The Transitioning Medical Professional Liability Market—Challenges in Valuing a Medical Professional Liability Company

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Likely driven by continuing health reform efforts and the flight of physicians from administrative detail and operating risk, statistics indicate that the number of physicians in private practice has declined notably over the past 10 years. By the time the Affordable Care Act was upheld by the U.S. Supreme Court on June 28, 2012, at least one industry source was estimating that the number of physicians in private practice would decrease to just over one in three by 2013. As physicians have shifted from independent operating status to employed status, in essence reducing the number of insurable physicians for certain participants in the medical malpractice insurance segment, a question regarding the continuing value of medical malpractice insurance companies naturally arises.

Introduction

Over the past decade, the medical professional liability (MPL) segment of the insurance industry, not unlike the health care industry itself, has experienced a sea of change.

After record premium increases in the first half of 2000, MPL insurance rates peaked in early 2006 and generally have declined since.

In fact, successive years of rate decreases have caused some industry participants to conclude that current MPL premium rates are approaching unprofitable levels for some insurers.

State limits, or "caps," on noneconomic damages and related MPL tort reforms are credited by many industry participants with reducing both claim frequency (the number of claims per physician or hospital bed) and claim severity (the average cost per claim), supporting the observed recent decline in MPL rates.

However, general inflationary pressures, challenges to tort reform, and societal changes—demographic as well as legislative—that will increase the demand for health care services, collectively, are expected to cause an increase in MPL rates in the near future.

Further, increasing health care needs for aging baby boomers, and the expansion of Medicaid eligibility and universal requirements for health care insurance resulting from the implementation of the Affordable Care Act (the "Act"), ultimately could result in an overburdened health care system.

Such a system would be prone to delayed diagnoses, misdiagnoses, and medical errors, potentially causing an increase in future MPL claims and/or the severity of such claims. Such circumstances would be expected to exert upward pressure on MPL rates.

This discussion identifies changes in the MPL market over the past decade, and the impact that those changes have exerted, and are expected to exert, on the value of MPL companies.

In addition, the discussion addresses some of the valuation challenges encountered with regard to the analysis of MPL companies.

Trends in the MPL Insurance Industry

Pricing Trends

Over the past decade, the MPL insurance market has faced challenging circumstances. Beginning in 1999, and as a result of significant settlement awards and court decisions, insurance companies that focused on MPL coverage experienced claim costs that exceeded established reserves. In many cases, this resulted in significant losses and reduced the capital available to support current and future business. This situation led many professional liability carriers focused on MPL coverage to withdraw from, or limit new business in, one or more markets.

In 2002, several MPL insurance companies were forced from the market due to financial difficulties. The St. Paul Companies, then the leading writer of MPL insurance, withdrew from the market. In 2003, Farmers Insurance Company exited the MPL insurance market as well.

In addition to withdrawing or limiting business in certain markets, many MPL insurance companies implemented rate increases in the early part of the decade in order to survive.

According to a study conducted by former Missouri Insurance Commissioner Jay Angoff, who analyzed the 2004 annual statements of 15 of the largest MPL insurers in the United States, the insurance carriers analyzed increased their net premiums by 120.2 percent between 2000 and 2004. These rapid rate increases have since slowed.

Medical Economics reported in their annual survey, the *2012 Exclusive Malpractice Survey*, that only 15.0 percent of respondents indicated a rate increase from 2010 to 2011. The *2011 Exclusive Malpractice Survey* also reported that only 1.0 percent of respondents indicated a rate increase from 2009 to 2010 and only 19.0 percent indicated an increase from 2008 to 2009.

Approximately 50 percent of respondents reported that their premiums decreased or stayed the same from 2010 to 2011. For family/general and internal medicine doctors, median premium decreases from 2010 to 2011 were 1.6 percent and 1.5 percent, respectively.[1]

Pricing in the MPL industry is highly cyclical, following patterns of substantial increases (hardening) and holding steady or decreasing slightly (softening). Prices increased more slowly in the last half of the 2000s than in the first, indicating that the market moved from a hardening cycle in the early part of the decade into a softening cycle in the later part.

