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New questions arise following the latest ruling on MLMIC distributions

By Daniel Hurteau and Erin Huntington

The conversion of the Medical Liability Mutual Insurance Company (MLMIC) in New York from a mutual to a stock insurance company has given rise to an abundance of dispute resolution. As part of the demutualization process, MLMIC calculated and planned to issue payments to "eligible policyholders," reflecting the equity in MLMIC. The amount of the payments was based on premiums paid on policies in effect from July 2013 through July 2016.

The process of returning MLMIC's equity was convoluted from the start but has become even more so as the law has developed over the last many months. Hundreds of disputes pending before New York's courts, arbitration panels, and MLMIC's own alternative dispute resolution process are facing one question: should payments be remitted to the named insured on the MLMIC policy (usually an individual medical provider) or to the insured's employers (usually medical practices and hospitals) that, in many cases, obtained, administered, and paid the premiums on those policies?

The emerging majority view on this question has followed the holding in *Schaffer, Schonholz & Drossman, LLP v. Title*[1] that the party paying the premiums on the MLMIC policy is entitled to payments. But, a recent decision from the Fourth Department in *Maple-Gate Anesthesiologists, P.C. v. Deixy Nasrin and Douglas Brundin*[2] has created a minority view that will likely need to be resolved by the New York Court of Appeals.

The MLMIC demutualization

In mid-2018, MLMIC sought regulatory approval from the New York State Department of Financial Services (DFS) to convert from a mutual to a stock insurance company under New York Insurance Law § 7307. The impetus for MLMIC's conversion was a sale to a division of Berkshire

[1] *Schaffer, Schonholz & Drossman, LLP v. Title*, 171 A.D.3d 465 (1st Dep't 2019 April 4, 2019)

[2] *Maple-Gate Anesthesiologists, P.C. v. Deixy Nasrin and Douglas Brundin*, 2020 NY Slip Op 02389 (4th Dep't Apr. 24, 2020)

Hathaway, Inc. (Berkshire). That request initiated a process of review, public comment, and then various decisions by DFS.

Part of what DFS had to decide was how the billions paid by Berkshire would get distributed and to whom. Ultimately DFS decided cash payments (cash disbursement) were to be made based on the premiums paid on all policies in effect from July 15, 2013, through July 14, 2016. MLMIC computed each cash disbursement based on a multiplier of the premiums paid to MLMIC for each policy.

But DFS punted on the question of who would be paid. During public comment, both the physicians who were in many cases the nominal policyholders and the practices, hospitals, and others that acted as policy administrators and paid the premiums raised their hands as prospective payees. DFS did not decide the issue; rather, it left it to be determined through dispute resolution processes, including mediation, arbitration, and court proceedings.

The First Department's decision: *Schaffer, Schonholz & Drossman, LLP v. Title*

The most definitive statement on this issue comes from the First Department.[3] The *Schaffer* court considered a radiology practice's claims for declaratory judgment seeking a determination on the rightful payee of MLMIC cash disbursement. The court not only held that the radiology practice had a viable claim for declaratory judgment but that it was, in fact, entitled to the cash disbursement. The First Department reasoned,

> Although [the provider] was named as the insured on the relevant MLMIC professional liability insurance policy, petitioner [the practice] **purchased the policy and paid all the premiums on it**. Respondent does not deny that she did not pay any of the annual premiums or any of the other costs related to the policy. **Nor did she bargain for the benefit of the demutualization proceeds.** Awarding respondent the cash proceeds of MLMIC's demutualization would result in her unjust enrichment.[4]

Until recently, *Schaffer* remained the only appellate decision on this issue.

Supreme Court decisions following *Schaffer*

While the *Schaffer* opinion was succinct, subsequent opinions from various Supreme Court proceedings have followed its logic and elaborated on its reasoning. Soon after *Schaffer,* the Supreme Court in Westchester County specifically adopted *Schaffer's* reasoning and conclusion. In *Maple Medical LLP v. Scott,* the court looked at five pending matters where one medical practice had procured an MLMIC policy for physicians as part of their employment agreements. In each instance, the practice made all premium payments on behalf of the physicians.[5]

The parties moved for summary judgment on the practice's claims for declaratory judgment, unjust enrichment, and breach of good faith/fair dealing. The court, applying *Schaffer,* held that because the practice procured, paid for, and was the policy administrator for the policies, it was entitled to the cash distribution. The court also pointed out that the physician was merely named on the policy and "did not bargain for the benefit of the Payment" of the cash disbursement. The court

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[3] *See Schaffer, Schonholz & Drossman, LLP v. Title*, 71 A.D.3d 465 (1st Dep't 2019).

