

ANTI-SUBROGATION BILL PASSES IN NEW YORK

We can't say we didn't warn you! Our March, 2008 newsletter article was entitled "New York Anti-Subrogation Bill Would Destroy All Non-Statutory Subrogation Rights." On November 10, 2009, our worst fears were realized when the New York State Senate and Assembly passed Senate Bill S66002, as substituted for Assembly Bill A40002. The bill, previously promoted by the infamous enemy of any corporation, former Governor Eliot Spitzer, was delivered to Governor Paterson on November 10 and, according to a conversation Gary Wickert had with Governor Paterson's office on November 17, he is expected to sign it. While originally thought to affect multiple lines of insurance, it arguably, though not insignificantly, eliminates subrogation and reimbursement rights only for fully-insured health insurance plans.

It is vitally important for insurance companies and their management to understand the impact of any anti-subrogation legislation, in order to advise its employees and formulate legally acceptable skirmish lines behind which to gradually retreat and operate under. It is no different with this legislation. Understanding what the legislation does and does not do is a necessary step in both complying with and skirting its edges where permissible. After all, we appear to be at war.

THE NUTS AND BOLTS OF THE BILL

The actual bill is made up of six separate parts, A through F. It describes itself as follows:

*AN ACT to amend the insurance law, in relation to municipal cooperative health benefit plans, a study of community rating and the provision of claims experience to a municipality (Part A); to amend the general municipal law and the highway law, in relation to mutual aid (Part B); to amend the public health law, in relation to the composition of county and part-county boards of health (Part C); to amend the general municipal law, in relation to purchasing requirements (Part D); to amend the public authorities law and the local finance law, in relation to authorizing certain bonds to be issued or purchased by the municipal bond bank agency (Part E); **and to amend the civil practice law and rules, in relation to treating public and private defendants equally when considering the impact of collateral source payments in tort claims for personal injury, property damage or wrongful death; to amend the general obligations law, in relation to protecting parties to the settlement of a tort claim from certain unwarranted lien, reimbursement and subrogation claims; and to repeal certain provisions of the civil practice law and rules relating to collateral source payments (Part F).***

It is Part F that will affect the prospective handling of subrogation claims in New York State. In order to fully understand what is and what is not affected by this new anti-subrogation bill, it is important to understand the nine sections comprising Part F of the bill. The new bill makes the following six fundamental changes to New York law spread over nine sections which make up Part F.

1. REPEAL OF CPLR § 4545(a)(b)

Section 1 of the bill repeals subsections (a) and (b) of § 4545. Section 4545 has for years been New York's twisted effort to abolish the collateral source rule, the evidentiary rule that bars defendants from introducing evidence to show that a plaintiff has received collateral source benefits, such as insurance payments. Section 4545 (a) and (b) allowed for collateral source payments in medical malpractice cases and suits against government entities (except for life insurance and workers' compensation) to be introduced into evidence, and the jury verdict to be reduced by that amount. These two sections are now gone.

2. AMENDMENT OF CPLR § 4545(c)

Section 2 of the bill amends subsection (c) of § 4545 and renumbers it as subsection (a). Section 3 of the bill reletters subsection (d) as (b). This subsection now provides that in any action for “personal injury, injury to property or wrongful death” where the plaintiff seeks to recover “medical care, dental care, custodial care, rehabilitation services, loss of earnings or other economic loss,” evidence of collateral source payments (except life insurance and any payment for which there is a “statutory right of reimbursement”), will be admissible and reduce the jury verdict. This collateral source reduction will take place after the jury verdict is rendered. It should be noted that, despite the reference to “injury to property” in the new subsection (a), previous case law interpreting former subsection (c) has held that it does not apply to, nor does it prohibit, property subrogation suits brought by insurance carriers. In *Kelly v. Seager*, 558 N.Y.S.2d 403, 403 (N.Y.A.D. 4 Dept., 1990), the court construed § 4545(c) and stated:

