

CONFLICTING APPROACHES TO ATTORNEY DISBURSEMENTS UNDER THE NY MEDICAL INDEMNITY FUND

Todd A. Kipnes, JD, MBA *

February 15, 2013

Part 1: Background

Under the New York State Medical Indemnity Fund (MIF) statute,¹ all settlements and verdicts involving a “birth-related neurological injury” must be allocated between future medical expenses (“MIF Damages”) and all other damages (“Non-MIF Damages”). Although the defendant need not pay the MIF Damages, they are used, together with the Non-MIF Damages, to determine the attorney fee using the sliding scale set forth in NY Judiciary Law § 474-a. The defendant (or its insurer) must pay: 1) all Non-MIF Damages; and 2) the *pro rata* portion of the attorney fee allocated to MIF Damages.

Section 474-a(3) states that the attorney fee “shall be computed on the net sum recovered after deducting from the amount recovered expenses and disbursements.” In the ordinary medical malpractice case, this has no effect on the cost of the settlement to the defendant, and only dictates how much of the settlement is paid to the attorney (*i.e.*, fee and disbursements) and how much is paid to the plaintiff (*i.e.*, the remainder after fee and disbursements). The same is not true in cases involving the MIF, however, because the portion of the settlement allocated to MIF Damages is not paid by the defendant. The issue that arises is

¹ NY Public Health Law § 2999-h, *et seq.*

whether or not it is appropriate to allocate disbursements to the MIF Damages on a *pro rata* basis, same as the attorney fee.

In our experience, this question has not been answered consistently by settling parties or by the Courts. In effect, three primary methods for allocating disbursements have developed (as well as a number of other variations thereon). While the methods are not necessarily susceptible to catchy nomenclature, we will entitle them as follows:

- 1) Disbursements Allocated to Non-MIF Damages;
- 2) Disbursements Allocated *Pro Rata*; and
- 3) Disbursements Paid Separately.

Part 2: Conflicting Methods of Allocating Disbursements

The following chart summarizes the effect of each method on a hypothetical \$5 million settlement with \$100,000 in attorney disbursements. Each method is then explained in greater detail in the sections that follow.

	No Disbursements	Disbursements Allocated to Non-MIF Damages	Disbursements Allocated <i>Pro Rata</i>	Disbursements Paid Separately
Total Settlement	\$5,000,000	\$5,000,000	\$5,000,000	\$5,000,000
Disbursements	NA	\$100,000	\$100,000	\$100,000
Settlement for Fee Calculation	\$5,000,000	\$4,900,000	\$4,900,000	\$4,900,000
Attorney Fee	\$650,000	\$640,000	\$640,000	\$640,000
Allocation to MIF Damages	50%	50%	50%	50%
MIF Damages	\$2,500,000	\$2,500,000	\$2,500,000	\$2,450,000
Non-MIF Damages	\$2,500,000	\$2,500,000	\$2,500,000	\$2,450,000
Fee on MIF Damages	\$325,000	\$325,000	\$320,000	\$320,000
Cost of Settlement²	\$2,825,000	\$2,825,000	\$2,820,000	\$2,870,000
Net Recovery (After Fee and Disbursements)	\$2,175,000	\$2,085,000	\$2,080,000	\$2,130,000

² In the first three columns, Cost of Settlement equals Non-MIF Damages plus Fee on MIF Damages. In the fourth column, Cost of Settlement equals Non-MIF Damages plus Fee on MIF Damages plus Disbursements.

I. Disbursements Allocated to Non-MIF Damages

Using this method, all the attorney disbursements are allocated to the Non-MIF Damages. The total attorney fee remains the same as in all the other methods, but the fee allocated to the MIF Damages, which is an element of the equation for the cost of the settlement, is unaffected by the disbursements (*i.e.*, because the MIF Damages are unaffected by the disbursements). As a result, the cost of the settlement remains the same regardless the amount of attorney disbursements.³

Some of the *advantages* of this method are as follows:

- It makes intuitive sense that disbursements would be allocated to the portion of the settlement actually paid in cash (*i.e.*, Non-MIF Damages).
- It increases predictability for the parties that the cost of the settlement does not change as disbursements change.
- Where parties seek to settle on a fixed cost amount (*i.e.*, then “back into” the total settlement amount), this method simplifies the process because changes in disbursements do not affect the total settlement.
- It avoids the odd result that higher disbursements result in a lower settlement cost.

Some of the *disadvantages* of this method are as follows:

- Arguably, it does not comply with the language of NY Pub. Health § 2999-j(14), stating that the attorney fee shall be allocated in a “proportional manner”.
- Disbursements frequently relate to efforts to value future medical expenses, and therefore should be allocated (at least partly) to the MIF Damages.

³ Note that the cost of the settlement using this method is the same as the cost assuming no disbursements at all.

II. Disbursements Allocated *Pro Rata*

Using this method, the attorney disbursements are allocated between the MIF- and Non-MIF Damages in the same proportion as the overall settlement. The attorney fee again remains unaffected, but because the Non-MIF Damages are the only ones paid in cash, even the disbursements allocated to the MIF Damages must be paid out of the Non-MIF Damages. The result is that higher disbursements result in a lower cost to the defendant and a lower net recovery for the plaintiff.

Some of the *advantages* of this method are as follows:

- Arguably, it complies with the language of NY Pub. Health § 2999-j(14), stating that the attorney fee shall be allocated in a “proportional manner”.
- Disbursements frequently relate to efforts to value future medical expenses, and therefore should be allocated (at least partly) to the MIF Damages.

Some of the *disadvantages* of this method are as follows:

- Because the cost of the settlement changes as disbursements change, it reduces predictability for the settling parties regarding the cost of the settlement. This also affects the Court-approval process, because any disallowance of attorney disbursements *increases* the cost of the settlement.
- Where parties seek to settle on a fixed cost amount (*i.e.*, then “back into” the total settlement amount), this method complicates the calculations because changes in disbursements actually change the settlement.
- It leads to the odd result that higher disbursements *decrease* the cost of the settlement.

III. Disbursements Paid Separately

Using this method, the attorney disbursements are removed from the settlement calculations, and then paid separately. To use the example from the chart above, the \$5,000,000 settlement becomes a \$4,900,000 settlement for the purpose of calculating the MIF Damages, attorney fee, etc., and then the disbursements are added back to the cost in the end. Once again, the attorney fee remains the same, but the cost and the net recovery are higher than in the other examples.

Some of the *advantages* of this method are as follows:

- It avoids the issue of allocating the disbursements among the damages altogether.
- Once disbursements are finalized, separating out their cost simplifies the other calculations required in a MIF settlement.

Some of the *disadvantages* of this method are as follows:

- Because the cost of the settlement changes as disbursements change, it reduces predictability for the settling parties regarding the cost of the settlement.
- Where parties seek to settle on a fixed cost amount (*i.e.*, then “back into” the total settlement amount), this method complicates the calculations because changes in disbursements actually change the settlement.

Part 3: Conclusion

There is not yet a consensus regarding the proper method of accounting for attorney disbursements in a MIF settlement. Each of the three most common methods has distinct advantages and disadvantages. Presumably, one of these methods (or a different one entirely) will eventually prevail, bringing a bit of uniformity to the settlement process.

* *Todd A. Kipnes is Principal and General Counsel of Kipnes Crowley Group, LLC. He can be reached at tkipnes@kipnescrowley.com or (914) 390-3333.*

This memorandum is not intended to provide legal, tax, or business advice, and no legal, tax, or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to the author.