

FOCUS ON

PROFESSIONAL LIABILITY

Jeffrey Segal, MD

Dr. Segal, a neurosurgeon, is Founder and Chief Executive Officer of Medical Justice Services, Inc, of Greensboro, NC.

The author reports no financial relationships relevant to this article.

Playing high-stakes poker

Do you fight—or settle—that malpractice lawsuit?

The decision usually isn't clear-cut. Here's what you need to know to make matters come out favorably.

CASE Brachial plexus injury, then a summons

J.L., a 29-year-old primigravida, has gestational diabetes. When she goes into labor at term, she reports to the state-of-the-art hospital where you practice. Delivery is difficult and achieved using forceps. The infant weighs 9 lb 4 oz, and has obvious weakness in his right arm. A neurologist diagnoses Erb's palsy, and the child undergoes brachial plexus exploration and repair of injured nerves.

Two years later, most arm function has returned. Soon thereafter, you receive a summons from the parents and their attorney demanding \$3 million. Do you fight—or settle?

You could say there are two types of physicians: those who have been sued and those who will be.

This is an overstatement, of course, but not by much. In high-risk specialties such as obstetrics, most physicians will receive a summons at some point in their career. In fact, almost nine of every 10 ObGyns report that they have been sued



© Ken Orvidas

IN THIS ARTICLE

Beware! There may be a hammer clause hiding in your policy

Page 50

Consider a "high-low agreement" ahead of a judgment

Page 56

More about professional liability by this author. Prepare your defense of a cerebral palsy claim (and other claims) long beforehand—in the prenatal period. That's what Dr. Segal advised readers in the July 2007 issue of OBG MANAGEMENT. Read his argument for obtaining patient contracts in the "Past Issues" archives at www.obgmanagement.com.

at least once in their career, with an average of 2.6 claims each.¹

Once you receive a summons

You face a tough choice at that moment: Fight the claim? Or settle it?

To prevail in a case of negligence, the plaintiff must prove, by a preponderance of evidence, that:

- there was a physician–patient relationship
- the physician violated a standard of care
- the violation caused damages.

CONTINUED

Calculating whether to fight or to settle that claim

Before you decide what to do, you need to know:

- how a consent-to-settle clause can protect you—and why such clauses are losing favor with carriers
- why you are personally liable for judgments that exceed policy limits and asset protection—and how to minimize your risk
- what the options are when you want to settle but the carrier does not
- that you may be reported to the National Practitioner Data Bank (and that there are situations in which this can be avoided)
- how a high-low agreement can limit total liability
- why you should take care to avoid a reputation for settling, and how such a reputation can affect your future insurability
- why you shouldn't assume that stress will vanish upon settlement of a case*

*For more about stress, see "Got malpractice distress? You can help yourself survive," in the February 2008 issue of OBG MANAGEMENT, available at www.obgmanagement.com

FAST TRACK

A consent-to-settle clause—or its omission—is usually established contractually at the beginning of coverage

If any of the three stipulations remains unproven, the claim fails. Your first step is to determine, with your attorney, whether each of the three elements can be established. If the answer is a resounding "Yes," then a settlement merits strong consideration. A patient who is injured as a result of negligence deserves compensation. And if it is clear that the plaintiff will prevail, it makes little sense to prolong the inevitable, particularly when it might take years to reach court.

Usually the facts are more complicated, and the answer to "fight or settle?" is less clear-cut. You and your attorney need to decide whether the case is defensible. If it is, each side will produce experts to argue the facts in court.

Given how stressful litigation can be, there are a number of considerations that enter into the calculus of fight or settle. This article will focus on seven of those considerations (see the box above).

How consent-to-settle clauses can protect you

For years, many carriers curried favor with physicians by barring settlement of

a case unless the physician agreed to it. If the physician balked, the carrier was obligated to defend the case to the end.

This clause is still found in professional liability policies, but the number of carriers offering such flexibility has decreased considerably. Many carriers now base the decision to settle on both the merits of a case and the cost of defense. If the carrier determines that it would be much less expensive to settle a case for nuisance value than to defend it through trial, the carrier is within its rights to settle. Obviously, this posture has ramifications for the insured physician.

A consent-to-settle clause—or its omission—is usually established contractually at the beginning of coverage. If the ability to demand consent for settling is important to you, look closely for such language when you purchase or renew coverage. State law can also determine whether such a clause is included.

Beware of the hammer

In addition to a standard consent-to-settle provision, some carriers promote a "hammer clause," by which an insurer's liability is limited to a recommended settlement. Let's say the carrier decides to settle a particular case for \$100,000, the physician withholds consent, and a judgment of \$300,000 is entered. The physician is individually liable for the "overage"—in this case, \$200,000.

As if this were not complicated enough, there is also a modified hammer clause, which is a "kinder, gentler" approach. In this scenario, the physician is liable only for a percentage of any judgment above the recommended settlement. In the example just given, if the modified hammer provision were 50%, the carrier would pay its recommended settlement (\$100,000) plus 50% of the overage—in this case, another \$100,000, for a total of \$200,000. The physician would be liable for the remaining \$100,000.

