NEW YORK CITY BAR ASSOCIATION
TORT LITIGATION COMMITTEE

REPORT ON LEGISLATION

S. 5555 Senator DeFrancisco
A.8114 M. of A. Zebrowski

AN ACT to amend the civil practice law and rules, in relation to the impact of collateral source payments upon tort claims for personal injury, property damage or wrongful death, and upon related subrogation claims.

THIS BILL IS APPROVED

The Tort Litigation Committee of the Association of the Bar of the City of New York, a committee composed of both plaintiff and defense attorneys, as well as active members of the Judiciary, supports the proposed legislation.

The Proposed Bill

Under the current law, a plaintiff who has a tort claim for personal injury, wrongful death, or property damage cannot recover damages for any expense or economic loss that was, or is reasonably likely to be, covered by a collateral source. The plaintiff may present evidence of his or her economic loss to the jury or other finder of fact, but the Court must then deduct, or offset, from plaintiff's recovery any award for such past or future economic loss which was, or will be, replaced or indemnified with reasonable certainty, in whole or in part, from any collateral source. Such collateral sources may include health insurance, Social Security, Workers' Compensation, Medicaid, Medicare, No-Fault benefits, etc. The proposed legislation seeks to exempt this collateral source offset from settlements.

Purpose

For the most part, the statute as written works well when a case proceeds all the way through a jury verdict. The plaintiff presents evidence of his or her economic loss for consideration by the jury or other finder of fact. If the plaintiff is awarded any of his or her economic damages, the Court then holds a hearing outside the presence of the jury and hears evidence on which of the plaintiff's economic damages awarded by the jury

have already been, or will be with a reasonable degree of certainty, reimbursed by a collateral source, such as health insurance, Social Security, Workers' Compensation, etc. If those collateral sources are entitled to reimbursement, by either contract or statute, reimbursement must be made from the plaintiff's recovery. If reimbursement is not so required, then the plaintiff's damages award for those items is reduced, or offset, by the amount of the collateral source to avoid a double recovery.

A problem arises, however, when a settlement is reached before a verdict since settlements do not typically allocate how much of the settlement is for pain and suffering and how much is for plaintiff's economic loss. Often, it is the parties' intention to compromise both of these elements of the plaintiff's damages in a settlement. However, a collateral source payor, such as a health insurer, may seek reimbursement of 100% of the health benefits it paid to, or on behalf of, the plaintiff even though the plaintiff did not recover in settlement 100% of that economic loss.

This scenario creates a problem for plaintiffs who may have to reimburse a collateral source payor more than the plaintiff actually collected for that economic loss. This also creates a problem for the defendant/tortfeasor since it may now be exposed to a further claim for damages by the collateral source payor, which could be substantial, and which the defendant/tortfeasor did not contemplate (or possibly even know about) when settling with the plaintiff. This has a chilling effect on all settlements for both plaintiffs and defendants/tortfeasors.

Solution: The Proposed Bill

The proposed bill, specifically Subdivision (e), effectively eliminates this problem by exempting all settlements from any such collateral source offsets. The only exceptions would be for collateral source payors with a statutory right of reimbursement, or lien, such as Workers' Compensation, Medicaid, Medicare, etc. In this way, both the plaintiff and defendant/tortfeasor know in advance exactly who is entitled to reimbursement, and exactly how much, and can structure the settlement accordingly. There would no longer be the risk of the plaintiff having to repay a collateral source payor for an economic loss larger than he actually recovered, or of a defendant/tortfeasor being exposed to a further claim for damages after it already allocated, and/or paid, a settlement to a plaintiff. For these reasons, this Committee fully supports the proposed legislation.

However, we suggest that the bill identify and itemize those collateral source payors that have statutory liens.

The bill should also indicate that it does not apply to private, written agreements for services rendered between a plaintiff and a medical provider to avoid the possibility of the plaintiff not honoring the agreement out of his or her settlement proceeds. For example, a plaintiff may refuse to pay a medical provider pursuant to such an agreement on the ground that, since the right to payment is not statutory, the monies owed need not be paid. Therefore, the following sentence should be added to Subdivision (e) to avoid this problem: "This Subdivision does not apply to private, written agreements entered

into by plaintiff(s) with medical provider(s) for medical treatment relating to plaintiff's tort claim for personal injury, wrongful death, or property damage."

Lastly, the amendment should refer to "tortfeasor(s)" rather than "defendants".