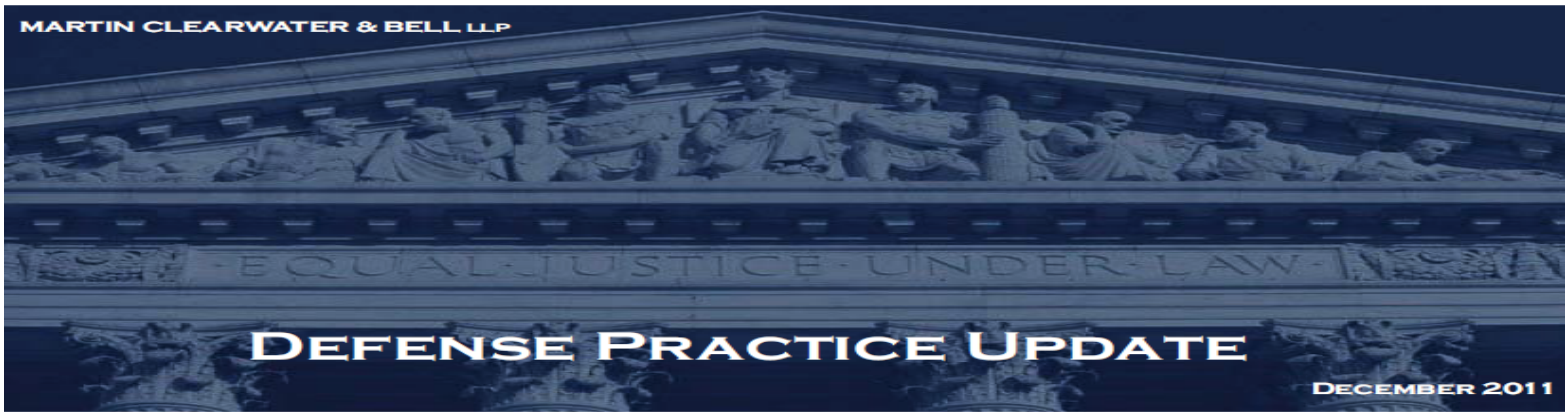

MEDICAL INDEMNITY FUND UPDATE
PRACTICE ADVISORY

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Medical Indemnity Fund Update

The New York State Medical Indemnity Fund became operational on October 1, 2011. While many cases have now been settled under the Fund, many questions remain. Recently, we attended a program arranged by the Association for Healthcare Risk Managers of New York, Inc. (AHRM) at which Hon. Douglas E. McKeon shared his experiences in settling cases under the Fund and his views as to how specific issues involving the Fund might be resolved. These included the following.

Will enrollment in the Fund limit the care available to a child?

Justice McKeon indicated that in extraordinary cases, he would be disposed to setting aside some portion of a settlement amount in a "medical trust" to cover the costs of "cutting edge" treatments that might not be paid by the Fund or a private insurance company. More importantly, he emphasized that once a child is accepted for enrollment, the child is "in the Fund for all purposes," and the Fund will pay for all qualifying health care costs incurred over the child's lifetime, even those unrelated to the original injury. For example, if a child developed cancer after enrollment in the Fund, the Fund would cover the costs of the cancer treatment as well as the original injury. Furthermore, the Fund eliminates the need for a Special Needs Trust to enable the plaintiff to receive settlement cash while still remaining eligible for Medicaid, and the receipt of services under the Fund does not give rise to a lien.

In addition, the care provided through the Fund is personalized in the sense that each child is assigned a case manager, which is a further indication that children enrolled in the Fund will receive the services that they require.

Who makes the determination of eligibility?

Justice McKeon believes that it is up to the judge signing a compromise order to determine whether a child is eligible for enrollment in the Fund. He appears to favor an expansive interpretation of what constitutes a qualifying injury in order to achieve the Fund's stated purpose of reducing malpractice premiums and providing some measure of relief to hospitals. For example, in a case involving "concurrent" causes of injury, he believes that the child should go into the Fund.

Indeed, except in an extraordinary case where a determination has been made (perhaps at a *Frye* hearing) that the child's injury is entirely unrelated to the birth admission, Justice

McKeon believes that the court is *obligated* to certify a child as eligible. Justice McKeon also feels that judges should be working closely with the Fund managers and suggested that it might be appropriate to incorporate a child's life care plan into a compromise order. He considers it extremely unlikely that the Fund administrator would reject a child whom the court had certified as eligible.

Is Erbs Palsy a "birth-related neurological injury?"

In response to this question, Justice McKeon cited the following definition:

> "Obstetrical brachial plexus palsy results from iatrogenic (physician induced) strong traction or stretch injury to the cervical roots C5-8 and T1 . . . Avulsion is the most severe type, where the nerve is torn from the spinal cord . . ." (O'Leary, Shoulder Dystocia and Birth Injury, 3rd ed., Humana Press 2009).

While he indicated that he could make an argument for either side as to whether a typical Erbs Palsy case should be included in the Fund, Justice McKeon suggested that avulsion cases should probably qualify.

