INSURANCE LAW

Law in Flux on Coverage For Same-Sex Couples

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According to the federal government's General Accounting Office (GAO), more than 1,100 rights and protections are conferred upon U.S. citizens upon marriage. Areas affected include Social Security benefits, veteran's benefits, Medicaid, hospital visitation, estate taxes, retirement savings, pensions, family leave, immigration law, and, of course, insurance coverage.[1] One of the more interesting and significant questions that has recently arisen in the courts and legislatures across the country is whether same-sex couples can be legally married and thus entitled to those benefits presently available to opposite-sex couples. As will be seen, the answer to this question will undoubtedly have a significant impact on issues relating to insurance coverage for spouses and "resident relatives." Thus, it is important to understand the current state of the law on this important subject.

In 1996, the U.S. Congress passed, and then-President Bill Clinton signed, the Defense of Marriage Act (DOMA) (28 USC §1738C), which allowed each state to choose whether or not to recognize a same-sex union recognized in another state. Since that legislation was passed, almost every state has taken the opportunity to either amend its state constitution or enact legislation to deal with the subject of same-sex marriage. As of April 2009, 29 states have enacted constitutional amendments[2] and 13 states have enacted laws[3] restricting marriage to one man and one woman. In addition, the constitutional amendments or laws in 18 of those states[4] go even further to restrict other legal relationships, such as "civil unions" and "domestic partnerships."

Several other states grant same-sex partners most or all of the rights and responsibilities of marriage by recognizing "civil unions" or domestic partnerships in varying degrees.[5] Generally speaking, however, the benefits allowable to such individuals, in the absence of a marriage license, do not extend to matters controlled by federal law and do not extend to states that have prohibited same-sex marriage.

On the other hand, as of this month, five states—Massachusetts (since 2004),[6] Connecticut (since 2008),[7] Iowa (since 2009),[8] Vermont (effective Sept. 1, 2009),[9] and Maine (expected to be effective September, 2009)[10]—have enacted laws that permit same-sex couples to marry. Although California became the second state to make marriage licenses available to same-sex couples in June 2008, when its Supreme Court overturned that state's ban on same-sex marriage, a state constitutional amendment to define marriage as between a man and a woman (Proposition 8) was passed in November 2008, thus effectively overturning the earlier court decision.[11] Illinois, Maryland, Minnesota, New Hampshire, New Jersey and Washington have same-sex marriage bills before their Legislatures this year.[12] The Canadian provinces of Quebec and Ontario currently allow for same-sex marriage. Which brings us to New York....

> In one case, the Supreme Court held that the term 'relative' is defined as 'either through blood, consanguinity, or through marriage, affinity' and did not cover a live-in friend.

In 2006, in *Hernandez v. Robles*, 7 NY3d 338 (2006), the New York Court of Appeals held that the state constitution does not compel recognition of marriages between members of the same sex, and that the challenged provisions of the Domestic Relations Law that did not permit same-sex marriage were supported by a rational basis and did not violate due process or equal protection. Accordingly, as summarized by one commentator in these pages, the Court held that since there was no statutory authority in New York State to celebrate a same-sex marriage, such a marriage celebrated in New York is invalid.[13] Although Governor David A. Paterson and several New York legislators have actively discussed new legislation intended to legalize same-sex marriage in New York,[14] current law does not allow for such marriages in this state.

From the foregoing recitation, however, it is clear that five of the seven states and provinces that border New York State[15] do allow same-sex marriage. Thus, a question that naturally arises is whether New York would recognize same-sex marriage legally performed outside of New York State as a matter of comity. That is a question that was not addressed or answered by *Hernandez*,[16] but was addressed recently by the Appellate Division, Fourth Department, in an interesting case involving insurance benefits.

'Martinez'

In *Martinez v. County of Monroe*, 50 AD3d 189 (4th Dept. Feb. 1, 2008), lv. to appeal denied, 10 NY3d 856 (2008), the plaintiff sought a judicial declaration that her same-sex marriage in Ontario, Canada, was entitled to recognition in New York state for purposes of her application for spousal health care benefits. Notably, the Fourth Department expressly rejected the notion that the Court of Appeals' decision in *Hernandez* reflected a New York state public policy against same-sex marriages, explaining that *Hernandez* "holds merely that the New York State Constitution does not compel recognition of same-sex marriages solemnized in New York [citation omit- » Page 9

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ted]. The Court of Appeals noted that the Legislature may enact legislation recognizing same-sex marriages [citation omitted] and, in our view, the Court of Appeals thereby indicated that the recognition of plaintiff's marriage is not against the public policy of New York." Moreover, the *Martinez* court observed that "unlike the overwhelming majority of states, New York has not chosen, pursuant to the Federal Defense of Marriage Act (28 USC §1738C), to enact legislation denying full faith and credit to same-sex marriages validly solemnized in another state."

