Ins. Law § 673(2): No-Fault Insurer's Action for Recovery of First-Party Benefits Deemed an Independent Action Which Accrues 2 Years After Injury If Insured Has Failed to Bring Suit

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Insurance Law

Ins. Law § 673(2): No-fault insurer's action for recovery of first-party benefits deemed an independent action which accrues 2 years after injury if insured has failed to bring suit

When an insurer has paid benefits to its insured as compensation for an injury sustained by the insured, the common-law right of subrogation generally permits the insurer to bring suit against the third party whose conduct caused the injury. The insurer as subrogee "steps into the shoes" of its insured, succeeding to all the rights and privileges which the insured possessed. Conversely, 

Problems Surface to Determination in Surrogate Court Issues, N.Y.L.J., Oct. 19, 1981, at 19, col. 1, 27, col. 2. "The recent addition as a ground for divorce of the mere existence of a valid written separation agreement after the agreement has endured for one year, should lead to a strong or conclusive presumption, absent express contrary intention in the separation agreement or will, that the soon-to-be former spouse be cut off from all participation in the estate." Id. Nevertheless, it is submitted that a presumption should be entertained only when the separation agreement contains a general release and is filed with the intention of obtaining a later divorce.

The doctrine of subrogation in insurance arises from "general principles of equity." G. Couch, Cyclopedia of Insurance Law § 1997, at 6591 (1931). It may be defined broadly as the substitution of one who has paid another's debt into the place of the creditor. Id. § 1996, at 6587. The insurer, upon payment of an insured's loss, is subrogated to the insured's cause of action against anyone responsible for the loss. Hamilton Fire Ins. Co. v. Greger, 246 N.Y. 162, 164, 158 N.E. 60, 61 (1927); see 6A J.A. Appleman & J. Appleman, Insurance Law and Practice § 4051 (1972). Almost all standard form insurance policies provide for the insurer's right to subrogation despite the fact that the right attaches without any formal stipulation. See Am. Jur. Insurance § 1335 (1940); G. Couch, supra, § 1996, at 6588. Moreover, it is generally accepted that the right to subrogation does not inure to the insurer until it has paid a claim under a policy. J.A. Appleman & J. Appleman, supra, § 4051, at 112; see, e.g., Safeguard Ins. Co. v. Rosen, 39 App. Div. 2d 851, 851, 332 N.Y.S.2d 963, 964 (1st Dep't 1972) (per curiam), aff'd, 31 N.Y.2d 1054, 295 N.E.2d 189, 342 N.Y.S.2d 378 (1973); Krause v. American Guar. & Liab. Ins. Co., 27 App. Div. 2d 353, 355, 279 N.Y.S.2d 235, 237 (1st Dep't 1967), aff'd, 22 N.Y.2d 147, 229 N.E.2d 175, 292 N.Y.S.2d 67 (1968). In order to be subrogated, however, the insurer must not be acting as a volunteer and must be secondarily liable when it pays the claim of its insured. 11 J.A. Appleman & J. Appleman, supra, § 6501.

any defenses, including the statute of limitations, which the third party could assert against the insured may be raised against the insurer. Under the “no-fault” provisions of the Insurance Law, however, an insurer may not bring suit for the recovery of first-party benefits paid to its insured until 2 years have elapsed since the injury during which time the insured did not exercise his right to sue. The question has thus arisen whether a “no-fault” insurer

1977).

83 In State Farm Mut. Auto. Ins. Co. v. Regional Transit Serv., Inc., 79 App. Div. 2d 858, 434 N.Y.S.2d 486 (4th Dep’t 1980), the court stated that “[t]he right to recover [by subrogation] is subject to the same defenses that an at-fault party could have asserted including the Statute of Limitations.” Id. at 859, 434 N.Y.S.2d at 487 (citations omitted); see Great Am. Ins. Co. v. United States, 575 F.2d 1031, 1034 (2d Cir. 1978); Seven Sixty Travel, Inc. v. American Motorists Ins. Co., 98 Misc. 2d 509, 514, 414 N.Y.S.2d 254, 258 (Sup. Ct. Albany County 1979). Thus, a release given by the insured to the tortfeasor will defeat the insurer’s subrogation rights unless the tortfeasor had knowledge of the existence of the subrogated claim. Scavone v. Kings Craft Corp., 55 App. Div. 2d 807, 390 N.Y.S.2d 20 (4th Dep’t 1976); Silinsky v. State-Wide Ins. Co., 30 App. Div. 2d 1, 289 N.Y.S.2d 541, 545 (2d Dep’t 1968). In addition, contributory negligence of the insured, failure to join a claim in the original action, immunity from suit, illegality of the insured’s conduct, laches, and a limitation of liability between the insured and the tortfeasor are among the defenses which may be raised against a subrogated insurer. 16 G. COUCH, supra note 82, §§ 61:223-231.

