Health Reform Sparks New Fraud Schemes
Enactment of the health care reform law has already spawned new insurance scams, with bogus policies sold by phone and door-to-door, federal regulators warn. ► Page 7

Soft Market Persists, But Price Cuts Moderate
Commercial insurance buyers are likely to enjoy another year of favorable pricing, although the latest surveys indicate that rate cuts in workers' comp and D&O are either flat or moderating. ► Page 8

Ruling Gives Green Light To More Class-Action Suits
The U.S. Supreme Court opened the door for plaintiffs to file more class-action suits in a case involving Allstate, ruling that some litigation barred by state law can be brought in federal courts. ► Page 10

Sampson Cites Risks Of Nat'l Insurance Office
A Senate financial reform bill would give “unprecedented subpoena power” to a new Office of National Insurance, while creating unnecessary oversight, argues PCI President David Sampson. ► Page 26
Unique Programs Launched To Address
Specialty offerings designed to give peace of mind to service customers

BY SUSANNE SCLAFANE

WHETHER YOU’RE going under a surgeon’s knife or hiring an attorney to take a business contract dispute to court, there are risks of unintended outcomes, but until recently you couldn’t buy insurance to cover them.

Two program managers—a former executive of a medical malpractice insurance company and a plaintiffs’ attorney—have separately launched what they believe to be groundbreaking specialty insurance programs designed to address complications that can arise from such professional services arrangements.

Andrew Kagan, chief executive officer of Surgical Risk Solutions—the Jacksonville, Fla.-based program manager for Complication Insurance—explained that the patent-pending coverage provides financial resources to patients in the event of adverse outcomes following any one of 80 covered elective surgical procedures.

Mr. Kagan, who was formerly vice president of strategic planning for Florida Doctors Insurance Company, a Jacksonville-based medical malpractice insurance company, explained that the new policy provides economic relief to patients’ families—a lump-sum payment of $200,000, $250,000 or $300,000 depending on the amount of coverage purchased for as little as $80 in premium—even when a surgeon is not at fault for the injury.

“Basically, it’s a standard AD&D [accidental death and dismemberment]-type policy,” he said, explaining that a claims payout would be triggered by death, paralysis, loss of a limb or loss of use of a limb, loss of sight, or loss of hearing. If the covered surgical patient suffers one of these major debilitating injuries and if the injury can be traced back to the surgery, then it would be covered event, he said.

Like Complication Insurance, Plaintiff Contract Litigation Insurance (PCLI) is intended to ease a potential financial burden to a party that engages a professional for expert services—the professional being a plaintiffs’ lawyer to litigate a contract dispute, according one of the creators.

Kevin Martin, CEO of Sonoma Risk Agency—the Los Angeles-based program manager for PCLI and a former partner at the law firm Bingham McCutchen—said that he and another attorney founded the program after years of representing clients who faced the risk of paying their adversary’s attorney fees. He explained that many contracts contain “prevailing-party” or “fee-shifting” provisions, entitling the winners of contract suits to recover their attorneys’ fees from the losers.

“Just based on our experience, we identified the need for this coverage,” he said, believing that if clients had the ability to insure that risk “they could litigate with greater peace of mind and really just concentrate on prosecuting their cases.”

The PCLI policy is triggered when a policyholder plaintiff loses at trial or summary judgment, and a court orders the plaintiff to pay the defendant’s attorney fees. The policy pays the fees or the policy limit, whichever is less.

Separately recalling the experience that prompted him to design Complication Insurance, Mr. Kagan said he started thinking about it after witnessing the trial of a surgeon who had performed total knee replacement surgery on a 60-year-old man.

The surgeon was a partner of Mr. Kagan’s father, who is an orthopedic surgeon in Fort Myers, and although the knee surgery was successful, the patient died when he developed deep vein thrombosis—a blood clot in his leg that traveled to his heart several weeks after surgery during rehabilitation.

“You had this catastrophic outcome, and basically no other recourse for the family other than to sue. If the jury finds that a doctor fell within the standard of care,
you haven’t seen it before,” he said. “Instinctively, you sit there and think if someone is about to undergo surgery, that is a very high-risk situation. Do I really want to give coverage here?”

But in the end, he said QBE studied incidence rates and vetted the program with its pricing actuaries. “We felt there was enough of a need, and yet at the same time we didn’t feel there was a massive selection issue,” he said.

There is “not a very rigorous underwriting process, but there are certainly parameters” that protect QBE, he added. “We’re comfortable that it’s a good risk, priced appropriately to sell,” while at the same time priced adequately to produce a return and meet shareholder expectations.