“The collateral source rule set forth in CPLR 4545I does not apply to subrogation actions seeking to recover monies paid by an insurer on a fire loss. The purpose of the statutory collateral source rule is to prevent multiple recoveries for the same loss by an injured party (see generally, 5 Weinstein-Korn-Miller, N.Y. Civ. Prac., § 4545.01). That purpose would not be served by its application to subrogation claims. Subrogation itself “exists to prevent double recovery by the insured and to force the wrongdoer to bear the ultimate costs” (Scinta v. Kazmierczak, 59 A.D.2d 313, 316, 399 N.Y.S.2d 545). Where, as here, the insurer has indemnified its insureds for their fire loss, the insurer is the real party in interest on the subrogation action (see, Siegel, N.Y. Prac., § 137), and the pertinent issue, for purposes of CPLR 4545I, is whether the insurer stands to obtain a multiple recovery.”

I can see no reason why this holding would not apply to the new subsection (a), which is essentially the same as the old subsection (c). Furthermore, the legislative memo prepared by counsel for the sponsoring committee, as well as a similar memo prepared by a judicial administrative agency involved in the bill, both echo the ruling in *Kelly v. Seager*, that the bill does not apply to property damage subrogation claims.

3. REPEALS CPLR RULE 4111(e) AND AMENDS RULE 4111(f)

Sections 4 and 5 of the bill affect CPLR Rule 4111, which governs New York verdicts and works hand-in-hand with § 4545 to implement the partial abolition of the collateral source rule. Rule 4111(f) now becomes subsection (e) and provides as follows:

(e) Itemized verdict in certain actions. *In an action brought to recover damages for personal injury, injury to property or wrongful death, which is not subject to subdivision (d) of this rule the court shall instruct the jury that if the jury finds a verdict awarding damages, it shall in its verdict specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element including, but not limited to, medical expenses, dental expenses, loss of earnings, impairment of earning ability, and pain and suffering. Each element shall be further itemized into amounts intended to compensate for damages that have been incurred prior to the verdict and amounts intended to compensate for damages to be incurred in the future. In itemizing amounts intended to compensate for future damages, the jury shall set forth the period of years over which such amounts are intended to provide compensation. In actions in which article fifty-A or fifty-B of this chapter applies, in computing said damages, the jury shall be instructed to award the full amount of future damages, as calculated, without reduction to present value.*

Subdivision (d) applies to all actions seeking damages for medical, dental, or podiatric malpractice, or damages for wrongful death as a result of medical, dental, or podiatric malpractice, and requires the court to instruct the jury to specify in its verdict the applicable elements of special and general damages upon which the award is based.

4. AMENDMENT OF CPLR § 4213(b)

Section 6 of the bill amends subsection (b) of § 4213, which governs trials to the court (judge) as opposed to a jury. This section now provides:

(b) Form of decision. *The decision of the court may be oral or in writing and shall state the facts it deems essential. In any action brought to recover damages for personal injury, injury to property, or wrongful death, a decision awarding damages shall specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element, including but not limited to medical expenses, dental expenses, podiatric expenses, loss of earnings, impairment of earning ability, and pain and suffering. In a medical, dental or podiatric malpractice action, commenced on or after July 26, 2003, the court's decision as to future damages shall be itemized in accordance with subdivision (d) of Rule 4111 of this Chapter. In any action brought to recover damages for personal injury, injury to property, or wrongful death, other than a medical, dental or podiatric malpractice action commenced after July 26, 2003, the court's decision as to future damages shall be itemized in accordance with subdivision (e) of Rule 4111 of this Chapter.*

This section simply instructs judges to itemize damages, both past and future.