85 Pursuant to section 672(1) of the Insurance Law, first-party benefits are paid without regard to fault. See N.Y. INS. LAW § 672(1) (McKinney Supp. 1981-1982). The term “first-party benefits” is defined, subject to certain deductions, as the amount which the insurer reimburses its insured for “basic economic loss” caused by the insured through the operation of a motor vehicle. Id. § 671(2). The section also defines “basic economic loss” as necessary medical and related remedial expenses, lost earnings, and any other “reasonable and necessary” expense. Id. § 671(1); see Hughes v. Nationwide Mut. Ins. Co., 98 Misc. 2d 667, 414 N.Y.S.2d 493, 497 (Sup. Ct. Livingston County 1979).

86 N.Y. INS. LAW § 673(2) (McKinney Supp. 1981-1982). This section provides in part:

In any action by or on behalf of a covered person, against a noncovered person, where damages for personal injuries arising out of the use or occupation of a motor vehicle . . . may be recovered, an insurer which paid or is liable for first party benefits on account of such injuries shall have a lien against any recovery to the extent of benefits paid or payable by it to the covered person . . . . The failure of such person to commence such action within two years after the accrual thereof shall operate to give the insurer a cause of action for the amount of first party benefits paid or payable against any person who may be liable to the covered person for his personal injuries, which cause of action shall be in addition to the cause of action of the covered person; provided, however, that in any action subsequently commenced by the covered person for such injuries, the amount of his basic economic loss shall not be recoverable.

Id. Section 673(2), by its terms, confers upon an insurer a right to sue the tortfeasor, but recovery is limited to the amount of first-party benefits paid or payable by the insurer to the insured. Id.; see note 84 supra. The insurer may not sue, however, until 2 years have passed during which the insured let his claim remain unexercised. N.Y. INS. LAW § 673(2) (McKinney Supp. 1981-1982); see, e.g., Nationwide Mut. Ins. Co. v. Country-Wide Ins. Co., 77 App. Div. 2d 304, 433 N.Y.S.2d 518, 519 (3d Dep’t 1970); Government Employees Ins. Co. v.
suing a noncovered person\textsuperscript{86} for recoupment of first-party benefits must sue within 3 years from the injury, as in a personal injury action brought by the insured.\textsuperscript{87} Recently, in \textit{Safeco Insurance Co. v. Jamaica Water Supply Co.},\textsuperscript{88} the Appellate Division, Second Department, held that the "no-fault" provisions of the Insurance Law create a new and independent cause of action in favor of an insurer,\textsuperscript{89} and that such an action is not subject to the statute of limitations applicable to a tort action brought by the insured.\textsuperscript{90}

In \textit{Safeco}, the plaintiff's insured, Morris, sustained injuries in an automobile accident which occurred on the defendant's work site.\textsuperscript{91} The plaintiff paid first-party benefits to Morris pursuant to New York's no-fault insurance law.\textsuperscript{92} Shortly thereafter, Morris brought an action in ordinary negligence against both the defendant and the city of New York.\textsuperscript{93} The plaintiff attempted to assert its right to a lien on any recovery realized by Morris in that action,\textsuperscript{94} but the lien was denied in an arbitration proceeding.\textsuperscript{95} As a


\textsuperscript{88} 83 App. Div. 2d 427, 444 N.Y.S.2d 925 (2d Dep't 1981).

\textsuperscript{89} Id. at 428, 444 N.Y.S.2d at 926; see note 84 supra.

\textsuperscript{90} 83 App. Div. 2d at 428, 444 N.Y.S.2d at 926.

\textsuperscript{91} Leon Morris was injured when his automobile collided with a metal plate at the work site. Id.

