

# The HPM&B Firm Reporter

## THE POTENTIAL IMPACT OF *FASSO V. DOERR* ON SETTLEMENT NEGOTIATIONS

Under the recent decision by the Court of Appeals in *Fasso v. Doerr*, 12 N.Y.3d 80, 903 N.E.2d 1167, 875 N.Y.S.2d 846 (2009), the defense bar must exercise greater caution in negotiating settlements of personal injury actions because the parties do not have an automatic right to extinguish the equitable subrogation claim of a health insurer who paid all or part of the plaintiff's past medical expenses. If a tortfeasor settles with an injured party for less than its total insurance coverage without obtaining a release from the health insurer, it could be exposed to additional liability on the subrogation claim. The New York Legislature is considering a bill that would close the so-called "subrogation gap."

In *Fasso*, plaintiff brought an action in Buffalo County, alleging that defendant's malpractice caused plaintiff to undergo two liver transplants. The surgical and medical expenses, totaling \$780,000, were paid by her health insurance carrier, Independent Health Association Inc. (IHA). IHA made an unopposed motion to intervene in order to pursue recovery of those expenses from defendant Dr. Doerr, which was granted. IHA asserted a claim for equitable subrogation. The equitable subrogation doctrine allows an insurer to stand in the shoes of the plaintiff and collect from a tortfeasor sums the insurer expended under its policy.

After the trial began, the injured plaintiff and the defendant physician agreed to settle the case for a total sum of \$900,000. They also agreed that the defendant physician did not admit wrongdoing and that the subrogation cause of action by IHA was extinguished under the "made whole" rule because the injured plaintiff settled for less than her actual damages. The trial court approved the settlement and dismissed IHA's subrogation claim.

The Court of Appeals reinstated the subrogation claim and remanded the case for further proceedings, rejecting the argument that this claim was extinguished by the settlement. The Court held that it is only when the injured party's recovery by settlement or verdict is greater than the wrongdoer's available insurance coverage and assets that the insurer is barred from sharing in the settlement payment or recovery. Because there was \$1.1 million in coverage remaining under the defendant's \$2 million malpractice policy following the \$900,000 settlement, this provided a potential source of recovery for IHA.

*Fasso* was decided in a unique procedural posture because neither party opposed IHA's motion to intervene in the proceedings. Indeed, the Court of Appeals invited the Legislature to consider whether it is good policy to allow health insurers to intervene and assert equitable subrogation claims in personal injury actions. It observed that "participation by insurers in settlement negotiations creates conflicts of interest with plaintiffs, who may wish to accept settlements that do not allocate sufficient monies to cover all or part of the medical expenses, and discourages or prevents settlements since insurers will be inclined to object to anything less than full recovery of their expenditures." Indeed, the New York Legislature is considering a bill that would amend CPLR 4545 to address this issue, providing that "[e]xcept 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." S.2393; A.2875 (for full text, visit <http://public.leginfo.state.ny.us/menugetf.cgi>).

While the ramifications of *Fasso* and the pending legislation are still unclear, a settling defendant must be aware of expenses borne by a health insurer. If a settlement is for less than the defendant's available insurance coverage and less than the full value of the injury, the defendant still may need to contend with a subrogation claim. It should consider opposing the health insurer's motion to intervene as a subrogee or be prepared to include the subrogee in settlement negotiations.