



# LEGAL NOTES

## Blustein, Shapiro, Rich & Barone, LLP

BURT J. BLUSTEIN  
MICHAEL S. BLUSTEIN  
RICHARD J. SHAPIRO  
GARDINER S. BARONE  
RITA G. RICH  
JAY R. MYROW

ARTHUR SHAPIRO,  
of Counsel

10 MATTHEWS STREET  
GOSHEN, NEW YORK 10924

PHONE: (845) 291-0011  
TOLL FREE (866) 692-0011  
WWW.MID-HUDSONLAW.COM

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CAROL C. PIERCE  
AUSTIN F. DUBOIS  
JAMIE T. FERRARA

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### ***NO CASH REFUND POLICIES, WARRANTIES, AND RETURNING DEFECTIVE GOODS***

**By Gardiner S. Barone, J.D.**

[gbarone@mid-hudsonlaw.com](mailto:gbarone@mid-hudsonlaw.com)

Some retailers refuse to give you a cash refund when you return a product purchased at the store. However, in order for the store to have a legally enforceable “No Cash Refund Policy,” the store must comply with the requirements of General Business Law § 218-a, which permits retailers to enforce a no cash refund policy if there are a sufficient number of signs notifying consumers of the store’s refund policy. The law clearly identifies where a retailer must post signage of its refund policy in order for its policy to be enforceable. According to the applicable statute, notice of the store’s refund policy must be posted: “(a) on a sign attached to the item itself; or (b) on a sign affixed to each cash register or point of sale; or (c) on a sign so situated as to be clearly visible to the buyer from the cash register; or (d) on a sign posted at each store entrance used by the public.” Of course, if there is no sign posted that the store maintains a refund policy, then the store cannot enforce a “no refund” policy. Instead, the applicable statute makes the retailer “liable, for

a period of up to twenty days from the date of purchase, to the buyer for a cash refund or a credit, at the buyer's option, provided that the merchandise has not been used or damaged by the buyer.” In other words, if there is no sign or inadequate signage, then you can return undamaged or unused goods for a full refund within twenty days of purchase.

Even where a store has prominently posted signage of its refund policy, you may still be entitled to a full refund where the goods purchased are defective or unmerchantable. If the goods purchased were defective or did not perform as represented by the retailer, then there may be a breach of a warranty that is created by operation of law. In such an instance, you are entitled to return the goods in exchange for a full refund. This point is illustrated by *Baker v. Burlington Coat Factory Warehouse*, where the clothing retailer refused to refund the consumer's cash payment when she returned a defective fake fur coat two days after purchase. At the time, Burlington had a no refund policy. However, because the coat was defective, the implied warranties trumped the store’s no refund policy, and the court ordered Burlington to give a full refund.

Nevertheless, there are instances where a retailer can ‘disclaim’ all implied warranties, but there are restrictions on its ability to do so.

The ability of retailer to disclaim an implied warranty is markedly limited when the retailer knows that the goods are to be used for a particular purpose. Where the retailer is aware of the customer's intended use of the goods, any disclaimer is narrowly construed and exceptionally limited.

In most instances where a retailer attempts to disclaim all warranties, it is required to offer a 'limited warranty' that must, at a minimum, provide for repair and/or replacement of any defective goods.

Finally, if a retailer attempts to stonewall you in your efforts to return or replace defective goods, you should be mindful that in the *Baker* case referenced above, the court found the retailer's no refund policy to be a *deceptive business practice* in violation of § 349 of the General Business Law. In such a circumstance, the Court may award the consumer three times the actual purchase price of the goods, *and* attorneys' fees for winning its lawsuit against the retailer.

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## ***THE 2011 STATE BUDGET AND ITS IMPACT ON LONG-TERM CARE MEDICAID ELIGIBILITY***

**By Richard J. Shapiro, J.D.**

[rshapiro@mid-hudsonlaw.com](mailto:rshapiro@mid-hudsonlaw.com)

With much fanfare, the New York State Legislature passed its 2011 budget *prior* to the April 1<sup>st</sup> deadline. The new \$132.5 billion budget contained a two percent spending cut and eliminates a \$10 billion budget deficit.

As part of the budgetary process, Governor Cuomo appointed a Medicaid Redesign Team ("MRT") that was charged with finding ways to trim New York's soaring Medicaid costs (New

York currently spends more than twice the national average on Medicaid per capita). Of the MRT's 49 proposals, three recommendations in particular would have had a significant impact on long-term care issues that most affect seniors.