\textsuperscript{92} Id. The full no-fault ceiling amount of $50,000 was paid by the plaintiff to Morris. Id.; see N.Y. Ins. Law §§ 671(1), 672(1) (McKinney Supp. 1981-1982); note 85 and accompanying text supra.

\textsuperscript{93} 83 App. Div. 2d at 428, 444 N.Y.S. at 925. Morris was seeking recovery for personal injuries which he sustained in the accident. Id. Such a suit is consistent with section 673(2) of the Insurance Law because the defendant, Jamaica Water Supply, is clearly a noncovered person. See N.Y. Ins. Law §§ 671(10), 673(2) (McKinney Supp. 1981-1982); note 86 and accompanying text supra.

\textsuperscript{94} In an action by a covered person (Morris) against a noncovered person (Jamaica Water Supply), section 673(2) of the Insurance Law affords the covered person's insurance
result, the plaintiff insurer instituted its own action against the defendant, seeking recovery of the benefits it had paid its insured. The action was commenced, however, more than 3½ years after the insured was injured. Accordingly, the defendant interposed the defense of the statute of limitations and moved to dismiss the complaint. Denying the motion, special term held that although the plaintiff's suit "was in the nature of subrogation," section 673(2) of the Insurance Law effected a 2-year toll on the 3-year personal injury statute of limitations provided in CPLR 214, and thus, the plaintiff's suit was timely.

The statutory lien has a two-fold purpose: to prevent recovery by the insured for basic economic loss from both the insurer and the tortfeasor, United States Fidelity and Guar. Co. v. Stuyvesant Ins. Co., 61 App. Div. 2d 1122, 1123, 403 N.Y.S.2d 154, 156 (4th Dep't 1978), and to avoid a duplicative suit by the insurer against the tortfeasor, see Cole v. Lord, 91 Misc. 2d 178, 182, 397 N.Y.S.2d 537, 540 (Sup. Ct. Broome County 1977).

The arbitration proceeding, which was demanded by Morris, culminated in a determination that because the insured was not suing for basic economic loss, the statutory lien could not attach to any recovery. Id.; see Royal Globe Ins. Co. v. Connolly, 54 App. Div. 2d 1117, 1118, 389 N.Y.S.2d 207, 208 (4th Dep't 1976); Adams v. Government Employees Ins. Co., 52 App. Div. 2d 118, 120, 383 N.Y.S.2d 319, 320 (1st Dep't 1976); N.Y. INS. LAW § 673(2) (McKinney Supp. 1981-1982). The decision of the arbitrator was later affirmed by the state supreme court. 83 App. Div. 2d at 429, 444 N.Y.S.2d at 926.

Of course, the insured in Safeco had instituted an action within 2 years of the injury. See note 93 and accompanying text supra. Nonetheless, because an arbitrator had held that recovery of basic economic loss had not been sought, the situation was treated as if no claim at all had been brought by the insured. 83 App. Div. 2d at 430, 444 N.Y.S.2d at 927.

The accident in which the insured was injured occurred on March 21, 1977. 83 App. Div. 2d at 428, 444 N.Y.S.2d at 926. The arbitration proceedings lasted from November 29, 1978 until September 1979, when the state supreme court affirmed the decision of the arbitrator. Id. The plaintiff insurer finally commenced suit on October 21, 1980. Id. The defendant in Safeco argued that the 3-year statute of limitations for personal injury actions in CPLR 214(5) (McKinney Supp. 1981-1982), which accrues from the time of injury, was the applicable provision. 83 App. Div. 2d at 428, 444 N.Y.S.2d at 926.


