

UP FRONT

News, Updates and Other Emerging Strategies from Around the World

Lifting the Veil on Professional Liability

Two key benchmarking projects release much-anticipated results to build on in 2007.

Health-care risk managers and their insurers are still trying to get their arms around professional liability. Two 2006 benchmark studies deliver different but similarly encouraging findings that could help—one, that the frequency of liability claims has stabilized and, two, that risk management actually does help prevent claims in the first place.

Pamela Popp, senior director of claims and litigation at Stanford University Medical Center, said that such benchmarking analyses are "wonderful resources" for health-care risk managers.

"It is simply," she said, "that we want something to compare to."

The first of these benchmarking studies was the seventh annual Hospital Professional Liability and Physician Liability Benchmark Analysis, a combined effort of Aon Risk Consultants and the American Society of Healthcare Risk Managers.

One of the most surprising findings here was that the average paid expense on expense-only claims increased by more than 15 percent—from \$15,100 in 2004 to \$17,400 in 2005. This "key finding ... actually caught us by surprise," said Gregory Larcher, director and actuary at Aon and head of the research.

The average paid expense on claims with indemnity payments more than doubled from 2000 to 2005, from \$28,000 to \$58,000.

According to Popp, these expense costs are driven by "outside experts," and not just attorneys, making the most significant factor of overhead costs the hospital's decision to handle claims inside or outside.

Another key finding was that hospital professional liability claims did not increase for the second year in a row. Larcher attributed reforms in Texas, Pennsylvania, Florida and California with the slowdown in claims frequency.

"Tort reforms have started to be digested," he said. Health care's push for patient safety could also help to continue these trends going forward.

The other major benchmarking study of



2006, a tag-team effort by Advisen Ltd. and Zurich Financial Services Group, validated such risk management practices.

The study also reinforced risk assumptions held by underwriters. For instance, a hospital's bed size was found to be directly correlated with claims severity, while its location in an urban setting seemed to increase severity and frequency relative to a hospital in a rural setting. For-profit hospitals fared better in claims than nonprofit and government hospitals.

The Advisen/Zurich study also examined the relationships between claims and certain risk management best practices identified by the Centers for Medicare & Medicaid Services. The initial results showed that hospitals may experience fewer and smaller claims if they followed these CMS recommendations, though the study's authors plan to conduct further analysis.

The Aon/ASHRM study looked at about 47,735 claims; the Advisen/Zurich study analyzed 381,829 claims.

—By Matthew Brodsky

BACK TO BACKDATING

The stock-options practice is still on the minds of D&O buyers and sellers—and the SEC.

The backdating issue still has forward momentum. On Dec. 27, 2006, UnitedHealth Group Inc. announced that the Securities and Exchange Commission was formally investigating its stock-options practices. The feds' eyes are also on CEO Steve Jobs of Apple Computer Inc. after an internal investigation there. Directors' and officers' policyholders and insurers are still trying to figure where the scandal, and their policies, will go next.

Meanwhile, policyholders can learn certain lessons out of current

cases if they're concerned about their own backdating practices, according to Jonathan M. Cohen, partner at Gilbert Heintz & Randolph in Washington, D.C.

One lesson is to understand that insurance, legal defense and business strategy are all intertwined when it comes to dealing with a backdating issue. It's been a common mistake of companies, Cohen said, to handle defense issues at the onset of an investigation, and worry about insurance recovery later. An insurance strategy must be formulated early on, with defense and overall business goals in mind.

"There may be strategies that you prefer to take for your overarching business aims or to defend that may put you in a position where you're not maximizing the chances of recovery," he said in a phone interview. "And you basically need to balance those competing concerns against each other."

For instance, a defendant in the courts characterizes a case of backdating as negligence, only to find that the D&O policy wording excludes acts of negligence. Or the company settles a case without admitting wrongdoing to avoid an exclusion in the D&O policy, though settling might not be the optimum defense outcome, insurance excluded.

Another lesson for D&O policyholders to take out of recent backdating cases is to recognize that many insurance policies are only a "single pot of money," Cohen said. "Tensions" may exist when each director or officer at a company is reaching into the same pot. Cohen, an attorney for policyholders, stated that individual officers might even consider retaining their own lawyers.

For D&O policyholders in general, the "moral of the story" of the ongoing backdating scandal is that they should know the wording of their policy, said Jerry Oshinsky of Dickstein Shapiro LLP, speaking at a D&O legal issues telecast organized by Mealey's in December. Going forward, Oshinsky said, wording and exclusions could be negotiated during the next renewal.

"There is a competitive marketplace out there," he said.

Yet insurers are also weighing the spate of backdating-related claims, especially in light of the fact that many are resulting out of derivative suits.

"That's kind of throwing everybody for a loop," said attorney Kevin M. Mattessich, who works out of Cozen O'Connor's New York office. "There's a debate over to what extent can a derivative suit really be covered."

"The insurers are all paying defense costs at the moment, but I think at some point that could change," he said, "depending on what direction these individual lawsuits go."

Insurers might come out with a special coverage for derivative cases, Mattessich added, or offer incremental defense coverage or D&O policies with refined wording on covered claims. Policyholders might also find underwriters asking more probing questions at renewal about backdating and compensation.

—By Matthew Brodsky



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