

5 Tips To Maximize Your Medical Malpractice Insurance

By **Jeff Sistrunk**

Law360, Los Angeles (December 9, 2016, 4:06 PM EST) -- Win or lose, medical malpractice claims can impose a massive burden on hospitals and solo medical practitioners, with potential exposure for defense costs and judgments often rising into the millions of dollars. In some cases, whether a medical provider has strong malpractice insurance may make the difference between ongoing viability and financial ruin.

Here, Law360 explores steps providers should take to secure the most effective medical malpractice coverage possible.

Make It Retroactive

Most modern medical malpractice policies are written on a claims-made basis, meaning that a policy will only extend coverage if an alleged act of malpractice takes place in and is reported during the policy period.

Oftentimes, though, a medical provider will be hit with a malpractice claim over an event that occurred during a previous policy period but did not culminate in a lawsuit until after that policy had expired. Those sorts of claims can pose problems from a coverage standpoint if a physician has since switched insurance carriers or taken a job at a new facility.

"Gaps in coverage can easily be overlooked when a provider is negotiating an employment contract or changing insurers, so it is important to make sure that any such gaps are covered," said Rodney K. Adams, leader of LeClairRyan's professional liability team.

To ensure that there are no gaps in their malpractice coverage, providers can take one of two steps. They can either purchase a "tail" from their previous insurer, which extends coverage for medical procedures that were performed when a prior policy was in effect but did not result in a suit until after the policy expired, or buy a "nose" from their new insurer, which provides coverage for claims stemming from procedures performed under a prior policy but first reported under the new policy.

According to attorneys, the reach of tail or nose coverage varies from insurer to insurer.

"Many tails will cover back as long as you have been insured with that carrier, but the length will depend on the specific carrier," said Josh Byrne, a partner in Swartz Campbell's professional liability group.

Make 'Professional Services' Inclusive

Generally speaking, medical malpractice insurance covers claims tied to medical providers' rendering of, or failure to render, "professional services." Providers should therefore work with their malpractice insurers to negotiate an expansive definition of that term, attorneys say.

"Policyholders would be wise to push for a broad definition of professional services," said Anderson Kill PC shareholder Joshua Gold.

The definition of professional services in a malpractice policy will typically include obvious medical activities, such as surgery, checkups or treatments. However, Gold said, there are other types of activities that are "less thought-of," particularly those involving advanced technologies that may not have even existed when standard medical malpractice policy forms were first written.

"For example, if a doctor performs surgery and implants an electronic medical device that can be hacked because security is insufficient, would that type of incident fall within the professional acts definition?" Gold asked. "Practitioners should ensure that methods of modern medicine are included in a policy along with traditional techniques."

Obtain Settlement Control

Unlike many other types of liability cases where the policyholder may be happy to settle a claim quickly to avoid the cost of litigation, in the medical malpractice arena, "there are a host of reputational reasons" that a practitioner may opt to defend a claim and resist settlement, according to Gold.

"If a practitioner settles, the public could be left with the perception that the allegations of malpractice — or worse — had substance to them," Gold said.

In addition to the reputational risks associated with settling a malpractice claim, practitioners may face serious threats to their ability to practice medicine if they opt for settlement, according to attorneys.

"Physicians should be very concerned about how many claims they have," Adams said. "In a number of states ... if physicians are subject to a certain number of claims within a particular time period, they will have to have a competency assessment to maintain their license. Likewise, settlements can affect a physician's hospital staff privileges."

As a result, medical providers must be cognizant of whether their malpractice policies give them control over settlement negotiations, attorneys say.

"Providers should be aware of who controls settlement and what risks flow from that," said Husch Blackwell LLP partner Kirsten Byrd. "If the carrier calls the shots, or if it is a joint decision, and the doctor does not want to settle the case, it is important to consider what risks might result if the case proceeds to judgment."

Most medical malpractice policies contain a so-called hammer clause requiring the insurer to obtain the policyholder's consent prior to settling a claim. However, a majority of hammer clauses also limit the extent of the malpractice insurer's liability in situations where the policyholder withholds consent.

"The insurer may argue that, if a claim could have been settled for a certain amount, but the policyholder refuses to take the settlement, the insurer may be off the hook for any amounts in excess of what the claim could have been settled for," Gold explained. "Policyholders should work with a broker to get the best hammer clause terms in the marketplace."

Choose Your Own Defense Counsel

Large hospitals and well-established individual medical providers may be able to negotiate with insurers the ability to select their own defense counsel, giving them further control over how medical malpractice claims are handled.

"An insurer's flexibility on selection of defense counsel will depend on the market power of the policyholder," Adams said. "Certainly, larger groups can negotiate who they want as defense counsel. If you're an individual physician, though, an insurer may or may not extend that courtesy to you."

Depending on the prevailing rates for medical malpractice lawyers in a given marketplace, insurance companies may attempt to limit the rates they are willing to pay for an insured's chosen counsel. To ward off any disputes with insurers over defense fees, practitioners should attempt to negotiate policy language up front to ensure that certain billable rates will be paid, attorneys say.

"Oftentimes, insurers will try to impose very low rates for defense counsel," Gold said. "That may not work for a complex case that requires a high level of expertise."

Fill Cyber Liability Gaps

With hackers growing more and more sophisticated by the day, medical providers of all sizes now face a heightened risk of data breaches. Cyber criminals can steal patient data through providers' computer networks or wireless medical devices connected to the so-called internet of things.

Medical malpractice policies may pick up some cyber liabilities, but limits are usually fairly low, according to attorneys.

"Most medical malpractice policies will include some modest level of coverage for cyber liability, but it will generally be \$100,000 or less," Byrne said.

To compensate, practitioners should look into purchasing specialized cyberinsurance designed to cover the costs of responding to a data breach, including any suits brought by patients.

"It is important to make sure there are no gaps in your medical professional or facility liability insurance," Gold said.

--Editing by Christine Chun.