

THIS IS A CLAIMS MADE POLICY WHICH APPLIES ONLY TO ANY CLAIM FIRST MADE AGAINST THE INSURED PERSONS DURING THE POLICY PERIOD. THE LIMITS OF LIABILITY AVAILABLE TO PAY DAMAGES OR SETTLEMENTS SHALL BE REDUCED AND MAY BE EXHAUSTED BY PAYMENT OF DEFENSE EXPENSES.

HOMELAND INSURANCE COMPANY OF NEW YORK

**“D.I.C.” EXCESS INDEMNITY POLICY
FOR HEALTHCARE ORGANIZATIONS**

In consideration of the payment of the premium, and in reliance on all statements made and information furnished to Homeland Insurance Company of New York (hereinafter called the “Underwriter”), and subject to all of the terms, conditions and endorsements of this Policy, the Underwriter and the Insured Person(s) agree as follows:

I. INSURING AGREEMENT

The Underwriter will provide the **Insured Persons** with insurance excess of the **Underlying Insurance** for **Claims** first made during the **Policy Period** against the **Insured Persons** for **Wrongful Acts**. If **Loss** from any such **Claim(s)** is not paid by the **Underlying Insurance** or as indemnification, the Underwriter will pay covered **Loss** on behalf of the **Insured Persons**, subject to all of the terms, conditions (including, without limitation, **CONDITION (F)**) and limitations of this Policy.

II. DEFINITIONS

(A) **“Claim”** means:

- (1) any written demand for monetary, non-monetary or injunctive relief;
- (2) any civil judicial proceeding in a court of law or equity;
- (3) any civil, administrative or regulatory proceeding, or investigation against an **Insured Person**; or
- (4) any written request to toll or waive any statute of limitations.

(B) **“Company”** means the **Parent Company** and/or any **Subsidiary**.

(C) **“Defense Expenses”** means the reasonable and necessary fees, costs and expenses incurred by an **Insured Person** in the investigation, adjustment, defense or appeal of a **Claim**; but, **Defense Expenses** shall not include remuneration, salaries, overhead,

fees, loss-of-earnings reimbursement, or benefit expenses of the **Company**.

- (D) “**EMTALA Fines**” means fines levied against an **Insured Person** for violations of the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C.A. 1395dd *et seq.*, or any similar state or local law or regulation.
- (E) “**Insured Person**” means:
- (1) any past, present or future director or officer of the **Company**, and any person serving in a functionally equivalent role for the **Parent Company** or any **Subsidiary** operating or incorporated outside of the United States;
 - (2) any employee, volunteer, trustee, member manager, faculty member, member of the medical staff or member of any duly constituted committee of the **Company**; and
 - (3) the lawful spouse, or spousal equivalent, of any person described in (1) or (2) above, but only to the extent such spouse or spousal equivalent is a party to any **Claim** solely in his/her capacity as a spouse or spousal equivalent of such person, and only for the purpose of any **Claim** seeking damages recoverable from marital community property, property held jointly by such person and such spouse or spousal equivalent, or property transferred from such person to such spouse or spousal equivalent.

In the event of the death, incapacity or bankruptcy of an **Insured Person**, a **Claim** against the estate, heirs, legal representatives or assigns of such individual for a **Wrongful Act** by such individual shall be considered a **Claim** against the **Insured Person**.

- (F) “**Loss**” means any amount, including **Defense Expenses**, which an **Insured Person** is obligated to pay as a result of a **Claim**, including but not limited to punitive or exemplary damages where insurable under applicable law, and **EMTALA Fines** in an amount not to exceed \$150,000 in the aggregate for all such **EMTALA Fines** during the **Policy Period**, which amount is part of, and not in addition to, the Limit of Liability set forth in ITEM 3 of the Declarations.

Loss shall not include:

- (1) reimbursements or disgorgements, regardless of the nature of the conduct or action that is the basis for such reimbursements or disgorgements;
- (2) taxes, fines (other than **EMTALA Fines**), penalties, regardless of the nature of the conduct or action that is the basis for the imposition of any such taxes, fines

or penalties. (For purposes of this Policy, an award of punitive or exemplary damages shall not be considered a “fine or penalty”);

- (3) the multiple portion of any multiplied damage award;
- (4) costs incurred to comply with any order for injunctive or other non-monetary relief, to to comply with an agreement to provide any such relief; and
- (5) matters which are uninsurable under the law pursuant to which this Policy is construed.

