

CPLR 3018: Joint Tortfeasor May Offset Medical Insurance Payments Given to Plaintiff by Other Defendant's Insurer

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over, the ability to have both causes heard before the same judge will expedite the disposition of the cases being heard.

ARTICLE 30 — REMEDIES AND PLEADING

CPLR 3018: Joint tortfeasor may offset medical insurance payments given to plaintiff by other defendant's insurer.

The general rule in the United States is that payments made to a plaintiff from a collateral source, *e.g.*, payments made pursuant to a policy of insurance, do not reduce the amount recoverable from the tortfeasor whether or not the plaintiff has himself provided for such payments.⁷⁸ New York, however, follows the stricter minority rule which requires that the plaintiff must have in some way paid for his benefits, is absolutely or conditionally liable to repay his benefactor, or has subrogated his right to sue for specified payments to his benefactor, before these payments will be considered "collateral."⁷⁹

It is clear that insurance proceeds are "owed" to a plaintiff and, hence, "collateral" under the New York rule when the plaintiff himself has paid for the premiums.⁸⁰ But it is not as clear when the plaintiff is a beneficiary of an insurance policy procured by a third person not a party to the litigation. In *Silinsky v. State-Wide Insurance Co.*,⁸¹ plaintiff was covered by her father's insurance policy as a member of the insured's household. The court indicated that the plaintiff may have been "owed" the insurance proceeds as a third-party beneficiary of the insurance contract between her father and the insurer.

However, plaintiff's claim to be a third-party beneficiary of an insurance contract cannot always be successfully employed. In *Moore v. Leggette*,⁸² for example, the plaintiff was the beneficiary of an in-

⁷⁸ REPORT OF THE N.Y. LAW REVISION COMM., N.Y. LEG. DOC. No. 65, at 221, 225 (1957): "[Otherwise] the practical effect . . . is to give the wrongdoer an undeserved windfall."

⁷⁹ New York's minority view was established by *Drinkwater v. Dinsmore*, 80 N.Y. 390 (1880) and was recently followed in *Coyne v. Campbell*, 11 N.Y.2d 372, 183 N.E.2d 891, 230 N.Y.S.2d 1 (1962) (plaintiff physician, treated gratuitously by his colleagues as a professional courtesy, cannot claim medical expenses in action against the defendant). In 1957, the New York Law Revision Commission proposed an amendment to the CPA which would have implemented the majority view. However, the Legislature declined to act on the proposal. *Id.* at 374, 183 N.E.2d at 891-92, 230 N.Y.S.2d at 2.

⁸⁰ See *Cady v. City of New York*, 14 N.Y.2d 660, 198 N.E.2d 901, 249 N.Y.S.2d 868 (1964), *aff'g* 19 App. Div. 2d 822, 243 N.Y.S.2d 661 (1st Dep't 1963) (reduction of damages for payment from firemen's pension fund not permitted); *Healy v. Rennert*, 9 N.Y.2d 202, 173 N.E.2d 777, 213 N.Y.S.2d 44 (1961).

⁸¹ 30 App. Div. 2d 1, 289 N.Y.S.2d 541 (2d Dep't 1968).

⁸² 24 App. Div. 2d 891, 264 N.Y.S.2d 765 (2d Dep't), *aff'd*, 18 N.Y.2d 864, 22 N.E.2d 737, 276 N.Y.S.2d 118 (1966). "Where such wrongdoer is a person prudent enough to take out a policy of insurance to indemnify the plaintiff . . . [the wrongdoer] is entitled

surance policy procured by the defendant, and the court permitted the defendant to plead his insurer's payments in reduction of damages.

This exception to the third-party beneficiary argument was recently extended by *Grynbal v. Grynbal*.⁸³ In that case the plaintiff, a passenger in the defendant's car, was injured in an accident with a joint tortfeasor. The defendant, relying upon *Moore*, claimed an offset for his insurer's medical payments to the plaintiff.

However, in a cross-motion, the joint tortfeasor claimed an offset for these same payments. The court allowed the joint tortfeasor to offset the damages but stated that in the event the plaintiff prevails, contribution of one-half of these medical payments would have to be made to the co-defendant or his insurance carrier in accordance with CPLR 1401.⁸⁴ Furthermore, the court held that, in the event that the plaintiff does not recover from the defendant, the joint tortfeasor's offset of medical payments would be disallowed.

The offset allowance to the joint tortfeasor is an important extension of the *Moore* rationale since, as between the plaintiff and the joint tortfeasor, the medical payments are nongratuitous, and hence collateral, benefits. It appears that the joint tortfeasor's right to the offset is a derivative right since *Salinsky* suggests that the court should disallow any offset when the co-defendant is removed from the litigation.

CPLR 3020: Verification of answer permitted by associate of attorney of record.

In *Teichman v. Ker*,⁸⁵ the Supreme Court, Nassau County, confronted with an original question arising under CPLR 3020, interpreted the section in a practical manner. The court denied a motion to treat verification of an answer by other than an attorney of record or an attorney of counsel as a nullity. Rather, verification by an associate of the attorney of record was held to be sufficient compliance with the section.

The court noted that the New York Advisory Committee had suggested that "where a firm of attorneys desires the name of the firm

to the benefit of such foresight and to reduction on damages. . . ." *Id.* at 891, 264 N.Y.S.2d at 767.

⁸³ 32 App. Div. 2d 427, 302 N.Y.S.2d 912 (2d Dep't 1969).

⁸⁴ CPLR 1401 enables a defendant, who has paid more than his pro rata share, to obtain contribution from the other defendants with respect to the excess paid over and above his pro rata share.

⁸⁵ 60 Misc. 2d 789, 303 N.Y.S.2d 985 (Sup. Ct. Nassau County 1969).