

# Healthcare and Medical Professional Liability Insurance

*August 14, 2024*

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# Speaker

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# Course Outline

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- What is Medical Malpractice?
- Different types of damages associated with malpractice
- Who needs malpractice insurance?
- History of the malpractice insurance market – 1970s to now
- Different types of malpractice policies
- Hospital Professional Liability (HPL)
- Medical Professional Liability (MPL)
- Allied Medical Professionals
- Exposures and rating elements
- Key Sections of the Medical Malpractice Policy

# What is Medical Malpractice?

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Medical Malpractice is an act or omission by a health care provider which deviates from accepted standards of practice in the medical community and which causes injury to the patient.

## Legal elements

- Duty owed to patient
- Breach of duty
- Damages / Injury
- Causation

# Claim Example: Duty Owed

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- A man complains to his doctor that he has pain and tingling in his chest.
- The doctor orders an EKG.
- The report gets lost and the patient is mistakenly sent home.
- The doctor never sees the EKG result and does not follow up with the patient.
- When the patient returns the following week, he is in active cardiac arrest and subsequently dies.

***Was there malpractice in this situation?***

# Claim Example involving Causation

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- A patient with a terminal brain tumor receives an overdose of radiation when the dose is miscalculated by the radiologist.
- The patient dies.
- The autopsy shows that the death is attributed to the tumor and is NOT related to the slight overdose of radiation received.

***Was there malpractice in this situation?***

# Types of Damages that May be Sought

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## Compensatory Damages

- Economic Damages
  - Financial losses
  - Life Care Plans
- Non-Economic Damages
  - Pain & suffering
  - Emotional distress

## Punitive Damages

- Designed to punish – not always insurable (varies by state)



# Who Needs Medical Professional Liability Insurance?

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- Hospitals and Healthcare Facilities
- Physicians, Surgeons & Dentists
- Mid-Level Providers (NPs & PAs)
- Allied Healthcare Professionals

# History of Medical Professional Liability Insurance

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- 1970's (**hard market** ends, PIAA (now MPLA) forms)
- 1980's (**soft market** continues, RRG Act of 1986)
- 1990's (**soft market** gets softer, results deteriorate)
- 2000's (**hard market** returns, lead writer St. Paul exits)
- 2010's (**soft market** follows, capacity grows)
- 2020's (**hard market** makes a cameo appearance, with **soft market** conditions soon following...)
- **Hard markets** are fleeting, **soft markets** tend to endure.

# Recent Trends & Issues

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## 2020 (the “Covid impact”)

- Frequency suddenly dropped as courts around the nation closed.
- Most insurers started to exclude communicable diseases in the face of what most agreed was an unprecedented situation.
- Several Covid-related claims are reported, mostly from nursing home patients, but most appear to be placeholders.
- The lack of causation is a clear issue with these claims and suggests they will not ultimately be successful.
- Courts slowly re-open, but the increased frequency of severity trend observed leading up to Covid appear to be continuing onward.
- New cases stemming from delays in treatment or diagnosis may now follow as unintended consequences of the pandemic closures.

