



Professional Liability
& Medical Malpractice

CAS CArE Boot Camp

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Professional Liability



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	Professional Liability
	<ul style="list-style-type: none"> ■ Professional Liability Vs D&O ■ What if Professional Liability ■ Coverage Issues ■ What is not covered? ■ Rating Professional Liability.
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 3</p>	

		
	Professional Liability vs. D&O	
	D&O	Professional Liability
	Liability arising out of	Liability arising out of
	<ul style="list-style-type: none"> ■ management of the interests of the Company, Shareholders and Creditors (in case of bankruptcy) ■ wrongful acts by D&O claimed against D&O ■ conflict of interest: D&O ⇔ Shareholders Company ⇔ Shareholders Company ⇔ Creditors 	<ul style="list-style-type: none"> ■ professional “services” provided to customers (or other third parties) against a fee / commission or for “free” of charge ■ wrongful acts claimed against the Company ■ conflict of interest: Company ⇔ Customer
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 4</p>	<ul style="list-style-type: none"> ☒ recourse of the Company against D&O out of a PI claim 	

What is Professional Liability?

- Not always easy to identify.
- Liability is a product of law and law is a product of Society
- Therefore - can anyone be a Professional ?
- Key is to distinguish between "Professionals" and "Non Professionals"
- Some Common Characteristics:
 - Specialized training
 - Highly Educated
 - Regulated by Governing Body or Law
 - Work is advisory /non material (?)

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Who's a professional?

Some examples - who has Professional Liability?

Architects	Brick layers
Engineers	Butchers
Lawyers	Teachers
Doctors	Bankers
Nurses	Directors
Athletes	Translators
Athletes' Agents	Writers
Electricians	Dentists
Accountants	Child care
Stock Brokers	Divers
Real estate agents	Mortgage brokers
Tax professionals	Financial advisors
	Actuary

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	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Coverage issues</p>
<p>CAS CRe Boot Camp, August 11, 2009, Hazel J Luckey Slide 7</p>	<ul style="list-style-type: none"> • Claims made and reported • No standard policy forms • Definition of Professional Services • Contractual issues >> to whom does the professional owe the standard of care? • What is covered? <ul style="list-style-type: none"> • bodily injury? • return of fees? • professional discipline? • who is an insured?

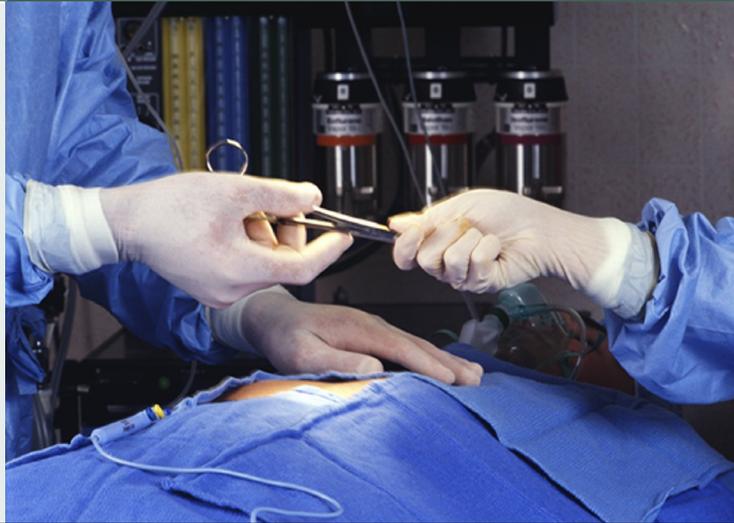
	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">What is NOT covered? (usually)</p>
<p>CAS CRe Boot Camp, August 11, 2009, Hazel J Luckey Slide 8</p>	<ul style="list-style-type: none"> ■ criminal/intentional acts ■ civil wrongs connected to criminal wrong doing ■ employment practices (sexual harassment / discrimination)? ■ sanctions, fines, penalties ■ own losses ■ warranties and guarantees? ■ infringement of copyright, patent, trademark

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Rating professional liability</p>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 9</p>	<p>Numerous factors:</p> <ul style="list-style-type: none"> ■ by revenue ■ by # of professionals ■ by the entire firm, or each professional individually ■ prior acts ■ new acquisitions ■ joint ventures ■ long-tail exposure, with severity potential ■ various classes of business ■ geographic distribution ■ contractual risk control <p>➤ can be very judgmental and subjective</p>

