

The Perfect Storm:

The Current Medical Malpractice Crisis

by Terence McCoy, MD, FMA Immediate Past President

What's worse than seeing your professional liability insurance rates increase by 50 percent? Receiving a nonrenewal notice despite having a clean malpractice record. What's worse than being nonrenewed despite a clean record? Seeing your professional liability insurance carrier become insolvent and realizing that you are, in essence, bare.

If all this sounds too scary to be true, it's not. The above scenario is happening all over the country, but nowhere more dramatically than in Florida. In the past 36 months alone, eight carriers doing business in Florida have either been liquidated, forced into rehabilitation, or have decided to stop selling medical malpractice insurance altogether. The insurance companies formerly known as Unisource, Gulf Atlantic, Caduceus, Frontier, and PHICO have all gone the way of the dinosaur, while Scottsdale and Fireman's Fund have decided to get out of the medmal line of business. An ninth carrier, St. Paul, has decided to severely curtail providing insurance to several specialties, including emergency medicine, general surgery, and OB/Gyn. While a tenth carrier, Claredon, has broken its ties with Gulf Atlantic and is no longer doing business in Florida. In addition, three more carriers have been bought out by another company (PPTF by ProNational, ProNational by Medical Assurance, and Medical Protective by General Electric).

In the mid 1990s, carriers were flooding into the state of Florida. Today, there is a mass exodus. Three years ago, there were five professional liability insurance carriers headquartered in Florida. Today, only one remains: FPIC. During those three years, rates have increased on average by 50%. In the past year alone, the average rate increase by all carriers still operating in Florida is more than 25% and rate increases in 2002 are expected to be in the 25% range once more.

What is causing this third malpractice crisis to hit the country since 1975?

According to Cliff Rapp, Vice President of Risk Management at FPIC, the following scenarios have converged at once to provide "the perfect storm":

- Erosion in patient loyalty attributed to the increasing presence of managed care
- Seeing more patients and spending less time with each patient has severely decreased communication between patient and physician – in fact, 82% of the motivating factors behind claims are attributed to communication failures
- As a result of managed care, there has been a shift from cases tried for committed acts to a world where omitted acts are equally important – in fact, failure to diagnose cancer has become a leading cause of malpractice claims
- There are more lawyers today than ever before
- Jury panel selection criteria has changed – a potential juror now only needs to be 18 years of age and have a driver's license
- Shows such as "Who Wants to be a Millionaire" have lessened the aura of a million dollars
- In tandem with increased federal and state regulatory and statutory causes of action, the average malpractice settlement in Florida has increased dramatically
- Jury verdicts are the yardstick by which all cases for settlement are measured and the average jury verdict has increased 57% in the last five years nationally, from \$2 million to \$3.5 million

Adds Bob White, Executive Vice President and COO at FPIC, "The professional liability industry has been in a soft market for the past 12 years. At the height of the soft market, many PIAA companies chose that time to go public – the worst possible time to do so. After becoming publicly traded companies, these carriers ventured outside of their core competencies by writing lines of insurance they were unfamiliar with and outside of their geographic comfort

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zones writing business in states that were foreign to them. In order to secure market share in new lines of business and new geographic regions these carriers deeply discounted their rates. This forced the competition to lower their rates even further. In short, the entire medical professional liability industry has been charging less than adequate rates while its age old nemesis, severity, continued its upward spiral."

In fact, rates have been artificially low for so long that in just the past five years most carriers have seen their combined ratios climb over 130 percent, and some have even risen to levels above 140 and 150 percent, which means for every dollar a company takes in, they are spending anywhere between \$1.30 to a \$1.50. All this in an industry that has historically enjoyed combined ratios in the 90 percent range. FPIC is one of only two carriers operating in Florida that has an average combined ratio over the last five years under 100 percent.

Other factors contributing to the malpractice crisis, according to Mr. White, include:

- Reinsurers took a beating in the soft market and are just beginning to take rate increases to recoup their losses and are tightening up the terms of their participation
- Returns from investment income have fallen dramatically
- Politicians seem less inclined to deal with tort reform issues for doctors

Mr. White believes that the problems in Florida are a continuation of the original malpractice crisis of the mid-seventies. He feels the legislature misdiagnosed the original problem and treated the symptoms of the condition, the crisis of availability and affordability, without treating the condition itself. Like all misdiagnosed and untreated conditions, the symptoms may abate but when they return they are more difficult to treat. Mr. White feels that Florida needs to implement changes that will control the rate at which claims severity is advancing by capping non-economic damages.