In determining the specific question posed to it, the *Martinez* court noted that "for well over a century, New York has recognized marriages solemnized outside of New York unless they fall within two categories of exception: (1) marriage, the recognition of which is prohibited by the 'positive law' of New York and (2) marriages involving incest or polygamy, both of which fall within the prohibitions of 'natural law' [citations omitted]."

The court concluded that plaintiff's marriage did not fall within either of these two exceptions. The "positive law" exception was not applicable because "'[A]bsent any New York statute expressing clearly the Legislature's intent to regulate within this state marriages of its domiciliaries solemnized abroad, there is no positive law in this jurisdiction' to prohibit recognition of a marriage that would have been invalid if solemnized in New York [citations omitted]. The Legislature has not enacted legislation to prohibit the recognition of same-sex marriages validly entered into outside of New York...." The "natural law" exception was not applicable either because "that exception has generally been limited to marriages involving polygamy or incest or marriage 'offensive to the public sense of morality to a degree regarded generally with abhorrence' [citations omitted] and that cannot be said here."

Thus, the Fourth Department concluded that the plaintiff's marriage, valid in Ontario, Canada, was entitled to recognition in New York in the absence of express legislation to the contrary. The court further noted that, "as the Court of Appeals indicated in *Hernandez*, the place for the expression of the public policy of New York is in the Legislature, not the courts [citation omitted]. The Legislature may decide to prohibit the recognition of same-sex marriages solemnized abroad. Until it does so, however, such marriages are entitled to recognition in New York."

In the absence of a ruling from the Court of Appeals or the other Departments of the Appellate Division, *Martinez* is controlling precedent for all of the trial courts in the state.[17]

Insurance Department

On Nov. 21, 2008, the Office of General Counsel of the State of New York Insurance Department issued an opinion on the following question: "Does the marriage of a same-sex couple legally performed in a jurisdiction outside New York confer the same rights to spousal health insurance coverage in New York as the marriage of an opposite-sex couple?"

After thoroughly reviewing the *Martinez* decision, as well as several consistent lower court decisions,[18] the author answered this question in the affirmative, and held, consistent therewith, that "same-sex parties to marriages validly performed outside of New York must be treated as 'spouses' for purposes of the New York Insurance Law, including all provisions governing health insurance." The author observed that "nothing in the Insurance Law—and indeed, nothing in any New York statute—either expressly authorizes or expressly prohibits this agency from interpreting the term 'spouse' in the Insurance Law to include same-sex parties to marriages legally performed out of state."

Further, the author explained, "In the Insurance Department's view, same-sex and opposite-sex legal spouses are similarly situated for purposes of construing the Insurance Law, a principal aim of which is to ensure that all consumers have a fair opportunity to purchase appropriate protection against risk." Thus, the author, on behalf of the Insurance Department, concluded that "where an employer offers group health insurance to employees and their spouses, the same-sex spouse of a New York employee who legally married his or her spouse out-of-

state is entitled to health insurance coverage to the same extent as any opposite-sex spouse." Finally, and significantly, the author took pains to advise that "while the query that gives rise to this opinion and the analysis set forth herein addresses accident and health insurance, the Department's analysis and conclusions are applicable to all other kinds of insurance as well."

In Circular Letter No. 27 (2008), dated Nov. 21, 2008, the Insurance Department observed, inter alia, that it expected all licensees to comply with *Martinez* and the opinion of the General Counsel by recognizing marriages of same-sex couples legally performed in other jurisdictions, "which includes providing all legally married couples with the same rights and benefits, regardless of the sex of the spouses."