Special term held that because the insurer's action was derived from its subrogation right, any defenses, including the statute of limitations, which the defendant could assert against the insured could also be raised against the insurer. See Id. The defendant's motion to dismiss was denied, however, because section 673(2) of the Insurance Law, see note 85 supra, was construed to toll the running of the statute for up to 2 years should an insured not interpose a claim for relief. 83 App. Div. 2d at 429, 444 N.Y.S.2d at 926. Of course, when a statutory prohibition against the commencement of an action is in operation, the period of such prohibition may not be considered for purposes of the statute of limitations. CPLR 204(a) (1972); see Aetna Cas. & Sur. Div. v. Sandy Hill Corp., 54 App. Div. 2d 222, 224, 388 N.Y.S.2d 162, 163-64 (3d Dep't
On appeal, the Appellate Division, Second Department, affirmed, but on other grounds. Justice Hopkins, writing for a unanimous court, found neither a statutory prohibition against the commencement of the insurer's action, nor a toll of the statute of limitations. Rather, the court held that section 673(2) authorizes an independent cause of action in favor of the insurer which accrues upon the expiration of the 2-year period of inactivity by the insured, that is, when the insurer becomes entitled to sue. The court based its conclusion on a finding that the character of the plaintiff's action was to recover on a liability created by statute, not in the nature of personal injury or subrogation. In reaching this determination, the court noted that the statutory concept of "no-fault" liability, of which section 673(2) is a part, altered the common-law scheme of tort recovery. Accordingly,

1976); 1 WK&M § 204.03; note 103 infra. Hence, special term reasoned that the insurer would have 3 years in which to bring suit after the running of the 2-year period described in section 673(2) of the Insurance Law. See 83 App. Div. 2d at 429, 444 N.Y.S.2d at 926. 102 Id. at 430, 444 N.Y.S.2d at 926. The court consisted of Justices Hopkins, Gibbons, Rabin, and Cohalan. 103 Id. at 430, 444 N.Y.S.2d at 927. The court reasoned that because the insured had a cause of action during the 2-year period after the injury, no prohibition was created by section 673(2) of the Insurance Law. Therefore, the statutory prohibition contemplated in CPLR 204, see note 100 supra, was deemed inapplicable. Id.; see SIEGEL § 52. Interestingly, in Aetna Cas. & Sur. Div. v. Sandy Hill Corp., 54 App. Div. 2d 222, 388 N.Y.S.2d 162 (3d Dep't 1976), the plaintiff insurer had argued that a 6-month toll on the statute of limitations was created by section 29 of the Workmen's Compensation Law, which authorized an assignment of a cause of action to the carrier upon the lapse of 6 months after the injury if, during that time, the injured party did not bring suit. Id. at 223, 388 N.Y.S.2d at 163. The court rejected the argument, emphasizing that as long as someone could bring suit within the 6-month period, namely the insured, no statutory prohibition of the type contemplated in CPLR 204(a) was in effect. Id. at 224, 388 N.Y.S.2d at 164; see 1 WK&M § 204.03. 104 Id. at 431, 444 N.Y.S.2d at 927; see note 109 infra. Under traditional tort theory, a party was compelled to prove fault before reparation could be made. Brown v. Kendall, 60 Mass. (6 Cush.) 292, 295-96 (1850). The Comprehensive Automobile Insurance Reparations Act (the Act), however, allows a named insured who is injured in an automobile accident to collect first-party benefits from his own insurer without regard to fault. N.Y. INS. LAW § 672(1)(A) (McKinney Supp. 1981-1982). See generally notes 84-86 and accompanying text supra. Because the purpose of the Act is to ensure
the court construed the language of section 673(2) to confer a new, nonderivative action upon the insurer because the statute phrases the insurer's action as one "in addition to the cause of action of the covered person." As further evidence of the novelty of the insurer's action, the court stated that section 673(2) allows the insurer to recover benefits "paid or payable" while, at common law, only benefits paid were recoverable. The accrual of such a statutorily created cause of action, the court further observed, must be adduced from the terms of the statute in question. Thus, the court reasoned, the insurer's cause of action was timely because it did not accrue until the conditions of section 673(2) were met; namely, the passing of 2 years from the time of the injury and the failure of the insured to bring an action during that period against prompt compensation for the economic loss of a party injured in an automobile accident, fault need not be considered. State Farm Mut. Auto. Ins. Cos. v. Brooks, 78 App. Div. 2d 456, 458, 435 N.Y.S.2d 419, 421 (4th Dep't 1981). For the events, policies, considerations, and expected effects which led to the adoption of the no-fault scheme in New York, see Comment, New York Adopts No-Fault: A Summary and Analysis, 37 ALB. L. REV. 662, 664-70 (1973). Significantly, the Act has had to withstand constitutional attack on many grounds, including due process and equal protection, e.g., Montgomery v. Daniels, 38 N.Y.2d 41, 45, 340 N.E.2d 444, 446, 378 N.Y.S.2d 1, 4 (1975), because it dramatically modified the common law, see Donovan v. Rapid Ray's Printing & Copying, Inc., 93 Misc. 2d 750, 751, 403 N.Y.S.2d 407, 408 (Buffalo City Ct. 1978).