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Helpful Resources</p>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 10</p>	<ul style="list-style-type: none"> ■ PLUS – Professional Liability Underwriting Society (www.plusweb.org) ■ IRMI – International Risk Management Institute (www.irmi.com)



Medical Professional Liability



Introduction

- The plaintiff, underwent successful spina bifida surgery at a Hospital in New Jersey in 1998 when he was 4 months old. During recovery, an endotracheal tube aiding his breathing moved, depriving his brain of oxygen for five to 15 minutes. The suit alleged that medical personnel failed to respond quickly enough, did not administer the correct drugs and did not call for help.
- The plaintiff was rendered a quadriplegic, is blind and cognitively delayed, and will require around-the-clock care for the rest of his life. His attorney says he will live for six or seven decades.
- What would a fair award be?

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Introduction</p>
<p>CAS CRe Boot Camp, August 11, 2009, Hazel J Luckey Slide 13</p>	<ul style="list-style-type: none"> ■ \$75.9 million <ul style="list-style-type: none"> – \$50 million for pain and suffering, – \$13.1 million for loss of services, – \$10.5 million for a life-care plan, – \$1.6 million for future lost wages, and – \$700,000 for past and future services rendered by the boy's mother. ■ Welcome to the world of Medical Professional Liability! ■ (this was actually thrown out by the supreme court in NJ)

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Introduction</p>
<p>CAS CRe Boot Camp, August 11, 2009, Hazel J Luckey Slide 14</p>	<ul style="list-style-type: none"> ■ 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. ■ Medical Professional Liability Claims may be brought against <u>one or all</u> of the following providers: <ul style="list-style-type: none"> – Hospitals, Clinics, Surgicenters – Physicians, Surgeons, Dentists, Prof Corp for Doctor Groups – Allied Health Professionals-Nurses, Therapists, Technicians. ■ Hidden Medical Professional Liability-there is no such thing as "incidental med mal."

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Introduction</p>
<p>CAS CRe Boot Camp, August 11, 2009, Hazel J Luckey Slide 15</p>	<ul style="list-style-type: none"> ■ The patient, as the injured party must prove: <ul style="list-style-type: none"> – a departure from the standard of care – injury, loss or damage – a causal link between the departure and the injury ■ The plaintiff's damages may include: <ul style="list-style-type: none"> – Compensatory Damages that include both economic and non-economic damages. <ul style="list-style-type: none"> – <u>Economic damages</u> include financial losses such as lost wages (sometimes called lost earning capacity), medical expenses and life care expenses. These damages may be assessed for past and future losses.

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Introduction</p>
<p>CAS CRe Boot Camp, August 11, 2009, Hazel J Luckey Slide 16</p>	<ul style="list-style-type: none"> – <u>Non-economic damages</u> are assessed for the injury itself: physical and psychological harm, such as loss of vision, loss of a limb or organ, the reduced enjoyment of life due to a disability or loss of a loved one, severe pain and emotional distress. Usually referred to as "pain & suffering." – Punitive Damages are awarded to punish. They are usually awarded in the event of wanton and reckless conduct. These types of damages are rarely awarded in Medical Professional Liability cases.

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Introduction</p>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 17</p>	<ul style="list-style-type: none"> ■ Common causes of Medical Professional Liability claims: <ul style="list-style-type: none"> Birth Injuries Delay in diagnosis Delay in treatment Drug reactions/interactions Failure to hospitalize Failure to order appropriate diagnostic tests Failure to refer to a specialist Inadequate medical monitoring Misdiagnosis Infections Performing operation/procedure without Patient's Informed consent Surgical errors

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Med Mal Cycle</p>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 18</p>	<ul style="list-style-type: none"> ■ The medical malpractice insurance trends tend to be cyclical in nature. ■ The first medical malpractice crisis was in the 1970's when several carriers left the market due to rising claims and inadequate rates. ■ This led to the Introduction of – tort reform, increased diagnostic testing, improved peer review, and increased communication between doctors and patients. ■ Also the formation of physician mutual companies in various states and various specialties.

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Med Mal Cycle</p>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 19</p>	<ul style="list-style-type: none"> ■ The second crisis was in the 1980's as claim frequency and severity increased again and premiums rose rapidly. ■ The third crisis was in 2000. ■ The strong economy and the stock market of the 1990's allowed insurers to keep medical professional liability premiums low since profits from investment income helped offset low premiums and underwriting losses. ■ However by 2000, jury awards had skyrocketed beyond benefit of offset. A number of carriers exited the market (led by St. Paul) and crisis of availability and affordability resulted.

