



CREATION OF THE NEW YORK STATE MEDICAL INDEMNITY FUND

By **Barbara D. Goldberg**

On March 31, 2011, the New York State Legislature passed a budget which provides for the creation of the New York State Medical Indemnity Fund, the purpose of which is to “provide a funding source for future health care costs associated with birth related neurological injuries.” The legislation is effective immediately, and is applicable to all actions for birth related neurological injury where no judgment had been entered or the parties had not entered into a settlement agreement before April 1, 2011. Some of the key provisions are as follows:

“Birth related injury” is defined as “an injury to the brain or spinal cord of a live infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation or by other medical services provided or not provided during delivery admission that rendered the infant with a permanent and substantial motor impairment or with a developmental disability . . . or both.” It should be emphasized that the law is limited to *birth-related* injuries. Therefore, it is inapplicable to other infants who suffer neurological impairment, such as the infant plaintiff in *Desiderio v. Ochs*, 100 N.Y.2d 159 (2003), who suffered devastating neurological injuries following surgery to replace a ventriculo-peritoneal shunt. Future medical expenses for this class of plaintiffs will continue to be paid by defendants and their insurers.

“Qualifying health care costs,” in turn, are defined as the “future medical, hospital, surgical, nursing, dental, rehabilitation, custodial, durable medical equipment, home modifications, assistive technology, vehicle modifications, prescription and non-prescription medications, and other health care costs actually incurred for services rendered to and supplies utilized by qualified plaintiffs, which are necessary to meet their health care needs as determined by their treating physicians, physician assistants, or nurse practitioners. . . .”

Thus, the legislation encompasses all the items of special damages (with the exception of lost earnings) typically included in a plaintiff’s Life Care plan. Going forward, these items, which often account for the most significant portion of an award in a case involving neurological impairment at birth, will be paid from the Medical Indemnity Fund rather than by defendants or their insurers.

A **“Qualified Plaintiff”** is one who has been found by a jury or court to have sustained a birth-related neurological injury as the result of medical malpractice, or who has sustained such an injury and has settled his or her claim.

Effect of Collateral Source Payments: Payments from the Fund will be reduced by collateral source payments as defined by CPLR § 4545(a); such payments “shall not constitute a qualifying health care cost and shall not be paid from the fund.” Payments from Medicare or Medicaid are excluded from the definition of collateral source, which is consistent with the role of these entities as secondary payers.

Calculation of Qualifying Health Care Costs: With respect to services provided in private physician practices, qualifying health care costs will be calculated “on the basis of one hundred percent of the usual and customary rates, as defined by the Commissioner in regulation.” Payments with respect to all other services “shall be calculated on the basis of Medicaid rates of reimbursement, or where no such rates are available, as defined by the Commissioner in regulation.”

Settlement Agreements and Judgments: Of particular significance, every settlement agreement for birth-related injury subject to the legislation that provides for the payment of future medical expenses “shall provide that in the event the administrator of the fund determines that the plaintiff or claimant is a qualified plaintiff, all payments for future medical expenses *shall be paid in accordance with this title, in lieu of that portion of the settlement agreement that provides for payment of such expenses.*” (emphasis added). Moreover, “[w]hen such a settlement agreement does not so provide, *the court shall direct the modification of the agreement to include such term as a condition of court approval.*” (emphasis added). Likewise, where a court or jury has made an award for future medical expenses, *any party to the action* “may make application to the court that the judgment reflect that, in lieu of that portion of the award that provides for payment of such expenses, and upon a determination by the fund administrator that the plaintiff is a qualified plaintiff, the future medical expenses of the plaintiff shall be paid out of the fund in accordance with this title. Upon a finding by the court that the applicant has made a prima facie showing that the plaintiff is a qualified plaintiff, the court shall ensure that the judgment so provides.”

Thus, while future medicals and the like will still be included in a settlement agreement or submitted to the jury as items of damages, they will now be paid from the Medical Indemnity Fund. Moreover, a defendant, upon notice to the plaintiff, may make an application to have the plaintiff enrolled in the Fund by providing a certified copy of the judgment or court-approved settlement agreement.

Role of Health Insurers: Health insurers (other than Medicare and Medicaid) will now be the primary payers of qualifying health care costs of qualified plaintiffs, and costs will be paid from the Fund only to the extent that health insurers or other collateral source payers are not otherwise obligated to make payments. Health insurers making such payments will not have a lien against the Fund or against any person or entity.

Protection for Defendants: Except as provided in the legislation, no defendant or defendant’s insurer will be required to pay for qualifying health care costs and no judgment may be entered requiring that any such payment be made by a defendant or its insurer.

Attorneys' Fees: Although payments for future medical expenses will be made from the Fund, they will still be included in calculating the plaintiff's attorney's fee, which "shall be based upon the entire sum awarded by the jury . . . or the full sum of the settlement, as the case may be." The attorney's fee will be paid in a lump sum pursuant to Judiciary Law § 474-a (the sliding scale); however, "the portion of the attorney fee that is allocated to the non-fund elements of damages shall be deducted from the non-fund portion of the award in a proportional manner." The "non-fund elements of damages" include pain and suffering and lost earnings, since the legislation does not otherwise provide for lost earnings.

The payment of future medical expenses from the Fund should result in significant savings for defendants and their insurers, since it will no longer be necessary to purchase an annuity to make future payments for qualifying medical expenses. As indicated, however, the plaintiff's attorney is still entitled to a fee based on the amount of the future medical expenses, as well as the non-fund elements of damages, and accordingly this is a cost to the defendant that must be factored into settlement discussions. Beyond this, it is difficult, at this early stage, to predict what other impact the Fund will have on the trial and settlement of medical malpractice cases involving birth related neurological impairment. How the Fund will actually operate in practice remains to be seen, and will likely depend in large part on its implementing regulations.

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