

What Do American Healthcare Organizations Want from Their Professional Liability Insurers in 2014?

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BATCH COVERAGE

- What Institutions Seek
- Types of Batch Events
- Industry Approaches
- Problems and Pitfalls

What Institutions Seek

- The demand has become almost universal
- No consensus on a common form yet
- Agreement on form should begin with agreement on the kinds of events that merit batch coverage

Major Batch Types

- Equipment failures and incorrect settings
- Infections or exposures
- Failure to heed warnings or recalls
- Medication errors
- Breach of privacy
- Natural disaster

Controversial Batch Types

- Only common link is a bad doctor or other provider
- Negligent or fraudulent medical research
- Mere spike in bad outcomes without known cause

Persons Affected vs. Severity

Severity of Injury	Few Patients Severe Injuries	Many Patients Severe Injuries
	Few Patients Minor Injuries	Many Patients Minor Injuries
	Number of Patients	

We have seen few cases both numerous and severe

Approaches to Satisfying the Demand

- The traditional solution: Bermuda forms like XL 004
- Has advantages of keeping claims in one period and preventing the aggregation of minor claims
- Common alternative: redefine Medical Incident to include “any number of persons”
 - “Related” is ambiguous and overly broad
 - There is no express election of batch treatment
 - Difficult to add special conditions or exclusions

Attempts to Build a Better Batch Clause

- Election within a limited time
- Restriction by event, injury, or claim dates
- Increased retention for batch claims
- Exclusion of batch from underlying aggregates
- Deductible for each claimant
- Restriction to a list of accepted fact patterns
- Consent required, not to be unreasonably withheld

Problems and Pitfalls

- Many more coverage disputes than other terms
- Memoranda of understanding and side letters
- Difficulty reconciling cause-of-injury aggregation with traditional course-of-treatment aggregation.