[4] *Schaffer*, 71 A.D.3d at 465 (emphasis added).

[5] *Maple Medical LLP v. Scott,* 51103/2019, 2019 NYLJ LEXIS 2505, *3 (Sup. Ct. Westchester Cty. July 18, 2019).

found in favor of the practice on its claims of declaratory judgment and unjust enrichment and ordered that the cash disbursement be awarded to the practice in full, along with interest.

Two subsequent opinions are also favorable to practices getting the cash disbursement. In *Schoch v. Lake Champlain OB-GYN, P.C.,* the court considered both parties' motions for summary judgment, seeking a declaration as to whether the plaintiff physician or her former employer, a medical practice, was entitled to the MLMIC cash disbursement. The court held in favor of the practice, noting that it "controlled and maintained" the MLMIC policy through its administration, as well as having paid all of the premiums for the policy. The court ordered that judgment be entered in favor of the practice, awarding the cash disbursements as well as "interest accrued while the proceeds were in escrow, plus costs and disbursements." [6]

In another opinion from within the Third Judicial Department, *Urgent Med. Care, PLLC v. Amedure,* the defendant physician received a cash disbursement from MLMIC. The defendant moved to dismiss the practices' claims for unjust enrichment, and the motion was denied. The court noted:

> Plaintiff has stated a claim for unjust enrichment. Plaintiff paid the premiums. Plaintiff claims that but for a mistake of fact, it would be the [named] policy administrator, and it was its payments and efforts that created the proceeds from demutualization. Defendant vigorously disagrees and properly notes she has legal title to the proceeds. **Legal title does not end the inquiry** . . . Plaintiff has clearly stated [] a claim."[7]

In *Sullivan v Medical Liab. Mut. Ins. Co.,* the court granted summary judgment in favor of defendant Northwell Health, Inc. (Northwell) on its claim for declaratory judgment against the plaintiff physicians for the MLMIC cash disbursement.

Importantly, the *Sullivan* court noted that the relevant inquiry was "(1) who paid the premiums to MLMIC and (2) whether there was a bargained-for exchange *with respect to the Cash [Disbursement]* from the demutualization process."[8] It was undisputed that Northwell paid all of the policy premiums at issue. Further, despite having established that plaintiffs' insurance coverage, and even the retention of MLMIC specifically, was a bargained-for term of their employment, the court held that the absence of any evidence of a "bargained-for exchange with respect to the Cash [Disbursement]" meant that Northwell was the rightful payee of the cash disbursement.

The court also rejected the plaintiffs' argument that they were entitled to the cash disbursement under Insurance Law Section 7307(e)(3). The plaintiffs argued that because they were MLMIC "policyholders" within the meaning of Section 7307, they were conclusively entitled to the cash disbursement. The court held that such an interpretation would be contrary to the First Department's decision in *Schaffer*, which while it "did not explicitly address this issue, there, as here, the 'policyholder' (insured) was the employee-physician and nevertheless the First Department found that the employer, who had unquestionably paid the insurance premiums, was

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[6] *Schoch v. Lake Champlain OB-GYN, P.C.,* No. 2018-4228, 2019 N.Y. Misc. LEXIS 3911, *2-4 (Sup. Ct. Saratoga Cty. June 9, 2019).

[7] *Urgent Med. Care, PLLC v. Amedure,* No. 19-0121, 2019 N.Y. Misc. LEXIS 4039, *19 (Sup. Ct. Greene Cty. July 12, 2019) (emphasis added). *See also, Women's Care in Obstetrics & Gynecology, P.C. v Herrick*, 2019 NY.Misc LEXIS 5852 (Sup. Ct. Warren Cty. 2019) (applying *Schaffer a*nd *Maple Medical* in denying provider's motion for summary judgment against medical practice).

