Ins. Law § 675: Attorney's Fees Awarded to Compensate for Services Necessary to Substantiate a Prior Claim for Counsel Fees

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coming to reconcile the language of the DRL with its proper interpretation.

Maureen F. Thompson

INSURANCE LAW

Ins. Law § 675: Attorney’s fees awarded to compensate for services necessary to substantiate a prior claim for counsel fees

Section 675 of the Insurance Law\(^\text{215}\) entitles a claimant to recover from the carrier reasonable attorney’s fees incurred in enforcing a valid claim for first-party benefits that are overdue and unpaid before an attorney has been retained.\(^\text{216}\) Although recovery is measured by the value of the services actually performed by the claimant’s attorney,\(^\text{217}\) section 675 fails to prescribe the specific


\(^\text{216}\) Id. Section 675(1) provides in pertinent part:

Payments of first party benefits shall be made as the loss is incurred. . . . If a valid claim or portion thereof was overdue and such claim was not paid before an attorney was retained with respect to the overdue claim, the claimant shall also be entitled to recover his attorney’s reasonable fee, which shall be subject to limitations promulgated by the superintendent in regulations.

In In re Country-Wide Ins. Co. (Barrios), 43 N.Y.2d 685, 371 N.E.2d 789, 401 N.Y.S.2d 26 (1977), the Court upheld an award for fees which greatly exceeded the claim. The Court declared that under section 675, “[i]t is the arbitrator who is empowered to evaluate legal services.” Id. at 686, 371 N.E.2d at 789, 401 N.Y.S.2d at 27. In response to this broad discretion conferred on the arbitrator, the legislature amended section 675 to authorize the Superintendent of Insurance to issue regulations limiting the attorney’s fees that may be recovered. See Ch. 892, § 13, [1977] N.Y. Laws 1835 (McKinney); notes 233 and 247 infra.

The New York no-fault law, which became effective February 1, 1974, was enacted to remedy three defects in the common-law system of automobile accident tort litigation: the system was excessively expensive and inefficient, distribution of compensation to accident victims was inequitable, and the system placed an onerous burden on the State’s judicial system. Montgomery v. Daniels, 38 N.Y.2d 41, 50-51, 34 N.E.2d 444, 448-50, 378 N.Y.S.2d 1, 8-9 (1975). Enactment was preceded by exhaustive legislative consideration. Id. at 53, 340 N.E.2d at 451, 378 N.Y.S.2d at 11. See note 244 infra.

A claim is overdue if the carrier does not make payment within 30 days after the claimant has shown proof of loss. N.Y. Ins. Law § 675(1) (McKinney Supp. 1979-1980). Once a claim is overdue, in addition to attorney’s fees, a carrier is liable for interest “at the rate of two percent per month.” Id.

Section 675(2) mandates that the carrier afford the claimant the option of submitting any dispute arising under subdivision one to arbitration. N.Y. Ins. Law § 675(2)(McKinney Supp. 1979-1980). As originally enacted, section 675(2) prescribed binding arbitration; the statute was amended, however, in 1977 to authorize review of the arbitration award by a master arbitrator. Ch. 892, § 13, [1977] N.Y. Laws 1835 (McKinney).

\(^\text{217}\) In re Country-Wide Insurance Co. (Barrios), 49 N.Y.2d 686, 686, 371 N.E.2d 789,
services that may be included in the award.\textsuperscript{218} Recently, in \textit{In re Fresh Meadows Medical Associates},\textsuperscript{219} the Court of Appeals held that in an arbitration to resolve a disputed claim, the arbitrator has the authority to order the carrier to pay the reasonable value of the attorney's services expended in substantiating a claim for his legal fees.\textsuperscript{220}

Janina Tokarz was injured while riding as a passenger in an automobile insured by Liberty Mutual Insurance Company (Liberty).\textsuperscript{221} She assigned her claim for payment of an x-ray bill to Fresh Meadows Medical Associates (Fresh Meadows),\textsuperscript{222} which submitted the claim to arbitration\textsuperscript{223} following Liberty's refusal to pay.\textsuperscript{224} Liberty contested Fresh Meadows' request for payment of both the x-ray bill and attorney's fees.\textsuperscript{225} In reply, Fresh Meadows sought to justify these sums and requested an additional amount for the services rendered in responding to Liberty's challenge.\textsuperscript{226}

\textsuperscript{218} See note 216 and accompanying text supra. The only guidelines available are embodied in regulations formulated by the Superintendent of Insurance. See generally note 216 supra. Rather than delineating the services that are compensable, however, the regulations merely limit the monetary amount that may be recovered. See [1978] 11 N.Y.C.R.R. § 65.16(e)(7); note 244 and accompanying text infra.