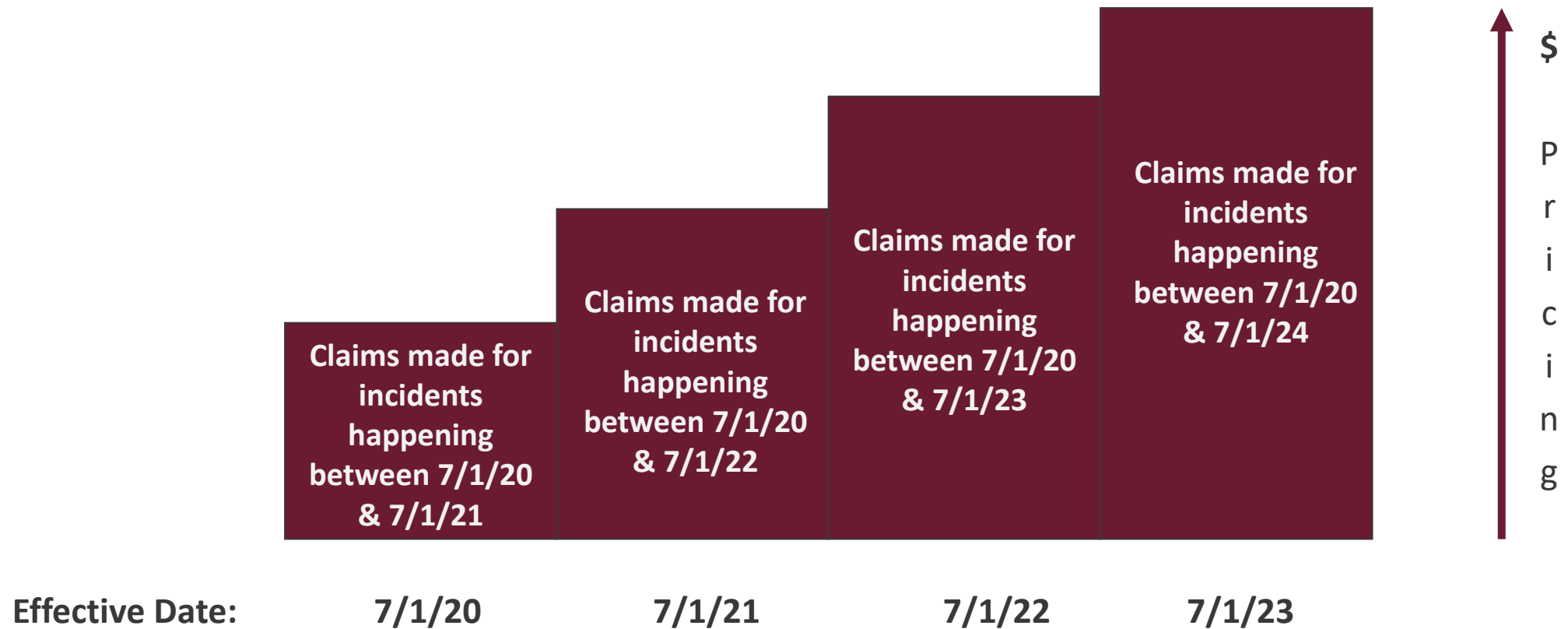
# Forms of Medical Professional Insurance Coverage

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## Claims-Made and Occurrence Forms

- Definitions & Differences
  - Long-tail (e.g. OB) vs short tail (e.g. GL)
- Malpractice is typically written on Claims-Made forms
  - Allows for adjustments to pricing and terms over time
- Retroactive Date/Extended Reporting Period “Tail” Coverage
  - Maintain retro date or ‘tail’ the policy to ensure no gaps in coverage
- Advantages/Disadvantages
  - Pricing more reflective of the risk with C-M form but it can create gaps also

