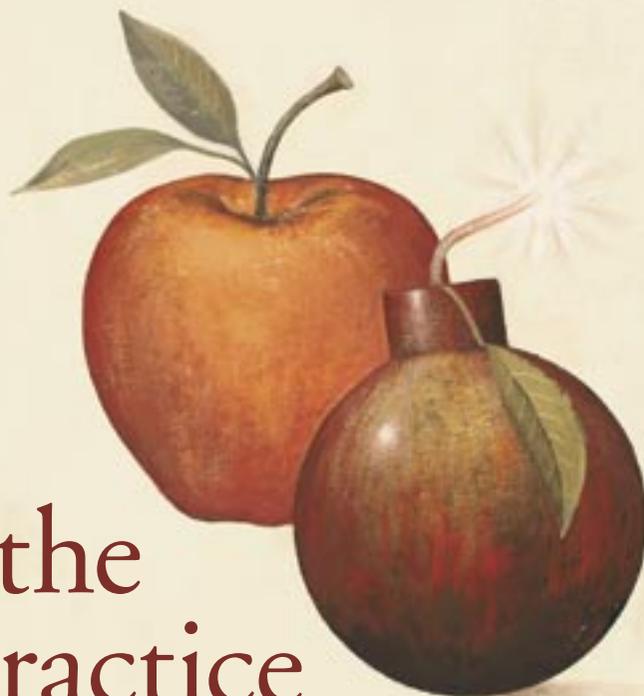


Here's how to make sure your expensive policy doesn't contain any unpleasant surprises.



Do You Have the Right Malpractice Insurance Policy?

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The costs a physician could incur to successfully defend a single claim of malpractice would likely exceed the annual premium for liability insurance, and this fact alone makes malpractice insurance a sound business expense. Unfortunately, it's one that growing numbers of physicians can't afford. Physicians and patients in 20 states are facing a "full-blown medical liability crisis" (up from 12 states two years ago), and at least 24 others are "showing problem signs," according to the American Medical Association.

For the many physicians who have had to relocate or give up obstetrics and certain procedures just to be able to afford any type of malpractice insurance, thinking critically about the coverage that their policy provides may seem impractical. Regardless, it pays to be aware of the protection your policy

provides, and, if you are among those lucky enough to be practicing in an area where you still have a choice of insurance, a review of your current policy and some shopping around might serve your practice well.

Types of coverage

Several different types of professional liability policies are available today. Most are claims-made, or discovery, policies. Claims-made policies cover claims made against the policy holder during the period in which the policy is in effect.

Tail coverage comes with a price tag, and not all employers are willing to pay it.

Under these policies, the date on which the event took place that gave rise to the claim is irrelevant; only the date on which the claim is made matters. Occurrence policies are also available in some areas. Under occurrence policies, the insurer is responsible for covering a claim if the event that gave rise to the claim takes place

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during the term of the occurrence policy, even if the policy is no longer in force. In many states, it is difficult, if not impossible, to obtain occurrence insurance.

Tail coverage, which protects physicians with claims-made policies who change jobs or whose coverage is terminated, is a key consideration for many physicians. It is occasionally possible to get tail coverage without having to pay for it. If the physician maintains coverage with the same insurer in his or her new position, the insurer might not charge for the tail, or the physician might find an insurer willing to add tail coverage to a new claims-made policy as an incentive to buy the policy. However, in most cases, tail coverage comes with a price tag, and not all employers are willing to pay it.

The employment agreement should stipulate whether the employer or the employee must pay for the tail. In cases where the new employer has had trouble finding a physician to fill the position, the physician may have the leverage to persuade the employer to pay for 100 percent of the tail coverage. If the employer has several qualified candidates from which to choose, it may attempt to pass 100 percent of the cost of the tail coverage along to the physician. Other employers may agree to pay one-half of the employed physician's tail coverage, thereby "sharing" the risk and cost.

GOING BARE

The skyrocketing costs of malpractice insurance have led many physicians to ponder the idea of practicing without coverage, or "going bare." This decision should only be made after checking the laws and regulations of the state in which you practice. At least 13 states require physicians to carry a minimum level of malpractice insurance in order to keep their medical license. Also, hospitals often require that physicians on their medical staffs have insurance, and health plans typically require it of physicians they contract with.