So, with all this bleak news, what's a physician to do?

For one thing, joining organized medicine could assist in

lobbying the government for tort reform. FPIC, along with the FMA, County Medical Societies, and specialty societies have been doing just that for the past several years, and will continue to do so until we are able to get runaway jury awards under control, thereby lowering your malpractice premiums.

Another important thing to do is become insured with a stable carrier that will be with you during the good times and the bad. FPIC has been the only continuous carrier in the state of Florida since 1975 and is now the only carrier still headquartered in the state. As David Rader, President and CEO of FPIC says, "When we say 'Here Today, Here Tomorrow' we mean it."

In addition to stability, you want a carrier who will fight for you in the courtroom and defend you against frivolous lawsuits. At FPIC, 85% of all cases are settled with no indemnity payment and 80% of all cases taken to trial are won. In the past two years alone, FPIC is 67-10-3 (87%) in the courtroom, far and away the leader in taking cases to court in Florida.

Finally, you want to be insured with a carrier who will assist you in protecting yourself from ever receiving a notice of intent in the first place. FPIC prides itself in its Partners in Prevention Program, whereby a highly trained and specialized risk manager will provide free office surveys. The Program also has more than 35 specialized risk management programs that can be targeted to a specific specialty, geographic region, or large group or IPA.

Formed as a reciprocal by the FMA during the first malpractice crisis in 1975, converted to an independent company during the second malpractice crisis in 1985, and now a stock company during the third malpractice crisis, FPIC, the endorsed carrier of the FMA, exists to provide physicians with the most comprehensive professional liability insurance coverage and the most protection, both inside and outside the courtroom. FPIC: Here Today, Here Tomorrow.

For more information on the pending malpractice storm, or to find a port of shelter, please contact Gary Izzo, Vice President of Marketing at FPIC, at 800-741-3742, ext. 3056.

New Members Elected to the Board of Directors

At the FPIC Insurance Group's Annual Shareholders Meeting in June, two new members were elected to the Board of Directors. John K. Anderson, Jr., and M.C. Harden, III, will each serve three-year terms. Gene C. Witherspoon was appointed to the Board of Directors in July.

"The election of Anderson and Harden to our Board is a major step forward in our goal of adding additional areas of expertise on our Board," said John H. Byers, President and Chief Executive Officer of the holding company.

Mr. Anderson currently serves as Executive Vice President, Treasurer, and Chief Financial Officer of American Heritage Life Investment Company, a life insurance company headquartered in Jacksonville, Florida. Prior to joining American Heritage, Mr. Anderson was the Chief Executive Officer of E. G. Baldwin & Associates, Inc., a regional distributor of medical imaging products and services to hospitals and other medical providers, located in Cleveland, Ohio. Mr. Anderson is also a member of the Board of Directors of Baptist Medical Center in Jacksonville, Florida.

Mr. Harden is Chairman of the Board and President of Harden & Associates, Inc., an insurance broker, and risk management and employee benefits consultant in Jacksonville, Florida. Mr. Harden is also a member of the Baptist Medical Center Board of Directors.

Mr. Byers also stated, "These two individuals have significant experience in the insurance industry and other areas that will add value to our Board and our organization."

Mr. Witherspoon is the President and Chief Operating Officer, and a Director of Anesthesiologists Professional Assurance Company (APAC), a wholly owned subsidiary of FIG, which specializes in providing professional liability insurance to anesthesiologists. Mr. Witherspoon has previously served as an Assistant Director of Insurance Company Regulation with the Florida Department of Insurance.

Robert O. Baratta, MD, chairman of the Board, commented: "We welcome Gene to our Board. He has been an important part of our management team since 1998 and we look forward to the contributions he will make to our entire organization by serving on our Board."

The new directors filled vacancies left by the retirement of Frank Moya, MD, D. L. Van Eldik, MD, and Henry M. Yonge, MD, from the Board of Directors. FPIC would like to thank the retiring directors for their dedication and service to the Company.

