As the Affordable Care Act’s exposures evolve, opportunities abound for excess & surplus writers.
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by Kate Smith

Jeremy Johnson toggles between topics with ease. If you want a sound bite on a particular surplus lines issue, Johnson, the CEO and president of Lexington Insurance, can give you one. If you want to deep dive, he can do that, too.

Whether he’s talking about California construction defect statutes, the growth of nonstandard homeowners coverage or the strong underwriting discipline of standard market and non-admitted carriers in this unfavorable investment environment, Johnson speaks with fluency on issues affecting excess & surplus lines writers.

On one issue in particular, though, he speaks with excitement—the Patient Protection and Affordable Care Act.

“It’s fascinating,” he said. “If you think back on your life, when would you come up with a piece of legislation that is as significant as the Patient Protection and Affordable Care Act? I don’t think you would. It is a change that will affect every industry and every man, woman and child in America.”

Johnson spoke without a hint of politics; his excitement, rather, was rooted in the professional challenge of finding solutions for a shifting landscape. “At one level, that legislation is leading to emerging business models,” he said. And new business models foster a need for highly customized insurance solutions.

Key Points

▶ The Law: Surplus lines writers are poised to take advantage of the Affordable Care Act.
▶ The Opportunity: The legislation presents new risks and exposures that will require innovative solutions.
▶ The Challenge: Writers are faced with the task of simultaneously predicting risks and solving them.
As the Affordable Care Act takes hold, surplus lines writers are finding opportunities in the uncharted waters of U.S. health care reform.

“Everything is in flux, and flux is good for innovative insurance companies,” said Susan Preston, president of Professional Program Insurance Brokerage.

Preston, who built her California business by working exclusively in surplus lines, said her firm grew 50% last year, largely on business emanating from health care reform.

“Some people spend their time arguing if this should have ever occurred, but I say, ‘Think of the opportunities,’” she said. “The Affordable Care Act has certainly made lots of opportunities for the E&S marketplace.”

The ACA is fueling consolidation within the health care industry, blurring the lines between managed and direct care, spurring cyber concerns and stretching the creativity of the insurance companies charged with finding solutions to risks that aren’t completely clear yet.

“This legislation will provide innovative E&S carriers with the opportunity to design and develop unique insurance coverage products for the known and emerging exposures of the ACA,” said William M. Allen, chairman of the excess & surplus lines specialty practice at Guy Carpenter.

The push for a streamlined care process is blurring the lines between managed and direct care, a shift that could lead to gaps or redundancies in coverage. Changes in reimbursement and electronic health record mandates are fueling consolidation, thus creating additional merger-and-acquisition risks.

From antitrust fears to changing applications of medical malpractice, from cyber risks to continuity of care issues, the exposures within the health care industry are evolving. The challenge for E&S insurers, who typically take on new risks, is to spot these emerging exposures and solve them.

New Exposures

The Patient Protection and Affordable Care Act contains 906 pages of regulations … and a sea of evolving risks.

“With new compliance standards emerging for businesses in real time, you’re seeing absolutely stunning levels of consolidation and M&A activity as a result of health care reform,” Johnson said. “As smaller providers roll up into larger systems and Accountable Care Organizations begin to take shape, you have a need for new insurance solutions in the health care space.”

Finding those solutions has been tricky at times, as the silos that once separated managed and direct care have merged.

The Affordable Care Act has spurred a surge in alternative delivery models such as Accountable Care Organizations, which are groups of doctors, hospitals and health care providers who work together to cohesively manage a patient’s entire episode of care. The aim is to eliminate redundancies by streamlining the process that takes patients from the beginning to the end of treatment.

Although safe harbors were created to allow for alliances between providers to create a continuum of care, there are antitrust concerns related to these ACOs.

“There are still a lot of gray areas of guidance in the safe harbors and a lot of uncertainty around whether the structures that are being put in place will withstand scrutiny,” said Martha Jacobs, managed care practice leader for Aon Risk Solutions.

“The concern is that litigation will ensue regardless. The marketplace needs to figure out how to underwrite this and address it.”

Underwriting ACOs is also challenging. “There is no clear consensus as of yet as to appropriate insurance coverage,” Allen said. “In other words, there has been more talk than action.”

Jacobs said one of the stumbling blocks to coverage has been that these structures blur the line between managed and direct care.