[8] *Sullivan v Medical Liab. Mut. Ins. Co.,* 2019 N.Y. Misc. LEXIS 6418, *5 (Sup. Ct. N.Y. Cty. Dec. 2, 2019).

entitled to the Cash [Disbursement]." Justice Ostrager also rejected the argument that the DFS has somehow ruled that MLMIC cash disbursements should go to the policyholders, noting "in January 2019, the Superintendent again clarified that "regardless of the parties' status as 'policy administrators' or 'designees' and regardless even of whether the monies are paid out of escrow to one party or another, nothing in the Approved Plan determines the underlying legal rights of the parties to the Cash [Disbursement.]"

In *Wyckoff Hgts. Med. Ctr. v Monroe*,[9] the court cited the foregoing decisions as determining that the entity that paid the premiums was entitled to the cash compensation offered as a result of demutualization. In his effort to get around the earlier decisions, the physician argued that the premiums paid were part of a compensation package. These arguments were previously made in *Columbia Memorial Hospital v Hinds*,[10] where the court held that the evidence clearly demonstrated that the insurance premiums were part of the physician's compensation package and thus did not rule in favor of the hospital. The *Wyckoff* court distinguished *Hinds* on the basis that the employment contract included insurance premiums as costs that were deducted from overall calculation of the physician's incentive compensation. In contrast, the employment agreement at issue in *Wyckoff* only referenced the premiums as "employment benefits," which had no bearing on the physician's compensation.

As a result, the *Wyckoff* court held that premium payments could not be considered part of the defendant's "compensation." The *Wyckoff* court further noted that "even if the premiums can be considered compensation, there is no basis to conclude that the cash compensation naturally flows to [the physician] as compensation as well. There is no basis to argue her underpayment, if true, should include cash compensation that nobody could foresee when the Employment Agreement was negotiated."

The Fourth Department's decision: *Maple-Gate Anesthesiologists, P.C. v. Nasrin, Brundin*

Aside from *Schaffer*, the only other appellate court to issue a decision on this issue is the Fourth Department. Last week, the Fourth Department issued a decision in *Maple-Gate Anesthesiologists, P.C. v. Deixy Nasrin and Douglas Brundin*, where it reached a contrary conclusion to *Schaffer*.[11]

In *Maple-Gate Anesthesiologists*, the Appellate Court based its decision on New York Insurance Law § 7307(e)(3), which provides that "when a mutual insurance company converts to a stock insurance company, the plan of conversion: 'shall . . . provide that each person who had a policy of insurance in effect at any time during the three year period immediately preceding the date of adoption of the resolution [seeking approval of the conversion] shall be entitled to receive in exchange for such equitable share, without additional payment, consideration payable in voting common shares of the insurer or other consideration, or both'." Applying this to the MLMIC Plan of Conversion, the Court noted that "[t]he plan stated that the cash distribution would be made to the policyholder unless he or she affirmatively designated a policy administrator ... to receive such amount on [his or

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[9] *Wyckoff Hgts. Med. Ctr. v Monroe*, 2020 N.Y. Misc. LEXIS 876, NY Slip Op 30529(U) (Sup. Ct. Kings Cty. February 13, 2020).

[10] *Columbia Memorial Hospital v Hinds*, 65 Misc.3d 1205(A), 2019 WL 46520674 (Sup. Ct. Columbia Cty. 2019).

[11] *See Maple-Gate Anesthesiologists, P.C. v. Deixy Nasrin and Douglas Brundin*, 2020 NY Slip Op 02389 (4th Dep't Apr. 24, 2020) ("the documentary evidence established as a matter of law that [the practice] had no legal or equitable right of ownership to the demutualization payments").

her] behalf." Because there was no documentary evidence that the physician (as the policyholder) had designated the practice to receive the distribution, the court ruled in favor of the physician.

In *dicta*, the Fourth Department also suggested that it would have rejected an equitable claim for unjust enrichment as well—expressly distinguishing itself from *Schaffer*.

Future decisions

For twelve months, the First Department's decision in *Schaffer* appeared to conclusively settle the issue of entitlement to the cash distribution squarely in the favor of whoever paid the premiums. The Fourth Department's apparent rejection of *Schaffer* has set up a split between the New York Appellate Departments that indicates the issue is far from resolved. It remains to be seen whether the Second or Third Appellate Departments will weigh in with their own decisions, or await guidance from the Court of Appeals. Until the issue is resolved, physicians and medical practices will need to pay careful attention to this developing area of law.

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