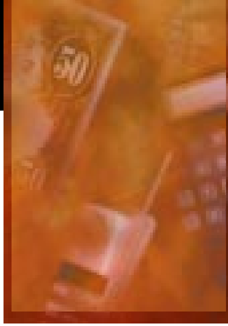

Hang On to Your Glass

Things are still bad in medical malpractice, of course . . . and they'll probably get worse. Lessen the risk of an uninsured claim by choosing an insurer covered by your state's guaranty fund.

BY RICHARD VENTO

I received an e-mail from Dr. J., a physician in Arkansas who read my article "Under Fire" in *UO*'s March/April issue. It seems Dr. J.'s insurance carrier is now bankrupt and he has an uninsured claim. His attorney is telling him to settle and to consider bankruptcy or asset protection/transfer. He wrote, "I thought you might like to hear that just when we thought that it couldn't get any worse—that it has!"

Members of insurance industry trade associations say this and countless similar examples of tragic situations are on the increase, not decrease. There is no debate in the industry about whether the glass is half empty or half full, but rather a consensus that "watch out, the glass is going to fall off the table" before things improve and the current malpractice insurance crisis is alleviated.

I attended a medical malpractice insurance conference in Las Vegas in May. The lecture/discussion topics included tort reform, coverage availability for doctors, insurance company premium pricing, reinsurance (insuring insurance companies), alternative insurance company structures (RRGs, captives, self-insurance), physician risk management, the severity of verdicts, and what the future holds. The presenters were unanimous in their opinions that the crisis is going to get worse before it gets better. It seems it really needs to get worse in order to motivate legislators to put meaningful tort reform on the books.

There is no debate in the industry about whether the glass is half empty or half full, but rather a consensus that "watch out, the glass is going to fall off the table" before things improve and the current crisis is alleviated.

Some insurance industry statistics that are indicative of the continuing crisis were presented at the conference, which was produced by Crittenden Research, Inc., an insurance industry trade organization that keeps its fingers on the pulse of the medical malpractice marketplace.

Continued

Continued from previous page

The facts reported were as follows:

- Median medical malpractice awards are up 111 percent (from $475,000 in 1996 to $1,000,000 in 2000).
- Indemnity payments greater that $1,000,000 increased 100 percent between 1998 and 2000.
- Average claim payments (indemnity) have grown an average of 6 percent a year from 1992 to 2001, twice the Consumer Price Index.
- There were 800 indemnity payments of more that $1,000,000 in 2002.
- Patients received only 57 percent of claims settlement money, and only 40 percent of money awarded by juries.
- Insurance company underwriting losses doubled between 1994 and 2001.
- 2002 investment yields for insurance companies were half the level in 1994, with only 10 percent of the investments in equities (by regulation).

An example closer to home for you, the physician, may be an article in the May, 2003 issue of *Philadelphia Magazine*, run as their feature story. The article illustrates the Philadelphia version of the current insurance crisis. An orthopaedic surgeon they discussed had his insurance premium increase from $65,000 to $140,000 over the last three years. At the same time, his gross income dropped from $300,000 to $180,000, due to reimbursement reductions, although he was working harder than he had ever worked. One day his office manager told him she could either pay the doctor his salary or the office bills, but not both.

The good doctor ended up moving his family to Virginia where he joined a group practice for $300,000, and his malpractice premium, with the same insurer he had in Philadelphia, dropped to $9,000. The drastic difference in premiums illustrates the tremendous differences in legal climates which leads to the difficulty insurance carriers face when trying to price their coverage. Pennsylvania's loss (and they've lost many doctors to other venues) was Virginia's gain. This archetypal story brings home most of the points I want to make.

Everyone has a role

Is the $140,000 or the $9,000 the right premium? Probably neither. At least his insurer was not one of the several doing business in Pennsylvania which have gone bankrupt. Philadelphia lost access to an orthopaedic surgeon who specializes in shoulders and was schooled at Harvard and Penn. Health-care reimbursement drove down his income, his medical malpractice insurance company raised his expenses, and his family has now left their home, friends, and schools.

Why? There are a plethora or reasons and excuses. However, until such time as there is a paradigm shift for all concerned and meaningful, effective, and lasting tort reform, we humans who live to work or work to live are going to continue to make the same mistakes we have in the past.

So long as there are consumers and juries with a lottery mentality, providers who are above reproach and think they never make mistakes, attorneys promoting victimization and marketing those lottery tickets for personal unearned gain, legislators without the integrity to do what's best for the citizens that elected them rather than the special interest groups that fund them, and an insurance industry that cannot seem to price or market its products properly, the vicious part of the cycle in which we are currently suffering will continue to wreak havoc. Everyone has a role in how and why we got here and a stake in how this current crisis plays out. This includes the family seeking medical care, the caregiver doing her best work, the attorney trying to provide a valuable service, the insurance broker trying to do the best job for his client, the insurance company providing protection for mistakes and asking for a fair profit, and the government trying to provide a quality life for its citizens.

Now, I have that off my chest—please forgive my ranting. After working exclusively in the field for the past 23 years and three insurance emergencies, I am frustrated by the continual finger pointing and failure on everyone's part to take responsibility for their actions. As the old adage goes, every time you point your finger at someone else, there are three fingers pointing back at you. I also remember being told during a sermon once of a fictitious race of people with no elbows—they could not bend their arms, so all anyone could do was to help one another and not themselves. That's it! We are in this crisis because we have elbows!

Back to Dr. J.