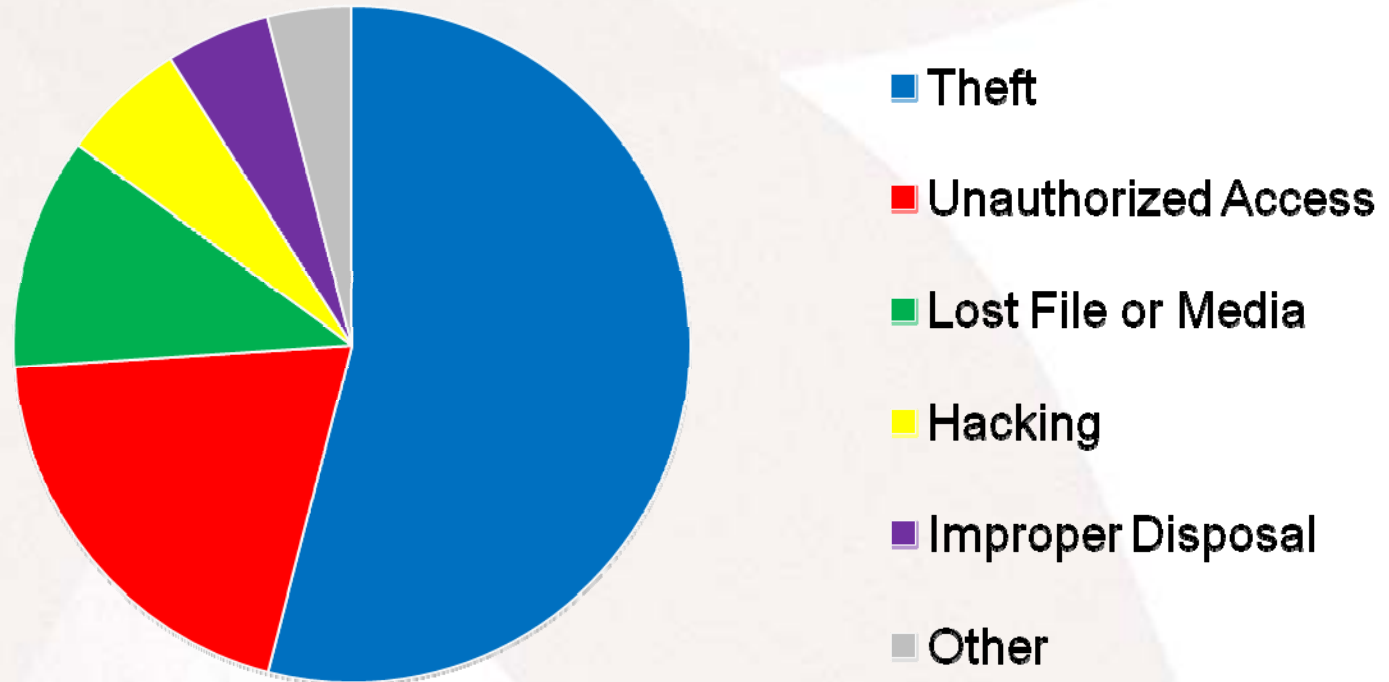
PRIVACY AND DATA PROTECTION

- Vulnerability of Healthcare Organizations
- Elements of Cyber Coverage
- Problems and Pitfalls
- HIPAA Omnibus Final Rule

Vulnerability of Healthcare Organizations

- Regulation on two fronts:
 - States – Personally Identifiable Information (PII)
 - HIPAA – Protected Health Information (PHI)
- 24% of reported breaches, most of any sector
- 94% have had breaches (Ponemon Report)
- 7 reported incidents with over 1 million records

Causes of Large Data Disclosures



Details can be found at OCR's "Wall of Shame":
<http://www.hhs.gov/ocr/privacy/hipaa/administrative/breachnotificationrule/breachtool.html>

Typical Cyber Policy

- Liability to third parties and employees
- Data loss (investigation, reconstruction, etc.)
- Regulatory defense and civil penalties
- Cost of managing security events
- Security liability

Cyber Coverage Is Unavoidably Complex

Glaxco
Insurance



"I think you misunderstood. The million dollar umbrella policy only covers you for claims involving an umbrella."

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Problems and Pitfalls

- Most losses are reported under multiple policies
- Privacy claims by patients overlap HPL
- Hospitals may resist yielding control to insurers

HIPAA Omnibus Final Rule

- No “harm threshold” for mandatory reporting: formerly this required a significant risk of reputational, financial, or other harm
- Privacy and security rules now apply directly to Business Associates
- Enforcement began September 23, 2013

Rules Now Apply Directly to BAs

- You are a BA if you receive PHI, whether or not you sign a Business Associate Agreement
- Breaches of unsecured PHI must be reported
- BAs must comply with the Security Rule that prescribes how electronic PHI is protected
- BAs must ensure that subcontractors who receive PHI comply with the same restrictions