5. ADDS NEW SECTION § 5-335

Section 7 of the bill adds a definition to § 5-101. It defines "Benefit Provider", for purposes of § 5-335 of the bill as "Any insurer, health maintenance organization, health benefit plan, preferred provider organization, employee benefit plan or other entity which provides for payment or reimbursement of health care expenses, health care services, disability payments, lost wage payments or any other benefits under a policy of insurance or contract with an individual or group." Section 8 of the bill adds a new § 5-335 to New York's general obligation laws. It reads as follows:

§ 5-335. Limitation of non-statutory reimbursement and subrogation claims in personal injury and wrongful death actions. *A. When a plaintiff settles with one or more defendants in an action for personal injuries, medical, dental, or podiatric malpractice, or wrongful death, it shall be conclusively presumed that the settlement does not include compensation for the cost of health care services, loss of earnings or other economic loss to the extent those losses or expenses have been or are obligated to be paid or reimbursed by a benefit provider, except for those payments as to which there is a statutory right of reimbursement. By entering into any such settlement, a plaintiff shall not be deemed to have taken an action in derogation of any nonstatutory right of any benefit provider that paid or is obligated to pay those losses or expenses; nor shall a plaintiff's entry into such settlement constitute a violation of any contract between the plaintiff and such benefit provider. Except where there is a statutory right of reimbursement, no party entering into such a settlement shall be subject to a subrogation claim or claim for reimbursement by a benefit provider and a benefit provider shall have no lien or right of subrogation or reimbursement against any such settling party, with respect to those losses or expenses that have been or are obligated to be paid or reimbursed by said benefit provider.*

B. This section shall not apply to a subrogation claim for recovery of additional first-party benefits provided pursuant to Article 51 of the insurance law. The term "additional first-party benefits", as used in this subdivision, shall have the same meaning given it in Section 65-1.3 of Title 11 of the codes, Rules and Regulations of the State of New York as of the effective date of this statute.

It should be noted that this new § 5-335 specifically exempts (*i.e.*, still allows) subrogation claims for recovery of "additional first-party benefits" as allowed by Article 51 of New York's automobile insurance laws and defined by the prescribed APIP Endorsement found at 11 NYCRR § 650-1.3. That Endorsement prescribes a subrogation clause which reads:

In the event of any payment for extended economic loss, the Company is subrogated to the extent of such payments to the rights of the person to whom, or for whose benefit, such payments were made. Such person must execute and deliver instruments and papers and do whatever else is necessary to secure such rights. Such person shall do nothing to prejudice such rights.

Thus, some limited PIP subrogation is still allowed under New York's crazy and confusing no-fault insurance laws, even after passage of this anti-subrogation bill.

6. EFFECTIVE DATES

Section 9 of the bill sets forth the effective dates of the various sections of this anti-subrogation bill. Sections 1, 2 and 3 of Part F of this Act (the changes to CPLR § 4545) will take effect "immediately" upon the Governor's signature of this bill and will apply to all actions commenced on and after that date.

Sections 4, 5 (changes to CPLR Rule 4111), 6 (changes to CPLR § 4213), 7 (addition of General Obligations Law § 5-101[4]), and 8 (addition of General Obligations Law § 5-335) will also apply to any applicable action or proceeding that was commenced prior to the effective date (Governor's signing date) if as of such date either the trial had not yet commenced or the parties had not "entered into" (settlement memorialized in writing or one "spread on the record") a stipulation of settlement.

For medical, dental, or podiatric malpractice actions commenced on and after July 26, 2003, the court's decision on future damages must be itemized in accordance with CPLR Rule 4111(d). For actions brought to recover damages for personal injury, injury to property or wrongful death commenced on and after July 26, 2003, that are not medical, dental or podiatric malpractice actions, the court's decision on future damages must be itemized in accordance with the relettered CPLR Rule 4111(e).

THE PRACTICAL EFFECTS OF THE BILL

Quite often, the actual ramifications of new legislation are not known until it has been trial-tested and appellate courts have had a chance to interpret the new law and its practical implications. Senate Bill S66002 is no different.

Health Insurance Subrogation

From a review of the new bill and the interpretations of sections of New York law left intact, it arguably appears that the only area of subrogation that will be drastically affected will be health insurance subrogation involving plans which are not self-funded ERISA plans. In fact, when predecessor Senate Bill S6068 was passed by just the Senate back in July, the New York State Trial Lawyers Association ("NYSTLA") website pronounced it a legislative victory. Sadly, it stated:

"NYSTLA is proud to announce that the New York State Senate voted to pass a mandate relief bill, S.6068 (Sampson), on July 17th, 2009, which includes an anti-subrogation provision. This is a major victory for the civil justice system and injured New Yorkers. The anti-subrogation provision amends the general obligations law to protect all settling plaintiffs and defendants in a personal injury action from certain unwarranted reimbursement and subrogation claims.