Dr. J., my e-mailer from Arkansas, is currently involved in his second lawsuit of a 16 year practice. He did not disclose his specialty or any details of

Continued from previous page

the alleged injury or the negligence issues—the details are not relevant for today's discussion. What is important is that his insurer, Doctors Insurance Reciprocal of Virginia (DIR), a Risk Retention Group, was declared insolvent (bankrupt) earlier this year by the State of Virginia's insurance regulators, and put into receivership. Dr. J has lost his insurance coverage for this lawsuit and possibly any future lawsuits that may arise out of his practice while he was insured by DIR.

The insolvency of DIR in particular tremendously exacerbates Dr. J.'s financial jeopardy because DIR is a Risk Retention Group, licensed only in Virginia. Its policyholders located in other states are neither protected by Virginia's insurance insolvency guaranty protection facility, nor are they protected by their own state's facility (commonly referred to as a "guaranty fund"). Therefore, Dr. J. will have to pay, out of his pocket, the entire amount of settlement or judgment, as well as all legal defense fees arising out of this or any other claim made or suit brought against him that would have otherwise been covered by DIR.

Risk Retention Group background

During the height of the casualty (including medical malpractice and products liability) insurance crisis of the mid 1980s, Congress passed the Risk Retention Act of 1986 (the Act). The primary purpose of the Act was to allow for the creation of specialized liability insurance companies, called Risk Retention Groups (RRGs). RRGs were, by definition, a group of otherwise unrelated, homogeneous entities who contributed capital to form an insurance risk taker for the sole purpose of insuring those similar entities' liability exposures among themselves. The Act was needed as a vehicle to allow these previously non-combinable (for the purposes of insurance company formation), unrelated groups of insureds to create an insurance market where suitable alternative markets were not readily available.

In the case of DIR RRG, it could only insure physicians and each insured physician had to contribute money to capitalize the company as well as pay premiums.

As a Risk Retention Group under the Act, an RRG had to apply to, and be approved by, one state's insurance regulator just as any other insurer wishing to become licensed in that state. That means it must meet or exceed all of that state's requirements for capitalization, management experience and expertise, business plan, investment program, and policy forms and rates. If the RRG meets muster on all of that state's requirements, the state will issue the RRG a license to do business in that state, and the RRG would continue to be regulated by that state.

DIR chose to apply for and was successfully licensed by Virginia. DIR was then said to be "admitted" (to do business) in Virginia. The Act then allows DIR to file its intention to do business with the insurance regulator in each of the other states in which it wished to market its insurance to physicians. DIR was then allowed to insure physicians in those other states without being specifically approved and scrutinized by regulators in those particular states. DIR is considered, in states other than Virginia, to be unlicensed or "non-admitted."

The state where the policyholder resides is the state whose insolvency facility would respond. In Dr. J.'s case, since he lives in Arkansas, and DIR is not licensed/admitted in Arkansas, but rather Virginia, he will not enjoy the protection of the Arkansas guaranty facility. Had Dr. J. purchased his insurance from an insurer licensed/admitted in his home state, he would have had the benefit of some protection from its guaranty facility. Each state's facility varies in the amount of coverage—$200,000 to $300,000 per occurrence, not claim, is typical, regardless of the policy limits of liability, if they are greater. There is typically a time limit within which a claim must be presented for payment, and usually any claims settlement consent provisions in your policy are eliminated.

Dr. J.'s situation is sad and could ultimately prove tragic. "Now my malpractice attorney is telling me to consult with a tax attorney and start talking about asset transfer/protection/bankruptcy, possibly settling the case for an amount estimated to equal my attorney's fees in hopes of 'cutting my losses,'" he says. Dr. J. goes on to say that his attorney spent most of her morning on the phone having similar discussions. He observes that DIR is national and will affect many physicians and hospitals, which will have to, in most jurisdictions under a doctrine called joint and several liability, pay for more of the loss if they were at all at fault. It also affects consumers with legitimate claims and those whose health-care costs are increasing because the malpractice crisis is fueled by bankrupt insurers.

Avoid costly mistakes

Dr. J.'s experience is a poignant vignette of the medical malpractice cri-

Continued from previous page

sis in this country, and this is far from an isolated case. What is especially noteworthy is that Dr. J. lives in Arkansas, historically one of the very least expensive states in the U.S. for malpractice insurance premiums. If he's not immune from the effects of this crisis, then who is? Where, if anywhere, did he go wrong and could his situation have been prevented?

There are no guarantees that ANY insurer is immune from financial difficulty and potential insolvency. Many licensed/admitted medical malpractice insurers, including some very large ones, have become insolvent under the noses of the state regulators. I'm not going to tell you that the state regulators do not have some culpability in many cases. I'm also not going to say that doing business with only admitted insurers will insulate you from insolvent insurers. However, protection by the state guaranty fund in your state could provide hundreds of thousands of dollars of reassurance in the event of insolvency. Thus, the licensure status of a prospective medical malpractice insurer should be one of the items on your due diligence punch list.

So, let the buyer beware! There has been a large number of Risk Retention Group insurance companies formed in response to the current availability and pricing crisis. According to the ***Risk Retention Repor***ter, 11 RRGs were formed in 2002 alone to provide medical malpractice coverage. By definition, they are non-admitted in all but one state, typically either Vermont or South Carolina. While there is no way of determining which, if any, of these RRGs will fail. I can tell you that the failure rate for RRGs is twice that of traditional insurance companies, according to one of the presenters at the Crittenden conference.

If I were a betting person, I think I would tend to favor odds which were twice as good as with the alternative choice. I believe that Dr. J. would probably agree with me that the malpractice premiums he saved pale in comparison to the emotion, stress, and potential financial ruin of having an uninsured claim because of an insurance company insolvency. ■

Richard Vento is the president of Medical Risk Management Services, Inc., a malpractice insurance brokerage and consulting firm in Jamison, Pennsylvania. He may be reached at rvento@medriskman.biz.