

Malpractice: The scary truth about tail coverage

A middle-aged Ohio FP, fed up with a stingy employer, has been looking to leave his group practice for more than a year. So what's stopping him? A restrictive covenant? Fear of a big drop in income?

Neither. It's the cost of tail insurance, which he estimates will run about \$50,000 if he leaves the group. "People assume that all doctors have this kind of money just lying around," he says. "I know I don't. I have one kid in college and two more headed there." The FP's employment agreement specifically states that the group won't pay for tail coverage, which protects against claims that are brought against a doctor after cancellation of a claims-made malpractice policy. (A claims-made policy, as you're probably already aware, protects the policyholder from claims for acts that occur and are reported to the insurer while the policy is in force.)

"Tail rates are tied directly to malpractice rates, and it's no secret what's been happening to them," say Ron Neupauer, president of Medical Underwriters of California, the management company for MIEC, a doctor-owned professional liability insurer that covers more than 6,700 physicians in four western states.

Currently, tail coverage typically costs 150 to 200 percent of the price of a mature claims-made policy. How much you'll pay will depend on where you practice and on your medical specialty. An internist in the Chicago area – who could be paying as much as \$41,000 for a mature claims-made policy, according to Medical Liability Monitor, a Chicago-based newsletter – could be looking at a bill of almost \$62,000 for tail coverage. Think that's bad? A Chicago area ob/gyn might have to come up with as much as \$229,000!

Indeed, the crisis is primarily one of affordability, not availability, as all claims-made policies are supposed to include a contractual right for the policyholder to buy tail coverage if and when the policy's cancelled.

Ways to avoid or soften the blow

Does all this mean that the Ohio FP is doomed to a life of servitude in a group he'd rather see in his rear-view mirror? And are you also doomed if you decide to leave your current practice?

Maybe not.

In the best of all worlds, you may qualify for free tail coverage under certain circumstances if you've had your claims-made policy with the same insurer for many years. In New York, for example, Medical Liability Mutual Insurance Company offers free tail coverage to retiring physicians as young as 55 who have been insured for 10 years and with MLMIC for five. "Each company will have a different policy on free coverage, but it's certainly worth a phone call," says Stanley L. Pollock, a practice management consultant in McKeesport, PA.

What if you're not planning to retire soon? Assuming you pay for your own malpractice insurance now, you won't need tail coverage at all if you simply stay with the same insurer and keep the same policy while you transition to your new practice. "If you're moving to another practice across town or in the same state, this shouldn't be a problem," say Pollock. "If you're leaving the state, ask your insurer whether it's licensed to do business in the new location. You'll have to switch to another company if it's not."

If you do have to switch insurers, try timing your move. "Doctors who switch malpractice carriers at the end of the year are especially hard hit financially," says Lawrence E. Smarr, president of Physician Insurers Associates of America, a trade association of more than 50 professional liability insurance companies owned and operated by physicians and dentists. "They've already paid their premiums for that year, then have to come up with another, much higher amount to cover the tail insurance."

Another cost-saver: Try to get your new policy with a carrier that offers "prior acts" or "nose" coverage. This does the same thing as tail coverage, but you don't pay a separate premium for it. Instead you begin paying premiums for a new malpractice policy of similar maturity to the one you had with your old carrier, which factors in the risk the new carrier is assuming. If you were in your third-year with your old claims-made carrier, for instance, you'll pay the new insurer's third-year rate. For fully mature claims-made policies, the nose coverage extends back to the effective date of the prior policy.

Just because an insurer offers nose coverage, don't assume you'll be able to purchase it. If you're currently in a group, for example, you may find yourself out of luck. "Most malpractice insurance companies won't give a doctor who's leaving a group prior acts coverage, because the liability for the old acts is hard to separate out," Ron Neupauer says. "When a group doctor is sued, the doctor and the corporate entity - both of which are usually named in the suit - are insured by the same company, and one lawyer is assigned to defend them both. That means if a doctor who leaves a group gets prior acts coverage with another insurer and is later sued, you have two insurers involved. Most liability insurers want to avoid that."

The new carrier may also refuse to cover prior acts if you've had a high incidence of claims or practiced in a litigious state. It may also refuse coverage because it doesn't have a relationship with any defense attorneys in the state you're leaving.

What's the answer then? Unfortunately, you may have no choice but to pay for standard tail coverage. The good news is that the premiums on your new claims-made policy will

be low for the first few years, allowing you to better handle the additional cost of the tail insurance. Ask the insurer if you can spread the cost of the tail coverage over a couple of years, so that you're not hit with a big payment up front. A good company should be willing to work with you.

Don't forget, too, that you can write off the cost of tail insurance as an unreimbursed business expense on Schedule A of Form 1040, subject to the 2 percent adjusted gross income floor for miscellaneous business expenses.

What about simply going without tail coverage? "I wouldn't recommend that to anybody," Larry Smarr says. For one, going bare could put you out of business in a hurry: Some states require proof of malpractice insurance as a condition of licensure. It'll also be tough to get hospital privileges or health plan contracts.

Review a practice agreement with an eye to tail coverage

There's another way to escape the need to pay for tail coverage: Structure your practice agreement so that the group picks up the tab. Stan Pollock says that most agreements require a physician to pay for his own tail insurance if he leaves the group before becoming a partner; if a partner leaves, the group pays the cost of the tail.

So if you're thinking of joining a group, you ought to ask that it pay not only for your malpractice insurance but any tail coverage you might later require – whether or not you make partner before you leave. That could be tough to negotiate, but it's certainly worth discussing. "At the very least, the employer and the doctor should split the cost of the tail evenly," says Michael J. Wiley, a practice management consultant with Healthcare Management Consulting Services in Bay Shore, NY.

Even if you don't have to think about tail insurance for many years, now's the time to dust off your original practice agreement. "Some old agreements are silent on the topic of tail insurance," Wiley says. "If yours is, you should have it amended. Argue that the tail is to cover you for procedures that you performed while you were an employee and which your employer made money on. It should be a cost of doing business for the employer.

"If you don't amend the original agreement," he continues, "you might wind up with a surprise and an ugly fight if you try to leave the group."

Dennis Murray. *Medical Economics* Jul. 9, 2004.