

# GREATER NEW YORK HOSPITAL ASSOCIATION

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August 27, 2018

Via Electronic Mail

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Hon. Maria Vullo,  
Superintendent  
New York State Department of Financial Services  
One State Street  
New York, New York 10004

Re: Comment on Implementation of MLMIC Plan of Conversion

Dear Superintendent Vullo:

On behalf of our New York State members, Greater New York Hospital Association (GNYHA) respectfully submits this comment letter on the proposed Plan of Conversion (Plan) of Medical Liability Mutual Insurance Company (MLMIC) from a mutual to a stock insurance company. **The purpose of this comment letter is not to seek an amendment or modification of the Plan. Indeed, we urge the Department of Financial Services (DFS) to approve it without delay, as we support the conversion and the related transaction between MLMIC and National Indemnity Company (NICO).**

MLMIC has engaged with GNYHA extensively on this issue, and we are grateful for their consideration. Of the two issues we raised with MLMIC on behalf of our members, the interpretation of the provision in the Plan entitled, “Objection to Recipient of Cash Consideration” (Objection Procedure) remains unresolved. DFS has the authority to address this issue and ensure a fair and equitable outcome, without delaying the conversion or affecting the timing of the transaction. **For the reasons outlined in the attached comment letter, GNYHA requests that DFS issue clarifying language in its final order approving the conversion to make clear that the Objection Procedure is open to all entities that functioned as Policy Administrators.**

We include proposed language for DFS’s consideration at the end of this letter. Thank you for the opportunity to comment.

Sincerely,



Kenneth E. Raske  
President



*GNYHA is a dynamic, constantly evolving center for health care advocacy and expertise, but our core mission—helping hospitals deliver the finest patient care in the most cost-effective way—never changes.*

Policy Administrators and the Objection Procedure

GNYHA supports MLMIC’s conversion and its related transaction with NICO. With this comment, our objective is simply to have MLMIC’s proposed Plan of Conversion<sup>1</sup> (Plan) implemented in accordance with its own terms, in particular, the provision set forth in Schedule I of the Plan, entitled, “Objection to Recipient of Cash Consideration” (Objection Procedure).<sup>2</sup> We are concerned that MLMIC has indicated that it intends to apply the Objection Procedure in a way that is at odds with its plain language by limiting the Objection Procedure to only those Policy Administrators formally listed as such on the Policy’s declarations page. This would be at odds with the Plan, which defines Policy Administrators as individuals or entities “designated on the declarations page of the Policy **or otherwise** as the administrator of the Policy on behalf of the applicable Policyholder, or any successor to such Person ...” [emphasis added]. It would also lead to unfair and inequitable results.

The Objection Procedure allows a Policy Administrator to assert its objection to the payment of the Cash Consideration to one or more Policyholders on the grounds that it is legally entitled to distribution of the Cash Consideration. The Plan provides that, when such an objection is received, the Cash Consideration is to be held in escrow pending joint instructions from the Policyholder and the Policy Administrator, or pending resolution through arbitration or litigation. Thus, there is no role contemplated for MLMIC with respect to resolving objections; the Objection Procedure merely triggers escrow of the Cash Consideration, pending dispute resolution between the parties.

In designing the Objection Procedure, MLMIC made the decision to provide standing to Policy Administrators designated in the Policy documents, “or otherwise.” This is an acknowledgement of the special status of such third parties, including their indispensable role in purchasing the policies that form the basis of the Policyholders’ rights vis-à-vis the conversion and that serve as the basis of the calculation of the Cash Consideration.

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<sup>1</sup> All capitalized terms shall have the same meaning as in the Plan, as applicable, and except where otherwise noted.

