

“Going Bare”: A Look at the Trend of Physicians Opting to Practice Without Malpractice Insurance

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In response to the outrageous cost of malpractice insurance, more and more doctors are fighting back by canceling their policies, or “going bare.” This practice is most popular in states such as Florida, where the prevalence of malpractice lawsuits has resulted in skyrocketing insurance premiums, and where physicians know there are state laws in place that protect many of their personal assets from creditors should they lose a malpractice lawsuit. Even the American Medical Association has changed its policy on this matter from recommending that its members carry a sufficient level of malpractice insurance to its current policy of leaving the decision to the physicians. Regardless, doctors should consider several factors before making a decision to cancel or discontinue their malpractice insurance policy.

First and foremost, several states, including Massachusetts, Pennsylvania, and Colorado, require physicians to carry a minimum level of liability coverage in order to maintain their medical license in those states. Obviously, if this is the case in the state where you practice, you have no choice but to keep your malpractice insurance. Some other states require the physician, if they opt not to carry malpractice insurance, to show assets sufficient to cover a certain level of liability (eg, \$250,000 in Florida). This essentially requires doctors either to carry malpractice insurance or self-insure their practice.

The other factor is the ability to shelter personal assets from creditors under state law. State laws differ, and as noted above, some states like Florida provide significant levels of protection. On the other hand, some states may not provide sufficient protection to warrant dropping insurance coverage. Physicians should consult an attorney for further information on the state laws applicable to their particular situation.

Besides state-mandated insurance coverage, physicians should consider whether hospitals and managed care organi-

zations require coverage. Many hospitals will not allow physicians to practice medicine in their facility if they do not have malpractice insurance. Conversely, some hospitals have also begun to “go bare,” or discontinue their own malpractice insurance, and thus could not require physicians to carry insurance if they do not carry it themselves.

In states where a government-funded Patient Compensation Fund, or PCF, has been instituted, physicians may lose eligibility for the PCF if they do not carry malpractice insurance. Louisiana has a PCF in place, but uninsured physicians are not automatically disqualified from using the PCF to satisfy judgments against them. The PCF there covers any pain and suffering judgments over \$100,000 and up to the \$500,000 limit. If an uninsured physician wants to utilize the PCF to pay a judgment, they must have the initial \$100,000 available, plus a sliding scale surcharge (usually \$6,000 to \$9,000). In Louisiana, then, the issue becomes a matter of cost-benefit analysis: Does it make more financial sense to pay the insurance premiums or to have the necessary funds available to cover the first \$100,000 of a judgment, plus the surcharge?

Patients' health insurance companies may also require the treating physician to carry malpractice insurance. If this is the case, physicians without malpractice insurance run the risk of either losing their patients or having to charge their patients directly when a claim gets denied by the patient's insurance carrier. Physicians without malpractice insurance will not be considered to be in-network by these insurance companies, and this will affect their ability to obtain new patients. Some physicians have dealt with this issue by informing all current patients of their malpractice insurance situation and by charging reduced rates. Although this practice addresses the issue of patient retention, it does not solve the problem of liability for malpractice lawsuits.

Other less significant factors exist as well. Some states require uninsured physicians to post a notice in their office that discloses their lack of malpractice insurance. The potential detriment of this is two-fold: Either patients will question how much their doctor cares about patient well-being, or they will wonder if the doctor has become uninsurable because of past lawsuits. Either way, this requirement could, and likely would, damage the patient's confidence in their physician. In addition, uninsured physicians may

opt to ask their patients to sign a binding arbitration or mediation agreement to help curb litigation costs should a malpractice issue arise in the future. However, the legality and enforceability of these agreements vary from state to state, and the circumstances under which they were signed will affect their validity.

After considering each of the factors described above, the decision would likely come down to a cost-benefit analysis. Assuming state law allows the practice of medicine without malpractice insurance, and assuming the feasibility of this option with reference to hospital, managed care, and patient health insurance guidelines, physicians should weigh the costs of insurance against the potential for liability, the amount of that potential liability, and the negative effect on their practices should they drop their coverage.

Understandably, physicians who pay outrageous premiums for policies that provide only fractionally higher coverage than the premium itself, eg, paying \$220,000 annually for a \$250,000 policy, may feel it does not make fiscal sense to continue such a policy. However, such decisions are not always straightforward, and each situation should be fully analyzed before "going bare."