Some physician leaders have questioned whether it is ethical for a physician not to have coverage that would benefit their patients in the event of a mistake. However, going bare may be the most realistic option for physicians whose high malpractice insurance premiums would otherwise force them out of practice. If you practice in a state where going bare is permissible and you elect not to maintain coverage, you should consult a qualified estate planning attorney with expertise in asset protection.

KEY POINTS

- Tail coverage should be obtained when physicians with claims-made policies change jobs or have their coverage terminated, but paying for it can be problematic.
- You should carefully review the insurer's rating, the coverage and exclusions, and the "consent to settle" provisions in the policies you are considering.
- The malpractice insurance crisis has led more physicians to consider practicing without insurance.
- Applications for insurance must be completed thoroughly and accurately so as not to jeopardize coverage in the event of a claim.

Payment of the tail may also be linked to the reason for termination. For example, the contract may specify that if the employer terminates the employee without cause or the employee terminates his or her employment with cause, the employer pays for tail coverage; if the employee terminates his or her employment without cause or the employer terminates the employee's employment with cause, the employee pays for tail coverage. There is no right answer to the issue of who pays for tail coverage. It depends on the situation faced and the negotiating leverage of the parties.

Rating the insurer

Numerous insurance companies have been placed into receivership and then liquidated over the last 10 years. Many others have found professional liability insurance to be too problematic and no longer will underwrite such policies. Therefore, it is important to research the financial rating of your insurance company or those you are considering.

AM Best Company ratings are recognized as the industry benchmark. These ratings assess an insurer's financial strength based on a review of the company's balance sheet, operating performance and

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You should be aware of the differences between claims-made, occurrence and tail coverage policies.



Tail coverage is usually paid for by the physician rather than by the employer.



Many insurance companies have gone out of business or stopped offering malpractice insurance, so research the financial rating of the insurer you're considering.



You might have the option of practicing without insurance, unless malpractice coverage is required to maintain a license in your state.

It is important to use an insurance company that has a secure rating of B++ through A++.



Compare each policy you're considering side-by-side – not just the rates and limits but the coverage and exclusions as well.



Make sure you understand all terms that affect your ability to consent to a settlement.



The costs of corporate coverage, like personal coverage, have soared in the last few years, but it remains important.



It is crucial that applications for malpractice insurance be completed thoroughly and accurately.

business profile. It is important to use an insurance company that has a secure rating of B++ through A++. The AM Best Web site at <http://www.ambest.com> allows users to search for a list of insurers with secure ratings. Dun & Bradstreet (<http://www.smallbusiness.dnb.com>) sells reports that offer more comprehensive information about companies' finances.

Coverage and exclusions

When comparing rates for the same coverage from two or more insurance companies, it is important to review the coverage and exclusion sections of the policies as well. To do this, be sure to ask for a copy of the insurance policy that each company would issue if it were to write a policy for you.

Some will cover not only claims of professional negligence but also claims of unprofessional conduct made to bodies such as state licensing boards. Some evidence suggests that these entities will become more proactive in disciplining physicians as a result of certain claims, which may make expanded coverage beneficial.

Most policies exclude claims involving punitive damages, intentional misconduct and contractual indemnity claims. Compare the language of each such exclusion in the

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policies you are considering and seek advice from your insurance agent or attorney if you have questions.

Litigation and consent to settle

Because even settlement payments in malpractice claims can adversely affect a physician's reputation, most professional liability policies now include "consent to settle" provisions that define the terms under which a settlement might be agreed upon by the insurer and the physician. (See "When you need to make a claim," page 67, for more information.)

These clauses should be reviewed carefully. You may find that while you technically retain the right to give your consent for a settlement, if you refuse to consent to the insurer's recommendation of settlement you may be responsible for ongoing defense costs and the amount of any verdict that exceeds the amount of the recommended settlement. These are known as "hammer clauses."

Corporate coverage

Malpractice coverage for professional corporations and limited liability companies used to be provided free or for a nominal cost. However, as the malpractice crisis has worsened this is no longer the case, and today the cost of covering a professional entity can be substantial.