Separately, Mr. Kagan said that while some of the riskiest covered procedures have “horrible” mortality rates—like total hip surgery with a 1-in-600 fatality rate—many other procedures, such as arthroscopies, have much lower frequencies of bad outcomes. “Spread of risk,” he said, is the key to making the program work from a return standpoint.

He said that for each insured, coverage extends for a period of 30 days starting with the surgery date. That term would protect the knee replacement recipient whose fatal outcome fueled the idea for coverage, as well as someone who developed a nasty post-op MRSA infection, resulting in the loss of a limb or other covered outcome.

There are three different price points for coverage, with $80 buying a maximum benefit of $200,000, $100 buying a $250,000 maximum benefit, and $120 for a potential $300,000 benefit. According to information on the Complication Insurance Web site, www.complicationinsurance.com, death, brain damage and paraplegia trigger the maximum payouts, while blindness and loss of one or two limbs trigger lower payouts ($100,000 or $150,000 for the $80 premium price point).

“At some point in the future, we would like to get up to a $1 million limit,” Mr. Kagan said, revealing that this was precisely what happened in this particular instance.

“There just seemed to be a better idea—to provide people an opportunity to cover themselves in this situation,” he said.

Both Mr. Martin and Mr. Kagan found experienced program carrier partners support their ideas—Schaumburg, Ill.-based Zurich North America for Sonoma, and New York-based QBE the Americas for Surgical Risk Solutions.

“We’re used to the issues that lawyers and their clients face from malpractice cases,” said Damiano Servidio, vice president of professional services for Zurich’s Programs unit, noting that his division is a longtime writer of lawyers professional liability insurance.

The concept Sonoma presented “made perfect sense.” The PCLI program “supports Zurich’s commitment overall to the legal community,” Mr. Servidio said.

Lawyers’ malpractice is just one of 70 programs in Zurich’s overall program portfolio, according to Craig Fundum, president of Programs & Direct Markets.

QBE, which has nearly 85 active programs overall, according to Stephen Fitzpatrick, president of QBE Specialty Insurance, counts Complication Insurance among 10 that it supports in the accident and health space, according to Tom Leonardo, senior vice president for the health team.

“The risk is one we’re comfortable with,” Mr. Leonardo said, pointing to the limited potential payout of $200,000-to- $300,000 per policy, and the fact that the coverage is for individual risks rather than catastrophic events with risk aggregations.

In addition, the program “provides a good service, [and] we didn’t see anything else in the market like it.”

A BETTER IDEA?

Mr. Leonardo admits to initially approaching the Surgical Risk Solutions’ program idea with the same hesitance he would any new program. “As an underwriter, you instantly try to poke holes and find reasons why this is something you shouldn’t do if
Seller Resistance Puts Claims Dispute Insurance On The Shelf

BY SUSANNE SCLAFANE

A FIRST-OF-ITS-KIND PROGRAM launched last year is still sitting on the shelf, according to the program’s underwriting manager, who said sellers’ attitudes are responsible for the lack of movement.

While creators of Complication Insurance and Plaintiff Contract Litigation Insurance say doctors and lawyers are enthusiastic about pushing sales, insurance brokers have been less inclined to inform customers that their best efforts might result in adverse outcomes, according to Richard Robin, CEO of NAS Insurance Services in Encino, Calif.

“Candidly, that’s one program where the product just hasn’t succeeded,” said Mr. Robin, when asked for an update on Claims Dispute Insurance, a product conceived by wholesaler Swett & Crawford and underwritten by NAS on behalf of syndicates at Lloyd’s.

The coverage was designed to fund up to $250,000 in legal expenses associated with contesting denials of insurance claims brought under other commercial insurance policies. (See NU, July 7, 2008, page 8 or http://bit.ly/b84r2n.)

“The producer who brought it to us was confident that it would be a huge wave, but at the end of the day, brokers felt uncomfortable selling a policy that indicated that the other policies they’d sold might not be adequate,” Mr. Robin said.

“We’ve had a few recent inquiries to see if we should approach it by [selling directly] to risk managers. So it’s sort of on our shelf,” he said.

“When any new product, you want to write enough so you’re not being selected against. That one has been on the shelf long enough that we’re suspicious when people are shopping for it,” he said.

NAS Insurance, which is celebrating its 35th year in business in 2010, has had tremendous success with other programs, including MEDEFENSE—an endorsement to physicians’ medical malpractice policies. (See the related article on page 17, for Mr. Robin’s account of the strategies and circumstances that fueled sales of this coverage.)
actually participate in receiving some of the recouped funds.

