New York's Medicaid Redesign Plan -- The Neurologically Impaired Infant's Fund: True Relief or Looming Disaster?

By Douglas M. Nadjari

The true cornerstone of Gov. Andrew Cuomo's Medicaid Redesign Team is the creation of a new fund designed to pay particular (and limited) medical expenses for neurologically damaged infants. The proposal was introduced by the Greater New York Hospital Association, a long time proponent of strategies designed to reduce the crushing cost of medical malpractice insurance.

The Fund covers all cases pending (if brought on or after April 1, 2011) and will come under the penumbra of the newly formed combination of the state insurance and banking departments. Its primary responsibility will be to assure administration of the fund on a case-by-case basis. To many, the medical indemnity fund was seen as the 21st century's best hope for reducing New York's skyrocketing medical-malpractice costs. According to Mr. Cuomo's chief Medicaid reform adviser, between 150 and 200 babies are expected to qualify annually for the fund and the situation is, no doubt, dire. In 2009, the state's hospitals spent $1.6 billion to cover medical-malpractice expenses and half of those funds compensated neurologically impaired infants.

The bill expressly covers "*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*." However, ethical issues abound for lawyers on both sides. For example, it is unclear whether the fund may be misused to cover brachial plexus injuries or Erb's palsies, both of which are common obstetrical malpractice claims (but are not necessarily caused by hypoxia or mechanical injury secondary to labor or delivery).

Leaving ethics aside, good advocacy requires that injured plaintiffs should be compensated. Courts suffering from overwhelming volume and wholesale staff reductions will undoubtedly push harder for cases to settle than ever before. Therefore, the extent to which well-meaning malpractice lawyers (and judges) may advocate a broader construction of the bill -- one that may include injuries that are were not expressly intended to be covered for the purpose of obtaining public funds to secure an otherwise elusive settlement -- also remains unclear.

Knowledgeable jurists say that the new legislation should not change the traditional calculus -- that an injury will still bear the same intrinsic value. Once an award is made (or a value is placed upon a case to be settled), the decision will then be made by the court with respect to: (1) how liability should be apportioned and (2) what portion of the award should be paid by the fund, as opposed to the various insurers.

Because the fund is designed to pay expenses on an annual basis, it expects to see lower annual expenditures than one would expect under the present statutory construct. Indeed, it is anticipated that the fund will expend $5 million in the first year and approximately $37.5 million annually by the eighth year.

The pink elephant in the back of the “labor and deliver suite” however, is how the fund will be capitalized, whether it truly protects physicians and who will pay the plaintiffs! Originally, the Governor’s Medicaid Redesign Team proposed an assessment on all insurers' gross premiums, but that was seen as a new tax and quickly failed. Now, the State envisions paying for the Fund based upon tax revenues received from tobacco products, alcohol, sugary drinks and the like. In sum, although the Fund is the creation of a “funding bill” it apparently has no reliable funding mechanism. Are we to assume that the fund’s coffers will also be augmented by monies clawed back by onerous audits and demands for repayment engineered by the Office of the Medicaid Inspector General? The truth is, no one knows and the bill makes no provision for the financial health of its own fund.

Indeed, despite the lapsed deadline for the funds operation (April 2011), the source of the funding still remains cloudy. This much is clear: if the fund fails or becomes underfunded and the

total award or settlement exceeds available medical malpractice insurance coverage, physicians will be personally liable for costs associated with the care of the impaired child. Accordingly, extreme caution must be taken to assure that settlements do not exceed malpractice coverage simply because the Fund appears to provide a new safety net. The net may be flawed and poses the real risk of burdening obstetricians, anesthesiologists and hospitals with a lifetime of even greater debt. Thus, we advocate the following:

1. Protect yourself by practicing under the protection of a corporate or other appropriate umbrella.

2. During tough times, avoid the temptation to cover normal operating expensing by infusing personal cash assets into your practice. This may enable a capable plaintiff's attorney to "pierce the corporate veil" and raid the personal assets you have worked so hard to earn and protect.

3. There are myriad vehicles that may be legitimately used to protect personal assets. Relevant rules and regulations are ever changing. As a result, capable healthcare counsel and accountants should be consulted annually to review your plans.

4. Become actively involved in relevant lobbying efforts to reduce malpractice costs and protect physicians.

5. Assure that you have maximum malpractice and excess malpractice insurance coverage. Ideally, you should seek an occurrence policy or secure a tail paid for by the hospital or your employer.

6. When a case is indeed settled, make sure that the settlement itself does not exceed the available insurance coverage -- despite the existence of a Fund designed to reduce costs. Get a written assurance (or one recorded stenographically in court) that assures you that the total award's total will not exceed available malpractice insurance coverage (including fees, which may be awarded belatedly to plaintiff's counsel).

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