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MEDICAL INDEMNITY FUND

For the first time in years our elected officials in Albany passed a budget on time, April 1, 2011, and this crowning achievement was immediately trumpeted by our newly elected Governor. Prior to its passage the Governor appointed what has become known as a “Medicaid Redesign Team” (MRT) made up of many health care industry executives empowered to recommend ways in which to address the state’s budget outlays in relation to growing Medicaid expenditures. Although one of their recommendations included a \$250,000 cap on non-economic damages in all medical malpractice cases, unfortunately this provision did not survive final passage of the bill. The Medical Indemnity Fund (MIF), a.k.a., the neurologically impaired infant’s Fund, was passed.

WHAT CASES DOES THE FUND PROVIDE FOR?

Essentially, the Fund covers children sustaining birth-related neurological injury:

“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 as that term is defined by section 1.03 of the mental hygiene law, or both.”

Please note that the Fund would not cover an infant who after being discharged from the hospital after birth later suffers a seizure or apnea spell and is then hospitalized and suffers permanent and long term neurological damage as a result of negligent care during that subsequent hospitalization.

WHAT IS THE EFFECTIVE DATE OF THE FUND?

The Fund will apply to all lawsuits and claims for which “no judgment has been entered and no settlement agreement has been entered into by the parties” before April 1, 2011. In essence, it applies to all eligible cases that have been commenced in the past and which have not as yet resulted in any type of disposition.

The actual operation of the Fund begins October 1, 2011 with provisions for coverage of medical costs for children whose claims are settled or awards entered on or after April 1, 2011 and before October 1, 2011. Naturally, all future eligible cases will be governed by the Fund.

WHAT DAMAGES DOES THE FUND COVER?

“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, PA’s or NP’s and as otherwise defined by the commission in regulation.”

The intent of the Fund is to insulate the hospital and the provider from what is typically the largest component of damages in a neurologically impaired infant case, i.e., future damages. In the recent past the New York appellate



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courts have sustained an award of \$40 million for round-the clock nursing care for a disabled infant over 55 years.¹ All such future medical and other health-related costs will now be paid for and administered by the Fund and will not impact the personal exposure or the insurance exposure of the hospital or the provider. **Thus, defendant physicians or hospitals and their insurers are not required to pay for such costs and no judgment may be entered which requires them to do so.**

WHAT IS NOT COVERED BY THE FUND?

Any award for loss of earnings, pain and suffering including loss of enjoyment of life, loss of services, and attorney fees will not be covered by the Fund and will have to be paid by the hospital, the provider or their insurance carrier. Also not covered by the Fund are past medical expenses which may involve repayment of a Medicaid lien, if applicable.

HOW IS THE FUND FUNDED?

Assessments on commercial health insurance policies will provide assets for the Fund. Hospitals in NYS are required to pay for the expense of future care for infants enrolled in the Fund by paying 1.6% of the hospitals' inpatient obstetrical revenues.

WHAT ARE THE ANTICIPATED SAVINGS TO THE HOSPITALS?

Currently, it is estimated that NYS hospitals pay \$1.6 billion to cover medical malpractice expenses or about 3% of their revenues. It has been estimated that as much as 50% of these expenses are due to cases involving neurologically impaired infants. There is a general consensus that the legislation will result in reducing claims severity stemming from the adjudication of these very difficult and sympathetic cases. The New York State Insurance Department is in the process of writing regulations to implement the law. Actuaries have varying opinions as far as the expected insurance price relief for hospitals and physicians and as such it is too early to provide an accurate estimate of potential savings.

OTHER BENEFITS OF THE FUND

Participation in the Fund is mandatory to those seeking either Medicaid compensation or those who choose to file medical malpractice suits. It has been analogized to the Workers' Compensation Fund in that medical services are provided on an "as needed" basis. This methodology is considered preferable and more cost effective than having a jury speculate and place a value on an infant's lifetime medical expenses.

The sheer folly of asking a lay jury to assess the future lifetime medical needs and costs of a disabled infant is best illustrated by the following real life example. In 1967, the House Ways and Means Committee projected that Medicare would cost \$12 billion by 1990. The actual cost turned out to be \$110 billion.

¹ *Desiderio v. Ocho*, 100 N.Y.2d 159 (2003).



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In this instance an eligible plaintiff is guaranteed access to care and these benefits are life long and cannot be exhausted as was possible under prior law. Also, the utilization of medical services is far more accurate since the care will in most instances be orchestrated by the treating physician. Health care providers will not be able to reject assignments from eligible plaintiffs enrolled in the Fund even though some may be relegated to compensation at Medicaid rates. Private physicians will have no reason to treat Fund patients differently from other patients since they will be compensated “on the basis of 100% of the usual and customary rates” as defined in the regulations.

It will still be necessary for eligible plaintiffs to file lawsuits, litigate them and either settle or try the case to verdict. Legal analysts have projected that dispositions will result in smaller awards, yet it is anticipated that the plaintiffs’ bar will seek to accentuate some of the non-Fund elements such as pain and suffering and lost earnings. It should be emphasized that the plaintiffs’ attorneys’ fee will be paid in a lump sum based on the “entire sum” awarded by the jury or by settlement but that portion of the fee allocated to “non-Fund elements of damages shall be deducted from the non-Fund portion of the award in a proportional manner.”

CONUNDRUM

Contained in the new law is a quirk that provides once liabilities of the Fund reach 80% of its assets the entire framework of the Fund will be shut down to any otherwise eligible applicants until the Fund is replenished. Judgments and settlements will then be satisfied as if the Fund legislation had not been enacted. The uncertainty and unpredictability of this provision is manifest and one can only envision the impracticality of a Fund Administrator attempting to estimate the projected financial outlays of the Fund in any given year and at the same time be aware of the numerous eligible cases that may be litigated that year throughout the state.

CONCLUSION

The Fund will not be operational until October 1, 2011 and much uncertainty still exists on the precise manner in which it will be administered. There is little question, however, that the Fund should help towards providing a measure of fiscal relief to hospitals and beleaguered obstetricians who simply cannot afford to be at risk for multi-million dollar awards that no physician or health care institution could possibly satisfy without a near catastrophic impact on their bottom line.