

This letter is being sent on behalf of Neurological Surgery, P.C., and the following eligible policyholders of Medical Liability Mutual Insurance Company (the "Policyholders") to provide comments and objections to the Proposed Plan of Conversion of Medical Liability Mutual Insurance Company to Convert from a Mutual Insurance Company to a Stock Insurance Company. Michael Brisman, M.D., a shareholder, officer, and director of Neurological Surgery, P.C. is requesting to attend the August 23, 2018 Public Hearing and also requests to speak at the hearing.

The basis for the Policyholders' comments and objections is as follows: MLMIC is demutualizing and being acquired by Berkshire Hathaway. As part of this process, MLMIC policyholders are being paid out a multiple of premiums paid during the 3 years prior to the announcement of the sale to Berkshire Hathaway (July 15, 2013 - July 14, 2016). As such, most policyholders who paid in to MLMIC will be paid out based on 3 years' worth of paid premiums. However, there is a smaller subset of policyholders who will be getting a much smaller compensation because they left MLMIC during this three year time period. These policyholders may have been with MLMIC for 20 years prior to those final three years, but because they left during that period, they are receiving a fraction of the payment that the other policyholders are receiving, and are being severely undercompensated.

The Policyholders fall within this subset. They left MLMIC in 2014 because they were concerned that their premiums, and likely those of other policyholders, were much higher than was needed to cover actual costs. They felt that MLMIC was likely accumulating large profits and that MLMIC should have either been pursuing lower premiums, or paying out large dividends, or both. These issues were brought to the attention of MLMIC's senior management team, which had extensive discussions with the Policyholders, and denied that there were any excess reserves or "profits."

In retrospect, it appears that there were ever increasing reserves that were far in excess of what was required to cover costs (*i.e.*, "profits"), and that the accumulation of these profits was part and parcel of the forthcoming demutualization plan and sale to Berkshire Hathaway – a process which we believe began in 2011-2013, when MLMIC completed a sale of its New Jersey division to Berkshire Hathaway. However, no one at MLMIC – despite the extensive discussions that were had with senior management about these financial issues – raised this as a possibility. Had they done so, the Policyholders would have remained with MLMIC to reap the ultimate monetary benefits of the sale and demutualization plan. However, they were kept in the dark, and left, "forfeiting" (in MLMIC's view) their rights.

This, we contend, is materially unfair to the Policyholders. Their proposed allocation is significantly diminished because of MLMIC's non-disclosure. This inequity needs to be adjusted by providing the Policyholders – and others who are similarly situated – with an increased allocation to account for the conduct of MLMIC. To do otherwise would run afoul of section 7307 of the Insurance Law, which states that the Superintendent is to make a decision to accept the plan for insurance demutualization or require modification of the plan based on whether the plan "...is fair, and equitable and is in the best interests of the policyholders and the public..."

This statement provides only a summary of this important issue. Given the importance and the complexity of the issues that the Policyholders raise, we believe that it is imperative that a representative of the Policyholders – Michael Brisman, an NSPC officer and director – be permitted to

appear and provide oral testimony at the hearing. It is only through this testimony that the rights of the Policyholders can be protected.

August 27, 2018

Dear Superintendent Vullo,

Thank you again for allowing me to speak, on behalf of my organization, Neurological Surgery P.C. ("NSPC"), at the public hearing on August 23 regarding the MLMIC demutualization and sale to Berkshire Hathaway. At that hearing, you said that you would review any additional testimony presented to you in the next five days, and as such, I am submitting this additional submission.

First, given the circumstances, NSPC is supportive of the MLMIC sale and my sense from the hearing was that it would likely proceed. That having been said, there are several specific items that we would ask DFS to pursue as best they can, pertinent to this transaction. They are as follows:

- 1) We ask that DFS do whatever it can to encourage MLMIC / Berkshire Hathaway to settle with NSPC regarding our loss of a full three year transaction payment due to their breach of their fiduciary responsibilities to us.**
- 2) We ask that DFS give full and easy access to any malpractice insurers who wish to enter the New York marketplace (who operate with acceptable standards and reserves).**
- 3) We ask that DFS do what it can to support the continued functioning of PRI, and to this end, support the legislature's renewal of PRI's license to practice that is anticipated in 2019, and ask that the legislature make this approval as soon as possible to reassure potential policyholders.**
- 4) We ask that DFS do what it can to independently assess the needed malpractice premiums for each specialty and each region, and not rely fully on the recommendations of the insurers, and be open to individuals contesting these rates.**

We will speak to each issue one at a time.

- 1) We ask that DFS do whatever it can to encourage MLMIC / Berkshire Hathaway to settle with my organization regarding our loss of a full three year transaction payment due to their breach of their fiduciary responsibilities to us.**

We understand that the law may not give DFS the ability to modify the conversion plan to include this provision. However, if DFS were to strongly encourage MLMIC / Berkshire to settle our claim with them, that might go a long way.