# Claims-Made Policy Illustration



**Retroactive Date for all policies in this example is 7/1/20**

# Claims-Made Coverage Illustration



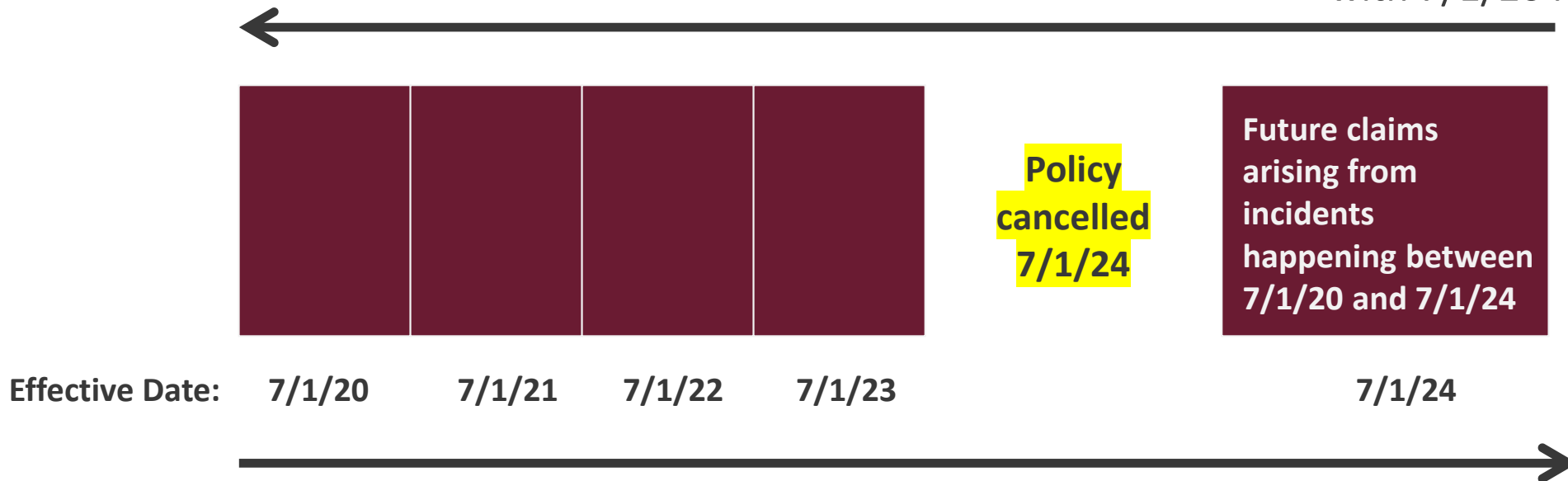
## Football Analogy

- Imagine a football game where video review is conducted throughout the game and the referees can assign a penalty at any point from the start of the game to the end
  - Quarter 1 begins but can naturally only have penalties from Q1 (low risk)
  - Quarter 2 follows but now penalties from Q1 and Q2 could be assessed (higher risk)
  - Quarters 3 and 4 come along and now the chance of a penalty grows even more as you have up to sixty minutes of play to that could give rise to a penalty (highest risk)
- Replace “penalties” with “malpractice claims” and you get an idea of how exposure grows as time goes on, and why more ‘mature’ policies cost more premium

# Prior Acts Versus ERP (“Tail”) Coverage

## **Option 1:** PRIOR ACTS COVERAGE

New Claims-Made Carrier writes policy eff. 7/1/24 with 7/1/20 Retroactive Date



**Option 2:** “TAIL” COVERAGE – Expiring Carrier Issues ERP for claims reported after 7/1/24 (for incidents that happened between 7/1/20 and 7/1/24 – commonly called incurred but not reported, or “IBNR” claims)

# Claims-Made vs Occurrence

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- How do the insuring agreements differ?
- Claims-Made Insuring Agreement:

I. **INSURING AGREEMENTS**

(A) **Claims Made Professional Liability Insurance:**

We will pay up to the applicable Limit of Liability set forth in ITEM 4.A. of the Declarations on behalf of the **insured** any **damages** that the **insured** is legally obligated to pay as a result of any covered **claim** for a **professional services wrongful act** happening on or after the **retroactive date**; provided, that the **claim** is first made against the **insured** during the **policy period** or applicable Extended Reporting Period and reported to **us** in accordance with GENERAL CONDITION (C) of this Policy.

Two key conditions:

1. Must happen on or after the retroactive date
2. Claim must first be made during the policy period or ERP

- Occurrence Insuring Agreement:

I. **INSURING AGREEMENTS**

(A) **Occurrence-Based Professional Liability Insurance:**

We will pay up to the applicable Limit of Liability set forth in ITEM 4.A. of the Declarations on behalf of the **insured** any **damages** that the **insured** is legally obligated to pay as a result of any covered **claim** for a **professional services wrongful act** that first occurs during the **policy period**; provided, that the **claim** is reported to **us** in accordance with GENERAL CONDITION (C) of this Policy.