Without a consent-to-settle clause, the physician is removed from decision-making. Further, a hammer clause or

modified hammer clause should cause a physician to think long and hard before forgoing a recommended settlement.

When personal liability exceeds policy limits

Even if the carrier is bound, through its contract with you, to defend a case to the end, it will generally be limited to a maximum payout. Policy limits depend on the particular policy, with higher limits associated with higher premiums.

Carrying a very high limit can make you a more appealing target for a lawsuit, frivolous or otherwise. Many personal injury attorneys view medical malpractice as little more than a series of insurance transactions. If you have a high coverage limit, you will attract greater attention. This is of particular concern when there are multiple defendants and culpability varies significantly between the actors.

When negligence is proven in states that still allow joint and several liability, even 1% liability can leave you responsible for the entire amount. The solution is to have reasonable—but not excessive—coverage. Many believe this balance lies at \$1 million/\$3 million limits.

Desire for a payout may persuade a plaintiff to settle for policy limits

If you have coverage of up to \$1 million and a court delivers a higher judgment, what happens?

It depends. In theory, you are liable for the overage; the carrier will pay up to the policy limit, and you are responsible for the rest. In reality, however, the situation is more complex.

You often have the right to demand a new trial or appeal the case. You may not prevail, but this approach creates new risks for the plaintiff right after “victory” is tasted. Rather than roll the dice, many plaintiffs, under the advice of their attorney, will reconsider and settle for the policy limit. It is in their interest to lock in a certain figure rather than prolong the case, exposing themselves

An astronomical number of physicians are facing litigation

There are approximately 50,000 to 60,000 medicolegal cases open at any given moment, but the number of physicians involved is much higher because many suits name multiple defendants.³ In 2004, the National Practitioner Data Bank (NPDB) reported entries for more than 200,000 health-care providers since 1990, most of whom had been reported just one time.⁴ Again that number is low because not every physician who is sued is reported to the NPDB. Reporting is required only if payment is made by settlement or judgment related to a written demand by a plaintiff. If the case against the physician is dismissed, or the physician wins in court, no report is entered. So the 200,000 entries are just the tip of the iceberg. With roughly 700,000 physicians practicing in the United States, the number of physicians affected by liability litigation could be staggering.

to increased risk. And if the judgment makes it clear that bankruptcy is an option for the physician, a plaintiff will take pains to prevent that end game. Once bankruptcy is filed, the clock slows, and it may take years for the plaintiff to receive any funds. Even then, the plaintiff may have to wait in line behind more senior creditors.

Consider asset protection

Asset protection prior to litigation can affect the dynamics of posttrial settlement discussions. Asset protection means many things, and there are different degrees of protection. A limited number of attorneys are skilled in asset protection, and plaintiff’s attorneys generally have limited experience breaking through the shield.

With a robust asset-protection program in place, you can come to the table with greater leverage and engage in a more rational discussion about a just settlement in which most, if not all, of the settlement will be within the policy limit.

When you want to settle, but the carrier doesn’t

Ordinarily, your interests and those of your carrier are aligned. You both want

FAST TRACK

Carrying a very high policy limit can make you a more appealing target for a lawsuit

to win—or at least lose less—but there is one scenario in which your interests may diverge. That is when you believe you are at risk for a judgment that will exceed the policy limit. In such a situation, you want your carrier to tender the full limit, but the carrier faces a worst-case scenario: paying the maximum amount on the policy.

If the carrier believes the case is defensible, it may choose to fight, hoping to win or receive a judgment well below the policy limit. If the carrier's strategy prevails, all parties will be better off. However, if the carrier gambles and loses, you will face the very scenario you hoped to avoid—exposure to a judgment beyond the policy limit.

The law generally provides that a carrier that wants to gamble must do so with its own money. To do otherwise constitutes action “in bad faith.” After judgment, many physicians sue their own insurance company on the basis of exactly that legal theory. It is even more common for a plaintiff, fresh from victory, to join forces with the doctor defendant and take action against the carrier.

This endgame is not automatic, however. If you want to minimize the risk that your pocket will be the only one left to pick after a high-stakes case ends, you must demand in writing that the case be settled up to the policy limit. Under such circumstances, it is best for your personal counsel to deliver that message because the carrier-appointed attorney faces something of a conflict, because she is an advocate for the physician but paid by the carrier.

Avoiding the National Practitioner Data Bank

In 1990, the National Practitioner Data Bank (NPDB) was launched with the goal of keeping dangerous physicians from migrating from state to state to escape accountability. A central database allows licensing agencies to quickly determine whether a doctor has a checkered past.

