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New Legislation Bars Health Providers' Right to Subrogation in Personal Injury Settlements

In our March 2009 Legal Alert, we reported on the New York State Court of Appeals' decision in *Fasso v. Doerr*, in which the high court held, in part, that the "made whole" rule did not prevent an insurer from seeking reimbursement from a tortfeasor where the settlement between the parties left a potential source of recovery available.

On November 13, 2009, a bill was passed which specifically overrules both *Fasso v. Doerr* (2009) and *Teichman v. Community Hosp. of Western Suffolk* (1996) to the extent that these cases acknowledged a non-statutory right to reimbursement or subrogation against a settling party.

Under the "made whole" rule, where sources of recovery are inadequate to fully compensate an injured party, the insurer assumes the risk of loss and has no right to share in the proceeds of the insured's recovery from the tortfeasor. Under these circumstances, the injured party's claim takes precedence over the subrogation rights of the insurer.

Although the Court of Appeals in *Fasso* recognized that the "made whole" rule was an important limitation on the doctrine of equitable subrogation, it held that this limitation did not apply to the facts of the case before it. Because the parties in *Fasso* settled for less than the amount of available malpractice insurance coverage, New York's Highest Court determined that the "made whole" rule did not apply. The Court further held that an injured party and the tortfeasor cannot, by reaching a settlement, agree to terminate the insurer's subrogation claim without its consent and that such an agreement cannot be used as a defense to the insurer's cause of action. The Court of Appeals' decision recognized a conflict within the courts on the issue of whether it is permissible to grant intervention to health insurers of injured parties in tort cases and suggested that the Legislature re-examine the concept of permissible intervention.

The Legislature accepted this invitation and earlier this month, after a nearly unanimous, bi-partisan vote, Governor Patterson signed in effect new General Obligations Law §5-335 which bars any benefit provider, such as a private health insurer or HMO, from seeking reimbursement from any settling party for the benefits paid (and/or future benefits the provider is obligated to pay) to the injured party. The only exceptions are for claims in which a specific statutory right of

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reimbursement lies (such as for Worker's Compensation, Medicaid or Medicare) and subrogation claims seeking to recover payment on excess no-fault benefits.

The new General Obligations Law §5-335 takes effect immediately and applies to all future and pending actions that were not resolved by judgment or settlement by November 13, 2009.

It is expected that this new legislation will help foster the settlement of personal injury actions as the new act has been lauded by the Plaintiff's Bar as removing a major obstacle to the negotiation and resolution of cases. ■

If you require further information regarding the information presented in this Legal Alert and its impact on your organization, please contact any of the members of the Practice Area listed on the front of this Alert.