How should a settlement be allocated?

Regarding settlement, Justice McKeon's view is that cases should be settled in the same manner as before the Fund was created: the parties should agree on a number, and then make an allocation between Fund and non-Fund damages. He noted that "[t]he allocation process seeks to determine, based on facts known at the time of settlement, the extent to which an award is meant to compensate for future medical expenses distinguished from other categories of damages." At the same time, however, as stated in his recent decision in *Mendez v. The New York and Presbyterian Hospital,* 2011 NY Slip Op 21407, "[t]he Fund is antithetical to the notion that judges, jurors and lawyers are soothsayers who can predict, at the time of trial or settlement, the actual lifetime cost of the child's future medical needs."

In *Mendez,* which involved a catastrophically injured child who would require future custodial care, Justice McKeon approved a 50-50 allocation of a $5,500,000 settlement. Prior to doing so, he looked at the prevailing appellate case law regarding custodial care awards. While awards for future custodial care and the like often represented much more than 50% of a total sustained award, Justice McKeon feels that some "adjustment" for settlement of Fund cases is proper, since enrollment in the Fund reduces the amount of ready cash available to the plaintiff. He believes that at least in cases where future custodial care is involved, a 50-50 allocation is appropriate.

On the other hand, in a case where most of the medical expenses were incurred in the past, a different allocation might be called for. For example, in an Erbs Palsy case involving an avulsion, an 80-20 allocation, with the 20% allocated to Fund damages, might be appropriate.

In cases where there is limited coverage and the parties are considering a settlement number in excess of the coverage, Justice McKeon suggested that one approach might be for the parties to enter into a "settlement agreement" which would be contingent on, and not take effect until, the infant compromise order was signed. In such a case, the compromise order would not be signed unless and until the child was accepted into the Fund, thereby eliminating the risk that the defendant would be bound to a settlement in excess of policy limits. Also, some judges have apparently permitted the inclusion of "escape clauses" in settlement agreements in such cases. Justice McKeon indicated that his thinking in this regard has "evolved," and that this type of settlement is less problematic now, since the Fund is operational, than it was several months ago when the Fund was first created.

Thus, a case with $3 million in coverage could potentially settle on paper for $4.5 million with a 50-50 allocation. Once the infant was accepted into the Fund and the compromise order signed, the amount that the defendant's insurer would actually have to pay, inclusive of the attorney's fee, which is allotted proportionately between Fund and non-Fund items, would be $2,550,000.

Does the Fund apply in federal court?

Although not part of Justice McKeon's initial presentation, this question was raised by a member of the audience. The issue of whether the Fund applies in federal court is significant because many cases involve clinics that are federally funded, requiring that suit be brought under the Federal Tort Claims Act (FTCA). While this issue has yet to be resolved, Justice McKeon was inclined to believe that the Fund would likely apply in diversity cases, and that it would certainly be in the best interests of the defendants to argue that it applies in FTCA cases as well.

There is in fact some authority that might support the inclusion of FTCA cases in the Fund. Under the FTCA, the government is liable for torts committed by its employees in the same manner as a private individual would be under the law of the state in which the conduct at issue occurred. S*ee Fonseca v. United States*, 474 F.Supp.2d 1011, 1012 (E.D.Wis. 2007). In addition, it has been held that a state law damage cap – which is analogous in some ways to the Fund -- applied to an FTCA case. *Haceesa v. United States*, 309 F.3d 722 (10th Cir. 2002).

Is the Fund working?

While, as noted, many questions remaining the Fund remain unanswered at this still early stage, it appears to be Justice McKeon's view that it is working. He indicated that most attorneys with whom he has settled cases believe that it is being well-managed. Since the Fund became operational, applications for enrollment are processed expeditiously, and a response is typically received within a few days after an application is submitted, which facilitates settlement. (The application form is available on the Department of Financial Services website at http://www.dfs.ny.gov/insurance/mif_indx.htm.)

Among the open questions that remain is the interplay between the Fund and the availability of private insurance coverage, since the statute contains a collateral source provision (PHL § 2999-j[3]), which requires plaintiffs to use private insurance before resorting to the Fund. Justice McKeon feels that to date, there has not been sufficient dialogue regarding this important issue.

Similarly, there may be issues regarding the apportionment of liability and the manner in which a settlement will be allocated in cases involving multiple defendants, although in this regard Justice McKeon feels that the primary consideration is the allocation of damages, not who the tortfeasor is. Yet another issue is whether, in an appropriate case, provision should be made for purchasing specially modified vehicles at various intervals. Currently, the legislation provides for modification of a vehicle owned by the plaintiff's family, if it is the primary source of transportation for the infant, but not for the purchase of a vehicle.

Finally, while there is much concern about the provision that enrollment in the Fund will be suspended once its estimated liabilities reach or exceed 80% of its assets, Justice McKeon indicated that he believes the "governor means what he says," and that the Fund will be adequately capitalized.