The NPDB labels a physician “as marked” if money is paid for a malpractice settlement or judgment. The NPDB lists hundreds of thousands of physicians, most of whom have a single entry. Many state licensing agencies have also begun listing physicians who have lost or settled a lawsuit; the only difference is that such information is posted online and is accessible to the public. In contrast, the NPDB remains confidential, accessible only by those who “need to know,” such as credentialing committees, hospitals, and licensing boards.

Even \$1 can incur a listing

Many physicians wrongly believe that they will not be reported to the NPDB if they are involved in a case that settles for an amount under \$30,000. Low-value settlements are often consummated for nuisance value, meaning that they have no legal merit. However, any payment—even \$1—is reportable to the NPDB. It does not matter whether payment is made by settlement or judgment.

A written demand for money, whether as damages for an injury, money to see another physician, or a refund of cash tendered, can sometimes be construed as reportable.

Being joined to a corporate entity can help you

Seasoned plaintiff's attorneys understand physicians' deep aversion to being reported. They often take advantage of a well-known exception to reporting: payment made in the name of a corporate entity.

If a physician is employed by a corporation with at least two physicians, and the case is settled in the name of the corporation, the physician can be dismissed from the claim, and no reporting is required. In that case, the physician maintains his clean record in the data bank. That said, this can get complicated if one is obligated to report to state authorities. Because each state is different, these details should be addressed with your attorney.

CONTINUED

FAST TRACK

Any payment—even \$1—is reportable to the National Practitioner Data Bank, whether it is for a judgment or a settlement

an actual
**HIGH-LOW
AGREEMENT**

Read how a high-low agreement came into play when defendants admitted liability in the case of a child with cerebral palsy, in this issue's "Medical Verdicts," page 69.

High-low agreements can avert huge judgments

As discovery progresses, the plaintiff and defendant usually come to a better understanding of their respective risk—but not always. In some situations, the plaintiff may have a strong case in regard to one element of negligence, such as damages, but a weak case in regard to causation. Cerebral palsy cases fit this paradigm. In such cases, the infant has clear-cut medical and rehabilitation needs that can run easily into seven figures, but proving that a physician's actions or omissions caused the injury can be difficult. Both sides can mitigate risk for one another by embracing a "high-low" agreement—a contract defining how a plaintiff will be paid based on a specific jury verdict.

For example, if the high-low agreement is \$500,000/\$100,000, the insurer is locked into one of two payments. If the jury returns a verdict for the defense, the carrier pays \$100,000; if the verdict is for the plaintiff, the carrier pays \$500,000, regardless of the amount of damages awarded by the jury. Without such an agreement, the range of potential judgments is no money at all to almost any amount.

When a high-low agreement is in effect, and the jury returns a verdict for the physician, the settlement is not reported to the NPDB even though the carrier must make a payment.

Why not?

The payment is being made pursuant to a separate agreement between the carrier and the plaintiff. The benefit to the insurer is the limitation of its liability, even if the plaintiff wins at trial and is awarded a higher amount. The benefit to the plaintiff is a guaranteed payment, even if there is no finding of liability against the practitioner.

How a reputation for settling can hurt

If you are so risk-averse that you demand that your carrier settle all cases—even those with no merit—two things will happen:

- Word will spread throughout the plaintiff's bar that you are an easy target, and the threshold for filing suit against you will decline. And given how little work will be required to net a settlement, attorney's summons will forever darken your door
- Your medical liability rates will climb—or coverage will be terminated.

Settling meritorious cases makes sense, but settling all cases regardless of merit is ill-advised.

Stress is common on both sides of the equation

Lawsuits take a long time to percolate through the system, with an average time from medical event to claim resolution of about 5 years—longer in obstetrics.²

Attorneys are accustomed to this time frame; physicians are not. The lingering effects on doctors include stress, loss of job satisfaction, family strife, depression, substance abuse, and so on.

Because a lawsuit is a major stressful life event, a physician may be only too happy to be done with one. If there were absolutely no consequences to settling, that would be a smart move. But there are consequences, and living with them can also cause stress. The best way to minimize stress on either side of the equation is to think long and hard before settling any case. ■

References

1. Wilson N, Strunk A. Overview of the 2006 ACOG Survey on Professional Liability. Available at: www.acog.org/departments/professionalliability/2006surveyNatl.pdf. Accessed March 11, 2008.
2. Studdert DM, Mello MM, Gawande AA, et al. Claims, errors, and compensation payments in medical malpractice litigation. *N Engl J Med*. 2006;354:2024-2033.
3. Mello MM, Studdert DM. The medical malpractice system: structure and performance. In: Sage WM, Kersh R, eds. *Medical Malpractice and the U.S. Health Care System*. New Century, Different Issues. 1st ed. New York: Cambridge University Press; 2006:11-29.
4. US Department of Health and Human Services. National Practitioner Data Bank. 2004 annual report. Available at: http://www.npdb-hipdb.hrsa.gov/pubs/stats/2004_NPDB_Annual_Report.pdf. Accessed March 11, 2008.

FAST TRACK

If you develop a reputation for settling every case, your medical liability rate may climb—or you may lose coverage altogether