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Defensive Medicine

Written by Joanne Sammer
Thursday, 01 July 2004

The escalating medical malpractice crisis is not just a problem for doctors and hospitals, it is also affecting the finances of individuals and businesses that pay for health insurance. In fact, malpractice costs totaled nearly \$25 billion in 2002, or \$85 per person, compared with \$5 per person in 1975, according to Tillinghast Towers Perrin's study, US Tort Costs: 2003 Update. The increase in medical malpractice costs continues to outpace increases in overall U.S. tort costs, rising an average of 11.9% per year versus an increase of 9.3% per year in all other tort costs.

◆The impact is felt by everyone as physicians practice more defensive medicine, which in turn adds to the cost of healthcare and health insurance and affects the quality and availability of healthcare,◆ said Robert Cubbin, president and CEO of Meadowbrook Insurance Group, a specialty risk management company in Southfield, Mich. ◆Doctors want to practice good medicine. Unfortunately, the current system causes them to do things just to cover themselves.◆

Although the depth of the malpractice crisis varies by state, the American Medical Association has declared 19 states to be in a medical-liability crisis: Arkansas, Connecticut, Florida, Georgia, Illinois, Kentucky, Mississippi, Missouri, New Jersey, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Washington, West Virginia, and Wyoming.

Taking a stand

Physicians in many of these states are threatening to move, going on strike, refusing to perform certain high-risk procedures, or leaving medicine altogether. There are even some cases of physicians foregoing malpractice coverage altogether because they can no longer afford the premiums. The situation is particularly dire for physicians in high-risk specialties like obstetrics and neurosurgery.

In Illinois, many neurosurgeons are leaving the state, retiring early, or refusing to perform surgeries that have a large risk of death and paralysis, such as removal of a blood clot or tumor from the brain. These physicians can no longer afford the cost of malpractice insurance.

Tom Hurley, a neurosurgeon in Joliet, Ill. and vice president of the Illinois State Neurosurgical Society believes the crisis is being exacerbated, at least in part, by unrealistic expectations among patients and their families.

◆Some families are willing to take a risk for a perfect outcome,◆ he said. ◆But many view a less-than-perfect outcome as unacceptable.◆ When these individuals experience such an outcome, they are quick to sue.

Some physicians are taking matters into their own hands by asking or requiring patients to sign documents waiving their right to sue if something goes wrong. However, the long-term viability of this approach is in doubt. For one thing, the legality of a waiver signed by a patient is open to question.

◆It depends on the circumstances,◆ said Cheryl Camin, an attorney with Gardere Wynne Sewel, a Dallas-based law firm. It could be argued that a patient under a doctor's care does not have negotiating leverage, especially if the patient's care involves a particular procedure that no other doctor in the area can or will perform. ◆Although the patient could say no and walk away, their healthcare is at stake,◆ said Camin. Instead of requiring patients to sign a waiver, Cubbin suggests asking patients to sign an agreement requiring that problems be handled through arbitration rather than through the courts. ◆That can help reduce costs for both sides,◆ she said.

Looking for alternatives

Some physicians are exploring or adopting alternative risk financing mechanisms, such as captive insurance companies and risk retention groups, to obtain necessary and affordable malpractice insurance. A

captive is an insurance company that is wholly owned and operated by the insured group or entity. Because the insured group must be large enough to generate the critical mass of premiums necessary to ensure the financial soundness of the captive, captives are only appropriate for very large practice groups. Smaller practices can join a group captive.

In general, captives and group captives insure the risks of the physicians and hospitals involved by charging premiums that are high enough to cover a specific level of claims, then purchasing reinsurance to cover claims over that amount. Using a captive can help reduce the cost of malpractice coverage in many cases because unlike commercial insurance companies, the captive is not out to make a profit. Another important benefit of using a captive is the ability to control the payment of claims and decide which claims to settle and which to fight. A common complaint among physicians is that insurance companies are quick to settle nuisance or frivolous claims, driving up premiums.

◆The main benefit of a captive is that it gets physicians actively involved in managing their risks,◆ said Cubbin. If it opts to form or join a captive, the physician group should analyze past claims and determine how to prevent such claims in the future. ◆The only true way to reduce malpractice costs is to reduce errors,◆ he said. This means physicians can take steps to validate protocols, ensure the necessary documentation of patient care, and so on.

Another option is a risk retention group (RRG), which must be chartered and licensed as a liability insurer in at least one state but can write insurance in all states. Last year, the Health Network Providers Mutual Insurance Co. was licensed as an RRG in Washington, DC and is providing coverage to physicians in Texas.

Of course, there is a limit to what physicians can do on their own. At some point, tort reform will be necessary to relieve the pressure on malpractice premiums, and this will likely take place on a state-by-state basis. Unfortunately, even after states adopt reforms such as caps on economic damages and enabling arbitration so every disagreement does not end up in court, the malpractice crisis is so large that it may take several years to correct itself.

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