THE NY MEDICAL INDEMNITY FUND:

Calculations and Rules of Thumb for the Mathematically-Inclined[1]

Todd A. Kipnes, JD, MBA[*]

November 1, 2012

Part 1: Background

Under the New York State Medical Indemnity Fund statute,[2] all future medical costs for a plaintiff who suffered a "birth-related neurological injury" are paid by the Medical Indemnity Fund ("MIF"), not by the settling defendant or its insurer. When settling a claim involving a "qualified plaintiff", the parties must allocate, subject to Court approval, a portion of the Total Settlement to future medical costs ("MIF Damages"), and the remainder to all other elements of damages (*e.g.,* pain and suffering, lost earnings, past damages, *etc.*) (together, "Non-MIF Damages"). The attorney fee is then calculated, based upon the Total Settlement amount, 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.[3]

Given the above, there are three important elements to any settlement under the statute: 1) the Total Settlement amount; 2) the Allocation to MIF Damages; and 3) the ultimate Cost to the defendant or its insurer. Once two of the three elements are established, the value of

---

[1] WARNING: This document may contain ALGEBRA.

[2] NY Public Health Law § 2999-h, *et seq.*

[3]   All plaintiffs who qualify for entry into the MIF receive the same coverage for future medical expenses, regardless the amount of their initial settlement or award. The *amount* of MIF Damages is relevant *only* for determining the attorney fee.

the third can be calculated therefrom. In the typical case, the parties will agree upon the Total

Settlement and the MIF Allocation, and then determine the Cost. In some cases the parties will

agree upon the Cost and the MIF Allocation, and then determine the Total Settlement. The third

possible scenario, where the parties agree upon the Total Settlement and the Cost, and then

determine the MIF Allocation, is likely to be rare, and is not addressed in this memo.

Unfortunately, the calculations that must be performed are not always

straightforward, especially when the variable being calculated is the Total Settlement (*i.e.,* not

the Cost). This is because the sliding scale attorney fee makes it impossible to determine the

Cost without knowing the Total Settlement, creating a circular situation whereby: 1) the Cost is

used, in part, to determine the Total Settlement; but 2) the Cost cannot be determined without

knowing the Total Settlement.

As a result, there are no universal equations that work in all cases to convert Total

Settlement to Cost, or vice versa. However, once the Total Settlement is known to be over

$1,250,000, which is the value over which the sliding scale attorney fee levels at 10%, universal

equations do become possible.[4]

To wit, below are various equations and rules of thumb that can be used to convert

Total Settlement to Cost and vice versa*,* as well as to determine the value of other settlement

variables, such as attorney fee and the net monies available to the infant plaintiff (*i.e.,* after the

---

[4] Our firm has developed an Excel spreadsheet, available for download on our website, which can be used to
perform these conversions regardless the size of the settlement.

fee is paid). **It is important to note that none of the equations below are valid if the Total Settlement is less than \$1,250,000.**[5]

<div align="center">

Part 2: Equations

</div>

Before we delve into the math, let's define the variables that we will use from this point forward: [6]

VARIABLE	DEFINITION	UNIT	EXPLANATION
T	**Total Settlement**	**\$**	The sum of all MIF Damages and Non-MIF Damages.
C	**Cost**	**\$**	The amount of the Total Settlement that the Defendant must pay (*i.e.,* all Non-MIF Damages and the *pro rata* Attorney Fee on MIF Damages).
A	**MIF Allocation**	**%**	The percentage of the Total Settlement that is allocated to MIF Damages.
D	**Disbursements**	**\$**	Litigation expenses that are reimbursed prior to calculating the Attorney Fee.
F	**Attorney Fee**	**\$**	The sliding scale fee based upon the Total Settlement (or Total Settlement less Disbursements, where applicable).
N	**Net Cash to Plaintiff**	**\$**	All monies available to the plaintiff after payment of the Attorney Fee and Disbursements.

I.   Assuming No Disbursements

As explained in more detail below, attorney disbursements have the potential to significantly complicate these calculations, especially because there does not appear to be a consensus yet on how to account for them. The first set of equations, set forth immediately below, assumes that there are no disbursements $(D = 0)$.

---

[5]   To be more precise, the amount used to determine the fee must be at least \$1,250,000. As explained more fully below, this means that, where the attorney fee is based upon the Total Settlement less Disbursements, then the Total Settlement less Disbursements must be greater than or equal to \$1,250,000.

[6]   You were warned about the algebra!

To determine Cost, given Total Settlement and MIF Allocation:

$$C = T(1 - 0.90A) + 150000A$$

Where: $D = 0$ and $T \geq 1250000$

Assuming a 50% MIF Allocation, which is the most commonly applied allocation, this equation simplifies to the following:

$$C = 0.55T + 75000$$

Where: $D = 0$, $T \geq 1250000$, and $A = 50\%$

To determine Total Settlement, given Cost and MIF Allocation:

$$T = (C - 150000A) / (1 - 0.90A)$$

Where: $D = 0$ and $T \geq 1250000$

Again, assuming a 50% MIF Allocation, this equation simplifies to the following:

$$T = (C - 75000) / 0.55$$

Where: $D = 0$, $T \geq 1250000$, and $A = 50\%$

To determine Attorney Fee, given Total Settlement:[7]

$$F = 0.10T + 150000$$

Where: $D = 0$ and $T \geq 1250000$

---

[7] This Fee equation applies in any medical malpractice matter in New York, including ones that do not involve the MIF.

