

Client Bulletin

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Do Subrogation Rights Survive CPLR Section 4545?

New York courts are mired in conflicting interpretations of New York Civil Practice Law and Rule (“CPLR”) Section 4545, which reduces a tort plaintiff’s damage awards by amounts received from certain “collateral sources” such as insurance. The conflict arises from the statute’s silence on whether a tort plaintiff’s insurer may recover from a tort defendant the insurance proceeds the insurer paid to its insured for the same loss.

CPLR 4545 operates to reduce a personal injury, wrongful death or property plaintiff’s damages award by the amount the plaintiff receives from certain “collateral sources” such as medical and property insurance. The New York legislature enacted CPLR 4545 amidst the medical malpractice insurance crisis of the 1980’s. In the context of the medical malpractice crisis, the legislature enacted the statute to (1) enable defendants’ insurers to lower their insurance premiums and (2) prevent a double recovery by plaintiffs – once from their insurer and again from the tort defendant for the same loss.

Although the text of CPLR 4545 does not expressly grant a plaintiff’s insurer the right to pursue a claim in subrogation against the tort defendant after the plaintiff’s insurer has paid its insured, the common law doctrine of equitable subrogation allows the plaintiff’s insurer to “stand in the shoes” of its insured and pursue the insured’s claims directly against the tort defendant – just as if the insurer were the insured. The insurer also is subject to the same defenses that the tort defendant could have asserted against the insured. In other words, the subrogated insurer has no greater rights than its insured.

CPLR 4545 has created a conflict concerning subrogation rights. On the one hand, when an insurer pays its insured for a loss caused by a tort

defendant, the doctrine of equitable subrogation allows the insurer to recover those insurance payments from the tort defendant even if the application of CPLR 4545 would prevent the insured from making the same recovery. On the other hand, CPLR 4545 prohibits a plaintiff from recovering against a tort defendant for damages already covered by the plaintiff’s insurance proceeds. The conflict arises from the fact that although an insured plaintiff cannot recover damages from the tort defendant that have been paid by insurance, a plaintiff’s insurer could recover these same damages under the doctrine of equitable subrogation despite the fact that the insurer “stands in the shoes” of its insured. Allowing plaintiffs’ insurers to recover from a tort defendant (or its liability insurer) the insurance proceeds it paid its insured would make the defendant liable for the same amount as if CPLR 4545 never had been enacted.

These conflicting arguments have led to a split in authority among New York’s intermediate appellate courts (the Appellate Division). One court has held that an insurer’s subrogation rights survive, even when its insured could not recover those insurance payments in a tort judgment under CPLR 4545. This court relied upon only one of the legislature’s two purposes behind CPLR 4545 – preventing a double recovery by plaintiffs. Conversely, two other Appellate Division courts have held that an insurer’s subrogation rights do not survive when CPLR 4545 applies. Their decisions are based on both of the legislative purposes behind CPLR 4545 – lower insurance premiums and prevention of double recovery.

Although New York’s highest court (the New York Court of Appeals) has not directly addressed whether subrogation rights survive, that court has stated in *dicta* (literally, “something said in passing,” which has no precedential value) that an insurer’s subrogation rights survive the enactment of CPLR 4545. The most recent of these decisions was on February 24, 2009 in *Fasso v. Doerr*, 2009 WL 435322. *Dicta*,

though, can indicate which direction a court may rule when presented with an issue.

Before the New York Court of Appeals directly confronts this conflict, the New York legislature may amend the statute to eliminate the conflicts among New York's intermediate courts and clarify its intentions and purpose behind CPLR 4545 regarding an insurer's subrogation rights. Indeed, in January 2008, the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of New York recommended amending CPLR 4545 to eliminate insurers' subrogation rights in personal injury and wrongful death cases unless the payment is subject to a statutory right of reimbursement (*e.g.*, Medicaid, Medicare or worker's compensation).¹ The New York legislature recently introduced a bill that adopts the Advisory Committee's proposal, but the bill is in committee and has yet to be voted on.

Should this bill become law, tort defendants would still be able to reduce a personal injury, wrongful death or property plaintiff's damages award by amounts received from certain collateral sources such as insurance.² However, insurers of plaintiffs in personal injury or wrongful death actions (not property actions as the bill currently is written) would not be able to recover these insurance payments in subrogation against a tort defendant who pays a judgment or settlement to an insured.

In the end, because the New York appellate courts are clearly divided on whether subrogation rights survive CPLR 4545, it is likely that this issue will soon be resolved either by the New York Court of Appeals or the legislature.



If you have any questions or would like further information concerning CPLR 4545 or subrogation rights, please contact:

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¹ The proposed amendment does not eliminate subrogation rights in property damage claims.

² The tort defendant still would be liable to the insured for any damages not covered by collateral source payments, such as pain and suffering.