

## What is “Incidental” Medical Malpractice?



ISO language for incidental medical malpractice insurance has been adopted by companies for close to 30 years. Incidental medical malpractice coverage is simply an extension of commercial general liability insurance. It covers NON-healthcare organizations for medical services that are not essential services for their businesses. Recent changes in the delivery of healthcare and the latest trends in litigation have made us question ‘*what is incidental*’ and when should companies purchase a separate policy for medical professional liability insurance. Let’s examine a few scenarios:

Scenario 1: When an aviation parts manufacturer employs an industrial nurse to respond to occupational injuries, their exposure can be considered “incidental” and covered under this CGL extension. But, what happens when the same manufacturer creates employee health clinics and starts charging a fee for services? Is the exposure still incidental or is the company in the business of providing healthcare?

Scenario 2: Imagine a professional (or semi-pro) sports association. In each arena, teams are

responsible for coordinating emergency medical services for players as well as patrons. Teams are staffed with medical directors, orthopedic and physical medicine specialists, trainers and therapists. The association and its team members develop best practices for concussion protocols, drug testing and provide constant medical monitoring. With the NFL close to a \$765M settlement for concussions, should any sports association cover its medical activities through incidental medical malpractice?

Scenario 3: Cruise ships, amusement parks and a host of large casualty risks fall into this grey area where “incidental” is questionable. In the recent case *Vaglio v. Royal Caribbean*, the US Appellate Court has opened the door for medical malpractice suits against cruise companies. This suit against Royal Caribbean was able to prove that the medical staff was under the “control” and “employed by” the cruise line. Most major amusement parks have employed medical staff for emergency response. Can these services be considered incidental when these organizations own and control the quality of care provided to employees as well as patrons?

All three scenarios are unique, yet related under the CGL extension. The burden of proof, therefore, falls on all us. Each consultant, broker and underwriter must decide whether or not the risks that a client presents are incidental. The following are some points to weigh when considering using CGL or a separate PL policy:

- **Are employees also patients?** Most CGL policies have cross suits exclusions that remove coverage for claims made by insureds against other insureds. Your client may have coverage for incidental medical malpractice, but it is limited to suits from third parties.

- **Are the medical professionals “employees” or “temporary workers”?**

Temporary workers are typically not covered as employees under a CGL policy. If temporary workers are used, it becomes critical (and burdensome) for the insured to monitor the insurance carried by each contracted provider.

- **Has the insured added a healthcare provider as an additional insured?** Each underwriter and policy differs, but there is some question whether an indemnitee is protected if he/she is in the business of providing medical services.
- **What is the CGL deductible/retention?** Large corporations with employee health clinics and complex casualty risks such as the

amusement parks and cruise lines carry large retentions on their CGL programs. Why would the insured need to assume a \$500,000 retention on a risk that can be transferred for \$25,000 and no deductible?

It is becoming more difficult to say who is in the business of providing healthcare services. As employers and select service providers take more ownership of these services, it is only a matter of time until there is a claim dispute. Incidental medical malpractice insurance creates an administrative ease by consolidating coverage, but the terms are not always in the insured's best interest. Be sure to carefully examine your client's operations to determine whether a stand-alone medical professional liability is best for their business.

This article is for general information purposes and is not intended to act as insurance advice. For specific information regarding a medical professional liability placement, please feel free to contact us.



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