Physicians often ask whether, given its cost, corporate malpractice coverage is necessary. While this coverage may not be mandated by state rules or regulations (which may require individual coverage), it remains important. The professional corporation or limited liability company can be held liable on its own for the acts of its employees within the scope of their employment. The additional coverage held by the entity can ensure that the resources are sufficient to settle a claim or, in the worst case, help to prevent a verdict from exceeding the coverage limits. Plus, if the entity does not

THE IMPORTANCE OF THE APPLICATION

When a malpractice suit is filed, an insurer will try to avoid covering the claim if it can find that your application contains false information or is missing what could be deemed "material information" by the underwriting department. The failure to list a prior disciplinary action or a prior medical malpractice action may give the insurance company the opportunity to disclaim coverage. All physicians should err on the side of full disclosure if there is any doubt about the question on the application.

To ensure the accuracy of the application, you should complete your own application. If it must be handled by an administrator, you should carefully review it before it is signed and sent to the insurance company. If you use an insurance agent to help you complete the application, ask the agent any questions you have concerning the degree of specificity that the answer requires and document his or her comments. If the insurance agent's interpretation of the question and the advice to you is later determined to be incorrect, you may have a claim against the agent under the agent's errors and omission insurance policy.

WHEN YOU NEED TO MAKE A CLAIM

Most insurance policies require policy owners to give the insurer immediate written notice of any claim. Notice of claim clauses differ as to the time limits that may apply and the method of notification. The purpose of immediate notice is to enable the insurer to investigate the claim while the events are within the recent memory of applicable witnesses. If you fail to provide timely notice of a claim, the insurance company may also try to avoid providing coverage.

To determine whether oral or written notice of the intention to file a claim is sufficient, consult your policy. An attorney can help you interpret these requirements and determine the circumstances under which an informal claim should be submitted. In some cases, an attorney can help you to get the insurance company to open a claim file even before a complaint is filed. This could be to your advantage in a case in which a particular piece of equipment malfunctioned during a procedure and you want to advance a claim against the manufacturer and distributor of the equipment. If the patient ultimately files a claim, your coverage will not be jeopardized.

Insurers routinely reserve the right to appoint counsel to represent their policy holders. Insurers are usually able to obtain a reduced hourly rate in exchange for providing regular business to certain law firms that specialize in defending professional malpractice claims. This does not mean that you cannot ask for a different counsel to be assigned.

If there is a conflict of interest, you can reasonably request that different counsel be appointed to represent your interests. A conflict of interest may devel-

op if the same attorney represents two doctors in the same group or a health care institution and an employed physician, for example.

Insurance companies also require that their policy holders reasonably cooperate with counsel by supplying information, making themselves available for depositions, responding to discovery requests and reviewing papers that will be filed with the court.

Insurance companies have a fiduciary duty to exercise good faith in working with physicians to defend against and settle malpractice claims. At times, the physician will want the case to be settled. This often occurs when a verdict threatens to exceed the available insurance coverage and it is expected that the claim could be settled by paying the plaintiff the policy limit. In such a situation, if the insurance company refuses to pay the policy limits and the verdict exceeds those limits following a trial, the insured may have a bad faith claim against the insurance company requiring it to indemnify the physician for all amounts awarded in excess of the policy limits. An insurance company may also act irresponsibly in attempting to settle a case that the physician would rather have tried, because all settlements are reported to the National Practitioner Data Bank, which is routinely queried by health maintenance organizations, hospitals and state licensing boards. In cases such as these, personal counsel can take a hard line for the professional while the attorney hired by the insurance company continues to represent the dual interests of the insurance company and the insured.

maintain malpractice insurance but is included in a lawsuit against a physician (which is almost always the case), the entity will have to engage and pay for an attorney to defend its interests. Corporate malpractice insurance would cover this expense. Whether to maintain corporate coverage may boil down to a cost vs. benefit decision for the practice's shareholders, but we always recommend that such coverage be maintained.

Proceed with caution

Understanding your malpractice policy can be complicated yet critical. When shopping for a new policy or renewing a current policy, do your homework and consider the issues presented in this article. They will help you identify whether a policy is worth signing, or whether its protection is inadequate. **FPM**

Send comments to fpmedit@aafp.org.



Insurance policies usually specify time limits and methods for notifying the company of claims.



Most policies allow the insurer to appoint its own counsel to handle claims but allow you to hire personal counsel as well.



Personal counsel can help to make sure the insurer is acting in good faith.