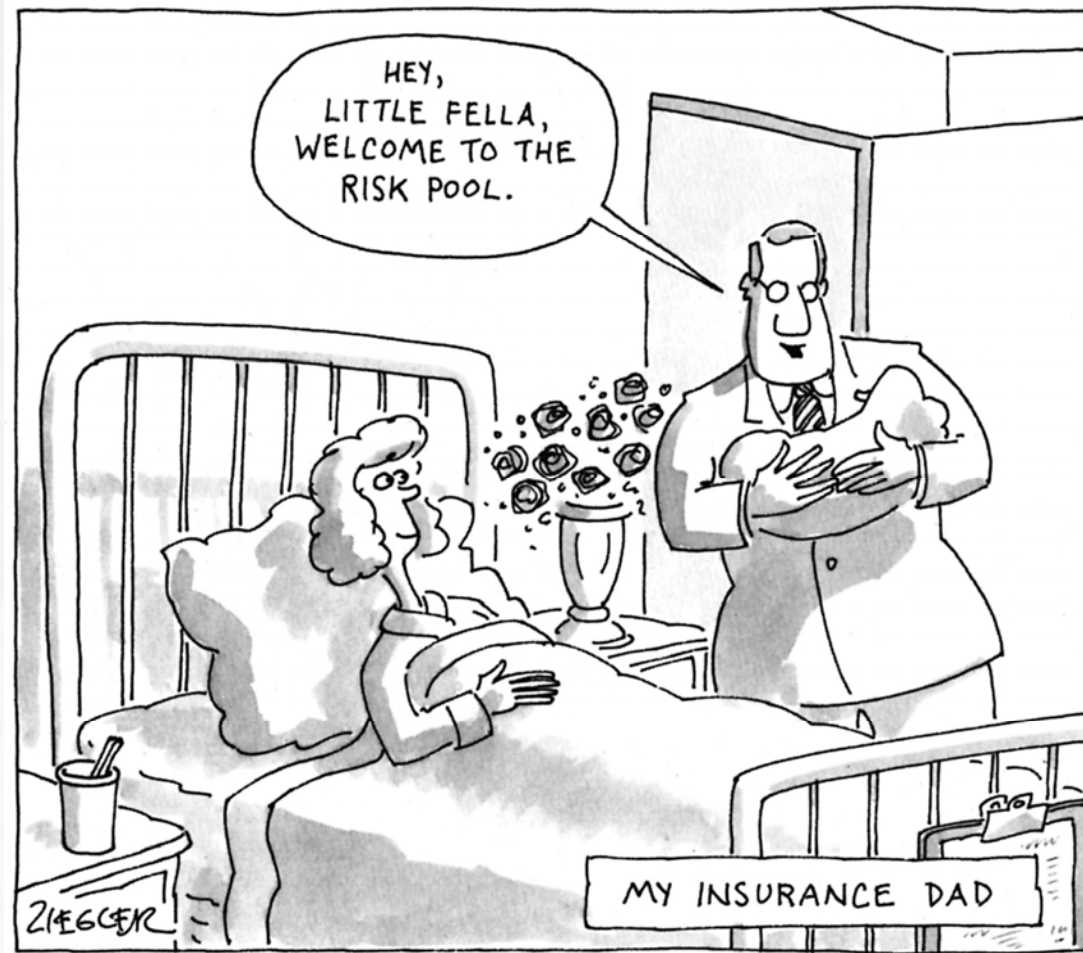
Issues When Negotiating BAAs

- Cap indemnity provisions
- Make sure timeframes are realistic
- Watch for hidden obligations in BAAs not required under HIPAA rules in BAAs
- Know how to document your assessment of the risk of a breach and your mitigation efforts
- Make sure the BAA is adapted to your business

ACCOUNTABLE CARE ORGANIZATIONS

- Characteristics of ACOs and Similar Alliances
- Mixed Opinions About Need for Special Coverage
- Potential Additions to Risk

A New Risk for Insurers



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Characteristics of ACOs

- Assigned population of patients
- Shared benefit from cost reduction
- Cost and quality metrics
- Standardization and protocols
- Sharing of patient data among members

Rapidly Increasing in Numbers

- CMS recognized ACOs grown from 27 to 115
- Over 100 others outside Medicare and Medicaid
- Many forms of sponsorship
 - Single provider 67%
 - Multi-provider partnerships 19%
 - Health insurers 8%
 - Insurer-provider partnerships 6%

Mixed Opinions About Need for ACO Coverage

- May not involve creation of a new entity
- Many risk managers believe current policies cover
- Demand is likely to center on multi-provider ACOs

Potential Additions to Risk from ACOs

- Professional liability: more vicarious responsibility
- Managed care liability: consumer and provider
- Privacy and data protection: more data sharing
- Risks increase with additional entities

CONCLUSIONS

- Batch coverage: universal demand but no world consensus about the form to use
- Privacy and data loss: a new growth area with new risks of liability for Business Associates
- ACO coverage: a work in progress but growing

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