

How secure is your security?

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For just over 100 years, doctors have sought their professional liability cover largely by buying membership of a mutual fund – to access membership benefits that include discretionary, claims-incurred, uncapped protection – rather than buying a claims-made, capped contract of insurance. What does it all mean?

Claims-incurred v. claims-made What's the difference?

'Claims-incurred' cover. Protection is based on the date of the clinical incident that ultimately leads to a complaint or a claim, not the date upon which the complaint or claim becomes known to the doctor and notified to the insurer or mutual fund.

'Claims-made' cover. The relevant date is the date the doctor makes a report to the fund or insurer – that is, 'makes a claim' for assistance.

How does the difference affect doctors?

There can be a long delay between the clinical event and the time the doctor first becomes aware of trouble. A survey by the Medical Indemnity Protection Society demonstrated that doctors overwhelmingly (see the Table) prefer claims-incurred protection because they pay for it whilst in active practice and stop paying on retirement (knowing that claims arising after retiring or leaving practice will continue to be funded by their indemnity organisation, provided the precipitant event occurred during financial membership).

With 'claims-made' protection, doctors need either to keep paying a subscription after retirement or, if the fund or insurer offers it, to buy an 'extended reporting benefit' by paying a one-off 'exit fee'.

Whilst 'claims-incurred' cover is preferred, it is not easily supplied on a guaranteed basis. This is because liabilities accrue which the fund will not know of for many years ('incurred but not reported' liabilities). When setting subscriptions, it is possible to assess whether the income raised from the subscriptions set for that year will be sufficient to fund all the liabilities that will ultimately have to be funded arising from incidents that occurred in that year. However, like all predictions,

there is no guarantee that the assessment will be 100% accurate. The potential value of currently unknown liabilities can be assessed actuarially with great precision, but not with certainty.

With 'claims-made' indemnity, the indemnifying organisation can rule off its books at the end of the year knowing with certainty what claims it must fund arising from that year. Hence it can more accurately report the value of its estimated liabilities. However, even that is not 100% accurate! Knowing a claim has been made does not mean knowing accurately how much it ultimately will cost. For example, in the UK the government adjusted what is called the 'discount rate' by 1%. Overnight, 10% was added to the known liabilities of the mutual funds operating there.

Capped v. uncapped

For complete protection, doctors need to purchase indemnity that will cover any award or settlement, irrespective of the dollar value of that award or settlement. Liabilities associated with uncapped cover are again difficult for an indemnifying organisation to assess because with long tail business, it is difficult to predict the size of an award made many years in the future.

The Adelaide and Le Fevre Hospital was sued for the negligent omission of an employed midwife in 1992. The

Preferred options for protection*

- 85% of doctors surveyed preferred claims incurred, uncapped mutuality
- 10% of doctors surveyed preferred claims made, uncapped mutuality
- 5% of doctors surveyed preferred claims made, capped insurance

* Source: Medical Indemnity Protection Society survey, December 1999.

Series Editor: Dr Paul Nisselle, Chief Executive, Medical Indemnity Protection Society, Carlton, Vic. The material in this series is provided for information purposes only and should not be seen as an alternative to appropriate professional advice as required.

award was close to \$5 million. The hospital's insurance was capped at \$2 million. Ultimately the hospital went bankrupt, and as it could not be sold as a going concern it was sold as real estate. In the end, the community lost a good hospital and the plaintiff ended up incompletely compensated – as a result of capped indemnity.

Uncapped indemnity is obviously the preferred option both for doctors and their patients, but it comes at a price – higher reinsurance costs – and imposes another degree of uncertainty. If a fund cannot accurately limit its maximum liability, in any one claim or in aggregate, then it cannot with certainty limit its total liability. Technically, it can fix its immediate liability through different forms of reinsurance, but there is always the possibility that liability will exceed the limits of the purchased reinsurance. The \$40 million award to actor John Blake in a personal injuries claim was greater than any previous award. No-one could have predicted an award of that magnitude.

Insurance v. mutuality

Companies providing insurance are strictly regulated by the Insurance and Superannuation Commissioner. Further, the provision of insurance is by way of a contract. The contract gives the policyholder 'certainty of performance', but only in accord with the literalness of the wording of the policy document issued.

The medical mutual funds are not insurance companies, but associations of members who pool their collective risk on a 'mutual' basis. The funds operate on a not-for-profit basis and 'membership benefits' are provided at the discretion of the governing body of the fund, which gives individual consideration to requests for indemnity from members. The exact parameters of protection are not defined. There is no reliance on legal interpretations of the

fine print embodied in an insurance contract. Instead, each member has the right to request assistance and indemnity in any matter affecting his or her 'professional character and interests'.

Whilst that does not provide certainty of protection, the discretion of the governing body of such funds is usually used to extend benefits beyond areas that would normally be covered by malpractice insurance, rather than to limit protection.

Mutual protection can be provided on a claims-incurred, uncapped basis, but it does not have the guaranteed certainty of performance – and external supervision – of insurance, and it is very difficult to be certain all potential liabilities are fully funded.

Know what you are buying. The product is more important to your security than the price.

Insurance is tightly regulated – it provides contracted certainty of performance, and funding requirements can be more accurately anticipated. However, insurance cannot be provided on a claims-incurred, uncapped basis.

Concluding remarks

There is now a real choice in professional indemnity.

The Medical Defence Association of Western Australia offers claims-made mutual protection. From 1 July 2000, the Medical Indemnity Protection Society will be offering both claims-made and claims-incurred mutual protection. Claims-made, capped malpractice insurance is now being offered by commercial (for-profit) insurers.

Know what you are buying. Price is only a determinant if you are sure you are comparing apples with apples. The product is more important to your security than the price. **MT**