While some market participants were forced out by difficult conditions in the early 2000s, those that remained have faced continued pressure from the softening cycle that has limited their ability to increase premiums.

However, *A.M. Best* reports that consensus in the MPL insurance industry holds that the industry will soon enter a renewed cycle of hardening. Likewise, *Property Casualty 360* reports a recent survey indicates that overall, professional liability rates likely will increase in the near future.

Despite challenges throughout the late 2000s, the MPL industry has outperformed the overall property and casualty insurance industry. The MPL insurance industry's average combined ratio after dividends for the five calendar years to 2011 was 86.2, significantly better than the overall property and casualty insurance industry combined ratio of 102.3. A combined ratio over 100.0 indicates that a company is not generating a profit on its underwriting business.

The industry reported surplus growth for eight of the nine years prior to 2012, with 2008 showing the only decline. Through 2011, gains totaled 86.0 percent from 2001 and 49.0 percent from 2006. Surplus growth in 2011 was 3.6 percent.

Increasing Hospital and Integrated Health System Employment of Physicians

A recent trend that is significantly affecting the MPL insurance industry is the consolidation of medical practices, specifically the acquisition of independent medical practices by large hospitals and integrated health systems.

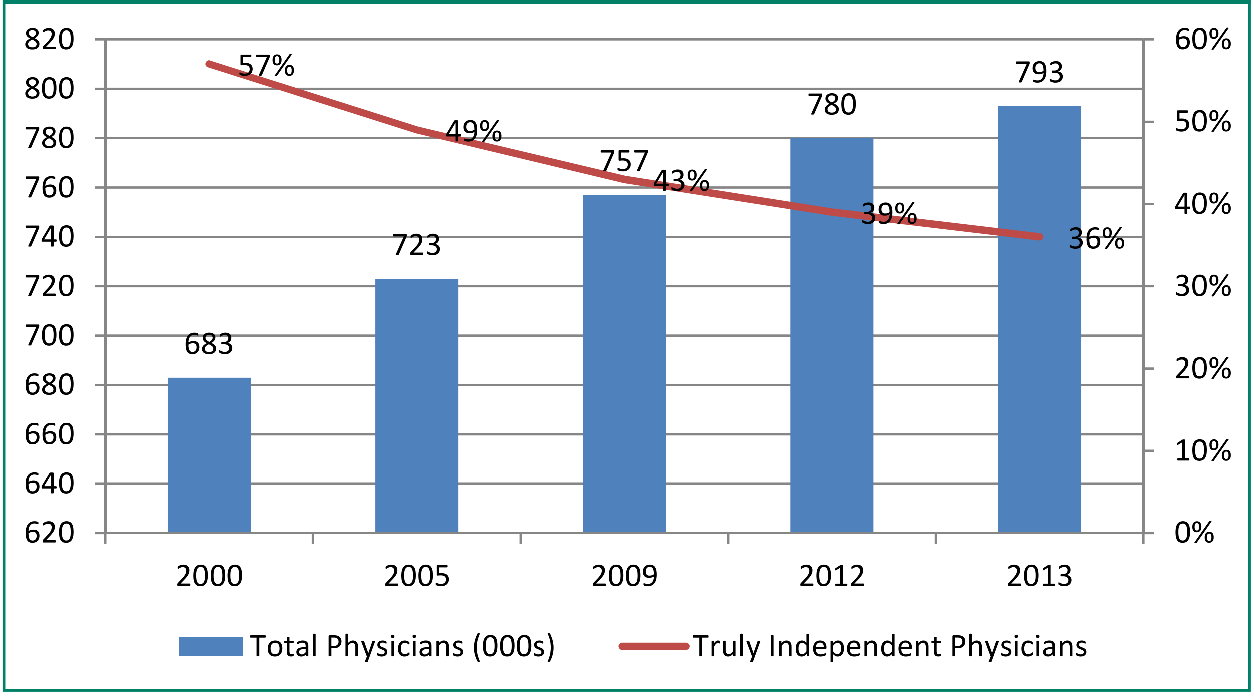
The shift in ownership is being driven by a number of economic factors, including reduced Medicare reimbursements and higher technology costs. According to estimates by the consulting firm Accenture, the number of independent doctors in the United States decreased from approximately 57 percent in 2000 to 39 percent in 2012.[2]

This trend is expected to continue. According to a survey of hospital executives conducted by staffing company Jackson Health care, 52 percent of those surveyed said their facilities planned to acquire physician practices in 2013, up from 44 percent who closed such deals in 2012.[3]

Exhibit 1 demonstrates the exodus of physicians from private practice, based on physician research conducted by Accenture.[4] Data for 2013 represent estimates.

