BY NORMAN H. DACHS AND JONATHAN A. DACHS

Civil Practice Law and Rules §4545: If It's "Broke," Fix It

Rarely do we editorialize in this column or express our opinions as to whether judicial opinions we discuss were either, eminently correct, erroneously decided, wise or unwise. We deem our function to alert our readers to interesting recent decisions and to enlighten them as to the current state of the law as explicated by our esteemed appellate jurists. However, one statute has generated so much confusion and so many conflicting decisions recently that we feel that the time has come for clarifying legislation.

We speak of Civil Practice Law and Rules (CPLR) §4545, commonly known as the "collateral source" statute.

Norman H. Dachs

Jonathan A. Dachs

The Statute

CPLR §4545 provides that "in any action to recover for personal injury, injury to property or wrongful death, where the plaintiff seeks to recover the cost of medical care, dental care, custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified in whole or in part, from any collateral source such as insurance (except for life insurance), Social Security (except those benefits provided under Title XVIII of the Social Security Act), workers' compensation or employee benefit programs (except such collateral sources entitled by law to liens against any recovery of the plaintiff)." The statute goes on to provide that the court shall "reduce the amount of the award by such finding, minus an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits."

This statute was enacted in response to the medical malpractice "crisis" that purportedly existed in the 1980s. Its goal was to control rising malpractice premiums by reducing tort recoveries. Another purpose was to avoid "windfall" double recoveries. Obviously believing that these goals were being fulfilled, the Legislature subsequently extended the statute's application to all property damage, personal injury and wrongful death actions.

In those few cases that actually go to verdict and judgment, the statute appears to work well. For example, if the plaintiff's medical expenses were fully covered by insurance, he or she will not again be compensated therefor by the defendant. If, however, these expenses were paid by a source entitled to assert a lien against the recovery, such as a workers' compensation insurer, the plaintiff can recover full damages, but must then satisfy the lien out of the recovery. However, recent judicial decisions have seriously affected and, indeed, deterred, the settlement of cases to which the statute applies.

As currently interpreted by the Court of Appeals, CPLR 4545's application now serves to complicate, delay and, in some cases, actually prevent the settlement of actions. In addition, as currently construed, the statute may effectively deny liability insurers, especially malpractice insurers, the premium-reducing benefits they sought to obtain by the statute's enactment.

Some cases have held that because CPLR 4545 does not expressly provide otherwise, an insurer that paid a plaintiff's medical expenses can sue the tortfeasor for those same expenses that the plaintiff may not recover. See *Kelly v. Seager*, 163 AD2d 877 (4th Dept. 1990); *Excellus Health Plan, Inc. v. Federal Express Corp.*, 11 AD3d 948 (4th Dept. 2004). There is, however, also authority for the contrary position: *Oxford Health Plans, Inc. v. Augustino Deli & Caterers*, 282 AD2d 728 (2d Dept. 2001). The issue has become even more complicated by two 2004 Court of Appeals decisions, in which the Court implied, without actually deciding, that a subrogation claim in which the subrogee seeks to recover damages that the subrogor would be barred from recovering was not meritless on its face. *Allstate Ins. Co. v. Stein*, 1 NY3d 416 (2004); *Blue Cross and Blue Shield of New Jersey v. Philip Morris USA*, 3 NY3d 200 (2004).

'Teichman'

The Court of Appeals decision in *Teichman v. Community Hospital*, 87 NY2d 514 (1996), which held that the statute does not govern settlements—leading to the conclusion that a health insurer could sue its own insured for reimbursement for damages that the plaintiff would not have been entitled to recover at trial—significantly muddied the water and left more confusion in its wake.

Recognizing that *Teichman* might open the door to collateral source payors and allow them to come between plaintiffs and defendants' insurers engaged in pretrial settlement discussions, cases decided after *Teichman* quickly sought to disabuse such payors of any thought that they suddenly acquired a vehicle that would enable them to easily recoup that which they had paid to or on behalf of the plaintiff.

The Second Department took the lead. Holding that "the intervention of various medical providers could create an adversarial posture between carriers and plaintiffs, and could unduly delay the determination of such actions" to the extent that "simple personal injury actions would be transformed into complicated, unmanageable, multi-party litigation," the court in *Humbach v. Goldstein*, 229 AD2d 64 (2d Dept. 1997), refused to allow the collateral source payor to intervene. The Third Department followed the lead in *Berry v. St. Peters Hosp.*, 250 AD2d 63 (3d Dept. 1998), when it held that nothing in *Teichman* permitted collateral source payors "to inject themselves into any settlement negotiations and into any result that was not favorable to their interests." However, the Court of Appeals has stated, in dictum, that a health insurer can intervene and can insist on resolution of its subrogation claim "as part of a global settlement of the personal injury claims." *Allstate v. Stein*, supra at

Continued on page 7

Norman H. Dachs *and* **Jonathan A. Dachs** *are with the firm of Shayne, Dachs, Stanisci, Corker & Sauer, in Mineola.*

This article is reprinted with permission from the July 12, 2005 edition of the New York Law Journal, ©2005, NLPIP Company. All rights reserved. Further duplication without permission is prohibited.

Civil Practice Law and Rules §4545: If It's "Broke," Fix It

Continued from page 3

p. 423. And in two recent cases, the Fourth Department held—each time by a three to two vote—that a health insurer can formally intervene as a party during the course of the underlying action. *Kaczmarski v. Suddaby*, 9 AD3d 847 (4th Dept. 2004); *Omiatek v. Marine Midland Bank*, 9 AD3d 831 (4th Dept. 2004).

Advisory Committee Opinion

The Advisory Committee on Civil Practice, one of the standing advisory committees established by the chief administrative judge of the courts has recently identified the following problems in the statute's actual operation as a result of these decisions:

- Collateral source payors, including but not limited to health insurers, might now be able to impose a toll or fee of some sort as the price for their approval of a settlement of an action to which they were not even a party. Ironically, they would be able to do this even in cases where they would get nothing at all if the case went to judgment.
- Although the statute was enacted, in part, to prevent double recovery, it may now sometimes operate to deprive the plaintiff of a single recovery. The settling plaintiff may be compelled to partially or fully reimburse his or her insurer for expenses that the plaintiff could not possibly have recovered at trial, and the plaintiff may be compelled to do so (if the plaintiff wants to settle) even in those cases in which the settlement proceeds cover only a fraction of the plaintiff's true, unreimbursed losses.
- While the statute was intended to reduce the tortfeasor's liability (and, indirectly, the tortfeasor's insurance premiums), the tortfeasor's savings may now be temporary and illusory, if, after a settlement, the health insurer can bring a valid claim for subrogation.
- Perhaps most troubling of all, many actions will now be delayed and complicated by interventions that will also delay, or even prevent, settlements.

The committee has said the statute should be amended to provide that no right of subrogation shall lie as to collateral source payments within the statute's scope.

To address these problems, the committee has recommended that the statute be amended to provide that:

1) No right of subrogation shall lie as to collateral source payments within the statute's scope. In other words, the tortfeasor's savings under the statute will be a real savings, as we believe the Legislature intended, and

2) By entering into a settlement agreement, the plaintiff shall not be considered to have taken an action in derogation of the right of subrogation of any person or entity that supplied the collateral source payments.

In our view, the committee's recommendation has substantial merit and should be adopted by the Legislature.

This article is reprinted with permission from the July 12, 2005 edition of the New York Law Journal, ©2005, NLPIP Company. All rights reserved. Further duplication without permission is prohibited.