

DON'T GET HAMMERED IN THE PRESS...OR IN YOUR INSURANCE POLICY

Consent to Settle for Correctional Healthcare Providers Medical Professional Liability Coverage

AN OVERVIEW

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SOME PRESS IS BAD PRESS

- *New York, May, 2011 – “City will pay \$2 Million after an inmate’s death.”*
- *West Virginia, June, 2009 – “Inmate seeks \$3 Million for injuries.”*
- *Pennsylvania, October, 2010 – “Northumberland County settles \$1.5 Million lawsuit.”*

If you are in the correctional healthcare profession you don't want to see yourself or your organization associated with the kind of headlines listed above.

Over the past decade, healthcare delivery in jails, prisons, and juvenile detention facilities has received intensive scrutiny in the press and in the courts. Through a series of landmark cases, and reforms at the federal, state and local levels, considerable improvements have been made in the quantity and quality of medical care delivered to the incarcerated population in the US. But there remains a tremendous challenge for the dedicated professionals in the correctional healthcare field in an environment that is overburdened, under-resourced, and vulnerable to systemic litigiousness and a Press corps hungry for stories.

There are approximately 55,000 lawsuits filed by inmates in the US annually, and a good portion of these allege civil rights violations related to healthcare delivery, as well as straightforward medical malpractice claims.

While a 2007 U.S. Bureau of Justice Statistics report says that approximately 95 percent of all medical malpractice claims settle prior to trial, the particular circumstances of your situation may compel you to resist settling, and to fight the case to its conclusion.

TO SETTLE...OR NOT?

There is a very brief and compelling explanation for why cases settle: insurance payouts for medical malpractice claims are at least 2 ½ times greater for claims that go to verdict than those that settled before trial. This is not only a concern for the insurance company, but for you. If policy limits are exceeded, you may be on the line for the balance of defense and indemnity costs; and jury verdicts make headlines, just like settlements.

But for medical professionals there are valid counter-arguments to settling, especially when there is strong evidence to suggest that negligence doesn't apply. Settlement in such cases can have the following negative impact:

- The facility's and/or professional's reputation is publicly damaged
- Settlements, like adverse judgments, are reported to the National Practitioner Data Bank. Any payment—even \$1—is reportable
- State licensure status may be jeopardized
- Future employment may be difficult to obtain, or staff privileges may be curtailed
- Medical liability insurance rates are likely to rise—or coverage may be terminated, and buying coverage in the future may become problematic
- The word may spread throughout the plaintiff's bar that you or your employer always settle and are an easy target
- In addition to economic and social effect, settlements that correctional healthcare professionals feel are unjust often result in feelings stress and isolation

WHO DECIDES?

The time to determine your rights with regard to settlement is not when you are named as a defendant in a professional liability action. It is when you are working with your insurance broker to procure coverage initially or during the policy period prior to expiration. A consent-to-settle clause is established (or omitted) in the insurance policy, so have your broker ask for a specimen policy and go over it together.

Parties settling a lawsuit will typically execute a compromise settlement agreement setting forth the terms of settlement. It can include language stating that the insured does not admit negligence and that the settlement is made only to avoid the time and harassment of defending a lawsuit. The parties will also execute an agreed motion for non-suit to be filed in court.

Consent-to-settle means the insurer cannot settle a claim without your consent. But you shouldn't assume your policy gives you the right to settle. For one thing, certain states prohibit consent-to-settle clauses in medical malpractice insurance policies. The idea is to encourage settlement and reduce rising medical malpractice insurance premiums.

The three basic options are:

1. No consent-to-settle: insurer uses its discretion
2. Discretion vested in an appeal board
3. Consent-to-settle included

While this article assumes the reader will be (or represent) the named insured, complications can arise when correctional healthcare organization is the named insured, and physicians or allied healthcare workers are named in addition to, or instead of the correctional facility. Generally speaking, it is the named insured whose consent must be obtained, but jurisdictions differ and may reach different conclusions. Courts in some states have held that physicians do not have rights under consent-to-settle clauses in policies issued to medical or correctional facilities. In these states, if a physician elects coverage under a facility's professional liability policy, the physician runs the risk that the facility's interest in settling will be different than the physician's and that, as a result, the physician will lose the benefit of a consent-to-settle clause. The definitions of Named Insured and Insured need to be spelled out clearly in the policy language for all parties.