Decisions in Other Contexts

The New York courts have broadly and expansively applied the terms "family" or "family members" in a variety of contexts in order to provide various rights and benefits to unmarried lifetime partners. See *Braschi v. Stahl Associates Co.*, 74 NY2d 201 (1989) (the term "family" as used (but not defined) in the noneviction provision of the rent-control laws includes unmarried life partners of tenants, not just persons related by blood or law; "In the context of eviction, a more realistic, and certainly equally valid, view of family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence")[19]; Cf. *390 West End Associates v. Wildfoerster*, 241 AD2d 402 (1st Dept. 1997) (no evidence other than oral reflections of respondent and the deceased's friends that respondent's relationship with the deceased tenant of record was characterized by the "emotional and financial commitment and interdependence necessary for purposes of family member succession to the rent stabilized tenancy"). See also, *Slattery v. City of New York*, 179 Misc.2d 740 (Sup. Ct. N.Y. Co. 1999), affd. as modified, 266 AD2d 24 (1st Dept. 1999) (rejection of challenge to provisions of the City of New York's Domestic Partners Law, which provided certain succession and occupancy rights and certain medical, health and retirement benefits to registered domestic partners of New York City employees because the term "families" is not restricted to those who have formalized their relationship by obtaining a marriage certificate or an adoption order, and that term should be interpreted to protect those who reside in households having all of the normal familiar characteristics of a family, i.e., "such persons as habitually reside under one roof and form one domestic circle, or such persons as are dependent on each other for support or among whom there is a legal or equitable obligation to furnish support"); *McMinn v. Town of Oyster Bay*, 66 NY2d 544 (1985) (zoning ordinance containing overly restrictive definition of "family" unconstitutional; "a municipality may not seek to [preserve the character of the neighborhood] by enacting a zoning ordinance that 'limit[s] the definition of family to exclude a household which in every but a biological sense is a single family.'")

Decisions in Insurance Law

Nevertheless, in the context of insurance law, wherein, as a general proposition, the terms of the policy are to be given their plain meaning and construed in a way that will give fair meaning to the language employed in order to reach a practical interpretation that expresses the reasonable expectations of the parties,[20] a different approach appears to control.

Pursuant to 11 NYCRR §60-1.1, which sets forth certain mandatory minimum provisions for automobile liability insurance policies, the definition of the term "insured" must, at the very least, include: (1) the named insured and, if an individual, his or her spouse if a resident of the same household with respect to the motor vehicle or vehicles...."

The mandatory Uninsured Motorist Endorsement-New York, and the Supplementary Uninsured/Underinsured Motorist-New York Endorsement (pursuant to Regulation 35-D [11 NYCRR §60-2.3, et seq.) both define the term "insured" to include, inter alia, "You, as the

named insured and, while residents of the same household, your spouse and the relatives of either you or your spouse." Similar definitions are contained in most liability policies.

In *Eisner v. Aetna Cas. & Sur. Co.*, 141 Misc.2d 744 (Sup. Ct. N.Y. Co. 1988), the liability policy issued to the plaintiff (not an auto policy) defined the term "insured" to include "you" (i.e., the named insured, plaintiff) "and the following residents of your household: (a) your relatives." The plaintiff claimed that "your relatives" included a co-tenancy, which covered Michael Gonzalez, his "lifelong friend and companion with whom he has shared living quarters for 20 years." Relying upon previous case law that held that the term "relative" is defined as "either through blood, consanguinity, or through marriage, affinity" [citations omitted], the court held that Mr. Gonzalez did not fall within either category. The court further supported its rejection of coverage for the live-in friend by noting that when the plaintiff received the policy naming only him as the insured, he did not contact the insurance company to correct it, nor did he request the broker to include Mr. Gonzalez.

In *Gaetan v. Fireman's Ins. Co.*, N.O.R., NYLJ, Nov. 3, 1998, p. 31, col. 3 (Sup. Ct. Suffolk County), the court excluded a traditional family member (father) from the plaintiff's family for the purpose of adjudicating the applicability of an exclusion from coverage on a boating liability policy, where the policy did not define the term "family," because the father never resided in the insured's household. In discussing the varied meanings of the term "family" in different contexts, the court stated—without the citation of any authority—that "As used in the context of uninsured motorist insurance coverage, 'family' is not confined to those who stand in a legal or blood relationship, but rather should include those who live within the domestic circle of, and are economically dependent on, the named insured (e.g., foster child or ward)...." As the court subsequently stated in *Slattery v. City of New York*, supra, "Under the definition applied in *Gaetan*, a registered domestic partner would constitute a 'family member.'" It is not clear, however, whether this dicta constitutes a correct statement of the law.

The Office of General Counsel of the State of New York Insurance Department held that "same-sex parties to marriages validly performed outside of New York must be treated as 'spouses' for purposes of the New York Insurance Law, including all provisions governing health insurance."

