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A questionable case of negligence goes to trial and the insurer decides to settle—against the defendant's wishes

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Physicians understand there is always a risk of being sued for malpractice. And it's a risk that doctors live with because it is part of the cost of practicing medicine. But not all physicians are aware of the fine print on their liability policy. What happens when the insurer and the physician have a difference of opinion about whether or not to settle a case? Who has the final say? This month's case explores that issue.

Dr. M, 57, was an obstetrician-gynecologist who worked in a small practice with two partners. He found his work rewarding, but was well aware of the high number of lawsuits against those in his particular specialty. So, when he was served with papers informing him that a patient was suing him, he was dismayed, but not shocked. The case involved a patient who had delivered a stillborn child during her eighth month of pregnancy. The patient claimed that Dr. M was on call on the night of the infant's death and had not responded adequately when called by his answering service about her condition. Dr. M felt confident that he had a strong case; he disputed that he was on call that night and claimed no wrongdoing.

The physician contacted his insurance company as soon as he was notified about the lawsuit and quickly met with the attorney assigned to him. Mr. A, the attorney, was businesslike and efficient, and explained the details of the trial process to Dr. M. As the initial stages of the lawsuit progressed, Dr. M was deposed several times, providing all necessary paperwork. He went through a lengthy preparation for trial and committed all the time necessary to take an active role in his own defense. Dr. M was optimistic that a vigorous investigation would vindicate him.

Difference of opinion

After months of preparation, the case went to trial. The plaintiff was called to the stand to testify almost immediately. Several other pertinent witnesses were called in turn by the prosecution. The case was going more or less as Dr. M had expected until several days into the trial, when Dr. M's attorney informed him that the insurance company had decided to settle his case for $500,000. Dr. M was appalled.

“I don't want to settle!” he exclaimed. “I'm ready for trial. This is my reputation we're talking about here. I won't settle. I want to take this all the way.”

“I'm sorry,” Mr. A said coolly, “ but the company has decided that it is more expeditious for us to settle the matter. I was authorized to make a $500,000 offer to the plaintiff's attorney, and the plaintiff has indicted that she wishes to accept it. The trial is over.”

The case was settled despite Dr. M's strenuous objections.

An unusual secondary lawsuit

Dr. M was enraged at this turn of events and hired an attorney to sue the insurance company for breach of contract, negligence, and bad faith. He was confident that he would have prevailed at trial had it continued, and argued that the settlement would adversely affect his professional reputation. A trial court initially dismissed Dr. M's complaint in favor of the insurance company, but he persevered and appealed until the case reached the state supreme court. The court, however, ultimately sided with the insurance company and ruled that the company was within its rights to settle the case regardless of Dr. M's objections.

Legal background

In making its decision, the court thoroughly read Dr. M's insurance policy and then focused on one specific clause. The clause stated that “the [insurance] company may make such investigation and settlement of any claim or suit as it deems expedient.” The court ruled that this language clearly allowed the insurer complete discretion in resolving the case—with or without the physician's consent. In other words, the language of the insurance policy gave the insurance company, and not the doctor, the final say in whether or not to settle the lawsuit. Whether or not Dr. M could have been vindicated in his malpractice case was irrelevant.

Protecting yourself

It goes without saying that one should never sign a contract, including an insurance policy, without first reading and understanding it. Yet this happens every day.

It is worth reviewing your existing malpractice policy to understand what your legal rights are in terms of settlement. Many insurance companies have a “consent to settle” policy clause preventing settlements without a physician's direct approval. However, a good number of underwriting agencies employ a “deems expedient” clause, like the one in Dr. M's policy. Language such as “the company may settle any suit it deems expedient” gives final discretion to the insurer in whether a case should go to trial or be settled. Dr. M found himself without recourse here, as his contract gave complete control to the company underwriting his liability policy.

A final word of caution when reading the fine print: a “consent to settle” clause often makes a liability policy more expensive to purchase. And not all “consent to settle” language is the same. While some such clauses give the physician the final say, others allow the insurer to consult a panel made up of its choosing in the event that the company disagrees with the doctor's settlement decision. In that case, the panel would be the final arbiter.

The important thing is to be knowledgeable about your policy, specifically regarding the settlement of suits and your level of control here. If you do not understand the language of the policy, it is wise to consult with an attorney who specializes in medical liability.