As indicated, the number of truly independent physicians in the United States decreased from approximately 57 percent of the physician population

Exhibit 1
U.S. Physicians Continue to Leave Independent Practice



in 2000 to 39 percent in 2012. A further decline to 36 percent of the physician population is expected by the end of 2013.

In addition to hospital acquisitions, new physicians entering the market are increasingly concerned with having a more balanced live-work lifestyle, which is magnifying the shift towards hospital-employed physicians.

According to a Medical Group Management Association survey, the number of new physicians who joined hospital-owned practices exceeded the number of first-year practitioners who joined physician-owned practices in 2010.[5]

However, the United States is recruiting and training a record number of physicians. In the coming years, there is likely to be a circumstance of more physicians getting paid less on a relative basis.

Health Care Reform

Both the physician services and medical malpractice industries may benefit from health care reform and an aging population. Recent health care reform has focused on expanding insurance coverage. If successful, this is likely to spur increased demand for medical services.

Baby boomers—those born between 1946 and 1964—make up the largest segment of the American population. This group has started to retire in recent years. As this population ages, they are likely to demand increased amounts of medical services.

Increasing numbers of doctors and patients and larger primary and specialist care segments likely will increase demand for coverage by MPL insurance companies.

The Act may have other consequences for the MPL insurance industry. The Act may result in unforeseen risks for the industry, including decreased margins for practitioners, which would change the way in which they buy MPL insurance.

The effect that the Act will have on the number of health care providers that will need to purchase MPL insurance is unknown.

From one perspective, the Act is expected to drive increases in the numbers of health care providers. From another perspective, the Act may lead to increased hospital acquisitions of medical practices, decreasing the number of independent physicians requiring MPL insurance.

Legislative Issues

Tort reforms also have been an issue affecting the MPL insurance industry in recent years, and legislative measures have been increasingly positive for MPL insurance companies.

Some states have begun imposing caps on the noneconomic damages portions of lawsuit judgments. In 2011, North Carolina and Tennessee enacted reforms imposing caps of $500,000 and $750,000, respectively, while Oklahoma reduced its cap from $400,000 to $350,000.

Thirty-two states have enacted noneconomic damages caps and, of those challenged, more than two-thirds have been upheld to varying degrees in state supreme courts.[6]

The possibility of limited medical malpractice awards could make MPL insurance company acquisitions more attractive, leading to higher pricing multiples for such companies.

However, Supreme Courts in Georgia and Missouri ruled against statutory damages caps in 2010 and 2012, respectively, declaring their limit on the ability of juries to award damages unconstitutional.

Other provisions of tort reform are also important, including provisions that limit when and how practitioners may be liable. Nonetheless, some judgments can remain unpredictable. Over the past two years, there were seven cases in six states with cumulative awards totaling more than $1.0 billion.

In 2011, the six states with the highest average payouts for medical malpractice lawsuits accounted for 51.4 percent of payouts nationwide.[7]

In recent years there has been an increase in jury awards for malpractice cases in excess of $50 million per award. From March 2010 through February 2012, seven such awards collectively cost the industry over a billion dollars in damages.

These large awards are expected to continue in the near future, despite legislation in some states that caps noneconomic damages. An increase in large medical malpractice damages awards could make MPL insurance company acquisitions less attractive.

Market Impact

The increased number of physicians employed by hospitals and integrated health systems, and consequent decrease in practice-employed physicians, serves to decrease the pool of available physicians that would independently purchase medical malpractice insurance. This is because hospitals generally self-insure their physicians.[8]

The decreased pool of potential policyholders has led to an increase in the number of smaller MPL insurance companies looking to sell. The result has been consolidation in the industry.