In *Hartford Ins. Co. v. Babb*, N.O.R., NYLJ, Sept. 1, 1999, p. 30, col. 5 (Sup. Ct. Nassau Co. 1999), the respondent, a pedestrian struck and injured by an unidentified vehicle that left the scene of the accident, made a claim for uninsured motorist benefits under the auto policy issued to his "live-in-friend." That claim was denied by the insurer on the basis that the respondent was neither a spouse nor a relative of the named insured.

In upholding the denial of coverage, the court observed that the respondent never even alleged that he was a spouse or relative of the insured, and never contested the insurer's view of his relationship to her as merely "a friend."

In *Ortiz v. New York City Transit Authority*, 267 AD2d 33 (1st Dept. 1999), an underinsured motorist case, the court rejected the plaintiff's claim for coverage under the policy issued to his same-sex partner. As stated by the court, "Even if the word 'spouse' could be understood to include the same-sex partners living together in a spousal-type relationship, plaintiff fails to raise an issue of fact as to whether such was the nature of his relationship with the named insured [citation omitted]." The court also rejected the contention that plaintiff qualified for coverage as a "relative" "given the structure of the clause and the sexual aspect of the relationship."

Conclusion

Recent developments in the area of same-sex marriage strongly suggest that a national trend is developing pursuant to which same-sex spouses will be able to assert rights under various types of insurance policies. In the aftermath of the *Martinez* decision, insurance company claims personnel and coverage counsel will be well advised to keep up with the latest news regarding the status of same-sex marriages throughout the country, with an eye on future developments in the New York Legislature, which may legalize and authorize such marriages in this state as well. Given the current political climate, important coverage determinations may be subject to change on a day-to-day basis.

1. "A Primer on Same-Sex Marriage, Civil Unions, Domestic Partnerships, and Defense of Marriage Acts," http://www.infoplease.com/ipa/A0922609.html.

2. Alabama (2006), Alaska (1992), Arizona (2008), Arkansas (2004), California (2008), Colorado, Florida (2008), Georgia (2004), Kansas (2005), Idaho (2006), Kentucky (2004), Louisiana (2004), Michigan (2004), Mississippi (2004), Missouri (2004), Montana (2004), Nebraska (200), Nevada (2002), North Dakota (2004), Ohio (2004), Oklahoma (2004), Oregon (2004), South Carolina (2006), South Dakota (2006), Tennessee (2006), Texas (2005), Utah (2004), Virginia (2006), Wisconsin (2006). [Source: Human Rights Campaign, http://www.hrc.org/your_community/index.htm; National Conference of State Legislators Web site, www.ncsl.org/programs/cyf/samesex.htm].

3. Delaware, Hawaii, Illinois, Indiana, Maine, Maryland, Minnesota, New Hampshire, North Carolina, Pennsylvania, Washington, West Virginia, and Wyoming [Id.]

4. Alabama, Arkansas, Florida, Georgia, Kentucky, Idaho, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin [Id.]

5. New Jersey and New Hampshire provide for civil unions. California, District of Columbia, Oregon and Washington provide domestic partnership laws. Hawaii and Maine grant certain, limited benefits through domestic partnerships or "registered reciprocal beneficiaries." Colorado and Maryland grant some rights through unregistered partnerships. [Id.].

6. The Massachusetts' Supreme Judicial Court, on Nov. 18, 2003, held in *Goodridge v. Department of Health*, that denial of marriage licenses to same-sex couples violated the state constitution's Equal Protection Clause. Thus, commencing May 17, 2004, Massachusetts became the first state to allow same-sex couples to legally marry.

7. Same-sex marriage was recognized in Connecticut on Oct. 10, 2008, with marriage licenses available to same-sex couples as of Nov. 12, 2008.

8. The Iowa Supreme Court held that state's ban on same-sex marriage unconstitutional on April 3, 2009. Iowa began issuing marriage licenses to same-sex couples on April 23, 2009.

9. In 1999, the Vermont Supreme Court, in *Baker v. Vermont*, held that the State Legislature was required to establish rights for same-sex couples that were identical to those of married opposite-sex couples. The Legislature thus created state-level "civil unions," but reserved the term "marriage" for heterosexual couples. In March 2009, the state Senate passed a measure recommending implementation of same-sex marriage, and in April 2009, the state House of Representatives passed the same bill. On April 6, 2009, the governor vetoed the bill, but on April 7, 2009, the veto was overridden. The new law will go into affect on Sept. 1, 2009.

