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Lawyers Await Specific Regulations on Infant Medical Malpractice Fund

Joel Stashenko, New York Law Journal | April 20, 2011

ALBANY - Although Governor Andrew M. Cuomo failed to win caps on non-economic damages in medical malpractice cases in his first budget, he did succeed in creating a new fund to pay medical expenses for infants who are neurologically damaged due to medical mistakes.

Proponents of the new fund say it will offer the best of both worlds when it goes into effect on Oct. 1 by allowing medical costs to be provided on an annual basis to injured parties, whose parents or guardians can pursue medical malpractice actions on the basis of emotional distress and other losses.

Between 150 and 200 babies are expected to qualify annually for the new fund, according to Jason Helgerson, Mr. Cuomo's chief Medicaid reform adviser.

Participation in the fund is mandatory to those seeking either Medicaid recompensation or filing medical malpractice suits.

Mr. Helgerson, whom Mr. Cuomo hired away from the state of Wisconsin, said the new health-care vehicle will be more accurate in providing care for injured infants and not subject to what he called the "conservative" estimates made by judges and juries trying to arrive at an accurate figure for health-care costs under the current malpractice award system.

Mr. Helgerson said courts tend to err on the side of victims when calculating medical costs 10 or more years down the road, in part because better and more expensive medical treatments regularly become more available.

"Almost always, the court is going to be incorrect because it is very difficult to project the length of a child's life, and the changes in technology or treatment," Mr. Helgerson said. "The court tends to be quite conservative and, as a result, we think that courts tend to over-allocate for the children's health-care needs. When you do it on a pay-as-you-go basis, like this approach does, we think we will save money."

Under the new statute, Public Health Law §2999-h[1], the fund describes "birth-related neurological injuries" 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."

Medical care will be decided on a case-by-case basis. In the event the fund is reduced to 20 percent or less of its annual size, the law contains a default stipulation allowing suits to be brought for medical expenses.

The services of some health-care professionals, such as home health aides, are to be paid according to the prevailing Medicaid rate, which opponents said would prohibit many patients from getting the top-notch treatment they deserve.



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The newly created entity that will emerge from the combination of the state insurance and banking departments, which was also created in the new budget, will be responsible for administering the fund. Regulations about claims and disbursement will be worked out in the coming weeks by the new state office, Mr. Helgerson said.

Public Scrutiny

Opponents of the fund countered that the system was championed by health-care providers and will subject the families of neurologically damaged infants to on-going battles with the state for treatments as their children age.

The establishment of the fund was included in a host of recommendations by a Medicaid Redesign Team (MRT) appointed by Mr. Cuomo to halt escalating Medicaid costs. Its proposals led to some \$2.4 billion in cost-savings on Medicaid in the 2011-12 budget.

<http://www.nylj.com/nylawyer/adgifs/decisions/022811medicaidproposal.pdf>

http://www.health.ny.gov/health_care/medicaid/redesign/docs/descriptions_of_recommendations.pdf

Another recommendation from the task force called for capping noneconomic damages in medical malpractice cases at \$250,000, a proposal fiercely opposed by the New York State Bar Association and other bar groups (NYLJ, March 1). The proposal was scrapped due to opposition in the Assembly before the budget was adopted (NYLJ, March 29).

<http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202483543251>

<http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202488374363>

Stephen P. Younger, the president of the state bar, said his group is also opposed to the neurological impairment fund because his members are not sure patients would get adequate medical care under the system.

"The idea creates a new insurance fund like the Workers' Compensation Fund, and I'm not sure that a new government program isn't kind of crazy in this [economic] atmosphere," said Mr. Younger, of Patterson, Belknap Webb & Tyler.

He also said the proposal for a fund had not received the proper "ventilation" in terms of public hearings or scrutiny.

Mr. Cuomo's Medicaid team contained ample representation from hospitals and health-care providers, but little or none from patient advocates or bar groups.

Both the Healthcare Association of New York State and the Greater New York Hospital Association had representatives on the task force, while no bar associations did.

Other groups opposed to the fund were Citizen Action of New York and the New York Public Interest Research Group.

Blair Horner, the legislative director of NYPIRG, said the approach taken by the task force is the wrong course to minimizing medical errors. He contended that strengthening the state's standards-of-care for obstetrical and birthing practices would go a longer way to reducing costly hospital errors.



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Mr. Helgerson said the first-year funding for the program would be worth about \$30 million, to be taken out of the state's existing multi-billion-dollar Health Care Reform Act fund.

The size of the fund in subsequent years will vary according to its needs as determined by state actuaries, Mr. Helgerson said.

Assessments on commercial health insurance policies will provide assets for the fund, and hospitals say it should ultimately save them more than \$300 million a year in insurance premiums and other costs when fully implemented within a few years.

The new fund will apply to all cases filed after Oct. 1 as well as those that have been filed, but in which no verdict or settlement has been reached.

Litigation Expected

Andrew S. Kaufman of Kaufman Borgeest & Ryan, a veteran defense attorney in medical malpractice cases, said the system could result in litigation as the mechanics are worked out.

"I think it is going to mean small verdicts [for plaintiffs]," Mr. Kaufman said in an interview. "I think it is going to mean that the value of these cases from the settlement perspective will go down. It remains to be seen how the apparatus is going to work."

He said the system should prove fairer to doctors and their insurers, who sometimes settle cases out of court rather than face the prospect of a huge court-imposed award for medical care.

Thomas A. Moore of Kramer, Dillof, Livingston & Moore, a New York Law Journal columnist, said in an April 5 column (<http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202488999579>) that the fund will deny some deserving children health care at the highest quality and force their parents or guardians to wrestle bureaucrats for coverage for some procedures.

Mr. Moore said in his column that the new law makes "vague and non-substantive" demands on health-care providers to improve the quality of care while burdening malpractice victims and their families.

The Medicaid task force "opted to advocate a bill that impairs the rights of children victimized by negligent obstetric care rather than one that would have prevented children from becoming damaged and would have achieved greater savings," wrote Mr. Moore.

http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202490671105&Lawyers_Await_Specific_Regulations_on_Infant_Medical_Malpractice_Fund&slreturn=1&hbxlogin=1