

## **Know Your Limits: Professional Liability Coverage**

**By: Nancy E. May-Skinner, Esq**

As pain and suffering awards continue to rise, hospitals and health care practitioners are asking themselves, will our insurance coverage limits be sufficient in the event of a medical malpractice judgment? With sustained pain and suffering awards reaching the \$20M mark, this is a question well worth asking.

So, what can practitioners and facilities do to protect themselves? They can be informed regarding what coverage they have, what coverage their potential co-defendants have, and the priority of coverage as between them.

### **Who writes Professional Liability Coverage in New York?**

Medical malpractice insurance is written by insurers licensed and regulated by the State of New York, excess/surplus insurers, and risk retention groups (RRGs). The latter two may not be subject to or benefit from all of New York insurance laws or regulations and do not get the benefit of the state insurance insolvency guaranty fund (New York Property and Casualty Guaranty Fund).

### **Is ALAE included in the policy limit?**

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 cases, policyholders should be informed regarding whether ALAE costs will reduce their available primary limit.

### **Is there a deductible and who is responsible for paying it?**

Excess and surplus policies may also contain a deductible, 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.

### **Does the policy have shared limits or separate limits and is the aggregate sufficient?**

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

### **Is Section 18 excess coverage available?**

Another consideration for hospitals and physicians covered with shared limits is that physicians with shared limits are not eligible for the free Section 18 excess coverage. Therefore, for physicians on shared limit primary policies, consideration should be given to purchasing other excess insurance.

### **Does contractual liability impact your coverage?**

Agreements between practitioners, groups or hospitals may provide for contractual indemnification, specific minimum coverage requirements, shared or separate limits, other insurance, priority of coverage, named insureds 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.

### **Do hospital bylaws or privileges require certain limits or coverages?**

Hospitals may also have bylaws requiring attending physicians to carry certain limits of coverage as a condition of privileges. The decision to require primary limits versus primary plus excess and/or entity coverage will substantially alter the amount of cover a hospital has in front of them in the event of a lawsuit against the hospital arising from alleged malpractice by the attending physician.

### **Is entity coverage required or provided?**

Practice groups may have separate entity coverage, providing an additional limit if the practice or an employee of the practice is named as a defendant.

### **Conclusion**

As is evident from the foregoing, hospitals and health care practitioners can better protect themselves by being informed regarding the insurance coverage they have and the coverage of those practicing around them.



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