This bill will remedy recent, ill-advised Court of Appeals decisions such as Teichman v. Community Hosp. of Western Suffolk, 87 N.Y.2d 514 (1996), and Fasso v. Doerr, 12 N.Y.3d 80 (Feb. 24, 2009). These decisions incorrectly opened the door to benefits providers, such as health insurers, "double-dipping" by seeking reimbursement from settling defendants who have caused personal injuries to a plaintiff who has health insurance."

Statutory Subrogation Rights Still Intact

None of the bill's harsh anti-subrogation provisions seemingly apply to cases where there is a "statutory right of subrogation." Therefore, workers' compensation, Medicare and Medicaid, longshore and harbor workers' compensation, and other such areas of subrogation appear to have survived unscathed. Perhaps this is by design, as the bill seemingly attacked the "double-dipping" of health insurance reimbursement, perhaps in the wake of negative publicity such as the Deborah Shank/Wal-Mart subrogation fiasco made visible in the Wall Street Journal almost two years ago. It appears that ERISA-covered self-funded health plans should still be able to avoid the harsh effects of this new bill thanks to ERISA's preemption provisions, which themselves have become the target of anti-subrogation efforts. However, future appellate decisions may provide differently. The negative anti-subrogation effects of the bill should also only affect insurers or entities meeting the definition of a "benefit provider" under § 5-101(4). This new law defines a "benefit provider" as "any insurer, Health Maintenance Organization, health benefit plan, Preferred Provider Organization, employee benefit plan or other entity which provides for payment or reimbursement of health care expenses, health care services, disability payments, lost wage payments or any other benefits under a policy of insurance or contract with an individual or group." If that's not you, you should still be able to subrogate or seek reimbursement, provided you have the right plan language.

PIP Subrogation

The new § 5-335 specifically exempts subrogation claims for recovery of "additional first-party benefits" under New York's automobile no-fault insurance laws as provided for in Insurance Law Article 51 and defined by the prescribed APIP Endorsement found at 11 N.Y.C.R.R. § 65-1.3. So it too appears to have survived.

Property Subrogation

The future of property subrogation may be in limbo, however. While the language of the various statutory sections amended or enacted specifically refer to cases involving "injury to property" as being included under the vice-grip of its anti-subrogation effects, previous case law casts some doubt as to whether and when property subrogation claims are affected. Despite the reference to "injury to property" in the new subsection (a) of § 4545, previous case law interpreting former subsection (c) has held that it does not apply to, nor does it prohibit, property subrogation suits brought by insurance carriers. In *Kelly v. Seager*, 558 N.Y.S.2d 403, 403 (N.Y.A.D. 4 Dept., 1990), the court seemed to indicate that while the anti-subrogation provisions might apply to a subrogated property carrier intervening into a suit filed by the insured seeking property damage, it should not apply to a subrogation suit brought by the subrogated carrier. But this is New York, after all, so how future courts will interpret the new subsection (a) which is almost identical to the subsection (c) they analyzed in *Kelly v. Seager*, is anybody's guess.

New York's Common Law Anti-Subrogation Rule

The new bill should not affect what has come to be known as New York's common law "anti-subrogation rule." This common law rule operates as a party's liability defense based on coverage principles, not a recovery right of subrogation. It basically says that an insurer cannot subrogate against its own insured.

LESSONS LEARNED

Once again we see a stark example of a clarion warning sounded throughout our industry and little or no preventative action, lobbying, or grass roots organizing rising to the call. Perhaps our industry is "okay" with the gradual creep of anti-subrogation legislation such as we have now witnessed in New York, perhaps it isn't. But if we are to judge solely by the amount of time, energy, and resources it has committed to battling the anti-subrogation malignancy spreading throughout the country, one would be safe to assume there isn't a lot of industry sleep being lost over it.