<sup>2</sup> The full text of the Objection Procedure is as follows:

If a Policy Administrator or EPLIP Employer has not been specifically designated to receive the Cash Consideration allocated to an Eligible Policyholder, but nevertheless believes that it has a legal right to receive such Cash Consideration, such Policy Administrator or EPLIP Employer may send MLMIC a letter (return receipt requested) or an e-mail (preferably an e-mail) that sets forth such position, along with a statement to the effect that it has provided a copy of such letter or e-mail to the applicable Eligible Policyholders, at any time prior to the date of the Superintendent’s public hearing. If sent by mail, the objection will be considered to be received by MLMIC only when actually received. If MLMIC receives a properly filed objection, the allocated Cash Consideration will be held in escrow by the Conversion Agent until MLMIC receives joint written instructions from the Eligible Policyholder and the Policy Administrator or EPLIP Employer as to how the allocation is to be distributed, or a non-appealable order of an arbitration panel or court with proper jurisdiction ordering payment of the allocation to the Policy Administrator or EPLIP Employer or the Eligible Policyholder.

But MLMIC has indicated that it intends to unnecessarily and arbitrarily place limitations on its own definition of Policy Administrators in a way that makes the phrase “or otherwise” meaningless. We ask that DFS issue language in its final order to address this situation so that the objections that the entities that paid the premiums and carried out other duties of Policy Administrators filed will be honored.

### de facto Policy Administrators

MLMIC uses the term “Policy Administrator” to denote third parties who perform important functions, including paying the premiums, with respect to a policy that provides coverage to a Policyholder. A Policy Administrator is defined in MLMIC’s existing documents as:

... the agent of all Insureds herein for the paying of Premium, requesting changes in the policy, including cancellation thereof, and for receiving dividends and any return of Premiums when due. By designating a Policy Administrator each Insured gives us permission to release information about each such Insured, your practice, or any other information that we may have to such Policy Administrator.<sup>3</sup>

A Policy Administrator, if formally designated as such by the Policyholder, is listed on the policy declaration page. However, we have learned that whether or not a Policy Administrator was formally listed in this way depended not on any legal or factual consideration, but merely happenstance.

In the hospital context, the person preparing the policy application and other forms upon which such a designation would be based could be the actual Policyholder, a line administrator, or the hospital’s Chief Financial Officer. Not surprisingly, there is wide variety in the field as to how these forms were filled out; the same Policyholder may have a Policy carrying the formal designation of a Policy Administrator in one year but not in the next year.<sup>4</sup> The same Policy Administrator may be listed as such on some of the Policies they purchased for their employees, but not on others, during the same time period. This is despite the fact that at all relevant times, the entity openly and transparently performed the same Policy Administrator functions (e.g., paying premiums, receiving the benefit of dividends in the form of premium credits, discussing and processing renewals), even interacting with MLMIC about claims, on behalf of all of its employed Policyholders.

These entities—*de facto* Policy Administrators—are just as entitled to invoke the Objection Procedure as any others who were formally listed as Policy Administrator on a declarations page. Courts have adopted similar interpretations in several areas, and have recognized “de facto”

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<sup>3</sup> See, MLMIC Policy Administrator Designation and/or Change Form: <https://www.mlmic.com/wp-content/uploads/2014/04/Policy-Administrator-Designation-or-Change-Form.1.12.16.pdf> [accessed August 7, 2018]

<sup>4</sup> For example, in at least one situation of which we are aware, a hospital-affiliated Professional Corporation carried out the duties of Policy Administrator for many physicians throughout the Eligibility Period, but in several cases, was “formally” designated only in the summer of 2016 through the execution of the MLMIC Policy Administrator Designation or Change Form.

administrators on similar facts.<sup>5</sup>

While the words “or otherwise” in the definition of Policy Administrator are not defined further in the Plan or the Policyholder Information Statement, they appropriately reflect the fact that Policy Administrators may, or may not, have been formally designated at various times, despite performing exactly the same functions. Indeed, prior to being informed of MLMIC’s narrower interpretation, we took the “or otherwise” language as a recognition of this practical reality and the need for the Plan to have a measure of flexibility in this regard.

Such a reading would be fair and equitable. Having determined that formally designated Policy Administrators have standing to invoke the Objection Procedure, it is not reasonable for MLMIC to refuse to acknowledge the standing of all those who performed Policy Administrator functions, including those whose status was “otherwise” established.