On the Lighter Side

We were all reminded recently of the sage advice that FPIC's Vice President of Claims has given out over the last few years. Ray Carey used to coach little league baseball. One of his kids was a young man who used to show up for games tired and listless. When Coach Carey tried to determine the cause of the young man's lack of enthusiasm, he learned that the boy's father had insisted that the child play 18 holes of golf before going out to play baseball. Coach Carey told the kid, "Concentrate on baseball - you'll never amount to anything in golf." It's a good thing "the kid" didn't pay a lot of attention to Coach Carey, as "the kid," David Duval, won the British Open, golf's most prestigious Major Tournament in July.

Premises Liability Coverage

For many years, FPIC has offered to physicians on their medical malpractice policy the option to include premises liability coverage. This basic coverage would allow protection for the slips and falls of the patients and guests entering the physician's office. Unfortunately, that coverage in all probability duplicates coverage with a physicians' business office package policy. Therefore, FPIC will no longer offer premises liability coverage as an option to the medical malpractice policy. This change will commence with all new and renewal policies effective December 1, 2001 and after. If you have any questions regarding this policy change contact Policyholder Services at 800-741-3742, ext. 3217.

FPIC Welcomes

Carol Lanfri

Carol Lanfri joined the staff of FPIC in the position of Senior Legal Counsel and Assistant Secretary. She is responsible for defending FPIC insureds in licensure disciplinary actions before the healthcare licensing boards such as the Board of Medicine and Board of Dentistry. Additionally, she represents licensees before the Division of Administrative Hearings.

Before joining the staff of FPIC, Ms. Lanfri worked at the Agency for Health Care Administration prosecuting licensees for the Board of Medicine and Board of Osteopathic Medicine. She was also the AHCA representative to the Osteopathic Board for two years.

Since moving to Jacksonville, Ms. Lanfri and her husband have enjoyed exploring the area, as well as participating in water sports.

Mrs. Lanfri can be reached at 800-741-3742, ext. 3295

Don Withers

Don Withers came to FPIC in August of this year. Prior to that Mr. Withers, a CPA, operated his own consulting and accounting firm for eight years and one of his clients was FPIC. Previously he worked at one of the "Big 5" accounting firms.

Mr. Withers will work as an internal auditor regarding FPIC's arrangements with MGIS, APIE, and PMA. He will also monitor the reinsurance and program business functions, insuring that information and funds are transferred to and received from our partners according to our contracts.

In his spare time, Mr. Withers enjoys golf, model trains and collecting Hess type trucks.

Feel free to contact Mr. Withers at 800-741-3742, ext. 3054

Randolph Collette

The position of Senior Attorney has recently been filled by Randolph Collette. He will be working in the legal department preparing responses to disciplinary investigations.

For the past 11 years, Mr. Collette was Senior Attorney for the Agency for Health Care Administration in Tallahassee, Florida. Prior to that he was an officer in the United States Airforce, serving as a navigator, wing operations scheduler, squadron commander and Judge Advocate.

When time and energy permits, Mr. Collette enjoys woodworking and stained glass projects.

The phone number for Mr. Collette is 800-741-3742, ext. 3290.

Marc A. Calixte

Marc A. Calixte joins the FPIC family as Assistant Vice President of Underwriting and will be working closely with Jeannie Whitter, Vice President of Underwriting. Previously Mr. Calixte worked as an underwriter and Market Manager of Florida for GE Medical Protective Company. He holds a Bachelor's of Arts in Accounting and a Master's in Accountancy both from Manchester College in North Manchester, IN.

Mr. Calixte is an avid sports fan. While living in Indiana he coached high school soccer and is currently searching for a soccer team to play on in the Jacksonville area. Mr. Calixte also enjoys golf, but would rather not comment on his handicap. When not participating in sports he likes to watch the Fighting Irish of Notre Dame play football.

Feel free to contact Mr. Calixte at 800-741-3742, ext. 3299.

