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# common SENSE

The Newsletter of the American Academy of Emergency Medicine — Volume 12, Issue 3— June 2005



## PRESIDENT'S MESSAGE

by A. Antoine Kazzi, MD FAAEM

### Star Trek 4 & The PhyAmerica Malpractice Insurance Debacle: The Humpbacked Whales and the Corporate Sharks of Emergency Medicine

In this President's Message, I would like to update you about the PhyAmerica malpractice insurance debacle which I had shared in my last President's Message. As stated at that time, the implications of this insurance travesty are critically important to our specialty, to our specialists, and to our patients. Its outcome defines the direction and outcome of any future EP group and corporate bankruptcies that could and will affect many of you!

I asked Dr. Mabley, one of the two chairs of the PhyAmerica Physicians Defense Working Group, to give you her own version of what this debacle was all about. I also invited her to share this platform to update you on the outcome of the bankruptcy proceedings.

#### The PhyAmerica Malpractice Insurance Debacle Update

On April 28, 2005, Judge E. Stephen Derby issued his final *Order* regarding the procedure for processing medical malpractice claims against PhyAmerica medical malpractice insurance policies. This order includes permanent protection of defendant physicians' personal assets, and a requirement that participation in the Alternate Dispute Resolution (ADR) process is mandatory if a plaintiff wishes to collect anything from the available remaining insurance policies. As one of our attorneys commented, "We couldn't have written a better *Order* ourselves."

This *Order* represents a victory for the defendant physicians. The PhyAmerica Physicians Defense Working Group and its physicians are tremendously grateful for the leadership and support of AAEM in the process of securing this essential *Order*. Our attorney, David Millstein, has given us great advice and representation.

Hand-in-hand with the Working Group Physicians, AAEM said, "This will not stand!" **And This Did NOT!**

The legal process allows for appeals, of course. Based on testimony during court, and on the fact that certain parties to this dispute may not be satisfied with Judge Derby's *Order*, this clearly may not be the last of this matter. Unanswered questions exist regarding the cause of the shortfall of medical malpractice insurance reserves. In addition, a handful of appeals have already been filed. We also anticipate additional ones. These may or may not interfere with the implementation of the ADR process and the final resolution for the defendant physicians of the cases of alleged medical malpractice. However, the solid *Order* that is now in place secures the best platform and line of defense we could want to counter any – now seriously compromised – attempts by plaintiff lawyers and hospitals to go after the individual EPs assets.

The article which follows, was written by Dr. Jill Mabley before the April 27, 2005, *Order* was issued. The background of this mess is detailed below, with some additional thoughts about what challenges the defendant physicians will face next after this bankruptcy Court *Order*.

This article is a follow-up report to Dr. Kazzi's President's Message, featured on page 1 of *Common Sense* in the March/April 2005 issue (Volume 12 / Issue 2). With the support of AAEM, the PhyAmerica Physicians Defense Working Group has actively participated in the proceedings of the United States Bankruptcy Court action (Baltimore Emergency Services, II, LLC, et. al., Debtors; United States Bankruptcy Court for the District of Maryland, Baltimore Division; Case Number 02-6-7576-SC through 02-6-7815-SD).

A confusing and frightening series of events led to the formation of the PhyAmerica Physicians Defense Working Group in February 2005. In September/October 2004, defendant physicians, who had been sued for alleged medical malpractice while working as PhyAmerica physicians prior to its bankruptcy declaration, received notification from the United States Bankruptcy Court that Sterling Healthcare had filed Omnibus Objection to Allowance of Certain Medical Malpractice Claims. This applied to both independent contractors and employees of PhyAmerica and any of the Staffing Companies or EP Groups that it had acquired prior to its bankruptcy. This document requested clarification by the Court of the process for holders of medical malpractice claims to seek recovery (money) from the medical malpractice insurance policies obtained on the defendant physicians' behalf by PhyAmerica. Sterling Healthcare, Inc., is the entity that purchased assets and obligations of the bankrupt PhyAmerica.

