



Liquidating MIIX

By Brian S. Kern, Esq. (2/08)

Back in the summer of 2002, MIIX Insurance Company went into voluntary solvent runoff and shortly thereafter ceased writing new medical malpractice insurance policies. This February, nearly five and a half years later, a “Petition for Liquidation of MIIX Insurance Company” was accepted by the Mercer County Superior Court. The petition, in short, advises the court that MIIX has insufficient funds to cover all unsettled claims, and claims should thus be referred to various state guaranty associations. The NJ State Guaranty Association provides \$300,000 of coverage per claim.

The court documents disclosed that when MIIX was placed into rehabilitation in October 2004, its surplus deficit was close to \$400,000,000, with more than 2,900 open cases. By year-end 2007, MIIX still had 500 open cases, with only \$30 million in remaining assets. According to sources familiar with the matter, MIIX currently has 220 open NJ cases.

The demise of MIIX, and the referral of outstanding claims to the Guarantee Association, raises a number of questions. When dealing with an insurance carrier, the failure of the carrier to settle within policy limits when it should have done so raises a “bad faith” claim against the carrier if an ultimate verdict exceeds policy limits. In these circumstances, the carrier, not the physician, will be responsible for the excess verdict. Although this rule contributes to higher insurance premiums overall, it also serves to protect individual physicians from losing personal assets in a malpractice suit. Will the Guarantee Association be subject to the same “bad faith” claim if it does not offer policy limits? No one knows. If not, the physician could be personally liable. Equally troubling is the fact that, knowing that there is only \$300,000 in coverage, a physician might be far more willing to settle a case than he or she would have been with higher coverage limits. Nonetheless, unless there is a change in the law, these settlements will still be reportable and available on the Internet, and result in increases in future malpractice premiums.

The demise of MIIX may also bring back the debate over the New Jersey statute of limitations (SOL), often misperceived to be a strict two-year time limit from an alleged act of negligence to file a claim. Since NJ follows a discovery rule, the two-year time period is tolled until a patient learns (or should have learned) that malpractice may have been committed. Physicians that treat children have even greater concern, as the SOL for a minor is tolled until the age of majority, or 18 years old (except for birth-related injuries.) One of the reasons claimed for the inability of MIIX to pay all outstanding claims is that it continues to receive new claims, years after it stopped writing policies.

A bill sponsored by Assemblyman Samuel Thompson, co-sponsored by Assemblyman Eric Munoz and introduced to committee seeks to amend the SOL to a strict four years (excluding minors), which would add significantly more stability into the market. Unfortunately, the prospect of this bill passing remains remote.

The end of MIIX may also prompt action on a bill to increase the amount available under the Guarantee Association. Many believed that the legislature would act on this issue following a NJ Supreme Court decision that held all insureds liable for awards above the \$300,000 limit, but commented, "In light of the potentially catastrophic effect that this ruling may have on responsible citizens who have purchased insurance to protect themselves and the victims of accidents in which they are involved, this issue is commended to the Legislature for such remedial action as it deems appropriate." Unfortunately, the legislature has yet to remedy the situation.

Another area of potential change is to require greater oversight and/ or financial scrutiny of existing insurers. Since MIIX ceased offering new policies, five NJ start-up carriers have been formed to capitalize on the demand created. In addition to the several well-financed companies that also offer coverage in NJ, the State is now seeing several risk retention groups (which avoid many state filing laws) enter the fray. Creating stricter financial requirements and other conditions on writing insurance could eliminate a repeat of the MIIX disaster. However, at this point in time, poorly financed companies continue to enter and operate in the State. Occasionally, physicians lured by lower premiums sign on, often unaware of the serious risks involved.

The good news is that changes in market conditions have brought financially secure medical malpractice insurance companies into the New Jersey market, helping to reduce the risk that physicians find themselves victims of another insolvency. The market may also be responding with products to cover physicians from the limited protection of state funds, the benefits of which must be weighed. This choice may well come down to the question of whether to pay now, or potentially pay a lot more later.

Brian Kern, Esq. is a principal with McLachlan Kane Insurance Agency, Inc., an agency specializing in medical professional liability insurance. He can be reached via email at bsk@insuranceagent.com