For the purposes of determining the insurability of punitive damages, the law of the jurisdiction most favorable to the insurability of such damages will apply, provided such jurisdiction has a substantial relationship to the relevant **Insured Person(s)**, to the **Company**, or to the **Claim** giving rise to such damages.

- (G) “**Outside Entity**” means any organization exempt from tax under Section 501(c) of the United States Internal Revenue Code (as amended) of which any **Insured Person** serves as a director or officer, but only if such service is at the direction of the **Company**.
- (H) “**Parent Company**” means the entity named in ITEM 1 of the Declarations.
- (I) “**Policy Period**” means the period from the Inception Date to the Expiration Date in ITEM 2 of the Declarations, or to any earlier cancellation date.
- (J) “**Subsidiary**” means any corporation during any time in which the **Parent Company** has, directly or through one or more **Subsidiaries**, the right to elect or appoint more than fifty percent (50%) of the directors, trustees or managers.
- (K) “**Underlying Insurance**” means all policies scheduled in ITEM 4 of the Declarations and any policies renewing or replacing them
- (L) “**Wrongful Act**” means any actual or alleged error, omission, misstatement, misleading statement, breach of duty or negligent act by an **Insured Person** in his or her capacity as such, or as a director or officer of an **Outside Entity**, but only during such time that such service is at the direction of the **Company**.

III. EXCLUSIONS

- (A) Except for **Defense Expenses**, the Underwriter will not pay **Loss** in connection with any **Claim**:

- (1) by or at the behest of, or in the name or right of, the **Company** or any **Outside Entity**; provided, that this Exclusion (A)(1) shall not apply:
 - (a) to any **Claim**, whether direct or in the form of a derivative action, by a security holder of the **Company** or such **Outside Entity** acting independently and without the solicitation or assistance of the **Company**, such **Outside Entity**, or any **Insured Person**; or
 - (b) to any **Claim** brought by a Trustee in Bankruptcy or Examiner of the **Company** or such **Outside Entity**, or any assignee of such Trustee or Examiner, or any Receiver, Conservator, Rehabilitator or Liquidator, or any comparable authority of the **Company** or such **Outside Entity**.
 - (2) brought about or contributed to by any dishonest or fraudulent act or omission or any criminal act or omission or any willful violation of any statute, rule or law by an **Insured Person**, or by an **Insured Person** gaining any personal profit, remuneration or advantage to which he or she was not legally entitled; provided, that
 - (a) the existence of allegations in a **Claim** which, if proven, would be subject to this Exclusion (A)(2) shall not affect the right of the **Insured Persons** to the current payment of **Defense Expenses**; and
 - (b) this Exclusion (A)(2) shall not apply unless such fraudulent act or omission criminal act or omission, willful violation of statute, rule or law, or gaining of personal profit, remuneration or advantage is established by a final adjudication in any judicial or administrative proceeding or by admission of an **Insured Person**. If it is determined by a final adjudication that this Exclusion (A)(2) applies to any **Claim** against an **Insured Person**, such **Insured Person** will repay the Underwriter any **Defense Expenses** paid on his or her behalf in connection with such **Claim**.
- (B) The Underwriter will not pay **Loss**, including **Defense Expenses**, in connection with any **Claim**:
- (1) for bodily injury, sickness, disease or death of any person, or for damage to or destruction of any tangible property including loss of use thereof;
 - (2) based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving:
 - (a) any prior or pending civil, criminal, administrative or regulatory proceeding as of the Inception Date in ITEM 2(a) of the Declarations, or any fact,

circumstance, situation, transaction, event or wrongful act underlying or alleged in any such prior or pending civil, criminal, administrative or regulatory proceeding; or

- (b) any fact, circumstance or situation which was the subject of any notice given before the Inception Date in ITEM 2(a) of the Declarations under any policy of insurance; or
- (3) against the **Insured Persons** of any **Subsidiary** in their capacities as such, for any **Wrongful Act** committed during any time in which such entity is not a **Subsidiary**.