Of utmost importance to the defendant physicians was the exposure of the individual defendant physician's personal assets to recovery in a medical malpractice judgment, due to an acknowledged possible near-exhaustion of insurance reserve funds.

In November 2004, correspondence from Steptoe & Johnson, attorneys for American International Specialty Lines Insurance Company (AISLIC), to the defendant physicians, stated that regarding Sterling's Omnibus Objection: "Those dispute resolution procedures, and the possible near-term exhaustion of the Policy, may limit or negate the ability of AISLIC to pay claims asserted against persons or entities covered by the Policy."

continued on pg 2

- 1 PRESIDENT'S MESSAGE
- 3 EDITOR'S LETTER
- 9 EM CONGRESS INFORMATION
- 14 WASHINGTON WATCH
- 15 JOB BANK

## President's Message- continued from pg 1

Correspondence from Western Litigation Specialists, Inc., presented defendant physicians with the following information: "This letter serves to apprise you, on behalf of AISLIC, of certain limitations in your coverage. Additionally, we are specifically reminding you of your right to retain independent counsel, at your own discretion and expense, to represent you with regard to this potential uninsured exposure."

In other words, defendant physicians were notified that they were essentially without medical malpractice insurance coverage for their ongoing cases, and that their personal assets were at risk to pay for defense costs, settlement, or judgment.

Judge Derby issued a Court Order on December 17, 2004, that established certain guidelines and protections to be used until the final ruling. Among the protections specified in this Order was protection of the personal assets of defendant physicians from collection by holders of medical malpractice claims.

Hearings regarding Sterling's Omnibus Objection took place during late March and April 2005, in Baltimore. In the few weeks before the first hearing date, defendant physician Mike Zielinski, DO FAAEM FACEP and the AAEM leadership contacted as many of the estimated 174-200 defendant physicians as possible – a task that was made daunting due to the short amount of time we had and the inaccuracies of the Court list of physicians and its out-of-date work addresses and limited contact information.

Guided by our excellent attorney David Millstein, Esq., the Working Group raised funds for legal expenses. Unfortunately, only seven defendant physicians have so far contributed to the legal expenses. These dedicated physicians make up the actual Working Group who then led, hand-in-hand with AAEM, the charge of:

- 1) Representing the actual physicians involved in the case – and not the corporations, lawyers, stockholders, plaintiffs, insurers and hospitals that were involved, represented and resourceful!
- 2) Putting a face to the physicians' names on the list that was being circulated.

The Physicians Defense Working Group then submitted an Amicus Brief to Judge Derby on behalf of ALL defendant physicians, requesting permanent protection of ALL defendant physicians' personal assets.

Attorney David Millstein, Robert McNamara, MD, Mike Zielinski, DO, and I (Dr. Mabley) were present in the court room during the first day of the hearing. On the second and third days, Mr. Millstein participated via speaker phone while Dr. Jill Mabley was present in the court room. Two broad issues were of interest to the Court: First, determining how much money was left in the medical malpractice insurance reserves (this reserve was recognized as being inadequate to fund the amount of claims, but the extent of the under funding was not well defined) and Second, determining the process for distribution of the remaining reserves to holders of medical malpractice claims. Issues of special interest to the defendant physicians included permanent protection of physicians' personal assets and payment of defense costs, past and future. Several attorneys also raised the question of why the shortfall of insurance reserves existed. The Judge pointed out that this question was not in the province of his bankruptcy court.

Many different parties were interested in the outcome of this hearing. In addition to counsel representing Sterling Healthcare, lawyers for the bankruptcy plan, multiple insurance companies, multiple hospitals, and multiple individual plaintiffs in the medical malpractice suits were in court. As the special interests of each of these groups were argued, the inevitability of prompt initiation of the appeal process became apparent.

As we waited for the Court ruling, we were optimistic about favorable treatment for defendant physicians by Judge Derby. However, we anticipate an appeal process, which could interfere further with the implementation of the Judge's *Order* and the resolution of the pending medical malpractice cases. In addition, because of the variation of timing and details of individual medical malpractice suits, and the exceptions requested by some of the parties, making sure that each defendant physician is protected will take more time, effort, and funds.