Conditions?

1. No retroactive date on the policy
2. No limit on when the claim can be made



# Claims-Made vs Occurrence

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- Practical Examples of Why and How this Matters
  - Texas Tort Reform of 2003 dramatically reduces frequency and severity
    - Claims-made rates dropped in response to lower costs going forward
  - California AB 35 broadens the MICRA caps in 2022
    - Claims-made rates increased due to higher costs going forward
  - Pennsylvania venue shopping in 2022 drives more cases to Philadelphia
    - Claims-made rates increased due to higher costs going forward
  - More to follow...(VA, NY, MT, CO and others have bills pending)
  - In all of the above cases, Occurrence rates for IBNR claims are not adjustable. Occurrence policies over-charged in TX but under-charged in CA and PA.

# Hospital Professional Liability (HPL)

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## Types of hospitals & healthcare facilities

- Acute Care
- Specialty / Surgical
- Teaching
- Psychiatric
- Long Term Acute Care
- Long Term Care Facilities
- Ambulatory Surgery Centers & other miscellaneous facilities

# Hospital Professional Liability (HPL)

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## Concepts affecting facilities' liability

- Charitable immunity
- Governmental or sovereign immunity
- Captain of the ship/Borrowed servant
- Vicarious liability
- Respondeat superior – independent contractors, allied providers, etc.
- Ostensible Agency – ER Physicians

# Hospital Professional Liability (HPL)

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## Sources of liability for hospitals

- Failure to admit/inappropriate discharge
- Failure to monitor/observe/diagnose
- Failure to notify physician, seek consultations
- Medical, surgical, medication, or other errors
- Failure to provide/maintain equipment
- Failure to prevent injury or falls
- Negligent credentialing or supervision
- Failure to follow policies & procedures

# Hospital Professional Liability (HPL)

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## Liability under State & Federal Laws

- State Laws
  - Statute of Limitations, Damage Caps, Elder Abuse, Contributory or Comparative Negligence – all may vary from state to state
- Federal Laws
  - Emergency Medical Treatment & Active Labor Act of 1986 (EMTALA)
    - Dobbs decision impact – lines are less than clear
  - Health Insurance Portability and Accountability Act of 1996 (HIPAA)
  - Federal Tort Claims Act of 1992 and 1995 (FTCA)

# Claim Example involving a Hospital

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## Failure to observe

Dr. Green has ordered that Mr. Lee, a patient in a psychiatric hospital who is at risk for suicide, be checked on every 15 minutes. Nurse Williams works the third shift and has cared for Mr. Lee for three nights. He has slept through the night each night, so on the fourth night Nurse Williams decided that the 15-minute checks were unnecessary and omitted them. When the morning nurse enters Mr. Lee's room, she discovers that he has slashed his wrist and bled to death.

***Was there malpractice in this situation?***

# Claim Example involving a Hospital

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## Failure to treat

A pregnant woman presents to the hospital's emergency department in distress. It is determined that both the mother and her baby are in peril and that aborting the pregnancy *may* be the only way to save the mother's life. The attending OB doesn't feel this situation is life threatening to the mother and therefore refuses to provide the abortion because state law declares abortions to be illegal. Both the mother and the child die as a result of the provider's lack of action.