To determine Net Cash to Plaintiff, given Cost and Fee:

$$N = C - F$$

$$\text{Where: } D = 0$$

II. Including Disbursements

In our experience thus far, we have seen Disbursements handled three different ways by the parties and the Courts. Each is explained below. Before we begin though, let's establish a hypothetical settlement for use as an example throughout the remaining analysis.

Total Settlement = $5,000,000.00

MIF Allocation = 50%

Disbursements = $100,000.00

Using the above equations, you would find that, disregarding the Disbursements, this hypothetical settlement would yield: i) a Cost of $2,825,000; ii) a Fee of $650,000; and iii) Net Cash to Plaintiff of $2,175,000.

In the sections below, we will explore the different methods of accounting for Disbursements and how they impact the settlement figures.

A. All Disbursements Allocated to Non-MIF Damages

Recall that the defendant or insurer must pay two elements of damages in every MIF settlement: 1) all Non-MIF Damages; and 2) the *pro rata* portion of the attorney fee allocated to MIF Damages. In this first method of accounting for Disbursements, they are allocated entirely to the first element above, Non-MIF Damages, and are not used to reduce the attorney fee allocated to MIF Damages.

Using our example above and applying this method of accounting for disbursements, the Fee would be $640,000, as calculated on $4,900,000 (*i.e.,* T − D). Of this Fee: i) $325,000 would be allocated to the MIF Damages (*i.e.,* 50% of the total Fee of $650,000, prior to adjusting for Disbursements); and ii) $315,000 would be allocated to the Non-MIF Damages (*i.e.,* the Disbursements are allocated entirely to the Non-MIF portion of the settlement).

As a result, the Cost of this settlement would be $2,500,000 (the Non-MIF Damages) plus $325,000 (the fee on the MIF Damages), for a total of $2,825,000, same as if there were no Disbursements at all. The Net Cash to the Plaintiff, however, is reduced to $2,085,000 after accounting for Disbursements (*i.e.,* N = C − F − D).

The relevant equations using this method of accounting for disbursements are as follows:

To determine Cost, given Total Settlement and MIF Allocation:

$$C = T(1 - 0.90A) + 150000A$$
$$\text{Where: } (T - D) \geq 1250000$$

To determine Total Settlement, given Cost and MIF Allocation:

$$T = (C - 150000A) / (1 - 0.90A)$$
$$\text{Where: } (T - D) \geq 1250000$$

To determine Attorney Fee, given Total Settlement:

$$F = 0.10T - 0.10D + 150000$$
$$\text{Where: } (T - D) \geq 1250000$$

To determine Net Cash to Plaintiff, given Cost and Fee:

$$N = C - F - D$$

B. **Disbursements Allocated *Pro Rata* to MIF and Non-MIF Damages**

In this second method of accounting for Disbursements, they are allocated on a *pro rata* basis to both the MIF and Non-MIF Damages. Returning to our example above, the Fee would remain $640,000, same as with the first method, but of this Fee: i) $320,000 would be allocated to the MIF Damages (*i.e.,* 50% of $640,000); and ii) $320,000 would be allocated to the Non-MIF Damages (*i.e.,* the other 50%).

As a result, the Cost of this settlement would be $2,500,000 (the Non-MIF Damages) plus $320,000 (the fee on the MIF Damages), for a total of $2,820,000, or $5,000 less than the Cost using the first method (or the Cost if there were no Disbursements). The Net Cash to the Plaintiff is also reduced by $5,000, to $2,080,000 (*i.e.,* $N = C - F - D$).

The relevant equations using this method of accounting for disbursements are as follows:

To determine Cost, given Total Settlement and MIF Allocation:

$$C = T - 0.90(T)(A) - 0.10(D)(A) + 150000A$$

$$\text{Where: } (T - D) \geq 1250000$$

To determine Total Settlement, given Cost and MIF Allocation:

$$T = [C + 0.10(D)(A) - 150000A] / [1 - 0.90A]$$

$$\text{Where: } (T - D) \geq 1250000$$

To determine Attorney Fee, given Total Settlement:

$$F = 0.10T - 0.10D + 150000$$

$$\text{Where: } (T - D) \geq 1250000$$

To determine Net Cash to Plaintiff, given Cost and Fee:

$$N = C - F - D$$

C.   Disbursements Ignored, and Then Paid Separately

In this third method of accounting for Disbursements (which, admittedly, is labeled awkwardly), Disbursements are simply removed from all the calculations, and then added back at the end. Returning to our example above, the Total Settlement would be reduced from $5,000,000 to $4,900,000, as the Disbursements are removed. The Fee would remain $640,000, same as with the first two methods, and: i) $320,000 would be allocated to the MIF Damages (*i.e.,* 50% of $640,000); and ii) $320,000 would be allocated to the Non-MIF Damages (*i.e.,* the other 50%).

As a result, the Cost of this settlement would be: i) $2,450,000 (the Non-MIF Damages); plus ii) $320,000 (the fee on the MIF Damages); plus iii) $100,000 (the Disbursements added at the end); for a total of $2,870,000. The Net Cash to the Plaintiff is $2,130,000 (*i.e.,* $N = C - F - D$).

The relevant equations using this method of accounting for disbursements are the same as those assuming no Disbursements at all (Section I, above), except that the Disbursements are removed from the Total Settlement at the start, and added back to the Cost at

the end. In effect, using this method, the defendant or insurer agrees to pay all Disbursements, on a dollar-for-dollar basis, independent of, and in addition to, the MIF settlement.

Part 3: Conclusion

As clear from the above, the MIF Statute adds a level of mathematical complexity to settlements, beyond that which participants in this area normally encounter. Our hope is that this article, and the resources available on our website, can aid claims examiners, attorneys, plaintiffs, and others, in mastering this complexity.

_____

*   *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.*

_____