

ACA & FUTURE MEDICAL EXPENSE UPDATES

New Jersey law provides that a defendant is given a credit for any moneys that a plaintiff is entitled to receive from a “collateral source.” The collateral source statute, N.J.S.A. 2A:15-97, provides:

In any civil action brought for personal injury or death, except actions brought pursuant to the provisions of P.L.1972, c. 70 (C. 39:6A-1 et seq.), if a plaintiff receives or is entitled to receive benefits for the injuries allegedly incurred from any other source other than a joint tortfeasor, the benefits, other than workers' compensation benefits or the proceeds from a life insurance policy, shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award recovered by the plaintiff, less any premium paid to an insurer directly by the plaintiff or by any member of the plaintiff's family on behalf of the plaintiff for the policy period during which the benefits are payable. Any party to the action shall be permitted to introduce evidence regarding any of the matters described in this act.

The purpose of the statute is to prevent double recovery.

However, there are limitations to this rule. As explained in Parker v. Esposito, 291 N.J. Super. 560, 567 (App. Div. 1996), a defendant is only entitled to a future collateral source credit to the extent that those future benefits “are neither contingent nor speculative nor subject to change or modification”. Id. at 567.

In the case of the Affordable Care Act (“ACA”) a defendant will not be able to show that any future health benefits “are neither contingent nor speculative nor subject to change or modification.” This issue was recently addressed in Pannacciulli v. Beloff, BER-L-845-12. This was a medical malpractice case where defendants sought to limit plaintiff’s claim for future medical expenses claiming that such expenses would be reimbursed through the ACA. The

Court denied the application finding that defendants could not show that it was reasonably certain that the plaintiff would receive benefits in the future, especially since Congress (and now the President) has vowed to repeal the ACA. The Court also found that it was also possible that a provider under the ACA might seek recoupment, which would also disqualify such payments as a collateral source.

MEDICAID AND OTHER GOVERNMENT ENTITLEMENTS

Similarly, New Jersey law does not allow a defendant to obtain collateral source credits for any governmental benefits such as Medicaid which provide a right of reimbursement. Lusby v. Hitchner, 273 N.J. Super. 578, 590 (App. Div. 1994). Because all Medicaid programs require reimbursement of the benefits provided, a defendant is not entitled to a credit under New Jersey law for any potential benefits which a plaintiff may be entitled to during the course of her lifetime.

Additionally, many Medicaid benefits are subject to budgetary constraints and must be renewed few years. Therefore, specific plans and benefits may come and go and are by definition not reasonably certain to continue for someone's life. See Puzio v. Mimms, 2005 WL 3691527 (N.J. App. Div. 2006) (defendant is not entitled to a credit for benefits such as Medicare and Social Security which are in a state of flux given the political climate and not reasonably certain to continue for a plaintiff's lifetime).

SPECIAL NEEDS TRUSTS

Plaintiffs who make a tort recovery can maintain their Medicaid eligibility by placing the settlement proceeds into a Special Needs Trust. However, Medicaid retains a right of reimbursement from the trust at the time of a plaintiff's death. Defendants may attempt to reduce their obligations by arguing that a plaintiff can underfund the Special Needs Trust so that

there will be little or no funds remaining at the time of death. However, the law is clear that a defendant may not intentionally underfund a Special Needs Trust to reduce its liability. As recognized by the Lusby court, “nor are the statutory purposes advanced when the ultimate burden is shifted from the tortfeasor’s liability carrier to a governmentally-funded secondary payer.” 273 N.J. Super. at 591-92. Moreover, the law governing Special Needs Trusts are specifically designed to protect Medicaid’s lien and insure that it will be repaid at the time of death. N.J.A.C. 10:71-4.11(g). It matters not that any monies remaining in the Special Needs Trust after repayment of any Medicaid lien would inure to the plaintiff’s beneficiaries. In fact, the Federal Medicaid statute, 42 U.S.C.A. § 1396(d)(4)(A) was written with the express purpose to ensure that Medicaid would be reimbursed from a Special Needs Trust at the time of death.