***Was there malpractice in this situation?***

# Medical Professional Liability (MPL)

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## Practice of medicine by providers

- Physicians/Surgeons (Allopathic MDs)
- Osteopathic physicians (DOs)
- Classes of Medicine – 130 recognized Specialties and Subspecialties
- Mid-level and Allied Providers



# Medical Professional Liability (MPL) Ethics

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## Medical Ethics Issues

- Do Not Resuscitate (DNR)
- Elder abuse
- “Wrongful Life” Actions
- Boundary violations and inappropriate relationships

# Medical Professional Liability (MPL)

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## Sources of liability- Physicians & Surgeons

- Negligence
- Failure to or delay in diagnosis, or misdiagnosis
- Failure to admit/refer, inappropriate discharge
- Failure to obtain Informed Consent
- Improper performance of a procedure
- Inappropriate or delay in treatment
- Injuries from medications, medical devices, equipment
- Liability under federal & state laws

# Medical Professional Liability Claims

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## Claims Considerations

- Types and locations of events
  - Urban venues tend to be more apt to award higher damages than rural ones, although recent nuclear verdicts in places like Iowa and Minnesota have bucked this trend
  - Legislative changes & tort reform are also large factors in this process
- Evidentiary rules and procedures
  - What is freely allowed in one state may be barred in another...venue matters!
  - A good attorney may be worth their weight in gold
- American Tort Reform Association's "Judicial Hellholes"
  - Yesterday's bad venue (e.g. TX) might be one of today's best
  - Insurers need to follow legal trends and stay on top of them

# Medical Professional Liability Defenses

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## Possible defenses- MPL Claims

- No negligence / within the standard of care
- Informed consent
- Comparative negligence
- Statute of limitations (exceptions)
- No causation
- Good Samaritan Statutes

# Allied Healthcare Professionals

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## Mid-level practitioners

- Physician's Assistant (PA)
- Nurse Practitioner (NP)
- Certified Registered Nurse Anesthetist (CRNA)
- Anesthesiology Assistants (AA)
- Certified Nurse Midwife (CNM)

## Others

- RN's, LPN's
- Lab Technicians, Phlebotomists

# Medical Professional Liability (MPL) for Nurses

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## Sources of liability for nurses

- Standards of practice:
  - Nursing Practices Acts
  - Hospital Policies & Procedures
- Negligence
  - Failure to communicate
  - Failure to observe
  - Failure to notify Physician

# Hospital Exposures and Rating

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## HPL exposures and rating bases

- Exposures
  - Occupied beds (by type) – Acute, psychiatric, etc.
  - Labor and delivery/OB (births)
  - Surgeries – inpatient & outpatient
  - Outpatient visits (by type) – emergency, urgent care, lab, pharmacy, etc.
- Rating Modifiers-
  - Territory, Claims-Made Year, Increased Limits Factors (ILFs)
- Experience and Schedule Rating plans

# Physicians & Surgeons Exposures and Rating

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## Key rating factors

- Physician specialty – surgical, non-surgical and more
- Territory, Claims-Made Year, ILFs

## Other rating factors

- Scope of their medical practice - what are they REALLY doing?
- Prior claims experience
- Prior Acts exposures



# Exposures and Rating Real-Life Application

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## Look at the present to predict the future

- A hospital paid a \$5M claim for a brain damaged baby resulting from a ruptured uterus during an attempted Vaginal Birth after Caesarian Section (VBAC).
- The decision to deliver via C-section was not made in time as the OB was not initially present when the patient went into labor.
- Subsequently, the hospital implemented a policy that requires the doctor to be at the patient's bedside continuously for all VBAC patients.
- This new procedure significantly reduces the likelihood of another bad outcome.

# HPL or MPL Policies

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## Key Policy Sections

- Who are the protected parties?
- What liability is covered?
- When will this policy respond?
- What are the limits of liability?
- Defense & Settlement provisions
- Consent to Settle Clause, if applicable
- Exclusions / what is NOT covered under the policy

# Summary

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- Like other Professional Lines, Medical Malpractice Liability requires the plaintiff to meet the Legal Elements of a claim, and commonly involves a Bodily Injury.
- Sources of Liability differ for different types of healthcare providers and are impacted by statutory and common law concepts.
- Different markets offer coverage with Claims-Made or Occurrence triggers, with some carriers offering both types.
- Rating Medical Malpractice Liability factors include the type of provider, the territory, the prior claims experience, and other subjective factors.

# Questions?

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Thank you!