



LIABILITY INSURANCE:

The newly sculpted ACS-sponsored program

by F. Dean Griffen, MD, FACS

According to the annual report of the Board of Governors, professional liability continues to be among the top concerns of Fellows of the American College of Surgeons. It's no wonder. Severity of losses continues upward. Liability insurance costs are commonly more than 20 percent of a surgeon's taxable income. These costs may lead to forced retirement, unwanted change in practice venue, or risking one's estate by going "bare." A recent trend toward stability in the frequency of claims has led many liability insurers to hold the line on escalating insurance premiums. However, the current unchecked escalation in severity of losses and economic conditions that lessen the income earned from investing premiums and reserves signal that future premium increases may be forthcoming.

Since 2002, the College has sponsored a liability insurance program underwritten by The Doctors Company (TDC) for Fellows to consider in comparison with other insurance options. Largely unmarketed, the ACS program has been available primarily for Fellows who find themselves in egregious liability insurance circumstances, although the product has always been one worthy of consideration by all.

The new ACS liability insurance program

During his recent College presidency, Gerald Healy, MD, FACS, urged the ACS leadership to begin pursuing a cost-saving liability insurance program sponsored by the College from a different perspective: aggressively linking liability with risk management and patient safety programs. Seeking ways to alleviate Fellows' liability woes, Dr. Healy reasoned that Fellows of the ACS should be favorable outliers that are less expensive to insure than the norm by virtue of membership selection criteria, especially if their insurance is linked to an upscale patient safety/risk-management education program. After meeting with ACS leaders and giving due consideration, TDC embraced this logic and agreed to underwrite a redesigned ACS liability insurance program that should be sustainable with lower premiums and more deductions, reflecting the lower risk of surgeon-policyholders with enhanced risk-management skills obtained from ACS and TDC patient safety risk-management education tools.

The proposed program, as envisioned by Dr. Healy, would also link the Fellows' educational requirements for premium reductions to states' Maintenance of Licensure and Maintenance of Certification requirements of surgical certifying boards. These requirements are becoming much more stringent. Thus, joining all these efforts into one package would hopefully mitigate the hassle factor of more and more paperwork.

ACS sponsorship of the program reflects an enthusiasm for TDC, not a criticism of any other insurance carrier. The College is committed to this program because it has the potential to provide tangible economic benefit for its Fellows through risk management and safe care. Even so, College members are encouraged to explore all insurance options and decide for themselves which carriers can best provide for their needs. In tandem with this important recognition, the ACS leadership realizes that many Fellows are active on the boards of other insurance com-

panies, working to ensure favorable insurance products and services throughout the industry. In that regard, it is noteworthy that physicians fill half the positions on TDC's board, and Donald Palmisano, MD, FACS, former member of the ACS Professional Liability Committee and past-president of the American Medical Association, is uniquely positioned as a member of the TDC board to speak for the interests of surgeons and their patients.

The ACS program is self-funded; for TDC, it is a separate block of business. The actuarial success of the program depends on the combined loss ratios* of Fellow-subscribers and is evaluated separately from the other TDC business. A viable program requires that premiums exceed expenses plus losses. Thus, the cost of insurance and success of the program depend on the quality of care provided and the risk-management behavior practiced by the participating Fellows. In this case, premiums are expected to be lower, because policyholders are all Fellows of the College and because TDC's risk-management and patient safety education programs, in concert with the ACS Division of Education, should be superior to any currently available.

The ACS program is unique, but similar programs have been developed by TDC with other specialty and subspecialty groups: the American Society of Plastic Surgeons (since 1990), the American Academy of Otolaryngology-Head and Neck Surgery (2003), the American Association of Neurological Surgeons (2001), and the American College of Physicians (2002). Developing these programs has provided TDC with valuable experience, and our newly crafted contract, which expands the boundaries of such ventures, reflects the confidence we share in the prospects for sustaining lower premiums through safer care.

Even so, success is not guaranteed. The original contract between TDC and the College was negotiated in 2002. Although without significant marketing and without a sophisticated patient safety/risk-management plan, TDC's small ACS book of business[†] is performing slightly worse than its book of surgeons outside of the program. The program's combined loss ratio has averaged 109 percent since inception, 106 percent over the last five years, and 105 percent over the last two.

*The combined ratio is the ratio of total insurance costs (claim costs plus operating expenses) to revenue; 100 percent represents break-even; anything below 100 percent represents a profit.

[†]As of the 2nd quarter report for 2008, 281 Fellows are insured.

Our new contract includes a wide range of favorable premium discounts driven by new training and patient safety initiatives. We hope the program will quickly develop a risk pool of sufficient size that achieves superior performance, leading to meaningful long-term reductions in the cost of insurance for Fellow-subscribers. Time will tell.