Although one might conclude that the decreased number of physician-owned practices (i.e., potential policyholders) should decrease the value of MPL insurance companies exclusively insuring this market, this is not necessarily the case.

Consolidation in the MPL insurance industry may lead to an upward trend in insurance premiums as MPL insurance companies experience an increase in pricing power as the number of competitors decreases. Increased premium prices would mean that the surviving insurers would benefit from increasing their policyholder base.

With a decrease in the number of physician-owned practices, and an increase in the number of newly minted physicians opting for steady hospital employment, it may be difficult for large companies to increase their policyholder base organically. Therefore, potential acquisitions may be more attractive, serving to increase pricing multiples.

As previously discussed, and as presented in Exhibit 2, the number of physicians employed by physician-owned practices has decreased over the 2000 to 2012 time period. During the same period, MPL insurance companies generally have commanded higher pricing multiples of statutory surplus and revenue.

However, the increasing number of physicians being employed by hospitals and integrated health systems could also result in delayed negative consequences to MPL insurance companies.

The structure of the MPL insurance industry may change as purchasers of insurance consolidate and increase in size. The result could be hospitals and integrated health systems that have more bargaining power or the ability to form their own insurance associations.

Softening cycles in the industry tend to drive merger and acquisition activity by causing favorable buying conditions for larger companies, while hardening cycles tend to drive organic business growth by providing new market opportunities.

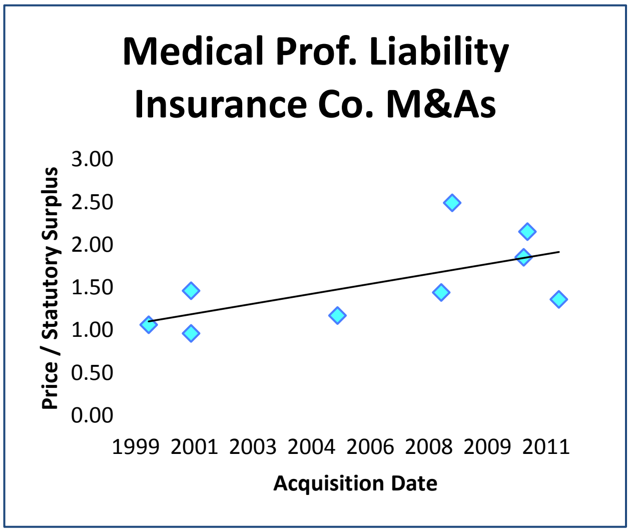
In September 2011, Medical Protective Co., announced intentions to acquire Princeton Insurance Company, with the transaction scheduled to close a few months later.

The Doctors Company Insurance Group ("Doctors Co.") acquired FPIC Insurance Group in October 2011, which helped make the company the largest writer in MPL insurance in the industry at year-end 2011. Doctors Co. previously acquired American Physicians Capital, Inc., in 2010.

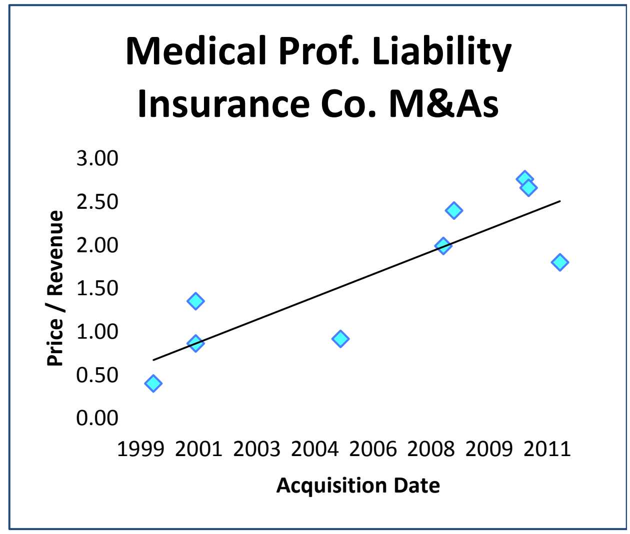
ProAssurance Group has also been active in merger and acquisition activity, with the acquisition of American Physicians Service Group, Inc., in 2010; the acquisition of Independent Nevada Doctors Insurance Exchange in late 2012; and the acquisition of Medmarc Insurance group in early 2013.