*continued on pg 8*



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#### AAEM Mission Statement

The American Academy of Emergency Medicine (AAEM) is the specialty society of emergency medicine. AAEM is a democratic organization committed to the following principles:

1. Every individual should have unencumbered access to quality emergency care provided by a specialist in emergency medicine.
2. The practice of emergency medicine is best conducted by a specialist in emergency medicine.
3. A specialist in emergency medicine is a physician who has achieved, through personal dedication and sacrifice, certification by either the American Board of Emergency Medicine (ABEM) or the American Osteopathic Board of Emergency Medicine (AOBEM).
4. The personal and professional welfare of the individual specialist in emergency medicine is a primary concern to the AAEM.
5. The Academy supports fair and equitable practice environments necessary to allow the specialist in emergency medicine to deliver the highest quality of patient care. Such an environment includes provisions for due process and the absence of restrictive covenants.
6. The Academy supports residency programs and graduate medical education, which are essential to the continued enrichment of emergency medicine, and to ensure a high quality of care for the patient.
7. The Academy is committed to providing affordable high quality continuing medical education in emergency medicine for its members.

#### Membership Information

Fellow and Full Voting Member: \$345 (Must be ABEM or AOBEM certified in EM or Pediatric EM)

Emeritus Member: \$225 (Must be 65 years old and a full voting member in good standing for 3 years)

\* Associate membership is limited to graduates of an ACGME or AOA approved Emergency Medicine program.

\* Associate Member: \$250 (Non-voting status)

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## President's Message- continued from pg 2

A final burden for defendant physicians is that they will be entered into the National Data Bank without having been able to defend themselves, if the payment to plaintiffs via the Alternate Dispute Resolution (ADR) process exceeds the threshold for Data Bank entry. The ADR process of negotiation, mediation, and arbitration is the Court-ordered process for the distribution of the remaining insurance resources. This Court-ordered process will occur instead of jury trial. We believe that an official explanation, supported by AAEM documents, can be added to any such individual EPs' files, to explain the unfair impact of the ADR process and corporate bankruptcy on the case settlement process and the affected physician. (End of Dr. Mabley's Message)

This was a costly battle. Seven brave physicians stepped in and contributed individually to support an initiative that is of key importance to all the 174-200 others who were directly affected. This small group of volunteer physicians carried the major part of the financial burden of this initiative which provided needed representation and protection for all the others. This is really not right... and I must take a moment to urge any emergency physician, member or non-member, who was affected by this debacle to consider sharing the burden of this initiative or contributing to the legal fund. Take a close look at what was done and contact Dr. Jill Mabley at [jmabley@tds.net](mailto:jmabley@tds.net)

### Conclusion:

In AAEM, we have always promised you, our members, relevance and transparency. This stand we took with regard to this corporate

debacle is another manifestation of our AAEM commitment to keep that promise. When I addressed you in La Jolla during our Scientific Assembly, I reaffirmed this commitment. Also, in La Jolla, I heard a wonderful statement made by our Peter Rosen Leadership Award recipient, Dr. Mark Langdorf, and would like, for reasons that will be obvious, to use his words to end this message:

"When my residents graduate, they are thrown into the big bad world of corporate medicine. They go from the protected and nurturing environment of the university, and are put at the mercy of the "sharks" of the corporate world, just like the humpbacked whales were in Star Trek 4 when they were released from the aquarium. (Those of you who know me know that I've learned everything I needed to know from Star Trek). I spent an hour the other day advising one of my senior residents regarding how to hunt for a job, and most of the hour was spent telling him what and who to avoid, who would exploit him and his training for their own profit.

It should not be this way."

**Indeed, it should not be this way!** And with your help, it will not be this way! Get involved in your Academy. Support our efforts and the AAEM Foundation and Political Action Committee. We simply cannot do it without you! Thank you for your confidence in AAEM and for your support! 

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