Patient safety/risk-management agenda

The patient safety/risk-management agenda is a major emphasis of the program. Arguably, recent improvement in the program's combined loss ratio may well be a reflection of the Division of Education's dedication to patient safety initiatives. In 1999, the Institute of Medicine's report *To Err Is Human*[‡] challenged policymakers to pursue changes in the delivery and governance of health care to reduce errors and enhance patient safety. Following the lead of the Accreditation Council for Graduate Medical Education and data from the ACS Closed Claims Study, the Division of Education began to augment and diversify its education programs. Among the six core competencies, practice-based learning, professionalism, and communication have received newfound emphasis. TDC and the Division of Education are working together to develop an educational package that will protect the assets of the program and lower premiums by enhancing patient safety and reducing surgical risk. Designed in accordance with the vision of ACS leaders, this package has the potential to reduce the hassle factor of the ongoing escalation of paperwork; it is hoped that documentation of continuing medical education requirements for the program

[‡]Kohn LT, Corrigan JM, Donaldson MS, eds. *To Err Is Human: Building a Safer Health System*. Committee on Quality of Health Care in America, Institute of Medicine. Washington, DC: National Academy Press; 2000.

[§]Discounts are common in the liability insurance industry, but the Tribute Plan is unique to TDC. Introduced in 2007, this plan is funded by the TDC board to pay a tribute for loyalty commensurate with the level of premiums paid over time. To receive Tribute, a subscriber must have at least five years of continuous coverage with TDC; reach at least age 55; and retire or become permanently disabled (upon death, Tribute becomes part of the subscriber's estate and thus can be inherited). Tribute is now in its third year of a planned \$250 million, five-year initial allocation. Designed to fulfill TDC's mission to "advance, protect and reward the practice of good medicine," this benefit plan has met with overwhelming approval according to annual member surveys.

will be accepted as sufficient for Maintenance of Licensure, Maintenance of Certification, and possibly even provide evidence for the Fellows to negotiate a true pay-for-performance plan. Efforts toward this end are ongoing.

TDC

TDC has achieved substantial market share in nine states (California, Florida, Georgia, Maryland, Ohio, Oregon, Texas, Virginia, and Washington) and is positioned to assess risk and price coverage with a high degree of confidence. In five states, the liability environment is so unpredictable as to preclude any attempt to correctly judge losses; TDC premiums in New York, New Jersey, Massachusetts, Mississippi, and Illinois will not likely be competitive. The remaining states are all reasonably in play.

Soon TDC will begin to aggressively market the ACS liability insurance program. Initially, efforts will be in states where losses can be most accurately predicted. Even though the program will be available to all of us, competitive rates will be more random in the other states. However, TDC will attempt to contact Fellows everywhere that its pricing seems to be sufficiently attractive. Over time, data will accrue to facilitate more accurate pricing nationwide. In the meantime, the stability of the program is likely to be enhanced by selective marketing, maximizing participation by Fellows in those states where losses can be accurately predicted. Even so, Fellows in other states should take advantage of the program depending on careful comparisons with other options. Given the program's unprecedented deductions, TDC is apt to be a preferred choice.

TDC provides deductions for all of its subscribers: a claims-free discount of 17.5 percent and a Tribute Plan[§] contribution that is currently 11.4 percent. In addition, as a result of TDC negotiations with the ACS leadership (represented largely by Dr. Healy and Paul Collicott, MD, FACS, Director of the Division of Member Services), ACS program members receive an additional 5 percent discount and the College will receive a 2.5 percent to 5 percent unrestricted grant. In sum, the current potential for savings is 38.9 percent of premiums. Rates will vary depending on actuarial results, but the deduc-


tions will continue for Fellows with favorable loss experience.

Because premiums can be higher or lower depending on an insurance company's return on investment of reserves and other business activities, the ACS has carefully assessed the financial practices and stability of TDC. The physician-owned company was founded in 1976 to address the first-ever liability crisis. Now with 43,000 members, more than \$3 billion in assets, and \$840 million in policyholder capital, A.M. Best gives TDC an A- rating (excellent) and Fitch Ratings gives it an A rating (strong). Reflecting its conservative investment strategy, the company has sustained itself during the recent financial crisis with minimal impact to its portfolio. To ensure ongoing transparency, TDC leadership will report actuarial and membership data quarterly to the ACS and will meet with the ACS Professional Liability Committee at least once a year.

ACS pledge to its Fellows: Mitigate liability

The ACS has been extremely sensitive to the liability issues of its Fellows. With College support, tort reforms that include caps on noneconomic damages have been enacted in more than half of the 50 states and are effective: Even including states with poor cap legislation, physicians pay premiums that are on average 17 percent lower than the premiums of physicians in states without caps. However, efforts to promote federal tort reform have been expensive and largely unsuccessful; given the current political climate in Washington, current efforts at the federal level are directed toward supporting pilot programs for medical courts and other tort alternatives.

The College has also promulgated standardized informed consent forms to assure that patients clearly understand the potential risks of surgical procedures. For use by defense and plaintiff attorneys, guidelines for identifying quality expert witnesses have been promulgated in an attempt to reduce the pervasiveness of "hired guns." To enhance accountability, an expert witness affirmation form—which, when signed, expresses the witness' willingness to submit his or her testimony for peer review—has been crafted. Risk management courses and CDs designed to assist Fellows in navigating the perils of liability are available as well.

This new and improved ACS-sponsored liability insurance program is the latest addition to the College's efforts to mitigate Fellows' liability woes. This product is currently offered and information is available on the ACS Web portal, which also provides a link to TDC. To obtain this information, (1) go to www.efacs.org and log in; (2) under "Member Services" at top of home page, click "Member Benefits"; (3) click on the "New programs and exclusive member benefits" link halfway down the page under "ACS Medical Liability Insurance Program." 

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