MLMIC’s position that the Objection Procedure can only be used by Policy Administrators formally designated on a declarations page of a Policy or some other, unspecified writing—an interpretation that is found nowhere in the Plan or any of MLMIC’s ancillary documents—places several GNYHA members at a distinct disadvantage, after years of paying the premiums and acting as the *de facto* Policy Administrator for their Policyholders. These entities merely want what the Plan contemplates—the ability to consistently access the Objection Procedure, with its escrow of funds, pending dispute resolution, which will not in any way implicate MLMIC other than as a stakeholder. They seek what is simply a procedural right that MLMIC and DFS have already granted.

### GNYHA Request

According to the Notice of Public Hearing issued with respect to the Plan, the standard of review is as follows:

The New York Insurance Law requires the Superintendent to approve the Plan if she finds that the Plan does not violate the New York Insurance Law, is not inconsistent with law, is **fair and equitable** and is in the best interests of the policyholders and the public [emphasis added].<sup>6</sup>

To ensure a fair and equitable outcome with respect to the implementation of the Objection Procedure, we ask DFS to include clarifying language in its final order making clear that the

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<sup>5</sup> Courts have repeatedly held in similar contexts that parties who perform the functions or take on the responsibilities of an administrator accede to the legal rights and obligations of that role even where relevant documents do not so designate them. See, e.g. *Coulter v. Morgan Stanley & Co.*, 753 F.3d 361, 366 (2d Cir. 2014) (holding a person is a “de facto fiduciary” of an ERISA plan, even if not named as a fiduciary in the plan, where the person exercises discretionary responsibility and control over the plan); *Estate of Djelaj*, 38 Misc. 3d 618, 620 (N.Y. Sur. Ct. 2012) (“[P]ersons who undertake duties and responsibilities ordinarily performed by a fiduciary, even though they are not a court appointed fiduciary, may be classified as the de facto fiduciary of an estate or trust.”) (citing *Breslau v. Sakow*, 219 A.D.2d 479, 482-83 (1st Dep’t 1995) (finding party was de facto executor of estate based on his assumption of authority over estate decisions, signing of estate account checks, and disposition of estate property).

<sup>6</sup> Notice of Public Hearing On Plan of Conversion of Medical Liability Mutual Insurance Company To Convert From A Mutual Insurance Company To A Stock Insurance Company dated June 22, 2018.

Objection Procedure should be applied consistently with its plain language and directing MLMIC to recognize the right of *all* those who functioned as a Policy Administrator to invoke the Objection Procedure, provided they include with their objection letters representations that they performed the functions of a Policy Administrator.

**GNYHA respectfully proposes the following clarifying language:**

**“The Objection Procedure is open to any Person who is a Policy Administrator based on having been listed on the declarations page or other MLMIC policy document, or by its having performed the functions of a Policy Administrator, provided the Person has represented that it performed such functions, in a writing submitted with its objection. Furthermore, to the extent that MLMIC has rejected objections from any Policy Administrators meeting this standard prior to the issuance of this order, those rejections shall be rescinded.”**

MLMIC may be reluctant to accept objections from these *de facto* Policy Administrators on the grounds that it is not in the position to verify such status due to the lack of a formal designation. We are not asking MLMIC to adjudicate whether someone was or was not a Policy Administrator. If a person or entity represents, in its objection letter or in a supplemental document<sup>7</sup> with its objection letter, that it functioned as a Policy Administrator during the relevant time periods, that should be a sufficient basis to trigger the escrowing of the Cash Consideration under the Objection Procedure. Just as MLMIC is not responsible for adjudicating disputes over a party’s ultimate right to receive the Cash Consideration, any dispute over a party’s standing as Policy Administrator would be resolved between the Policyholder and that party, presumably as a threshold matter. MLMIC is merely a stakeholder.

Issuance of this clarification would not constitute a change of the Plan, but rather ensure that the Objection Procedure is available to the full group of Policy Administrators, consistent with the plain language of the Plan. The clarification would simply ensure that MLMIC consistently honors objections from all entities that functioned as a Policy Administrator, rather than a narrow subset.

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<sup>7</sup> GNYHA advised its members in the *de facto* Policy Administrator position to consult with their counsel about submitting affidavits detailing that they functioned as Policy Administrator during the relevant time periods, along with their objection letters. It is our understanding that several of our members have done so.