Upon the lapse of 2 years, during which an insured has failed to exercise a right to sue, section 673(2) of the Insurance Law provides that the insurer's cause of action which springs into existence at that moment shall be in addition to the insured's cause of action. N.Y. INS. LAW § 673(2) (McKinney Supp. 1981-1982). That these words operate to create a statutory cause of action "could not be more plain," stated the court, 83 App. Div. 2d at 432, 444 N.Y.S.2d at 928, because if the insurer possesses its own right to sue, that right could not be a result of subrogation. See id.; note 114 infra.

Under section 673(2) of the Insurance Law, when the cause of action exists for the insurer, it may be exercised to recover first-party benefits "paid or payable" to its insured. N.Y. INS. LAW § 673(2) (McKinney Supp. 1981-1982) (emphasis added). Thus, the court reasoned, the insurer's cause of action was not derivative because, at common law, subrogation to a claim would not exist unless the debt actually had been paid. Future liability, the court observed, was not a basis for subrogation. 83 App. Div. 2d at 432, 444 N.Y.S.2d at 928, because if the insurer possesses its own right to sue, that right could not be a result of subrogation. See id.; note 115 infra.

83 App. Div. 2d at 432, 444 N.Y.S.2d at 928. The court noted that neither the Insurance Law nor the CPLR defines the accrual of a cause of action. Id. at 433, 444 N.Y.S.2d at 929; see CPLR 214(2) (1972); N.Y. INS. LAW § 673(2) (McKinney Supp. 1981-1982). When no definition is supplied, the judiciary is to fill the void. Cubito v. Kreisberg, 69 App. Div. 2d 738, 743, 419 N.Y.S.2d 578, 581 (2d Dep't 1979), aff'd mem., 51 N.Y.2d 900, 415 N.E.2d 979, 434 N.Y.S.2d 991 (1980). One practical, working definition of the accrual of a cause of action is from "the time the plaintiff is first able to commence the particular action." 1 WK&M ¶ 203.01.
the tortfeasor for the recovery of first-party benefits.110

It is submitted that, in holding an insurer’s action to be a non-
subrogated action, the Safeco court misinterpreted section 673(2).
Because the principles embodied in the no-fault article are in deroga-
tion of common law,111 its provisions should be strictly and nar-
rowly construed.112 Instead, the Safeco court relied on the statu-
tory phrases “in addition” and “paid or payable” to glean a
legislative intention to create a new cause of action in favor of an
insurer.113 While it is true that the insurer’s action is in addition to
the insured’s cause of action, once the insurer brings suit, the in-
sured is no longer permitted to recover first-party benefits in his
cause of action.114 Since the insured forfeits the right to such inde-

