HOT HINTS FROM THE HOTLINE
A SUMMARY OF SOME RECENT ARTICLES AND CASES OF INTEREST TO WHOLESALE BROKERS

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WILL YOU OR YOUR CLIENT BE LEFT STANDING NAKED WHEN THE SUN SETS

RECENT DEVELOPMENTS UNDERLINE THE HIDDEN DANGERS LURKING IN THE MEDICAL MALPRACTICE MARKETPLACE

The financial condition of the insurers underwriting the bulk of the medical malpractice coverage in New York presents serious issues for consideration by the brokers, retail, intermediate, or wholesale, who service this market for health professionals, medical facilities and hospitals. It is a situation begging for immediate action because significant negative legal consequences for brokers and their insureds may result from the failure of the Legislature to act reasonably and responsibly NOW.

We know that every broker, no matter the nature of his/her business or type of license, has the responsibility to exercise **due care** in placing and providing the proper coverage for the client. This duty includes placing the risk with an insurer that is solvent and will stay solvent until the last claim covered under the policy is paid. See, *Jamaica Bay Riding Academy v. Slack*, 204 AD2d 398. However, the current state of the medical malpractice market in New York has cast a long shadow on the broker's duty of due care and has placed many brokers between a rock and a hard place. This is underscored by the fact that in excess of 80% of the medical malpractice market by premium volume was underwritten by just three insurers in 2014: Medical Liability Mutual Insurance Company (MLMIC) with 44.5% of the market; Physicians Reciprocal Insurance Company (PRI) with 29.7% of the market and a third specialty carrier that writes 7.6% of the market. Of importance to every broker is the fact that MLMIC has not been rated by AM Best since 2004 and that PRI's year-end statutory statement shows that its liabilities exceed its assets by some $86 million. The third carrier writes a limited book of specialty coverages but it, too, is not rated by Best. The residual market is provided by Medical Malpractice Insurance Plan (MMIP) which was created by the Legislature to provide a market for those health professionals unable to otherwise obtain coverage. It is their insurer of last resort.

Although there are many rock –solid non-admitted insurers which write medical mal coverage, a New York excess line broker cannot place primary med mal coverage in the non-admitted market without obtaining a declination from MMIP and, as the market of last resort, MMIP doesn't issue declinations.   Since the non-admitted market is, for all intents and purposes, not an option, a broker seeking to place primary med mal coverage and exercise "due care" can choose only among insurers not rated by Best or one whose annual statement creates doubt rather than a promise of claims payments down the road. Risk Retention Groups which write New York medical malpractice have their own problems, especially if the RRG is a foreign entity not subject to the protections and restrictions of the New York Insurance Law (see the last issue of HOT TIPS FROM THE HOTLINE).

This minefield for brokers arose because since the mid 1980s, the Legislature has imposed a moratorium on putting a medical malpractice insurer into rehabilitation or liquidation by suspending the authority of the Department of

Financial Services to apply "for an order of rehabilitation or liquidation of a domestic insurer whose primary liability arises from the business of medical malpractice insurance …". (Insurance Law Sec. 2343 (c)). The moratorium presently in effect runs until December 31, 2019. Although the statute was initially enacted to deal with what was then considered a "crisis" in the medical malpractice arena, the continuance of the moratorium is perhaps best explained by the pragmatics of New York politics and the arcane relationships between political leaders and those who run the medical malpractice industry.

You might expect that if the Legislature faces up to reality and lets the moratorium expire and the "in the red" insurers are put into liquidation, that the New York Property/Casualty Security Fund (the Guaranty Fund) will be around to pick up the pieces and you and the insured will be protected. Unfortunately, that may not be the case. First, the very insurer whose insolvency may trigger demands for contributions to the Guaranty Fund, is the same insurer who should be making a contribution but is, of course, unable to do so. _ Moreover, there have been instances when a Guaranty Fund itself ran out of money and was unable to pay claims or defense costs. Such a situation arose with respect to the Public Motor Vehicle Liability Security Fund (PMV) which was established to cover livery cars. After claims were made against the Reliance Insurance Company which was in liquidation, the Insurance Department Liquidation Bureau sent a notice to the insureds which said, in effect, that PMV was unable to provide defense or indemnification for the claims as "the PMV Fund is financially strained . . ." In other words, the insureds were on their own and they could not compel the Legislature to provide additional funding. See, *Meja v. Santos,* 2007 NY Slip Op 51522 (U) and *Montemarano v. Serio,* 8 AD3d 19.

Considering the present financial condition of the domestic medical malpractice market, will the Legislature come to the rescue if the Guaranty Fund becomes "financially strained"? Judging from past similar situations, we deem it unlikely, leaving the insureds, as it did with the PMV, basically on their own.

So, if and when the sun sets on the Legislature's moratorium on putting the insolvent medical malpractice insurers into rehabilitation or liquidation, your insured may find himself "naked" - without coverage and without a guaranty fund to respond to claims.

An insured left "naked" will, in most cases, turn to his broker, or his broker's E&O coverage for cover. But most brokers' and agents' E&O policies contain an exclusion which holds that coverage is not afforded for damages arising out of the bankruptcy, financial inability to pay, insolvency, liquidation or receivership of any insurance company in which the broker has placed or obtained insurance for a customer. As "naked" as the insured may be, when he comes knocking on your door, you may be as "naked" as your client.

If it sounds like a Catch-22 situation, it is: if you place the coverage within the available domestic market, you may be obtaining the policy from an insolvent insurer and you can only hope the Legislature keeps the moratorium in effect until the policy and any tail have run their course, or you can decline to place the coverage and lose a client. Here are some suggestions which may not insulate you from being sued in the event of Armageddon, but may be of some value:

- Be aware and stay aware of the financial condition of any medical malpractice carrier you place or may place coverage with and make sure the insured is made aware of the financial condition of the medical malpractice insurer before you place the policy
- Write to the insured confirming that you have disclosed the financial condition of the insurer and the insured has chosen to purchase the policy.
- Individually and through all the professional associations you belong to, try and get the Legislature to "use its mentality and face up to reality" without

letting politics get in the way by getting rid of the law that protects insolvent insurers and by allowing primary medical malpractice policies to be placed in the excess line market with **solven**t albeit non-admitted carriers.

THE TIME TO ACT IS NOW

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