



NEW YORK ANTI-SUBROGATION BILL WOULD DESTROY ALL NON-STATUTORY SUBROGATION RIGHTS

By Gary L. Wickert

As if notorious corporation-hunter and New York Governor Elliott Spitzer didn't have his hand in enough cookie jars, he has just undertaken to take another swipe at corporate America. This time it takes the form of an anti-subrogation bill which would eliminate subrogation and reimbursement rights unless they are provided by statute. The current N.Y. bill (S6806-A / A9806-A) again seeks to eliminate the insurer's right to recover through subrogation benefits which arise from a "claim founded on personal injury or wrongful death". The only rights exempted are those whose subrogation is based upon a statutory subrogation right. N.Y.'s bill would eliminate contractual subrogation anytime a claim involves or may involve personal injury. The proposed bill reads as follows:

§ 27. Section 4545 of the civil practice law and rules is amended by adding a new subdivision (e) to read as follows:

(e) No right of reimbursement for certain collateral source payments.

A collateral source payor which has made payment to a person who had a claim founded on personal injury or wrongful death shall have no right to seek reimbursement from either the plaintiff or the tortfeasor unless the right to seek said reimbursement is set forth by statute. When an action within the scope of this section settles, it shall be conclusively presumed that the settlement does not include any compensation for those losses or expenses that would have been deducted, pursuant to this section, from any verdict that the plaintiff might have obtained. By entering into a settlement agreement, a plaintiff shall not be deemed to have taken an action in derogation of the non-statutory right of any person who supplied the collateral source payments; nor shall a plaintiff's entry into such agreement constitute a violation of any contract between the plaintiff and the person who supplied the collateral payments. Except where there is a statutory lien or statutory subrogation right, no defendant entering into such settlement shall be subject to a claim for reimbursement by any person who supplied the collateral source payments.

Typical of legislation crafted by legislators who do not understand the societal and cost-saving benefits of subrogation, but who are eager to see injured workers realize a double recovery at the expense of rising insurance premiums for the employing public, the proposed bill blindly limits any subrogation which isn't provided for by statute. On January 22, 2008, the bill was forwarded to the Finance Committee, and on February 21, 2008, it was amended slightly and resubmitted to the Finance Committee.

The bill can be traced at the following website: <http://public.leginfo.state.ny.us/menugetf.cgi> Please contact Assembly representatives and express your concern for the damage such a bill will do to the economy and the devastating effect it will have in health care – where we are struggling to keep costs down and make every dollar stretch. You can locate State Assemblymen at <http://assembly.state.ny.us/> and State Senators at <http://www.senate.state.ny.us/senatehomepage.nsf/home?openform>.

Several important public policy justifications for the often confusing and misunderstood concept of subrogation resonate more than others with a populace ignorant of both the truth and the many benefits of subrogation.

One of the lynchpins underlying subrogation, and the one most cited by legal scholars and courts across the country in support of the concept, is the fact that it serves to prevent a double recovery by the insured, who would otherwise recover once from his or her insurance policy (first-party), and again from the

tortfeasor's settlement or judgment (third-party). Allowing a double recovery to the insured is against public policy, as it allows a windfall to the insured, and results in two separate insurance policies paying for the same elements of damages. The public policy against allowing a double recovery has been echoed by American courts since the country was founded. In 1876, the U.S. Supreme Court had this to say:

"Compensation by the wrong-doer after payment by the insurers is not double compensation, for the plain reason that insurance is an indemnity; and it is clear that the wrong-doers are first liable, and that the insurers, if they pay first, are entitled to be subrogated to the rights of the insured against the insurers." The Atlas, 93 U.S. 302 (1876).

The concept of a "double recovery" is one that is easily understood by and does resonate with a public which is illiterate when it comes to legal concepts such as subrogation. It smacks of "fairness" and should be the poster child of any subrogation campaign aimed at winning the hearts of Americans on the subject. The notion that subrogation prevents the person ultimately responsible for causing injury or loss from evading responsibility for his or her actions is a valid policy justification for subrogation. However, the danger in relying on this justification alone is that the collateral source doctrine - a rule existing in most states which prevents the admission of trial evidence showing that the victim's damages were partially compensated by collateral sources such as insurance - is that the collateral source rule eliminates the risk of a tortfeasor evading responsibility. However, collateral source rules simultaneously emphasize the need to prevent a double recovery, which subrogation effectively accomplishes.