The FMA Protecting Physicians Rights

The Florida Medical Association Board of Governors voted at the July 2001 Board Meeting to join the California, Georgia and Texas medical associations in a fight against several health plans. On August 29, the FMA announced, at a press conference, its intentions to join in the federal litigation against eight national for-profit health plans. The health plans in Florida include Humana Inc., Aetna Inc., Cigna, United Health Care, and Prudential Insurance Company of America. The suit charges the plans with violating federal Racketeer Influenced and Corrupt Organizations Act (RICO) to defraud physicians, enrich themselves at physicians' and patients' expense, break contracts with physicians, and otherwise eliminating the patient and physician from the important health care decision process. Specifically the complaint alleges that the health plans:

- Systematically cheat doctors by manipulating claims handling software to guarantee denial of payment for care already rendered
- Violated Florida and other state prompt pay laws
- Define medical necessity based on cost rather than what the patient and physician believe to be necessary

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- Deliberately delay payments in order to benefit the health plan financially and in consequence stress the delivery system
- Provide financial and other incentives to claims reviewers who deny claims

Physicians have been held victim to downcoding, bundling, delayed payments, wrongful denials, inappropriate medical necessity determinations, and increased administrative expenses. These health plans have systematically denied, delayed and diminished payments to health care providers. They have taken physicians' payments and diverted them for their own profits. Without adequate and timely payments, physicians cannot maintain their practices and cannot provide the continuity and quality of care that patients require.

Hence, the decision to join this suit against these plans was not taken lightly. The FMA continually meets with health plans to resolve problems, we have filed complaints with the Department of Insurance on physicians' behalf, and we have tried legislative remedies. But because of loopholes between state and federal law, and the understandably limited

resources of our state agencies to enforce the laws already on the books, the plans can and do continue to cut corners, bully doctors, lie to patients, and engage in gangster-style threats to the doctors who stand up to them. The FMA is looking to close some of the loopholes with the Florida Prompt Pay law during this legislative session.

This federal injunction can:

- Ensure that patients see a specialist when it's appropriate,
- Make drug formularies consider efficacy as well as cost,
- Institute a fair system to appeal the health plans often inscrutable decisions,
- Do away with financial incentives that pit doctors' paychecks against their duty to care for their patients,
- Put medical necessity decisions back into the hands of the physician, and
- Stop the plans from playing hide and seek with claims for reimbursement.

Please tell your colleagues how the FMA continues to fight for their rights and their patients.

For additional information contact FMA at 800-762-0233.

Broad Form Defense Policies

FPIC's Broad Form Investigation Defense is offered as part of the insurance package for Florida and is designed to provide the policyholder with defense coverage in the event a physician is the subject of an investigation by any federal or state agency, professional, medical, or healthcare related organization. FPIC recognizes that in today's climate of intense watchdog efforts by various federal, state, and professional agencies, a physician may be the subject of numerous investigations that can result in exorbitant legal fees.

When accessing the Broad Form clause it is extremely important to notify FPIC in a timely fashion. FPIC should be notified within 30 days from when you receive notification that a possible violation will be investigated.

The Broad Form is designed to cover any legal expense incurred in the process of defense. FPIC has established relationships with attorneys, from which you will be assigned one for your defense. This policy feature is not intended to cover reimbursement costs incurred if you select an attorney outside of the recommended FPIC group.

It is also important to remember that FPIC's policy is claims-made. Under the policy, you are protected for claims that occur and are reported while the coverage is in force. If

coverage is discontinued with FPIC and you do not have "tail" coverage, you will not be covered for an incident that occurred while a FPIC policyholder.

FPIC's Broad Form Investigation Defense Coverage includes, but is not limited to:

- Board of Medicine/Claims-related
- Managed Care Termination
- ADA Violations
- OSHA
- EEOC
- Medicare/Medicaid Fraud & Abuse
- Board of Medicine/Any Investigations
- Peer Review (hospital & all other)
- Billing Investigations
- COBRA (patient dumping)
- Utilization Review
- CLIA Investigations
- Good Samaritan Complaints
- Abandonment
- QA Evaluations
- Sexual Misconduct

For more information regarding Broad Form contact the FPIC Policyholder Services Department at 800-741-3742, ext. 3217.

Congratulations

Terence McCoy, MD – On a successful term as the President of the Florida Medical Association. Dr. McCoy now serves as Immediate Past President.

H. Frank Farmer, Jr., MD - At the recent FMA Annual Meeting, Dr. Farmer was installed as the President of the Association for 2001-2002.

Yank D. Coble, Jr., MD – Was elected to the position of President-Elect of the American Medical Association.

Kay M. Mitchell, MD – Was honored with the Internist of the Year award from the Florida Chapter, ACP-ASIM.

We're With You!

Jamie Barkin, MD – Dr. Barkin, immediate past governor of its Florida Chapter ACP-ASIM, is serving as commander of the medical military forces in the current war against terrorism, Operation Enduring Freedom.

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