

## COLORADO NO-FAULT SHUFFLE



No-fault dies hard. Colorado repealed its no-fault insurance scheme in 2003, because it wasn't doing what it was supposed to do – holding down the cost of insurance. Some legislators, however, are having a difficult time administering last rites to the antiquated and dysfunctional system of no-fault insurance. This spring, the drama ramped up once again, as lawmakers fought to reinstitute a form of choice Med Pay benefits with significant obstacles to third-party litigation and subrogation.

The Colorado Med Pay see-saw finally came to rest last month, and it appeared subrogation was once again the illegitimate target. Colorado's legislature entertained three separate Med Pay subrogation bills in the legislative session which recently concluded. Two of the bills were introduced in the Colorado State Senate, SB11 and SB211, and a third bill in the Colorado House, HB1009. When HB1009 and SB11 were introduced, neither bill contained anti-subrogation language. When SB211 was introduced, it contained anti-subrogation language which was amended out of the bill in the Senate House and Human Services Committee. As the legislative session neared its close, at the last minute, both HB1009 and SB11 were amended in the Committee to ADD "anti-subrogation" language. Ultimately, SB11, as amended, was passed by the Colorado House and Senate and was signed into law by Colorado's Governor on June 5, 2008. SB11 amounts to the last death throes of the no-fault gang, still bitter and depressed at the no-fault law repeal. SB11 amends C.R.S. § 10-4-635 in the following significant ways.



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- (1) Carriers are required to offer Med Pay coverage of at least \$5,000 in every policy. Insureds may affirmatively reject such coverage. C.R.S. § 10-4-635(a).
- (2) Carriers providing Med Pay benefits may not recover against any owner, user or operator of a motor vehicle or any person or organization legally responsible for the acts or omissions of such person in any action for damages for benefits paid under such Med Pay coverage. An insurer shall not have a direct cause of action against an alleged tortfeasor for benefits paid under Med Pay coverage. C.R.S. § 10-4-635(3)(a).
- (3) The bill provides that nothing in subsection C.R.S. § 10-4-635(3)(a) shall be construed to afford an insurer a cause of action against a person for whom or to whom Med Pay coverage benefits were paid, except in a case where the benefits were paid by reason of fraud. C.R.S. § 10-4-635(3)(b)(III).
- (4) The Collateral Source Doctrine is not affected, which means that insureds will be allowed to recover against tortfeasors for damages which have already been paid for by Med Pay coverage. C.R.S. § 10-4-635(3)(b)(I).



While these amendments are certainly problematic for auto carriers attempting direct subrogation, it should be noted that there is no specific restriction in the statute that would prevent a med pay carrier from seeking contractual reimbursement from its insured for amounts paid in Med Pay benefits. It appears the legislature was attempting to put limits on reimbursement recoveries, but we don't believe the language of the bill will be sufficient to accomplish that goal.

We are recommending to our clients writing business in Colorado that they include reimbursement language in their policies and seek reimbursement from their insureds where the insureds have made third-party recoveries, notwithstanding the passage of SB11. This position makes both good sense and good public policy, because, pursuant to C.R.S. § 10-4-635(3)(b)(I), if a carrier could not seek contractual reimbursement from its insured, then the insured would enjoy a double



recovery – something subrogation was designed to prevent. In addition, there is nothing in the specific language of the amendment which, in our opinion, abrogates a carrier’s contractual right of reimbursement. The bill merely states that it, in and of itself, does not create a cause of action against a person for whom or to whom Med Pay coverage benefits were paid. It does not affirmative proscribe such a right of reimbursement.

These amendments will take effect on January 1, 2009, and will apply to policies issued, delivered or renewed after January 1, 2009. We can expect future litigation over the sloppy wording of these last minute amendments and their effect on an insurer’s right of contractual reimbursement.

Please Gary Wickert at [gwickert@mwl-law.com](mailto:gwickert@mwl-law.com) if you have any questions regarding the application of this new law.