NORCAL Group moved into the top ten market participants with the purchase of Medicus Insurance Holdings, Inc., in 2011.

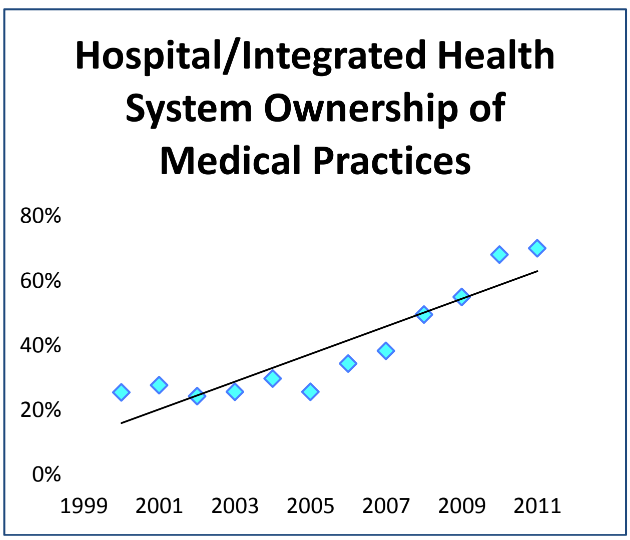
Exhibit 2



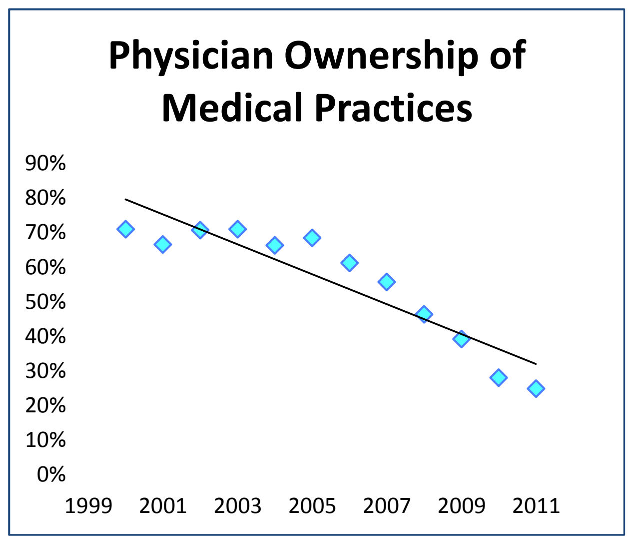
Source: Capital IQ and SEC filings 10k, 10q and 424B.



Source: Capital IQ and SEC filings 10k, 10q and 424B.



Source: Based on information from the *MGMA Physician Compensation and Production Survey* , 2001 through 2012.



Source: Based on information from the *MGMA Physician Compensation and Production Survey* , 2001 through 2012.

Nationwide in 2011, the top 100 MPL industry participants accounted for approximately 94.5 percent of direct written premiums (DWP), while the top 25 participants accounted for approximately 70.0 percent of DWP.

In 2011, the five largest market participants were represented by the following providers:

1. **Doctors Co. Insurance Group**. Accounted for 8.3 percent of 2011 market share, had DWP of $857.9 million, and reported a decrease in DWP of 3.1 percent from 2010 to 2011.
2. **Medical Protective Insurance Services**. Accounted for 8.2 percent of 2011 market share, had DWP of $846.1 million, and reported a decrease in DWP of 3.2 percent from 2010 to 2011.
3. **MLMIC Group**. Accounted for 5.5 percent of 2011 market share, had DWP of $562.7 million, and reported a decrease in DWP of 7.7 percent from 2010 to 2011.
4. **ProAssurance Group**. Accounted for 5.3 percent of 2011 market share, had DWP of $540.5 million, and reported a decrease in DWP of 3.7 percent from 2010 to 2011.

