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Insurer May Intervene To Enforce Equitable Subrogation Rights

The New York Court of Appeals, in *Fasso v. Doerr*, recently examined the law in New York with respect to the right of a health insurer to intervene in a medical malpractice action to recover \$780,000 in medical benefits paid to its insured.

Plaintiff Paula Fasso received medical treatment from defendant Ralph Doerr, M.D. She developed complications requiring a liver transplant. She subsequently sued Dr. Doerr and the hospital, alleging medical malpractice. Her medical and surgical expenses totaled approximately \$780,000, all paid by her health insurance carrier, Independent Health Association, Inc. ("IHA").

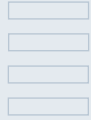
IHA moved to intervene in the medical malpractice action under CPLR §1013 to assert its equitable subrogation claim against Dr. Doerr. There was no opposition to IHA's motion, and the Supreme Court allowed IHA to become an intervenor party to the case. The Fassos subsequently moved for summary judgment dismissing IHA's complaint for equitable subrogation, contending that Mrs. Fasso's damages exceeded the \$2,000,000 of malpractice insurance coverage available to Dr. Doerr, and that Mrs. Fasso could not, therefore, be "made whole."

At trial, plaintiffs and defendant Dr. Doerr had agreed to a settlement whereby the plaintiffs would receive \$900,000 and IHA's equitable subrogation claim would be dismissed on the grounds that Mrs. Fasso was not "made whole" because the settlement was less than her alleged actual damages. IHA objected to the dismissal of its equitable subrogation claim, pointing out that there still remained \$1.1 million in potential insurance coverage available to satisfy its claim.

Supreme Court approved the settlement and also dismissed IHA's equitable subrogation claim on the grounds that Mrs. Fasso was not being paid the full amount of her damages. The Appellate Division affirmed, and the Court of Appeals granted leave to appeal. The Court of Appeals thereafter reversed the Appellate Division's decision.

New York's Highest Court cited the well-established rule in New York that where an insurer pays for losses sustained by its insured occasioned by a wrongdoer, the insurer is subrogated to the rights of its insured against the wrongdoer under the doctrine of equitable subrogation. Under this doctrine, if an injured party receives monies from the tortfeasor attributable to expenses paid by the insurer, the insurer may recover its payments from its insured. Additionally, when the tortfeasor does not pay damages for the insured's medical expenses, the insurer may seek recovery directly from the tortfeasor.

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The Court of Appeals recognized an important limitation on the equitable subrogation doctrine:

If 'the sources of recovery ultimately available are inadequate to fully compensate the insured for its losses, then the insurer who has been paid by the insured to assume the risk of loss-has no right to share in the proceeds of the insured's recovery from the tortfeasor.' (*Winklemann v. Excelsior Insurance Company*, 85 N.Y.2d at 581).

Thus, the 'made whole' rule provides that the insurer may only seek recovery from funds and assets that remain after the insured has been compensated, and the injured party's claim against the tortfeasor takes precedence over the subrogation rights of the insurer.

However, the Court of Appeals rejected the argument that the "made whole" rule prohibited IHA from seeking equitable subrogation because the plaintiff had settled for less than the total damages she sustained as a result of Dr. Doerr's malpractice. The Court found:

But that is not the situation here. In this case, the 'made whole' doctrine does not present an obstacle to the insurer'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.

The Court also rejected the contention that because the insurer stands in the shoes of its insured, it could not recover against Dr. Doerr based upon the settlement at trial stating:

[o]nce an insurer has paid a claim, and the tortfeasor knows, or should have known, that a right to subrogation exists, the wrongdoer and the insured cannot agree to terminate the insurer's claim without its consent, and such an agreement cannot be asserted as a defense to the insurer's cause of action.

The Court of Appeals also noted that "New York courts have disagreed on the issue of whether it is permissible to grant intervention to health insurers of injured parties in tort cases." Intervention creates an adversarial posture between the insured and its insurer "especially where the potential damages exceed the available sources of recovery." Because of spiraling healthcare costs, health insurers are increasingly seeking to recover payments in subrogation. As a result, the Court of Appeals suggested that the Legislature should re-examine the concept of permissible intervention under CPLR §1013, as it applies to personal injury actions involving a health insurer's claim of equitable subrogation.

This case demonstrates the competing interests of an insured and her insurer where limited assets are available to satisfy claims asserted against a tortfeasor. It also emphasizes the fact that in New York, the "made whole" rule gives the insured priority of claim and the insurer's rights may only be exercised where there are adequate assets available to the tortfeasor to satisfy the insured's claim in full. ■

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