10. On May 6, 2009, Maine Governor John Baldacci signed a same-sex marriage bill into law, despite previously expressed opposition. It is expected that the law will go into effect 90 days after the Legislature adjourns, which usually takes place in June. "Maine Governor Signs Same-Sex Marriage Bill as Opponents Plan a 'Veto,'" The New York Times, May 7, 2009, p. A21.

11. The validity of Proposition 8 is presently being challenged in the California Supreme Court. "Group Renews Fight for Same-Sex Marriage in California," The New York Times. May 7, 2009, p. A21.

12. "Same-Sex Marriage, Civil Unions, and Domestic Partnerships," The New York Times, http://topics.nytimes.com/topics/reference/timestopics/subjects/s/same_sex_marriage/index.html. The New Hampshire legislature gave final passage on May 6, 2009, to a same-sex marriage bill, but Governor John Lynch has not said yet if he will sign it. "Maine Governor Signs Same-Sex Marriage Bill as Opponents Plan a 'Veto,'" The New York Times, May 7, 2009, p. A21.

13. See Felder, Myrna, "Recognition of Same-Sex Marriage," NYLJ, Feb. 10, 2009, p. 3, col. 1.

14. "Paterson Introduces a Same-Sex Marriage Bill," The New York Times, April 17, 2009, http://www.nytimes.com/2009/04/17/nyregion/17marriage.html?scp=1&sq=Paterson Introduces a Same-Sex Marriage Bill&st=cse; "Governor Is More Hopeful on Same-Sex Marriage," The New York Times, April 18, 2009, http://www.nytimes.com/2009/04/18/nyregion/18marriage.html?scp=1&sq=Governor Is More Hopeful on Same-Sex Marriage&st=cse.

15. Connecticut, Massachusetts, Vermont, Quebec and Ontario.

16. See *Beth R. v. Donna M.*, 19 Misc.3d 724 (Sup. Ct. N.Y. Co. 2002) ("*Hernandez*, did not address what effect New York should give to a validly entered out-of-state same-sex marriage").

17. See *Mountain View Coach Lines, Inc. v. Storms*, 102 AD2d 663, 664 (2d Dept. 2004) ("The Appellate Division is a single statewide court divided into departments for administrative convenience...and, therefore, the doctrine of stare decisis requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule").

18. See e.g., *Golden v. Paterson*, NYLJ, Sept. 8, 2008, p. 19, col. 13 (Sup. Ct. Bronx Co. 2008) (holding that Governor's Memorandum implementing marriage recognition rule enunciated in *Martinez* is "consistent with New York's common law, statutory law, and constitutional separation of powers"); *Lewis v. N.Y.S. Dept. of Civil Services*, NYLJ, March 18, 2008, p. 28, col. 1 (Sup. Ct. Albany Co.) (finding policy memorandum issued by Dept. of Civil Service Employee Benefits Division, which recognized as spouses same-sex partners in any marriage performed in jurisdictions where such marriage is legal as lawful and within the agency's authority); *Beth R. v. Donna M.*, 19 Misc.3d 724 (Sup. Ct. N.Y. Co. 2008) (holding that out-of-state marriages between same-sex partners properly recognized in New York); see also *Godfrey v. Spano*, 15 Misc.3d 809 (Sup. Ct. Westchester Co. 2007) (finding Westchester County Executive's order requiring county agencies to recognize out-of-state same-sex marriages for purpose of establishing and administering all rights and benefits belonging to those couples was a lawful exercise of the County Executive's power).

19. In *Braschi*, supra, where the evidence established that the plaintiff and his friend lived together as "permanent life partners" for more than 10 years, they regarded one another and were regarded by friends and family as spouses; their families were aware of the nature of the relationship and they regularly visited each other's families and attended family functions together as a couple; they both considered their apartment as their home; they were viewed by all in the building as a couple; they shared all household obligations; they often paid the rent with a check from a joint checking account, and plaintiff was a named beneficiary of his partner's life insurance policy and primary legatee and co-executor of his estate, the Court of Appeals held that the plaintiff demonstrated a likelihood of success on the merits that he was entitled to protection from eviction upon the death of his partner.

20. *Vigilant Ins. Co. v. Bear Stearns*, 10 NY3d 170 (2008); *White v. Continental Casualty*, 9 NY3d 264 (2007).