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Pricing Considerations</p>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 20</p>	<ul style="list-style-type: none"> ■ Higher Hazard Entities <ul style="list-style-type: none"> – Publicly traded Hospital Management Organization – Large chain Dialysis centers or Publicly traded dialysis centers. – Physicians performing and hospitals that allow elective VBAC's. – Emergency room doctors, OB/GYN and Neurosurgeons. – Accreditation-JCAHO

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Pricing Considerations</p>
<p>CAS CARE Boot Camp, August 11, 2009, Hazel J Luckey Slide 21</p>	<p>Be aware of what <u>services</u> the provider performs</p> <ol style="list-style-type: none"> 1. Physicians & Surgeons-usually buy lower limit of coverage (\$1M per claim/\$3M in the aggregate) <ul style="list-style-type: none"> ■ Exposure <ul style="list-style-type: none"> – Physicians are priced based on: <ul style="list-style-type: none"> – their <u>licensed</u> specialty – the <u>jurisdiction</u> in which they practice ■ What are the High Hazard Specialties <ul style="list-style-type: none"> – OB/GYN, Neurosurgeon, Emergency Room ■ Board Certification

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Pricing Considerations</p>
<p>CAS CARE Boot Camp, August 11, 2009, Hazel J Luckey Slide 22</p>	<ol style="list-style-type: none"> 2. Hospitals-dependending on jurisdiction, the entity typically purchases a high limit of coverage, the "Deep Pocket." <ul style="list-style-type: none"> ■ Hospitals usually have a significant Deductible or SIR. Drop down exposure needs to be priced is these SIR/DED can be aggregated. ■ Exposure-all of the services provided by a Hospital are included in the rating: <ul style="list-style-type: none"> – Beds (acute care, skilled nursing, psychiatric, bassinets, rehab) – Deliveries, surgeries – Outpatient visits – Emergency room visits – Employed Physicians (not contracted)

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Varies by Jurisdiction</p>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 23</p>	<ul style="list-style-type: none"> ■ Be aware of the <u>legal environment</u> of the jurisdiction you are writing in. ■ In the United States, Medical Malpractice claims are primarily initiated in State courts and decided under State laws. ■ Trials are decided by a jury ■ Laws vary by state as respects: <ul style="list-style-type: none"> – Statute of Limitations-tolled for disability, minority and discovery. Contributes to the long tail nature of the line of business. – Contributory or Comparative Negligence

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Statute of Limitations</p>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 24</p>	<ul style="list-style-type: none"> ■ Statute of Limitations-usually tolled for minority or disability. <ul style="list-style-type: none"> – There are instances in which an injury is not discovered for months or years after it occurs. – In these cases, under medical malpractice law, the statute of limitations is applied when the injury is discovered or when the injury should have been discovered. <p>These tolling provisions contribute to the long tail nature of the cover.</p>

	<div style="text-align: right;">Swiss Re </div> <div style="text-align: center;">Contributory / Comparative Negligence</div>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 25</p>	<ul style="list-style-type: none"> ■ Contributory/Comparative negligence <ul style="list-style-type: none"> – many states have moved to comparative fault as to not bar recovery. – 5 states still follow pure contributory negligence. (AL, DC, MD, NC, VA,) – Jurisdictions following a comparative negligence system will typically apportion the damages using one of three variations of comparative negligence: <ol style="list-style-type: none"> 1. pure comparative negligence, modified 2. comparative negligence – 51% rule, 3. modified comparative negligence – 50% rule.

	<div style="text-align: right;">Swiss Re </div> <div style="text-align: center;">Med Mal - Joint & Several Liability</div>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 26</p>	<ul style="list-style-type: none"> ■ Joint & several liability <ul style="list-style-type: none"> – whereby a plaintiff may recover all the damages from any of the defendants regardless of their individual share of the liability. – As of October 2005, 36 states (AK, AZ, AR, CA, CO, CT, FL, GA, HI, ID, IA, KY, LA, ME, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, ND, OH, OK, OR, SD, TX, UT, WA, WV, WI, WY) separated joint and several liability, enacting proportional liability. – Fourteen states (AL, DE, IL, IN, KS, MD, MA, NC, PA, RI, SC, TN, VT, VA) have no separation of joint and several liability, with Pennsylvania and Tennessee courts declaring such separations unconstitutional.

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Update on Tort Reforms</p>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 27</p>	<ul style="list-style-type: none"> ■ Illinois-a Cook County Circuit Court struck down the non-economic damages cap in November of 2007. As a result of the Act's in severability clause, which prevent just on portion of a law from being struck down, the ruling also nullifies other provisions such as the certification of merit required for a lawsuit to proceed, the qualifications of expert witnesses who testify about the standard of care and state regulators ability to collect and make available actuarial data used by medical malpractice insurers in the state.

