



## **Examining the Consent to Settle Clause:**

By Brian S. Kern, Esq.

Most medical malpractice insurance policies in NJ contain a clause that requires a policyholder to first give consent before the company can settle a case on his or her behalf. Waiving this right is now as easy as checking a box on an application, and may even result in a nominal discount, yet many physicians remain unaware of the full implications of this clause.

Proponents of taking away this right argue that carriers and physicians will almost always agree on whether or not to settle a case. While that argument is facially persuasive, it is far too simplistic.

Companies must be careful not to develop a practice of settling cases too quickly. Since creating a reputation for unwarranted payouts could open the floodgates for frivolous lawsuits, carriers actively writing medical malpractice insurance will generally wait until all of the facts have been carefully vetted, and discovery (interrogatories, depositions, etc.) has concluded. But this is not always the case.

Following the discovery phase, a carrier will typically approach a physician with its analysis of the case. If the insurer believes that the case is winnable, the insured may be well protected, even above policy limits, thanks to existing NJ case law (see [www.insuranceagent.com](http://www.insuranceagent.com) for more articles on this issue).

However, if a carrier becomes insolvent or decides to shift focus from medical malpractice to other lines of insurance, its reputation among physicians may be the least of its concerns. Getting out quickly and cheaply may become its primary goal.

When an insurance company determines that a case should be settled, and a physician disagrees, the physician will often be faced with the possibility of a verdict above policy limits that will place his or her assets at risk. As a result, the physician almost always agrees to settle. Retaining the consent to settle clause has its advantages though.

In some instances, companies have been known to settle cases with significant damages, notwithstanding their analysis that there has been no negligence. Even though physicians may end up following a carrier's recommendation, premature settlements are generally in the best interest of the insurer, not the insured. The legal process is expensive, as are experts, and companies would prefer not to expend resources for cases they think may be losers – even in the absence of provable negligence.

Using the consent to settle clause, those that believe strongly in their medical judgment and treatment can require carriers to retain proper experts and place their case in better perspective. Ideally, a physician will convince a carrier to try the case with its complete backing, or, at least may be able to significantly reduce the settlement amount.

The MIIX downfall has further demonstrated just how valuable the consent to settle clause can be. Now that MIIX is in liquidation, the Property Liability Insurance Guarantee Association (PLIGA) is handling covered claims against former policyholders. PLIGA provides just \$300,000 in protection, but complies with the terms of the original underlying coverage, “as if the insurer had not become insolvent.”

The limited amount of coverage has led many physicians to settle cases they might otherwise have tried. But thanks in large part to the consent to settle clause that was contained within all MIIX policies, an opportunity exists for former insureds to have their day in court, without exposing their personal assets. The available vehicle is something called a high/low agreement.

A high/low settlement is one in which the plaintiff and the defendant agree, prior to a jury verdict, that, regardless of that verdict, the plaintiff will receive a minimum amount (the low) and no more than a maximum amount (the high).

As an example, a high/low agreement may provide for payment of \$100,000 to the plaintiff if the jury finds for the physician or awards less than \$100,000, payment of \$300,000 to the plaintiff if the jury awards more than \$300,000, and payment of the actual jury award if the award is between \$100,000 and \$300,000.

The advantage to physicians is that they get their day in court. A win would have much less impact on future premiums than a settlement, and also would not be reportable to the National Practitioner Data Bank. Currently, even in the event of a defense verdict, the “low” number is still listed on the State Board of Medical Examiners website, but this issue has been taken up by advocacy groups and may soon be changed. Without a consent-to-settle clause, there is little incentive for a company to enter into a high/ low agreement, especially in the example above.

Unfortunately, some physicians are not aware that their insurance policies, or employment contracts, do not contain a consent to settle provision. Hospitals and other institutions often provide insurance that grants the institution the ability to settle a claim without regard for the physician’s position. Worse, the institution then determines how to apportion liability, even where the allegations are against numerous physicians, other providers, and the hospital itself.

Physicians cannot assume that their interests are automatically aligned with the holder of the right to settle a case on their behalf. Before purchasing malpractice insurance or accepting coverage under another’s policy, make sure there is a consent to settle provision.

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