For purposes of determining the applicability of the exclusions above, no **Wrongful Act** of any **Insured Person** shall be imputed to any other **Insured Person**.

IV. CONDITIONS

(A) Notice:

- (1) As a condition precedent to the right of the **Insured Persons** to payment under this Policy, the **Insured Persons** or the **Company** must give the Underwriter written notice by certified mail of any **Claim** as soon as practicable after it is first made, but in no event later than thirty (30) days after the Expiration Date set forth in ITEM 2(b) of the Declarations (or the expiration of any Discovery Period, if applicable).
- (2) If an **Insured Person** or the **Company** becomes aware of any circumstances which may subsequently give rise to a **Claim** against any **Insured Person** and, prior to the Expiration Date set forth in ITEM 2(b) of the Declarations, gives the Underwriter written notice by certified mail of such circumstances with full particulars of the specific **Wrongful Act** involved, then any **Claim** subsequently made against an **Insured Person** arising out of such **Wrongful Act** shall be deemed to have been made during the **Policy Period**.

(B) Interrelationship of Claims:

All **Claims** based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same or related facts, circumstances or situations, or the same or related series of facts, circumstances or situations, shall be deemed to be a single **Claim** made at the time the earliest such **Claim** was first made, or at the time notice thereof was first given under Condition (A), whichever occurred first.

(C) **Defense and Settlement of Claims:**

It shall be the duty of the **Insured Persons** and not the duty of the Underwriter to defend **Claims**. No **Defense Expenses** shall be incurred and no settlement of any **Claim** shall be made without the Underwriter's consent, such consent not to be unreasonably withheld. The Underwriter, at its option, may associate in the defense or settlement of any **Claim**.

(D) **Advancement of Defense Expenses; Payment of Loss:**

- (1) Upon written request, the Underwriter will pay on a current basis any **Defense Expenses** for which this Policy provides coverage.
- (2) Except for such **Defense Expenses**, the Underwriter shall pay or reimburse **Loss** only upon the final disposition of any **Claim**.

(E) **Limit of Liability:**

The amount stated in ITEM 3 of the Declarations shall be the maximum aggregate Limit of Liability of the Underwriter for all **Loss**, regardless of the time of payment by the Underwriter, and regardless of whether the **Claim** or **Claims** giving rise to such **Loss** shall be first made during the **Policy Period** or during any Discovery Period. **Defense Expenses** shall be part of and not in addition to such Limit of Liability, and payment of **Defense Expenses** by the Underwriter shall reduce such Limit of Liability. The Underwriter will have no obligation to pay **Loss**, including **Defense Expenses**, after the **Limit of Liability** has been exhausted by the payment of **Loss**, including **Defense Expenses**. If the **Limit of Liability** is exhausted by the payment of **Loss**, including **Defense Expenses**, the premium will be fully earned.

(F) **Nature of Coverage; Other Insurance and Indemnification:**

All coverage under this Policy is excess over, and will not contribute with, all other insurance and indemnification to which an **Insured Person** is entitled, and the premium for this Policy has been calculated accordingly. However, if **Loss** is not paid by such other insurance or as indemnification, this Policy will respond on behalf of the **Insured Persons** as if it were primary, subject to all of its terms, conditions and limitations and without prejudice to the Underwriter's excess position. By so responding, the Underwriter does not waive, compromise or release its right to recover **Loss** paid under this Policy from the issuers of any other insurance under which coverage may be owed, or from any person or entity from which an **Insured Person** is entitled to indemnification. To that end, the **Insured Persons** and the **Company** agree with the Underwriter that:

- (1) all coverage under this Policy shall be specifically excess over, and shall not contribute with:
 - (a) any directors' and officers' liability and other similar insurance, and
 - (b) other existing insurance, including but not limited to any insurance under which there is a duty to defend;

whether such other insurance is stated to be primary, contributing, excess, contingent or otherwise; provided, that this Policy shall not be subject to the terms of any other insurance; and

- (2) all coverage under this Policy shall also be specifically excess over, and shall not contribute with, all indemnification to which an **Insured Person** may be entitled from any source, including but not limited to the **Company**.

