

MIIX “Gap” Coverage: A Good Investment?

As part of the Medical Inter-Insurance Exchange (MIIX) order of liquidation, a notice of claim date was set for April 9, 2009. This date represents the final day that creditors can make a claim against the insolvent company. It is also the final day that the Property-Liability Insurance Guaranty Association (PLIGA) will cover claims against former MIIX policyholders. Whether this deadline for PLIGA, which provides \$300,000 in coverage, will be extended is still unclear. Due to this uncertainty, the state’s largest medical malpractice insurance carriers have developed “gap” policies to mitigate this potential catastrophe.

Certainly, if the PLIGA coverage is not extended beyond April 9th, then all physicians previously insured with MIIX should secure any replacement coverage possible, as even a frivolous lawsuit could generate overwhelming legal fees. Notwithstanding any deadline, physicians should also immediately report all circumstances that could potentially lead to a claim to PLIGA, since companies will not offer coverage over these “known” events.

Physicians unaware of such issues should next consider that MIIX ceased providing coverage by year-end 2003. And though NJ has a notably weak statute of limitations rife with exceptions, the reality is that physicians should either have already been sued for acts occurring prior to 2004, or, at a minimum, be aware of an adverse outcome that could ultimately give rise to litigation. Therefore, if PLIGA does continue to cover MIIX claims, physicians should weigh the benefits of the available products carefully.

Currently, four carriers offer a product that provides \$1 million in coverage for a claim that MIIX would have covered. Perhaps the best product currently available is the one that removes PLIGA from the process entirely. For a one-time fee, physicians can have a permanent policy with a \$1 million limit per claim. A second product also eliminates PLIGA, but is sold annually for an extra charge, and is terminated if not renewed each year. Physicians should be cautious about committing to temporary coverage though, as there is no guarantee that it will continue to be offered in future years.

The remaining products function as “excess” policies, and are only triggered after the \$300,000 PLIGA limit is exhausted. If the notice of claim date is not extended, then these policies become critical primary policies that would fill the MIIX void. But if the notice of claim date is amended, concerns of having an excess policy lie in the relationship between the carriers and PLIGA.

Each NJ medical malpractice insurer has a panel of attorneys that it uses to handle claims. PLIGA will likely use different attorneys, which are appointed by the State. Whenever you have two policies responding to the same claim, it is imperative to coordinate the defense with all parties. Hospitals that have several layers of insurance have sophisticated in-house experts to manage the process, but physicians rarely have this luxury. Therefore, physicians that find themselves in this situation may want to consider

engaging a specialist to assist in the process, or avoid it altogether by not purchasing gap coverage.

Moreover, in a case that a physician wants to settle, bringing an extra \$700,000 to the negotiating table may simply raise the price tag. Plaintiffs who may have accepted a settlement within the \$300,000 guaranty fund policy limit might instead demand the policies' combined limits.

If a physician does not want to settle a case, the first issue is whether the purchased gap policy contains a consent-to-settle clause. If not, the physician can be in the unenviable position of not wanting to settle a case that the carrier decides should be settled. Of course, settlement will trigger a report to the National Practitioner Data Bank and the Board of Medical Examiners, even without consent.

With a consent-to-settle clause, the physician may be able to defend a case he or she believes to be medically justified, or even enter into high low agreements. A high low agreement is one in which the plaintiff and defendant agree to a trial or arbitration, and set minimum and maximum payouts based on the ultimate award. These agreements provide physicians with the opportunity to win their cases and thereby avoid certain public reporting requirements, as well as negotiate better malpractice insurance premiums, without putting their personal assets at risk.

If similar "gap" products continue to emerge, physicians should also consider the financial strength of the companies offering such products. Having to pay for insurance you already paid for once is bad enough. Paying for it twice is at least twice as bad.

Now that this PLIGA exposure has been identified, a solution should be tailored not only to rectify the problem today, but also to prevent a similar problem in the future. Proper legislation could eliminate the vulnerable link between the notice of claim date set in medical malpractice insurance company liquidations, and the PLIGA coverage.

Brian S. Kern, Esq. can be reached via email at bsk@insuranceagent.com