NEW YORK COURT OF APPEALS ISSUES FAVORABLE MADE WHOLE OPINION

***Paula Fasso Independent Health Ass'n, Inc. v. Doerr*, 2009 WL 435322 (N.Y. 2009)**

New York has recognized and employed the equitable made whole doctrine for many years. An insurer has no right of subrogation against its insured when the insured's actual loss exceeds the amount it has recovered from both the insurer and third party. Nothing surprising there. What is surprising is that, until recently, there were no New York cases applying the made whole doctrine to health insurance subrogation, but that is no longer the case. The New York Court of Appeals – New York's highest appellate court – issued an opinion on February 24, 2009, applying the made whole doctrine to health insurance subrogation, but giving subrogation professionals a nice surprise in the process.

In *Paula Fasso Independent Health Ass'n v. Doerr,* the New York Court of Appeals decision indicated that the made whole doctrine would be applicable to bar health insurance subrogation rights. While this clearly has the biggest effect on non-self-insured ERISA plans who do not have the benefit of ERISA preemption at their disposal, fully insured and non-ERISA plans shouldn't lose heart. In *Doerr,* the Fassos filed a medical negligence case against Dr. Doerr and received $780,000 in benefits from their health plan, Independent Health Association ("IHA"), who was allowed to intervene into the case. The plaintiff settled her case for $900,000 and contended that the "made whole" rule precluded IHA from pursuing equitable subrogation. The court acknowledged that the made whole doctrine applied. The good news, however, is that the court went on to state that the plaintiffs misconstrued the made whole principle.

The court in *Doerr* held that if the recovery received by the injured party, whether determined by settlement or verdict, is greater than the wrongdoer's assets and available insurance coverage, there is nothing left for the insurer to execute its subrogation rights against and the made whole rule prevents the insurer from sharing in the insured's judgment or recovery. But that was not the situation here. In this case, the court announced that the made whole doctrine did not present an obstacle to IHA's right to seek recoupment from the tortfeasor because the settlement between the Fassos and Dr. Doerr left a potential source of recovery - $1.1 million in remaining insurance coverage. Consequently, the made whole rule did not mandate dismissal of IHA's equitable subrogation claim merely because the Fassos decided to accept a settlement figure that did not completely compensate them for the full extent of their damages.

New York joins a growing list of states with case authority indicating that voluntary settlement of a lawsuit by an insured for an amount less than, and not as a result of, minimum limits of insurance, should not prevent a subrogated insurer from seeking full reimbursement of its subrogation interests.