(G) Cooperation, Assignment and Subrogation:

- (1) In the event of a **Claim**, or after giving the Underwriter notice of circumstances which may subsequently give rise to a **Claim**, the **Insured Persons** and the **Company** will provide the Underwriter with all information, assistance and cooperation as the Underwriter may reasonably request. The **Insured Persons** and the **Company** shall give notice and request coverage in respect of such **Claim** or circumstances under such other policy or policies of insurance as may be available or as the Underwriter may reasonably require, including but not limited to any policy or policies of directors' and officers' liability insurance. The **Insured Persons** further agree that, if a **Claim** is made, they will promptly seek indemnification in respect of such **Claim** from the **Company** and from such other sources as the Underwriter may reasonably require.
- (2) The **Insured Persons** and the **Company** will do nothing that may prejudice the Underwriter's position or the Underwriter's potential or actual rights of recovery in the event of a **Claim**.
- (3) In the event of payment under this Policy, the Underwriter shall be subrogated to, and entitled to an assignment of, all of the rights of recovery therefor of the **Insured Persons**, including without limitation their rights of recovery (a) under any other insurance, including but not limited to any policy or policies of directors' and officers' liability insurance, and (b) against any entity, including but not limited to the **Company**, for nonpayment of indemnification. The **Insured Persons** shall execute all papers and shall do everything that may be necessary to secure such rights, including the execution of such documents as

may be necessary to enable the Underwriter effectively to pursue and enforce such rights and to bring suit in their name.

(H) Cancellation:

- (1) The Underwriter may cancel this Policy only for failure to pay a premium when due, and then only by mailing or delivering to the **Parent Company** written notice stating when, not less than ten (10) days thereafter, such cancellation shall be effective.
- (2) Except as provided in Condition (J), the **Parent Company** may cancel this Policy by mailing the Underwriter written notice stating when, not later than the Expiration Date set forth in ITEM 2(b) of the Declarations, such cancellation shall be effective, and the earned premium shall be computed in such event in accordance with the customary short rate table and procedure. Premium adjustment may be made either at the time cancellation is effective or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.
- (3) The Underwriter shall not be required to renew this Policy upon its expiration.

(I) Discovery Period:

- (1) If this Policy is not renewed for any reason, the **Company** and the **Insured Persons** shall have the right to purchase an extension of the coverage granted by this Policy (a "Discovery Period"), but only with respect to any **Wrongful Act** committed before the effective date of such non-renewal or the date of any conversion of coverage under Condition (J), whichever is earlier. In order to purchase a Discovery Period, the **Company** and/or the **Insured Persons** must provide written notice by certified mail to the Underwriter within thirty (30) days of the non-renewal requesting a Discovery Period, and must pay any additional premium required by the Underwriter in its sole discretion promptly when due.
- (2) If a Discovery Period is purchased in accordance with Condition (I)(1) above, any **Claim** made during such Discovery Period shall be deemed to have been made during the **Policy Period**. The Underwriter's Limit of Liability in respect of **Claims** made during the Discovery Period shall be part of, and not in addition to, the Underwriter's Limit of Liability for all **Claims** made during the **Policy Period**.

(J) **Mergers and Acquisitions:**

If, during the **Policy Period**, the **Parent Company**:

- (a) acquires any assets, acquires a **Subsidiary** or acquires any entity by merger and, at the time of such transaction, the assets so acquired or the assets of the entity so acquired exceed twenty percent (20%) of the total assets of the **Company** as reflected in the **Company's** most recent audited consolidated financial statements; or
- (b) assumes any liabilities and, at the time of such assumption, the liabilities so assumed exceed twenty percent (20%) of the total liabilities of the **Company** as reflected in the **Company's** most recent audited consolidated financial statements;

(in any such case, a "Transaction"), such entity will be included within the term "**Subsidiary**" for a period of ninety (90) days after the date of such Transaction. There will be no coverage under this Policy in respect of any **Claim** against the **Insured Persons** of such entity which is first made more than ninety (90) days after the date of such Transaction unless the Underwriter has received written notice containing full details of such Transaction and the Underwriter, in its sole discretion, has agreed to provide such coverage upon such terms, conditions and limitations of coverage and such additional premium in connection with the foregoing as it may require.