Like you, NSPC tries to avoid conflict. However, absent a compromise resolution with us, conflict is likely because: (1) we were MLMIC's largest group of policyholders; (2) we had extensive and detailed discussion and meetings with MLMIC's leadership about our account, about the company, and specifically about the pros and cons of leaving the company; (3) our organization contributed more to the existing MLMIC profits than almost any other group (the difference in the premiums versus

expenditures approximated \$40 million, and with investment income, we believe that this total rose to some \$60 million); (4) the amount that our organization will have lost from not getting the additional two years of payment is approximately \$24 million, a number way too large to just walk away from; and (5) there is strong evidence that MLMIC did breach its fiduciary responsibilities to us.

When we spoke with MLMIC leadership and met with MLMIC representatives prior to leaving, they should have told us that they had accumulated in excess of \$1 billion in profits, and that these profits would likely soon be paid back to policyholders either in dividends or in a lump sum at the time of a sale. They should have told us that leaving the company would cause us to forfeit all claims to these enormous accumulated dividends. Their own documentation of these numerous conversations and meetings will readily reveal the complete inadequacy of the discussions – unless these records have all disappeared. MLMIC leadership should have been advocating for lower premiums and paying out dividends as their specific mission statement was to offer malpractice insurance at the lowest possible cost and not to accumulate or hoard massive profits as they were doing. And yet, their product had the highest regional charges, and had accumulated larger profits than almost any other for-profit insurance company. Many people left MLMIC during the past several years, and many people had to sell their private practices, because the MLMIC rates were so high and the dividends so miniscule. The biggest “dividend” they ever provided was a 20% premium reduction in 2016, that was announced only after they announced the sale of the company. Even this, however, is hard to even consider as a dividend, as it merely represented a modest discount on overly high premiums.

As I clarified in my August 23 testimony, NSPC does not have specific documents related to the intent of MLMIC leadership regarding a sale. However, MLMIC leadership seemed to have begun talking to Berkshire Hathaway around 2010 or 2011, and the discussion at that time primarily involved the sale of the New Jersey division of MLMIC (“Princeton”) to Berkshire Hathaway. My understanding is that these regular discussions and communications went on from around 2010-2013. MLMIC leadership wanted at that time to sell the New Jersey division but not the New York division, although it was unclear at the time, why it would be a great idea for MLMIC to sell the New Jersey division to Berkshire Hathaway but not also the New York division. Our understanding also is that the New Jersey division, after its sale to MedPro (a Berkshire Hathaway company), essentially completely separated from the MLMIC leadership, who continued to keep their jobs and run the New York division. We would suspect that there were extensive discussions between MLMIC leadership and Berkshire Hathaway leadership during these years, and that Berkshire Hathaway leadership had come to have a pretty good understanding of the interests of the MLMIC leadership.

Princeton Insurance was completely taken over by Berkshire, and MLMIC leadership continued to enjoy their jobs and their positions from 2010-2015. Against this backdrop, Berkshire in 2015 made a detailed transaction offer to MLMIC to acquire their New York division, also through Medpro, in a manner similar to how the Princeton deal was done. This could only be because Berkshire leadership had been led to believe from their extensive interactions with MLMIC leadership, that MLMIC leadership was interested in selling the New York division as well. Otherwise, why would they bother to make the

offer. And it turns out that they were exactly right. Soon thereafter, Berkshire and MLMIC leadership did come up with an arrangement for sale.

The initial offer of sale was rejected, though it seems to be extremely similar to the sale of Princeton. It is considered so terrible, that MLMIC leadership doesn't even bring it to the shareholders for a vote. The unacceptable component, as explained at the August 23 testimony, is that MLMIC leadership would be removed. Mr. Amsler explained that this would have been disastrous because it would deny the current policyholders of the leaders they consider so critical. But this makes no sense. MLMIC had no issue selling the Princeton company and having those policyholders abandon the MLMIC leadership. We are aware of no policyholder complaints from that deal. Had MLMIC brought the MedPro offer to their policyholders, then they would have known for sure how they felt. Also, it is unclear why the Berkshire leadership would be so much worse for policyholders than the MLMIC leadership. We also agree with the sentiment expressed at the public hearing that when something is sold, the main consideration for the sale is the price. Again, it appears that the interests of MLMIC leadership were being placed over those of policyholders. A proposal that MLMIC leaders claim would be great for policyholders is not even brought to policyholders for consideration because MLMIC leadership would lose their jobs.

Berkshire re-approached MLMIC then through its NICO division with what seems to be exactly the same proposal with the only change that the MLMIC leadership will keep their jobs. This offer the MLMIC leadership unanimously accepts. MLMIC's assets at this time are over \$5 billion and its profits are over \$2 billion, and it accepts, unanimously, a sale price of just \$100 million (or "book value plus \$100 million"). Only later is the sale price increased, appropriately, to something less outrageous (\$600 million), but the acceptance of the offer of \$100 million is critical as it again establishes intent.