Depending on your insurer and the policy options you choose, you may have a:

- Pure Consent Clause - A pure consent clause has no strings attached. In order to settle a case the insurance company must obtain your approval. You may reject the settlement without further ramifications. If you lose at trial and a \$1 million verdict is entered against you, your insurance company will be required to pay the entire \$1 million verdict plus any attorneys' fees incurred in defending the claim, up to applicable policy limits.
- Standard Hammer Clause - The insurer will not settle any claim without your (i.e. the named insured's) consent. If, however, you refuse to consent to any settlement recommended by the insurer and elect to contest the claim or continue any legal proceedings in connection with the claim, then the insurer's liability for the claim will not exceed the amount for which the claim could have been settled including claim expenses incurred up to the date of the refusal. You can reject a settlement, but the insurer can then cap its liability in the matter to, for example, \$450,000—the amount of a \$350,000 settlement offer plus \$100,000 in legal fees incurred before receipt of the settlement offer. If you lose at trial and a \$1 million verdict is entered against you, you may be required to pay out of pocket \$550,000 of the verdict—the difference between the \$1 million award and the \$450,000 liability cap imposed by the insurance company—plus the additional attorneys' fees incurred in defending the claim.
- Pounding Hammer Clause - This takes the hammer clause one step further stating that if you refuse to settle and insist on continuing to fight, you do so on your own. The insurer pays to you the amount of the accepted settlement plus incurred defense costs to the point of acceptance and steps out of the picture. You become responsible for your own defense and costs, and any judgment over the amount already paid to you by the insurer.
- Modified Hammer Clause - Often referred to as a coinsurance clause, this agreement means you are liable only for a percentage of any judgment above the recommended settlement. The most commonly used percentages are 50% and 70%. If the modified hammer provision is 50%, the insurer would pay its recommended settlement plus 50% of the overage. Keep in mind, the amount paid by the insurer is subject to the limits of liability on your policy.

Some policy wording incents the insured to agree to the settlement, for example by reducing any self-insured retention or deductible if the insured accepts the settlement.

In other policy wording the full hammer applies to defense cost while the modified wording applies to the amount of damages paid.

WHAT'S RIGHT FOR YOU?

In choosing your insurer and the policy options you want pay for, always consult with an insurance broker who is well-versed in medical professional liability. Your broker, in turn, can access National Specialty Underwriters who, through its exclusive insurance program for Correctional Health Care offers a multitude of attractive coverage features customized specifically for this unique branch of medicine, including a hard-to-find Consent to Settle Clause as a standard feature.

Finally, should you be faced with a claim and potential settlement, work closely with your medical malpractice attorney, and determine whether the plaintiff is likely to convince a judge and jury that all the elements of negligence can be established.

If the answer is "Yes," then a settlement merits strong consideration. A patient who is injured as a result of negligence deserves compensation and if it is clear that the plaintiff will prevail, it makes little sense to prolong the inevitable, particularly when it might take years to reach court.

If the answer is "No", it may be time to exercise your consent-to-settle powers.

Resources

1. Bressler, Amery & Ross: Professional Liability Update – Consent to Settle; Whose Consent is Needed? – February 2008
2. World Journal of Radiology – Editorial - Spectrum of diagnostic errors in radiology; October 28, 2010|Volume 2|Issue 10|
3. The Physician's Guide to Medical Malpractice – D. Bowen Berry – Baylor University – January 2001
4. OBG Management: April 2008 – Vol. 20, No. 04
5. Consent to Settle Who Decides? – Armon & Beidel – Spring 2010 – Legal matters
6. IRMI Professional Liability Insurance Manual



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