5. CNA **Insurance Companies**. Accounted for 5.0 percent of 2011 market share, had DWP of $516.3 million, and reported an increase in DWP of 0.4 percent from 2010 to 2011.

As reflected in recent operating results for the five market leading companies, DWPs generally are decreasing. Due to this current decreasing trend in organic growth, large companies are looking to acquire smaller insurers to increase their policyholder base.

As noted earlier, this trend could be a factor influencing the increase in pricing multiples paid for smaller MPL insurance companies.

MPL Insurance Company Valuation Issues

Due to circumstances unique to MPL insurance companies, a valuation analyst may find it difficult to understand the gap between non-market-based valuation conclusions and the market prices being paid for such companies. Specifically, valuation analysts may have difficulty reconciling conclusions of value resulting from the income approach and the market approach.

In general, the valuation factors outlined in Revenue Ruling 59–60 can be categorized into three Internal Revenue Service generally accepted approaches for valuing the stock of closely held companies.

These generally accepted business valuation approaches are as follows:

1. The asset-based approach
2. The income approach
3. The market approach

Perhaps the most meaningful indication of value for a particular MPL insurance company is provided by the merger and acquisition market.

A current value indication resulting from the market approach—guideline merged and acquired company method—is often particularly relevant because of the following reasons:

1. The acquisition market for sizeable MPL insurance companies has been active over the past five years
2. There are a limited number of publicly traded companies operating in the industry
3. Cash flow from MPL insurance companies may be erratic and normalized cash flow may be difficult to accurately estimate
4. The merger and acquisition market provides an indication of what companies are actually paying for MPL insurance companies
5. the merged and acquired company multiples produce meaningful value indications from an equity surplus, revenue, and income perspective

Income Approach—Difficulty Determining Normalized Cash Flow

The application of the income approach—direct capitalization method requires determining a normalized level of cash flow that a company likely will generate in the future. This basic principal often is challenging to execute in the valuation of an MPL insurance company.

One difficulty results from the manner in which MPL insurance companies present financial information. MPL insurance companies that are not publicly traded typically only produce audited financial statements in accordance with statutory accounting principles (SAP)—those principles required by the National Association of Insurance Commissioners (NAIC) and by state law that should be followed by insurance companies in submitting their financial statements to the NAIC and state insurance departments.

Such principles differ from generally accepted accounting principles (GAAP) in some important respects—for example, SAP requires that expenses must be recorded immediately. This presents a challenge for valuation analysts that typically convert GAAP basis financial statements into cash flow. However, this obstacle can be overcome through an understanding of the accounting differences.

Perhaps a more difficult issue to overcome is determining what level of cash flow an MPL insurer is likely to sustain over the long term. MPL insurers may or may not generate significant profits based solely on premiums earned from policyholders (i.e., underwriting).

It is not uncommon for an insurer to realize a combined ratio (the sum of the ratio of losses and loss adjustment expenses incurred to premiums earned plus the ratio of commissions and other underwriting expenses incurred to premiums written) of greater than 100, indicating that the company is losing money on its underwriting business.

However, a company may still generate significant investment income earned from investments on the substantial invested asset base maintained by a company.

Determining a normalized level of investment income may prove difficult in a changing interest rate environment, or an interest rate environment such as that experienced by the nation since the financial and economic crisis began in late 2008.

As with investment returns, cash flows from underwriting activity can be erratic and fluctuate significantly from year to year. Losses and loss adjustment expenses can vary from year to year, as represented by large fluctuations in the combined ratio and company profitability.

Additionally, MPL insurance companies may operate with reserve redundancies (i.e., reserves in excess of expected payout requirements) or deficiencies (reserves below expected payout requirements), and make related accounting adjustments that can significantly influence reported earnings.

Taking in loss reserves—that is, recognizing additional income—in the case of redundancies, or increasing loss reserves—that is, recognizing additional expense—in the case of deficiencies, may exert significant impact on reported earnings from year to year.

The resulting erratic historical earnings stream renders the estimation of a normalized level of expected earnings problematic.

If a valuation analyst instead looks to projected financial information to estimate future earnings, the difficulty persists due to the fact that exact reserve redundancies or deficiencies are not typically known, and loss reserve adjustments may be subject to the judgment of company management.