In addition to the increased perception of risk, Mr. Robin said a new delivery model suggested by an underwriter at Lloyd’s changed the sales dynamic for MEDFENSE. (NAS issues policies on behalf of syndicates at Lloyd’s).

The Lloyd’s underwriter, which was doing a substantial amount of treaty reinsurance business for physicians malpractice mutuals in the United States, suggested NAS hook up with reinsurance intermediaries to be introduced to their clients—executives of physicians malpractice carriers.

“We came up with a new model, which was basically adding a low-limit [MEDFENSE] benefit” to the physicians malpractice policy for all insurers or members of a mutual.

In essence, the MEDFENSE piece is reinsured to Lloyd’s, he explained, noting that the add-ons can be sold in this way to RRGs and physicians’ associations also.

“Generally, with this model, we try to get the whole spread of business, and in return we waive underwriting.

It’s administratively efficient. It’s like getting a benefit on your credit card,” he said.

Mr. Robin said that “at this point, MEDFENSE is really a benchmark. Just about every physicians’ med mal policy out there [has regulatory defense cost coverage] in some way shape or form, whether or not we continue to participate.”

Mr. Robin noted that over the years NAS has found new ways to exploit the distribution model with physician insurers, such as offering additional policy add-ons and higher limits.

One increasingly popular add-on is e-MD, a cyber liability privacy policy created in response to the emergence of HIPAA laws put in place in the 1990s addressing the privacy and security of electronic medical records. “This year, all the med mal carriers are waking up to new red-flags rules,” he said, referring to Federal Trade Commission rules requiring procedures to detect and mitigate identity theft.

There’s also been increased demand for MEDFENSE itself, driven by the emergence of contractors known as RAC auditors, he said—referring to Recovery Audit Contractors hired by the federal government to pursue large Medicare and Medicaid overpayments. “They’re sort of bounty hunter contractors that are going out to medical offices trying to find issues,” he said, noting that MEDFENSE’s broad coverage for regulatory investigations captures RAC audits.

MEDFENSE has “always been treated like an accordion, so there’s a list of perils that we’re happy to put in,” he said, listing Stark and EMTALA proceedings—the former relating to anti-kickback laws and the latter to emergency medical treatment laws.

“Those weren’t that big a deal 10 years ago, but they are now. So we have it standard in MEDFENSE policies [today],” he added.

“We’ve had policies that have included representation when an insured has a federal tax audit,” he said, highlighting the flexibility with which the policies can be written. “We’ve had per-diem benefits, where a physician has to sit in front of a state board for some hearing, and they would have some daily benefit that pays them for their time.”

in many types of contracts,” including partnership agreements, leases, promissory notes, franchise and licensing agreements, he said, noting that there are roughly four million contract cases filed annually and that plaintiffs lose one out of three contract trials.

As for the insurance underwriting process, Mr. Martin said it involves reviews of the complaint, the underlying contract at issue and the insured’s litigation history.

“If we see that the complaint is frivolous, we won’t write it,” he said. “Similarly, if we see that the plaintiff is a career plaintiff”—with a history of filing meritless suits or of being sanctioned by the court—“that’s not a risk we’re going to take.”

Mr. Servidio said Zurich has a broad appetite, identifying cases filed in arbitration or mediation and class actions as the only types for which coverage is not available.

The only notable policy exclusion, he said, involves fees incurred by the defendant in opposing a plaintiff’s abuse-of-litigation tactics. If, for example, a policyholder plaintiff was sanctioned for filing a frivolous motion and a defendant incurred attorneys’ fees for opposing that motion, Zurich will not reimburse those fees, he said.

The two men said there is a wide range of limits available, declining to provide a range of possible premium costs.

Initially, plaintiffs have a 60-day window from the date of the initial lawsuit filing in which to apply for coverage, they noted. “We’re not requiring a plaintiff to buy this insurance prior to filing a lawsuit, because we recognize that a plaintiff has many issues to consider,” Mr. Servidio said.

Decisions involve expense factors that may come up in the context of litigation, and Sonoma and Zurich want to provide a plaintiff with the necessary time to weigh those, he said. “We also recognize that this insurance is the first of its kind, and it’s going to take the plaintiffs some time to learn about it,” he said.

While they learn about it through their attorneys, Mr. Martin confirmed that the lawyers get absolutely no commission for sales. “The only benefit to the attorney is that they’re helping their clients reduce their financial exposure in litigation, and [the coverage is] helping [the lawyers] maintain best practices in protecting their clients.”

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