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Update of Tort Reforms</p>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 28</p>	<ul style="list-style-type: none"> ■ Texas-Class Action filed in the Eastern District of Texas in 2008 challenging the 2003 Medical Malpractice Tort Reform Act as unconstitutional ■ Colorado-There is a Bill pending that would increase the limit on non-economic damages in medical malpractice cases from \$300,000 to \$466,000. The overall cap of \$1M would still stand. The bill was passed in the Senate and is pending in the House Judiciary Committee.

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Update on Tort Reforms</p>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 29</p>	<ul style="list-style-type: none"> ■ Georgia-In May of 2008, a superior court judge ruled that the legislative cap on non-economic damages is unconstitutional as it gave special protection to the medical community. The ruling is anticipated to be appealed to the Supreme Court whose decision could result in eliminating the cap.

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">ECO / XPL</p>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 30</p>	<ul style="list-style-type: none"> ■ Extra contractual (ECO) and excess of the original policy limits (XPL) products provide customers with protection for both losses that are beyond the scope of the contract and exceed the policy limits. <ul style="list-style-type: none"> – ECO-related losses cover those liabilities that the customer is legally liable to pay but are not covered under any provision in the underlying policy. – XPL-related losses cover those liabilities that the customer is legally liable to pay but that are in excess of the original policy limits offered by the carrier.

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">ECO / XPL</p>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 31</p>	<ul style="list-style-type: none"> ■ ECO and XPL are normally triggered by reasons of: <ul style="list-style-type: none"> – alleged or actual negligence, or – fraud or bad faith by: <ul style="list-style-type: none"> – the insurer rejecting an offer of settlement, – the preparation of the defense. – trail of any action against their insured, or – the preparation or prosecution of an appeal consequent upon such action.

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">ECO / XPL</p>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 32</p>	<ul style="list-style-type: none"> ■ Highly dependent on state laws ■ The Lower the policy limits, the more exposure there is to ECO/XPL ■ Florida judge can (and does) refuse to take the tender of policy limits hence you can get a \$8M claim on \$200K policy. ■ Washington state recently made it easier to sue for bad faith.

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Clash/Batch</p>
<p>CAS CRe Boot Camp, August 11, 2009, Hazel J Luckey Slide 33</p>	<ul style="list-style-type: none"> ■ Key difference between Clash and Batch is that for Clash there is 1 injured person and they sue several different insured (doctors) whereas for batch, there are many different injured people but just one insured. ■ CLASH Example: In a bad baby claim they sue <ul style="list-style-type: none"> – the OB/GYN, – the anesthesiologist – the pediatrician – the hospital ■ BATCH Example: Sue the hospital because 1 nurse gave hepatitis C to 1000 patients.

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Clash / Batch</p>
<p>CAS CRe Boot Camp, August 11, 2009, Hazel J Luckey Slide 34</p>	<ul style="list-style-type: none"> ■ The worry for an insurer is that a catastrophic situation may arise that affects hundreds of different claimants and insureds, but in which none of the claims individually attach to the reinsurance. ■ There are a multitude of different wordings in an attempt to define this coverage as it is so complex ■ Due to the problems in drafting, disputes can arise when a loss occurs due to differing interpretations hence they are very difficult to price

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Dual trigger stop loss</p>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 35</p>	<ul style="list-style-type: none"> ■ provides stop loss protection on a client's net (of reinsurance) account, the coverage relies on two triggers ■ the first and most important is the claim frequency trigger, the definition of claim will generally follow that of the underlying policies ■ the second trigger is a net indemnity and loss adjustment expense (Lae) amount (i.e. a traditional stop loss). ■ coverage is in play when the observed claim frequency exceeds trigger 1 and will begin to make recoveries when the net indemnity and Lae amount exceeds trigger

	<p style="text-align: right;">Swiss Re </p> <p style="text-align: center;">Rating of Clash cover</p>
<p>CAS CArE Boot Camp, August 11, 2009, Hazel J Luckey Slide 36</p>	<ul style="list-style-type: none"> ■ There is no industry standard to price Clash ■ Requires special studies and expertise ■ Not only is Clash covered as part of XOL treaties there is a trend for the covers to be purely per event. <ul style="list-style-type: none"> – This is particularly dangerous for reinsurers given the prevalence of say Hepatitis C with multiple claimant claims.