However, if a valuation analyst ignores the impact of all historical and projected adjustments relating to reserve redundancies, the end result may be a significant undervaluation of an MPL company. According to *Fitch Ratings Report: MPL Insurance Market Update*, industry MPL insurance loss reserves remained significantly redundant at year-end 2011.[9]

Large reserve redundancies are not typical in most other property/casualty lines, and result from steadily decreasing claims frequency coupled with litigation reforms in many states. Reserve releases over the 2007–2011 period averaged significantly higher for MPL insurance companies than for the insurance industry at large.

A valuation analyst typically must work with company management to estimate a normalized level of earnings based on consideration of a company's long-term prospects, including the following:

1. Underwriting income
2. Investment income
3. Accounting adjustments that may persist over a finite or ongoing period of time

Income Approach—Undervaluation Based on Historical and Projected Cash Flow

Another issue that a valuation analyst may encounter when applying the income approach is a large discrepancy between the value indications resulting from the following:

1. Direct capitalization or yield capitalization method
2. Guideline merged and acquired company method

One reason for this discrepancy is that the valuation pricing metric that appears to be one of the most favored by acquiring companies for the purpose of determining an offer price for a subject MPL insurance company is statutory surplus.

Recognizing that historical earnings can be misleading, acquiring companies appear to be more interested in increasing their market share and surplus base than in scrutinizing a target company's historical and projected earnings.

Additionally, acquiring companies recognize that purchasing an MPL company can be equated to purchasing a "book of business," the anticipated economic returns from which can be affected by operational changes implemented by an acquiring company.

A company's statutory surplus is the sum of paid in capital, paid-in and contributed surplus, and net earned surplus, including voluntary contingency reserves.

This surplus may be significant for the following reasons:

1. Regulatory restrictions require that companies maintain a certain level of surplus to ensure liquidity and financial stability.

2. Companies may choose to maintain excess discretionary reserves to meet unforeseen claims and expenses.
3. Companies generally generate a significant portion of income from investment returns on surplus assets.

In the valuation of an operating company, such as a manufacturer or service provider, excess cash or noncore investment assets may be added to the value conclusion resulting from the income approach (after necessary normalization adjustments are made to eliminate investment or interest income derived from returns on this excess cash or noncore investment assets).

However, in the case of an MPL insurance company, such normalization adjustments are difficult or inappropriate for the following reasons:

1. Regulators require MPL insurance companies to maintain a certain level of admitted assets, eliminating the validity of classifying them as "excess."
2. Investing significant assets is a core part of an MPL insurance company's operations, eliminating the validity of classifying such assets and returns on these assets as "noncore."

When companies carry large statutory surplus accounts, the income approach may result in value indications that are below the reported statutory surplus level of the subject company.

This result can occur when the income approach fails to account for reasonable returns on significant excess assets carried by MPL insurance companies. And, this result can occur when the income approach incorporates only conservative interest and investment income in the expected earnings stream estimated for the subject MPL company.

However, purchase prices paid by acquiring companies indicate that they consider, and in fact place great weight on, a target company's statutory surplus.

Therefore, the guideline merged and acquired company method, emphasizing a multiple of surplus approach, may produce a more meaningful indication of the value of an MPL insurance company than the income approach.

One procedure that a valuation analyst may apply to arrive at a more meaningful value indication based on the income approach would be to estimate the level of excess statutory surplus that could be distributed over time and still allow the MPL insurance company to meet regulatory requirements.

The level of expected distribution capacity could be estimated over a discrete projection period, serving to increase the projected cash flow in a discounted cash flow method and the ultimate value conclusion resulting from the method.

Market Approach—Difficulty Applying the Guideline Publicly Traded Company Method

The market approach typically is completed using the guideline publicly traded company method or the merged and acquired company method. Both methods look to the marketplace for pricing multiples based on consideration of various financial and operating metrics, including revenue, earnings, and surplus equity base.

However, the guideline publicly traded company method may be difficult to apply for the purpose of estimating the value of MPL insurance companies.

Due to consolidation in the industry, there are a limited number of publicly traded companies that generate a significant portion of revenue from providing MPL insurance services.