110 83 App. Div. 2d at 433, 444 N.Y.S.2d at 929.
111 E.g., Scarpelli v. Marshall, 92 Misc. 2d 244, 247, 399 N.Y.S.2d 1001, 1003 (Sup. Ct.
Nassau County 1977); Abbas v. Galluzzo, 88 Misc. 2d 926, 927, 390 N.Y.S.2d 514, 515 (Sup.
112 One court has stated that “[t]he Act must be interpreted only as it is expressly
written, and the common law [subrogation] is to be changed only to the extent that the
‘clear import of the statutory language absolutely requires’ it.” Liberty Mut. Ins. Co. v.
2d 926, 927, 390 N.Y.S.2d 514, 515 (Sup. Ct. App. T. 2d Dep’t 1976) (per curiam)) (empha-
sis added). Indeed, the rules of common law are “never abrogated by implication.”
Thus, the sections of the no-fault law must be interpreted as they are expressly written, and
a court is powerless to change the statute’s meaning by implying the intention of the legisla-
County 1975). Concededly, the no-fault article, while in derogation of common law, has a
remedial purpose, see note 106 supra, and should be liberally construed. E.g., Fischer-Han-
purpose of the no-fault plan, however, its provisions should not be contorted and extended
to confer a benefit unintended by the legislature. Fleming v. Allstate Ins. Co., 102 Misc. 2d
994, 996, 424 N.Y.S.2d 831, 832 (Sup. Ct. N.Y. County 1980).
113 See 83 App. Div. 2d at 431-32, 444 N.Y.S.2d at 928; notes 107 & 108 and accompa-
nying text supra. An inquiry into legislative intention begins with the words employed in a
statute. Department of Welfare v. Siebel, 6 N.Y.2d 536, 543, 161 N.E.2d 1, 5, 190 N.Y.S.2d
683, 689 (1959). Commentators have noted, however, that “we may not end with the words
in construing a disputed statute.” F. Frankfurter, Some Reflections on the Reading of
Statutes 16 (1947); see E. Crawford, The Construction of Statutes 164 (1940). Only
when the meaning is absolutely clear from the face of the statute may a court resist looking
behind it to ascertain its purpose. Id.; see Church of the Holy Trinity v. United States, 143
U.S. 457, 460 (1892). It is submitted, in this regard, that the Safeco court “relied more on
the dictionary than on legislative intent” in reaching its conclusion, see Schulman v. Spera,
102 Misc. 2d 179, 183, 423 N.Y.S.2d 115, 118 (Sup. Ct. N.Y. County 1979), and that the
court ignored the more important, albeit implicit, purpose of section 673(2): the avoidance
of duplicative actions. See note 94 supra.
114 See N.Y. Ins. Law § 673(2) (McKinney Supp. 1981-1982). The last three sentences of
the section expressly preclude the insured from recovering basic economic loss from a
noncovered person if the no-fault insurer has commenced such a suit. Id. Thus, it is submit-
dependent recovery once the insurer institutes suit, it is suggested that, like common-law subrogation, the insurer's action is in substitution of, not in addition to, the insured's cause of action. Moreover, it is submitted that the tortfeasor's liability is not statutorily created merely because the insurer may sue for benefits "payable" which were not recoverable at common law. Rather, it appears that although the statute terms the insurer's action "additional," an independent cause of action has not, in fact, been created. Indeed, Professor Schwartz has expressly stated that no new cause of action is created by section 673(2) of the Insurance Law. "The damage limitation contained in section 673 thus represents merely a legislative diminution of that which may be recovered through enforcement of an ancient right." Schwartz, No-Fault Insurance: Litigation of Threshold Questions Under the New York Statute—The Neglected Procedural Dimension, 41 BROOKLYN L. REV. 37, 43 (1974). The Safeco holding is particularly disturbing in light of State Farm Mut. Auto. Ins. Co. v. Regional Transit Serv., Inc., 79 App. Div. 2d 858, 434 N.Y.S.2d 486 (4th Dep't 1980), wherein the court stated that "Article XVIII of the Insurance Law did not create a new cause of action but has simply altered the economic remedy available." Id. at 859, 434 N.Y.S.2d at 487 (citations omitted). The State Farm court held time-barred an insurer's action, brought 4 years after the occurrence of the injury. Id. at 860, 434 N.Y.S.2d at 488; see Transamerica Ins. Co. v. Lumbermen's Cas. Ins. Co., 77 App. Div. 2d 5, 7, 432 N.Y.S.2d 269, 271 (3d Dep't 1980).

Notably, in United States Cas. Co. v. North Am. Brewing Co., 253 App. Div. 576, 3 N.Y.S.2d 256 (2d Dep't 1938), the court was faced with a Workmen's Compensation statute similar to section 673(2) of the Insurance Law in that it provided an immediate "additional" cause of action for an employer to recover medical benefits paid to an injured employee. Id. at 577, 3 N.Y.S.2d at 257. The court held that the statute did "not establish a new right or create a new liability," and thereupon stated that the employer's action was barred by the 3-year personal injury statute of limitations. Id. at 578, 3 N.Y.S.2d at 257-58.