First, the MRT recommended eliminating "spousal refusal" for Community Medicaid programs, a move which the MRT estimated would save the state over \$28 million in 2011-12. Under spousal refusal, a "well" spouse signs a letter or statement in which they refuse to have his or her assets and income considered in determining the "ill" spouse's Medicaid eligibility. A common planning strategy is for virtually all the couple's assets to be transferred to the well spouse so that the ill spouse's assets fall below the permitted level (currently \$13,800). Upon completing the asset transfer, the ill spouse would fall within Medicaid's financial eligibility criteria. Even if the well spouse's assets were then to exceed the maximum permitted amount (currently \$109,560), utilizing a spousal refusal typically allows the well spouse to retain all of the transferred assets. Eliminating spousal refusal in the Community Medicaid context would have curtailed this planning strategy.

A second recommendation was for the implementation of a 60-month look back period for the transfer of assets for non-institutional (i.e., Community) Medicaid eligibility. Many people are familiar with the 60-month look back period that is imposed for nursing home Medicaid cases, and they are surprised to learn that there is presently no similar look back period for the Community Medicaid program. Accordingly, a parent can transfer an unlimited amount of assets to their children in order to gain immediate eligibility for the Community Medicaid program. For nursing home Medicaid eligibility, however, a similar asset transfer from a parent to the children would result in the imposition of a "waiting period" before Medicaid would be made available to pay for the parent's nursing home care.

Another of the MRT's proposals was to enhance the local Department of Social Services' ability to recover assets from the estate of a deceased Medicaid beneficiary by expanding the definition of "estate" to include non-probate assets, such as "life estate" deeds, "in trust for" bank accounts, revocable and irrevocable trusts, and assets owned jointly with rights of survivorship. Under prior law, only probatable assets – that is, those assets owned in the descendant's name only – were subject to "repayment" to the state for Medicaid payments made during the decedent's last ten years of life. The MRT's proposal was to expand the estate recovery to include many of the "testamentary substitutes" that have traditionally been used to avoid the estate recovery rules.

To the surprise of many in the elder law community, of the three above-described recommendations *only* the estate recovery proposal was included in the budget ultimately adopted by the Legislature. For 2011 at least, spousal refusal and penalty-free asset transfers for Community Medicaid remain as available planning strategies. As for the expansion of estate recovery, the new statute specifies that the determination of the nature of assets ultimately covered under estate recovery is subject "to regulations adopted by the commissioner [of health]." Rest assured that there will be heavy lobbying by the various stakeholders to help shape those regulations, with senior advocates attempting to narrow the scope of the estate recovery statute to the greatest extent possible.

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### ***NEW YORK OFFERS BUILDER INCENTIVES FOR "GREEN" CONSTRUCTION***

Last fall, New York enacted legislation creating the Residential Green Building Program to be administered by the NYS Energy Research and Development Authority ("NYSERDA"). The

program provides financial incentives ranging from \$5,125.00 to \$13,375.00 for new construction and substantial renovations of residential buildings (1 to 12 dwelling units) that are certified to meet LEED (silver or higher) or National Green Building Standards ("NGBS") (second level or higher).

The stated purpose of the Program is to "promote the construction of 'green' or 'sustainable' residential buildings" and to promote smart growth and site planning, reduce greenhouse gas emissions, reduce energy consumption and conservation and create healthy indoor living environments.

In order for construction to qualify as "green", certification is required by a qualified technician that LEED or NGBS standards have been met. Any owner or builder may qualify as a "technician" so long as they complete the training and certification requirements set forth in the law. Once construction is certified, the amount of the incentive is determined at \$3.75/sq. ft.

The program runs through October 13, 2013 and a certificate of occupancy must be issued by that date in order to qualify for the incentive. Currently, program budget is \$16 million over the life of the program. The maximum that any one builder may obtain during any calendar year is \$120,000.00.

With the housing market as tight as it has been and with more public demand for energy efficiency and lower costs in home maintenance, this program offers a cost savings to builders and developers who provide the latest "green" technologies and designs to their customers. More information about the program can be obtained on the NYSERDA website at <http://www.getenergysmart.org/GreenBuilding.aspx>.

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## EDUCATIONAL WORKSHOPS

**Blustein, Shapiro, Rich & Barone, LLP offers complimentary educational workshops to our clients and friends. Here's our upcoming workshop schedule:**

### **Estate Plans That Work™**

May 19, 2011 *or* June 16, 2011 (3:00 p.m. to 6:00 p.m.)

### **Long-Term Care and Medicaid Planning**

June 26, 2011 (4:00 p.m. to 6:00 p.m.)

**To register for a workshop, call Donna at 291-0011 x.242, or register online at [www.mid-hudsonlaw.com](http://www.mid-hudsonlaw.com) by going to the "Event Calendar" link.**

**All workshops will be held in the BSRB Education Center at our 10 Matthews Street location.**

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