(K) **Conversion of Coverage Under Certain Circumstances:**

Immediately upon the occurrence of any of the following events:

- (1) the acquisition of the **Parent Company** or of all or substantially all of its assets by another entity, or the merger or consolidation of the **Parent Company** into or with another entity such that the **Parent Company** is not the surviving entity, or
- (2) the appointment of a receiver, conservator, trustee, liquidator or rehabilitator, or any similar official, for or with respect to the **Parent Company**, or
- (3) any transaction or event as a result of which any person, entity or affiliated group of persons or entities has the right to elect or appoint more than fifty percent (50%) of the directors, trustees or managers of the **Parent Company**;

coverage under this Policy shall continue with respect to **Claims** for **Wrongful Acts** committed before such event, and coverage shall cease with respect to **Claims** for **Wrongful Acts** committed after such event. After any such event, the Policy may not

be canceled, and the entire premium for the Policy shall be deemed fully earned. The occurrence of any of the foregoing events shall not affect the right of the **Company** or the **Insured Persons** to purchase a Discovery Period under Condition (I) above.

(L) **Exhaustion:**

If the Limit of Liability is exhausted by the payment of **Loss**, including **Defense Expenses**, any and all obligations of the Underwriter under this Policy shall be completely fulfilled and extinguished, and the Underwriter shall have no further obligations of any kind or nature whatsoever under this Policy.

(M) **Entire Agreement:**

For purposes of this Policy, "Application" means the application attached to and forming part of this Policy, including any materials submitted in connection with such application, which are on file with the Underwriter and are a part of this Policy, as if physically attached. The **Insured Persons** and the **Company** agree that this Policy, including the Application and any endorsements, constitute the entire agreement existing between them and the Underwriter or any of its agents relating to this insurance.

(N) **Representations; Severability:**

The **Insured Persons** and the **Company** represent that the particulars and statements contained in the Application are true, accurate and complete, and agree that this Policy is issued in reliance on the truth of that representation, and that such particulars and statements, which are incorporated into and constitute a part of this Policy, are the basis of this Policy and are material to the Underwriter's acceptance of this risk. No knowledge or information possessed by any **Insured Person** shall be imputed to any other **Insured Person** to determine whether coverage shall be available.

(O) **No Action Against the Underwriter:**

- (1) No action shall be taken against the Underwriter unless, as conditions precedent thereto, there shall have been full compliance with all of the terms of this Policy and the amount of the obligation of the **Insured Persons** to pay shall have been finally determined either by judgment against the **Insured Persons** after adjudicatory proceedings, or by written agreement of the **Insured Persons**, the claimant and the Underwriter.
- (2) No person or entity shall have any right under this Policy to join the Underwriter as a party to any **Claim** against an **Insured Person** to determine the liability of such **Insured Person**; nor shall the Underwriter be impleaded by an **Insured**

Person or his or her legal representative in any such **Claim**. Bankruptcy or insolvency of any of the **Insured Persons** or of any of their estates shall not relieve the Underwriter of any of its obligations hereunder.

(P) **Authorization and Notices:**

Unless otherwise expressly agreed in writing, the **Parent Company** shall act on behalf of the **Insured Persons** with respect to all matters under this Policy, including but not limited to the receipt of notices and other communications and any return premiums.

(Q) **Changes:**

Notice to any agent or knowledge possessed by any agent or other person acting on behalf of the Underwriter shall not effect a waiver or change in any part of this Policy or estop the Underwriter from asserting any right under the terms, conditions and limitations hereof; nor shall the terms, conditions and limitations hereof be waived or changed except by written endorsement issued to form a part of this Policy.

(R) **Assignment:**

No assignment of interest under this Policy or of any claim or cause of action against the Underwriter arising out of its performance of, or alleged failure to perform in accordance with, the terms and conditions of this Policy shall be effective without the Underwriter's written consent.

(S) **Headings:**

The descriptions in the headings and sub-headings of this Policy are solely for convenience, and form no part of the terms and conditions of coverage.

In witness whereof the Underwriter has caused this Policy to be executed on the Declarations Page.