See 53 App. Div. 2d at 432, 444 N.Y.S.2d at 923. A simple "but for" test is employed to determine if a liability is one created by statute. That is, would the liability exist but for the statute; or, alternatively, did the liability exist at common law? European Am. Bank v. Cain, 79 App. Div. 2d 158, 164, 436 N.Y.S.2d 318, 321 (2d Dep't 1981); State Farm Mut. Auto. Ins. Co. v. Regional Transit Serv., Inc., 79 App. Div. 2d 858, 859, 434 N.Y.S.2d 486, 487 (4th Dep't 1980); Klimczak v. Connrex Corp., 49 App. Div. 2d 1031, 1031-32, 374 N.Y.S.2d 497, 498 (4th Dep't 1975). No subrogation rights accrue to an insurer until it has made payment under a claim of the policy. 6A J.A. APPLEMAN & J. APPLEMAN, supra note 81, § 4051, at 112; see Safeguard Ins. Co. v. Rosen, 39 App. Div. 2d 851, 851, 332 N.Y.S.2d 963, 964 (1st Dep't 1972) (per curiam), aff'd, 31 N.Y.2d 1054, 295 N.E.2d 189, 342 N.Y.S.2d 378 (1973). The Safeco court, however, reasoned that because the section permits the insurer to recover for benefits "payable," a liability which did not exist at common law, see note 81 supra, the cause of action was statutorily created. It is submitted that the insertion of the word "payable" was a creature of expediency and does not support a finding that the insurer's action is not, by its nature, derivative. The insurer's payment of first-party benefits is to be made "as the loss is incurred." N.Y. INS. LAW § 675(1) (McKinney Supp. 1981-1982). This allows for a more accurate computation of damages because medical costs and treatment may be ongoing and unascertainable at the time of the injury. See Comment, supra note 106, at 693-94. Thus, only as the insured's damages become provable, pursuant to the requirement in section 675(1) of the Insurance Law, is the insurer required to pay. The phrase "paid or payable," it seems, allows an insurer to recover those first-party benefits not as yet incurred by its insured but which reasonably can be expected to accumulate. See also Comment, supra note 106, at 703 (similar meaning attributed to phrase "paid or payable" in
that such phraseology serves only to facilitate an insurer's efforts to recover all of its payments in one action against the tortfeasor, thereby fostering the legislative purpose of avoiding duplicative lawsuits.\textsuperscript{116}

Thus, it is suggested that the insurer's action is not a new statutorily created action and should therefore be subject to the 3-year personal injury statute of limitations which accrues on the date of injury. Since section 673(2) does not toll the personal injury statute of limitations,\textsuperscript{117} the insurer is afforded 1 year within which to commence his suit. Surely, having already paid benefits within 2 years of the injury, the insurer has sufficient notice to enable it to commence a suit in the third year.\textsuperscript{118} It is submitted that such a result is preferable to the \textit{Safeco} holding which subjects a defendant to potential tort liability extending 5 years from the date of the injury. Hence, it is hoped that the Court of Appeals will review section 673(2) of the Insurance Law at the earliest opportunity and construe that provision narrowly in the interests of equity and legislative purpose.

\textit{Edward G. Bailey}

\textbf{JUDICIARY LAW}

\textit{Judiciary Law § 479: Prohibition against attorney solicitation of clients through third-party mailings held constitutional}

Section 479 of the Judiciary Law prohibits an attorney from engaging in direct or indirect solicitation of legal business.\textsuperscript{119} While

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{116} See notes 112 & 115 and accompanying text \textit{supra}.
\item \textsuperscript{117} See note 103 \textit{supra}; cf. O'Brien v. King, 258 App. Div. 504, 505, 17 N.Y.S.2d 44, 45 (1st Dep't 1940) (stockholder not entitled to bring suit on behalf of corporation until after a demand made upon the corporate directors has been refused); Chaplin v. Selznick, 186 Misc. 66, 69, 58 N.Y.S.2d 453, 455-56 (Sup. Ct. N.Y. County 1945) (time during which stockholder demand is made and refused does not operate to toll the statute of limitations).
\item \textsuperscript{118} In Aetna Cas. & Sur. Div. v. Sandy Hill Corp., 54 App. Div. 2d 222, 388 N.Y.S.2d 162 (3d Dep't 1976), a worker's compensation case cited by the \textit{Safeco} court, Justice Swee-ney stated that "it is significant that the plaintiff delayed some eight months before bringing the action and had it acted diligently there was ample time to commence the action within the statutory period." \textit{Id.} at 224, 388 N.Y.S.2d at 164. The \textit{Aetna} court dismissed the complaint as barred by the statute of limitations. \textit{Id.}
\item \textsuperscript{119} Section 479 of the Judiciary Law provides:
\begin{itemize}
\item It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly
\end{itemize}
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