Over the last five years, three of the four MPL insurance companies that previously were publicly traded were acquired by Doctors Co., which is a private entity. These acquisitions have allowed Doctors Co., to become the largest medical malpractice insurer in the United States.

However, acquisitions by Doctors Co., have decreased the number of publicly traded companies in the industry available to be analyzed for the purpose of completing the guideline publicly traded company method.

The second largest medical malpractice insurer, Medical Protective Insurance Services, is a subsidiary of the much larger publicly traded company, Berkshire Hathaway, Inc. Of the five largest medical malpractice insurance companies, only one, ProAssurance Corporation, is independent and publicly traded.

However, the recent industry consolidation that has rendered the guideline publicly traded company method less applicable has also provided for a robust merger and acquisition marketplace that reasonably can be relied upon to complete the guideline merged and acquired company method.

Over the last five years, at least five large medical malpractice and professional liability insurance companies have been acquired, for which information is publicly available.

Board of Directors' Responsibility

During periods of consolidation activity in certain industries, such as the consolidation that has occurred within the MPL industry over the past five to seven years, companies often receive unsolicited acquisition offers.

While an offer may, initially, seem quite appealing from an internal perspective, based on consideration of the historical and prospective results of operation for a particular MPL company, the reasonableness, or "fairness," of a particular offer from a financial perspective can only be established based on the application of a rigorous, independent valuation analysis.

This analysis typically includes an examination of economic and market conditions, including recent, relevant acquisition activity in the MPL industry segment.

Further, if a particular MPL company is a particularly attractive acquisition target, based, for example, on consideration of financial performance and/or market position, it may be necessary to expose the MPL company to the market as an acquisition target.

If the board of the MPL company has concluded that the sale of the company is in the best financial interest of the organization and its shareholders/policyholders, basing the sale of the company on negotiations with a single suitor may not satisfy fiduciary obligations regarding the board's responsibility to ensure that the best price and terms were obtained.

Conclusion

Over the past decade, the MPL insurance industry segment has been affected by numerous factors that require current consideration when the question of value arises with regard to an MPL company.

While MPL rates generally have declined over the past five years, changing circumstances in the health care industry, an increase in demand for health care services resulting from the aging baby-boomer population, and the impact of health care reform, are expected to exert upward pressure on MPL rates in the near term.

Generally accepted valuation practice requires consideration of all three valuation approaches. However, and based on challenges with regard to estimating normalized earnings for an MPL company, transactional data may produce the most meaningful indications of value.

For this reason, and assuming the ability to identify and analyze relevant transactions, the market approach to value, through completion of the guideline merged and acquired company method, may produce a more meaningful and reliable value conclusion than the income approach or cost approach.

Further, and based again on consideration of challenges associated with estimating a normalized level of long-term earnings for a particular MPL company, a well-reasoned multiple of surplus or revenue may produce the most reliable value indication.

Notes:

1. "Malpractice Premiums: For Most, the Slide Continues," *Medical Economics* (November 25, 2012).
2. "A Hospital War Reflects a Bind for Doctors in the U.S.," *The New York Times* (November 30, 2012).
3. Sue Ter Maat, "Hospital Interest in Acquiring Physician Practices Grows," *American Medical News* (April 1, 2013).
4. "More U.S. Doctors Leaving Private Practice Due to Rising Costs and Technology Mandates, Accenture Report Finds," http://newsroom.accenture.com/news (October 31, 2012).
5. "Risk Managers Tackle Challenges of Hospital Acquired Physician Practices," *Risk Management Reporter* 31, no. 2 (April 2012).
6. "MPL Outperforms, But Is This Sustainable?" *Best's Special Report: U.S. MPL* (May 1, 2012).
7. Ibid.
8. According to an article in *Business Insurance* (Matt Dunning, *Business Insurance* 46, no. 41 (October 22, 2012): 4), approximately 80 percent of hospital risk managers surveyed in the ASHRM/Aon study indicated their facility self-insures physicians against medical malpractice exposures.
9. "Fitch: MPL Insurance Underwriting Performance Expected to Decline," *Business Wire* (May 8, 2012).

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