Berkshire leadership, from their extensive interactions with MLMIC leadership, clearly believed that MLMIC leadership wanted to sell the New Jersey division but keep the New York division because they wanted to work for a few more years, and then sell the New York division. It became clear though that MLMIC leadership in 2015 wanted to continue working in that function, though they certainly did want to sell the company. As such, when Berkshire offered to buy the New York division for a very low price (\$100 million) and keep the MLMIC leadership in place, MLMIC leadership wholeheartedly accepted. That's what they wanted -- to sell the company, to get the security of a bigger parent company, and to keep their jobs. Again, we believe people will be able to establish intent and interest from actions.

We also believe that in the course of our group's meeting with MLMIC, about the pros and cons of staying with MLMIC, MLMIC representatives would have had an obligation to reveal if a sale in the near future was even a reasonable possibility as the consequences to us would be so enormous. Obviously, leadership at Berkshire thought that such a sale was a reasonable possibility and they were right.

On a personal note, I very much like Don Fager, Ed Amsler, and Mike Schoppmann. I think they are smart and hardworking and very professional and knowledgeable. I've spoken to all of them many times over the years. I'm sorry that I have had to be so tough on them and MLMIC. The truth is that I've

been pretty happy with their services, though I think our premiums were very much overpriced. However, I have no choice but to fight as hard as I can, because I have an obligation to my organization and my shareholders.

2) We ask that DFS give full and easy access to any malpractice insurers who wish to enter the New York marketplace (who operate with acceptable standards and reserves).

There is nothing better for protecting the public than competition and this is the biggest concern with this transaction. MedPro and MLMIC are the two strongest malpractice insurers in New York. It may be that combined they will have only 37% of the total market, but that doesn't really paint the full picture and the full concern. For many physician specialists, the choice is much narrower because there are only a few insurers that are accepted at all hospitals. These include MedPro, MLMIC, PRI and, very recently The Doctors Company (TDC). TDC just entered the region, and PRI has had a decline in market share recently and a less than healthy balance sheet. For specialty groups such as mine, these are the only four options. MLMIC has aggressively worked to knock out its competitors, and once acquired by Berkshire, they will have more resources to dominate the market. We think it's critical, as a result, that DFS give full and easy access to any appropriate insurance carrier that wants to enter this market.

3) We ask that DFS do what it can to support the continued functioning of PRI, and to this end, support the legislature's renewal of PRI's license to practice that is anticipated in 2019, and ask that the legislature make this approval as soon as possible to reassure potential policyholders.

Continuing the idea of fostering competition is the idea of bolstering PRI. NSPC currently is insured through PRI. PRI has offered us a unique opportunity to risk share with them through a captive that allows us to take advantage of our group's outstanding clinical results and unusually favorable record with malpractice losses. Until TDC entered the market, PRI was the only alternative to MLMIC. In the past, PRI issued many poor risk policies, particularly with hospitals, that cost them much more than their premiums. We believe Bruce Shulan is working hard to turn things around at this company. We think it's in everyone's interest that this company be supported as much as possible to give it a chance to recover so doctors have choices in a very limited marketplace. PRI isn't looking to profit off doctors. Berkshire Hathaway is. It would be very helpful if DFS could encourage the state legislature to reinstate PRI's license to practice (albeit with negative surplus) as soon as possible as this would help them get more business and avoid losing current business. This will add to needed competition once MLMIC is sold.

4) We ask that DFS do what it can to independently assess the needed malpractice premiums for each specialty and each region, and not rely fully on the recommendations of the insurers, and be open to individuals contesting these rates.

We are not suggesting that every premium rate for every specialty and every region is set too high. But certainly, some are. We are concerned that the recommendations from the admitted carriers will frequently overstate the needed premiums. There are many different ways of performing actuarial analyses, and insurers can always find actuaries who will assess things the way they want them to be assessed. We would ask that DFS, going forward, be extra careful with the premium recommendations from MLMIC/NICO as they will have a natural tendency to want to keep these rates high – they will now, admittedly, be pursuing profits for their shareholders. We would also ask that DFS readily accept concerns from various healthcare providers who have concerns that their premiums may be set too high for their specialty and their region.

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Finally I would like to comment on the most important aspect of medical malpractice insurance, and that is, reducing medical malpractice and ensuring optimal outcomes for patients. Because my father is a New York neurosurgeon, New York neurosurgery has been a major part of my life for my entire life. When I started work on Long Island, and joined two senior neurosurgeons, it was my intent to bring the highest level of neurosurgical care to Long Island that was possible. We now have almost 20 surgeons, and are one of the largest neurosurgery groups in the country. We also have one of the lowest rates of malpractice losses anywhere, which is unusual because we live in one of the most litigious areas in the country. We have achieved this goal because we subspecialize, perform the surgeries personally, work together in teams, and have made extensive dedicated efforts to optimize care.

I think one of the most important things a malpractice insurance carrier can help do is reduce malpractice. MLMIC did this to some degree through its risk reduction newsletters and courses. Not once at the public hearing was there any mention of whether transitioning to NICO would likely increase or decrease these patient safety efforts. I hope if the transaction does move forward, that DFS will try to ensure that patient safety is at least as important for the NICO company as profit generation.

Thank you for hearing us out and for all the difficult work you do on behalf of the State of New York.

Sincerely Yours,

Michael Brisman M.D.