Let's also not sell the storied history of subrogation short. Subrogation is actually one of the oldest legal concepts in jurisprudence, having had its roots in Roman law. Under the reign of Emperor Hadrian (A.D. 177 - A.D. 138), Roman law began to shape the building blocks of subrogation. Suretyship began as an accessory contract and the concept known as *beneficium cedendarum actionum* (subrogation to the right of action of the creditor against the principal debtor or pro rata against the co-sureties) was later perfected by Justinian himself. Our U.S. Supreme Court has supported and validated the concept and underlying justifications for subrogation since 1799. Even that is considered modern history considering subrogation is also one of the oldest concepts known to Anglo-American common law, and seems to have been formally established, also with regard to suretyship, in 1215 in the Magna Carta. It has a very long and proud heritage, but you wouldn't know that by the amount of public support it gets from our industry. NASP is a good start, but the industry itself must wake up to what is at stake.

Perhaps the most important societal justification for subrogation, however, is the fact that subrogation helps keep premiums lower for all Americans and reduces the burden of insurance on the public. This is something all Americans, whether Republican or Democrat, tort reformers or trial lawyers, can benefit from and agree on. The only problem is, we haven't done a good job of marshaling evidence in support of this fact, and have done an even worse job of communicating this benefit to the public. Courts have opined on the subject in a variety of ways, but at least with regard to workers' compensation, it has been put like this:

"This situation [before subrogation] was, in reason, imperfect; it served to bring to the employee more than his damages, which was, perhaps, not sound economy, and to make the insurance more burdensome to the insurer and hence more expensive to the employer and ultimately to the public than would have been the case had the amount recovered from the actual tortfeasor been applied first to the repayment of the amount of the compensation, and then the balance to the employee, to make him whole." Consolidated Underwriters v. Kirby Lumber Co., 267 S.W. 703 (Tex. Comm. App. 1924).

New York, the very state where this subrogation-killing statute is being considered, has modified its collateral source rule to allow evidence of collateral sources and then require a reduction of any jury award in the same amount, except where there is a right of subrogation right. Efforts to repeal the subrogation exception have produced testimonials from their own Superior Court to the virtues of subrogation. One is as follows:

“The terms of the statute clearly limit its reach to those plaintiffs who have or will be compensated by a collateral source. The intention behind §4545 is to prevent double recovery for the same injury, and thereby to reduce insurance premiums (5 Weinstein-Korn-Miller, N.Y. Civ. Prac. §4545.01, p. 45-612). If recovery in subrogation actions were limited by §4545, as defendants contend, the loss would be borne by the insured’s insurer. By not limiting recovery, the insurer obtains reimbursement for monies it pays to its insured by passing the loss onto the tortfeasor and his insurer. In either case, the insured, limited by §4545(c), is compensated only once for his loss. The cost to the insurance industry as a whole is the same, except the tortfeasor’s insurer will ultimately pay for the loss, placing the burden where it properly belongs. The goal of reducing insurance premiums is advanced by permitting full recovery in the subrogation action because the insurer is reimbursed by the tortfeasor rather than having to increase its own premiums to obtain reimbursement. Construing §4545 as limiting recovery in subrogation actions, does nothing to further the purpose of the legislation. Kelly v. Seager, 545 N.Y.S.2d 261 (N.Y. Sup. 1989).”

The insurance industry is second to none when it comes to lobbying and public relations in many arenas. Unfortunately, subrogation is not one of them. Until that void is filled, it is up to us to make enough noise to be heard. At the time of this newsletter’s printing, it’s looking like this bill’s anti-subrogation language may not be included in the final legislation. Nonetheless, we need to be heard and heard loudly, or the same issue will surface next year. Contact the New York lawmakers who considered this bad piece of legislature and reinforce in their minds that the subrogation - killing language is best left out of the final bill. Their own Superior Court recognizes the societal value of subrogation - surely, they can too.



**MAKE SOME NOISE
FOR SUBROGATION!!**