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# Medical Malpractice Insurance Coverage in New York

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With ever-increasing pain and suffering awards, unsuccessful legislative attempts to establish caps on damages through tort reform, and expanded statute of limitations, such as Lavern's Law concerning failure to diagnose cancer claims, New York healthcare providers, practices and hospitals, often question what they can do to protect themselves in the event of a medical malpractice judgment. While the importance of insurance is obvious, practitioners should be appropriately informed as to their medical professional liability coverage, available limits of coverage, insurance coverage maintained by potential co-defendants, and the priority as between them.

## OCCURRENCE, CLAIMS-MADE AND TAIL COVERAGES

Occurrence and Claims-Made coverage are the two basic types of medical malpractice insurance policies. An Occurrence policy covers a physician for any incident that "occurs" during the policy period regardless of when the malpractice claim is filed. Accordingly, it will continue to provide coverage even after a policy ends. A Claims-Made policy, however, will only provide coverage if both the alleged malpractice took place and the claim is filed during the policy period. Given that a lawsuit may be initiated years after an incident occurred, a Claims-Made policyholder must obtain extended reporting or "Tail" coverage if, for example, the practitioner changes from a Claims-Made to an Occurrence policy, or the practitioner retires, thereby ensuring continued malpractice coverage for incidents that may have occurred years earlier. Another consideration with Claims-Made coverage is to ensure that the retroactive date remains the first Claims-Made policy effective date. This will mean that as long as the Claims-Made policy is renewed with the same

retroactive date, the new policy will cover claims reported during that policy period.

## WHO WRITES PROFESSIONAL LIABILITY COVERAGE IN NY?

There are a number of insurance companies writing medical professional liability insurance in New York. Some companies are licensed and regulated by the State of New York, and are thereby required to follow NY insurance laws and regulations. Others write coverage as registered Risk Retention Groups (RRGs) or as excess and surplus insurance carriers, and are not subject to all of the State's laws and regulations. It is highly advisable to be aware of the differences between insurance companies, as well as the coverage they offer, before making a choice.

## LIABILITY LIMITS IN NEW YORK

The most common medical malpractice coverage in New York is a primary policy with limits of \$1.3 million per occurrence/\$3.9 million in the aggregate for a 1-year policy period. Physicians must consider several factors in deciding whether the limits of liability

coverage adequately protects their personal assets from a judgment in favor of plaintiffs, including the incidence of lawsuits associated with their specialty and potential sustainable verdict values for a plaintiff's non-economic (pain and suffering) and economic (e.g., loss of income) damages.

## HOSPITAL PRIVILEGES

Another significant consideration with regard to coverage limits involves hospital privileges. Hospitals in New York routinely have bylaws requiring attending physicians to carry certain limits of coverage as a prerequisite to granting privileges. In addition to \$1.3 million/\$3.9 million primary insurance, a hospital may require the physician to maintain an additional layer of \$1 million/\$3 million in excess coverage. The decision to require primary limits versus primary plus excess and/or entity coverage will substantially alter the amount of coverage a hospital has in front of it in the event of a lawsuit against the hospital arising from alleged malpractice by an attending physician. A physician should also explore what types of policies the hospital will

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CONTINUED FROM PREVIOUS PAGE

accept in the credentialing process prior to purchasing coverage.

### IMPACT OF ALAE ON POLICY LIMITS

Hospitals and physicians should be aware that some policies issued by excess/surplus insurers include allocated loss adjustment expense (ALAE) within the policy limit. ALAE is the cost of settlement and defense, most notably defense costs, but also including expert witness fees, court costs, claims and investigation costs. Given the substantial defense costs in medical malpractice litigation, policyholders should be informed regarding whether ALAE costs will reduce their available primary limit.

### DEDUCTIBLES AND RESPONSIBILITY FOR PAYMENT

Excess and surplus policies may also contain a deductible that is to be reimbursed by the policyholder. Typically, this involves the hospital or insurance carrier paying the judgment or settlement, then seeking reimbursement from the insured practitioner for the deductible amount. Under these circumstances, hospitals or practices should consider whether there is any credit risk created by a deductible or other risk sharing device in the policy.

### SHARED VERSUS SEPARATE POLICY LIMITS

Insurance policies issued to practice groups and hospitals may have shared limits or separate limits. While physicians often have separate limits, there are also times when hospitals or groups may share limits with employed physicians and other practitioners. With shared limits, it is important to know both the policy limits for each practitioner and the aggregate or total shared limit. Is the aggregate sufficient to cover the number of practitioners insured under the policy? While a Certificate

of Insurance (COI) may appear to cover each physician with separate limits of \$1.3 million/\$3.9 million, this amount of coverage may not actually be available to each physician if the total aggregate is less than \$1.3 million times the number of insured practitioners. Therefore, best practice includes review of the COI and confirmation of the coverage provided for each practitioner.

### IS EXCESS COVERAGE AVAILABLE?

For eligible physicians, New York State has a program which is often referred to as “Section 18” or “free” excess coverage above their primary coverage. If the eligibility requirements of the Section 18 program are met, and slots are available, its excess coverage provides an additional \$1 million/\$3 million above qualified primary coverage at no cost to the physician. In order to be eligible, the physician must maintain primary policy limits of \$1.3 million/\$3.9 million with a NYS licensed insurance carrier, have a current affiliation with a NYS acute care hospital and complete the required risk management course every two years. Another consideration for hospitals and physicians is that physicians covered with shared limits are not eligible for the free Section 18 excess coverage. Because Section 18 excess coverage is only available when primary coverage is through a NYS licensed carrier, a physician with primary RRG insurance should consider purchasing additional excess coverage. A physician should explore this issue prior to purchasing coverage.

### CONTRACTUAL INDEMNIFICATION

Agreements between practitioners, groups or hospitals may provide for contractual indemnification, specific minimum coverage requirements, shared or separate limits, other insur-

ance, priority of coverage, named insured or additional insureds. Hospitals and practice groups often have these types of agreements for coverage of hospital specialty areas, including, most commonly, emergency medicine and radiology. These contracts and their effect on liability and limits should be considered in assessing the overall sufficiency of coverage.

### PROFESSIONAL ENTITY COVERAGE

Practice groups may also have separate entity coverage providing an additional layer of insurance if the practice or its employee is named as a defendant.

### CONCLUSION

In light of the foregoing considerations, healthcare providers, practices and hospitals can better protect themselves by being informed regarding the insurance coverage they have, additional coverage that is potentially available, and the coverage of those practicing around them. ■



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1. Section 18 coverage is not available to new participants unless previously qualified physicians fail to reapply for the coverage. Physicians seeking Section 18 coverage for the first time are placed on a waiting list until an opening is available; however, a physician can purchase coverage from his or her admitted carrier during the waiting period. If a physician is accepted into the Section 18 program during the same policy year, the premium paid for the additional coverage will be reimbursed by the carrier.