

Mesotherapy and the Professional Liability Insurance Market Environment

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More and more physicians are adding mesotherapy to the many ways in which they can help their patients. Unfortunately, these same physicians are being confronted with more and more obstacles in acquiring professional liability coverage for providing mesotherapy to their patients. For the most part, standard insurance companies are not interested in providing coverage for this unless the services are being provided by qualified dermatologists or plastic surgeons. One might expect that the non-standard insurance companies (surplus lines insurance companies) would be eager to write this type of exposure at much greater premiums. This is not necessarily the case.

As new treatment modalities/procedures are introduced to the medical community, there is a time lag before the insurance companies are comfortable from a risk standpoint to know how to actuarially plan for future expected losses. Each insurance company considering offering coverage will assign the project to their actuary in order to determine sound projections on claims and losses including associated legal costs. At that point the appropriate premium can be established and the decision made on whether to offer coverage. This risk-analysis involves determination of proficiency to forecast acceptable patient outcomes. The determination of proficiency must take into consideration who (which physician) is providing the medical services under question. For example, does that particular physician practice in a related specialty and have all the requisite training for that specialty? Furthermore, if that physician is providing mesotherapy, does the physician have adequate training? This leads to the next question — what is adequate training?

Some surplus lines companies are offering professional liability coverage for physicians providing mesotherapy to their patients while other companies have chosen not to do so at this time. Some companies are evaluating mesotherapy services and will decide at a later time whether or not to offer such coverage.

In the meantime, if a physician needs to find coverage for his or her provision of mesotherapy services, a qualified and knowledgeable medical professional liability insurance broker should be consulted. On a positive note, physicians should

take heart in the fact that a softening of the market is occurring. This means that over time there will be more competition in the marketplace due to more insurance companies entering the market, and the underwriting guidelines will become somewhat more liberal. In general the insurance companies will become more interested in your business. Another factor that will affect the medical professional liability insurance environment is the implementation of medical malpractice reform in the states.

For successful medical malpractice reform in a state, each of the partners (legal, insurance, and healthcare industries) must give a little in order to facilitate movement towards meaningful change in the system. For example, the legal environment should have non-economic damages caps, increased requirements for expert witnesses, immunity for good faith activities, allowed expressions of compassion, and consulting physicians with merit. The insurance industry will find that the departments of insurance will want to have increased regulatory power, greater claims statistical reporting, and will encourage deductibles and risk management discounts. On the other hand, the healthcare industry will see such developments as increase in size and activity of medical disciplinary boards, more disclosure of information available to the general public, increased regulatory investigations and fines, more claims statistical reporting with greater availability to the public, and increased pressure for deductibles and risk management programs and discounts. The rest of this article discusses what the Diederich Group believes would follow successful implementation of these changes.

Diederich believes that over time after the above mentioned movement, states will experience a stabilization of medical malpractice insurance rates. This will be caused by two factors. First, insurance carriers' ability to better predict jury awarded, large-dollar, non-economic (punitive) damage awards will be enhanced. In the past, these unpredictable and often sympathetic awards have made it very difficult for insurance carriers to adopt sound rates — often 4-6 years in advance of potential claims. By applying non-economic damage caps on malpractice cases, carriers do not have the actuarial difficulties of establishing sound rates. Secondly, there will be provisions for

increased disclosure of claims statistics to the departments of insurance. This will indirectly provide important data to carriers who are considering entering the state and may expedite their entry. The effect of this will be that existing carriers will be held accountable for the rates they charge due to the threat of new carriers entering a state and taking market share.

While it is in everyone's interest to see immediate results in the form of lower premiums, if history is any indication, it will not happen as quickly as desired. Texas, for example, enacted tort reform in 2004 with non-economic damages capped at \$250,000, and it took six months to see any noticeable effect on premiums. Carriers took an approximate, on average 10% decrease in premiums charged beginning six months after legislation was passed. By all indications, this was driven by the anticipation of lower claims severity. The most beneficial aspect of the legislative reform is that the existing carriers loosened their underwriting to provide coverage in areas where they did not want to write previously, and new carriers have gradually begun to enter the marketplace. This is most evident by the physicians insured in the state's JUA (a state program for physicians who cannot obtain coverage elsewhere) beginning to obtain coverage with standard carriers and doing so at lower premiums than they previously paid.

Diederich believes that malpractice reform is significant when related to alternative insuring options such as Risk Retention Groups (RRGs), Risk Purchasing Groups (RPGs), and other alternatives. Following implementation of reform changes, these programs will no longer appeal to physicians based solely on price. These programs have traditionally been targeted as a distressed market solution when few alternatives exist and are mostly driven by premiums. As the market changes due to malpractice reform, physicians will become more concerned with the quality of their insurer, financial rating, and stability. RRGs, RPGs, and other alternative insuring options do not afford the financial protection granted by standard admitted carriers who are protected by a state's guarantee fund. This fund, paid into by admitted carriers, protects policyholders against coverage issues associated with insolvency. Alternative insuring options like RRGs and RPGs do not have this protection. Should programs like these go insolvent, the policyholders can be left without the insurance protection for which they paid. In some cases there may not be carriers willing to provide prior acts coverage, thereby leaving physicians with a permanent gap in coverage. In the near future we expect to see many physicians begin to gravitate back to the standard carriers. Some carri-

ers have agreed to provide prior acts coverage for these physicians to return to the standard marketplace. Others are not making this offer, fearing the exposure is too great for the premium charged.

Diederich believes that physicians seeking quality affordable insurance coverage should expect to see a gradual improvement of their ability to secure such coverage subsequent to med-mal reform changes. Physicians will see a continual barrage of alternative carriers entering and exiting the marketplace. This will create potential turmoil for physicians who elect coverage with alternative carriers when these carriers later exit the marketplace.

Diederich believes the better long-term options for physicians in the present environment are to choose quality stable carriers and to be selective among those carriers included in these options. Diederich is recommending that its clients continue coverage with their current carrier unless directed otherwise at renewal, as there are some exceptions.

Malpractice reform, once implemented, will take time to create trends from which statistical data will be used by carriers and will affect what coverage is offered to physicians as well as pricing strategies. Physicians should look forward to a more healthcare-friendly environment in the months and years following implementation of med-mal reform.

In conclusion, medical cosmetic services present a challenge to professional liability insurance companies. Over time, one way or another, they will rise to the occasion and meet this challenge. As we can see now, the surplus lines companies are beginning to step up to the plate and address new medical treatment modalities/procedures. Others will follow, and there will be a settling out of premium costs as the insurance companies begin to acquire data bases on which to base their coverages and associated premiums. The softening of the marketplace will cause more companies to be more interested sooner, to the benefit of the medical practitioners. Finally, as tort reform comes to the various states, hopefully momentum will be created to bring helpful changes to the medical malpractice environment and will benefit each and every physician. That will be a good day!

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