“What we’re still seeing from the marketplace is silo underwriting,” Jacobs said. “They’re saying, ‘We can do the managed care exposure but we can’t cover the direct care.’ We need carriers who can be creative and find the underwriting aptitude within their ranks to be able to understand both sides of those equations, the direct and the managed care side of it.”

ACOs are not the only examples of blurred lines. Both health care systems and health plans are crossing the fence in their efforts to increase efficiency and demonstrate value, whether it is a health plan buying clinics or a health system creating a third-party administrator service for self-funded employers.

“These days the health care entities we work with are not simple organizations on one side of the fence or the other,” Jacobs said.

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“Everything is in flux, and flux is good for innovative insurance companies.”
—Susan Preston, Professional Program Insurance Brokerage

line of exposure that gets them onto the other side of the fence, whether it’s creating these new ACOs or whether it’s just through their business operations. We’re seeing an increase in health systems that don’t have their own managed care plan, so they don’t buy a managed care E&O policy. But they’re doing things operationally—their billing practices, their collection practices, TPA work that they perform for others—that they believe creates a type of exposure that does not fall neatly into a traditional policy they purchase.

Such scenarios are ideal for specialty writers.

“Creativity from the surplus-lines side of the house is needed,” Jacobs said.

“The theme in the health care industry is continuum of care. These ACO models talk a lot about handling a patient’s continuum of care from the beginning to the end, and having a seamless process of handling that so it’s more efficient. If we could mirror that on the insurance side of it, so that we have a policy that really covers, soup to nuts, the continuum of exposures—whether it’s information being transmitted electronically that could lead to a breach, whether it’s a nurse going out to meet with a patient as a care coordinator but being able to also provide care if that patient needs it, or whether it’s the decisions around whether a certain procedure is paid for—there would be great demand for it.

“We need that sort of holistic approach to coverage. That is a great opportunity in the marketplace for a carrier to differentiate themselves.”

The Affordable Care Act already has attracted millions of new health insurance enrollees. This influx is expected to strain a health care delivery system that already suffers from a shortage of primary care physicians.

“Over time, more and more health care delivery will be borne by health care extenders, such as nurse practitioners and physicians’ assistants, with less interaction with physicians,” Allen said.

“As a result, more of the medical professional liability exposure is expected to shift to the health care extenders going forward.”

**New Opportunities**

Preston said her brokerage has seen a different side of the same problem. “We’re seeing a large call for doctors to act as medical directors,” she said. “We’re seeing clinics and labs set up and run by nurse practitioners, nurses and physicians’ assistants, and the doctors are serving as medical directors with little or no direct patient care.”

She also has seen more requests from doctors who are serving as consultants for pharmacies, medical suppliers and allied services. She has found coverage for these in the E&S markets.

“The ‘med mal’ carriers do not want the indirect patient care,” Preston said. “Whether that will change in the future, it very well could. But as these things come up and don’t fall into a traditional box, they’ve left a lot of openings for the E&S marketplace.”

Preston sees telemedicine as another area that will grow as a result of the Affordable Care Act.

“Doctors will be giving advice, so it will be direct care, but it’s going to be online,” she said.

“I have a doctor who works with paramedics on an offshore platform, where they can send him questions. But there will be a bigger call for doctors to work directly with the general public. And it will require some innovation from the insurance industry to make that happen.”

Cyber coverage opportunities also are on the rise in health care. “The more data you collect, the higher the exposure you’ve got,” Jacobs said. “And there’s a vast amount of data that’s going to be stored and collected in any scenario—whether it be a traditional scenario or one of these newer structures we’ve talked about [ACO].

“There will be issues around whose is it, who is responsible for it if it’s changing hands, if it’s collected by one and shared with another. I think that area of exposure is not understood as well as it should be and is not being addressed as well as it could be with insurance.”

While the breadth of new exposures may be daunting, E&S writers say they got into these lines because they like the challenge.

“This is exciting,” Johnson said. “It’s what makes it really exciting to work at a company like Lexington. We know there’s going to be brand new exposures for the insurance industry, and we’ll respond to them.”

“We need carriers who can be creative and find the underwriting aptitude within their ranks to understand both the direct and the managed care side.”
—Martha Jacobs, Aon Risk Solutions