\textsuperscript{220} 49 N.Y.2d at 97, 400 N.E.2d at 304, 424 N.Y.S.2d at 363.

\textsuperscript{221} Id. at 96, 400 N.E.2d at 303, 424 N.Y.S.2d at 362. Section 672 of the Insurance Law mandates that all automobile liability insurance policies issued in New York provide coverage to persons, other than those in another motor vehicle, for losses resulting from the use of a motor vehicle. N.Y. Ins. Law § 672(1)(a) (McKinney Supp. 1979-1980); see [1978] 11 N.Y.C.R.R. § 60.1(a).


\textsuperscript{223} See generally note 216 supra.

\textsuperscript{224} 49 N.Y.2d at 96, 400 N.E.2d at 303, 424 N.Y.S.2d at 362.

\textsuperscript{225} \textit{Id.}

\textsuperscript{226} \textit{Id.} Fresh Meadows maintained that the additional services involved "the reading of \textit{the carrier's} Brief, researching the Law contained therein and in my Reply Memorandum
The arbitrator directed Liberty to pay the x-ray bill and the requested counsel fees.\textsuperscript{227} The Supreme Court, Queens County, denied Liberty's motion to vacate that portion of the award relating to counsel fees.\textsuperscript{228} On appeal, the Appellate Division, Second Department, reversed in part, modifying the award by excluding the amount representing the additional legal services expended in substantiating the original claim.\textsuperscript{229}

A divided Court of Appeals reversed,\textsuperscript{230} holding that an arbitrator's authority includes the power to award the reasonable cost of an attorney's efforts to justify a claim for his fees.\textsuperscript{231} Judge Jones, writing for the majority,\textsuperscript{232} noted that neither section 675 nor its accompanying regulations directly address the issue whether counsel fees incurred in attempting to collect the original fees are recoverable.\textsuperscript{233} Relying upon the legislative intent of the statute,\textsuperscript{234} the majority dismissed Liberty's contention that an en-
titlement to a "fee on a fee" should not be implied since the recovery of attorney's fees represents a deviation from the traditional American rule that each party must bear his own litigation expenses.235 Judge Jones observed that the statute had been enacted to reimburse claimants forced to engage counsel to arbitrate their valid claims because of the carrier's wrongful refusal to pay.236 To accomplish this end, the majority concluded, the authority of the arbitrator must extend to directing the recalcitrant carrier to compensate the claimant for all attorney's fees.237

Judge Meyer dissented, maintaining that since attorney's fees are recoverable only pursuant to an express statutory or contractual authorization,238 the power to award the cost of substantiating an original claim for fees cannot be implied for section 675.239 Moreover, Judge Meyer argued, legislative silence reflects an intent to proscribe a "fee on a fee."240

A departure from both established rules of statutory construction and prior precedent, the Fresh Meadows decision represents a significant judicial effort to effectuate the spirit of No-Fault.241 Imposing liability on the carrier for the insured's counsel fees, section 675 stands contrary to the common-law principle that every litigant is responsible for the costs of his attorney's services.242 Al-

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235 Id. at 98-99, 400 N.E.2d at 305, 424 N.Y.S.2d at 363-64. See note 242 and accompanying text infra.
236 49 N.Y.2d at 98, 400 N.E.2d at 305, 424 N.Y.S.2d at 364.
237 Id. at 99, 400 N.E.2d at 305, 424 N.Y.S.2d at 364.
238 Id. at 99, 400 N.E.2d at 305-06, 424 N.Y.S.2d at 364 (Meyer, J., dissenting). See note 242 infra.
239 Id. (Meyer, J., dissenting).
240 Id. at 100, 400 N.E.2d at 306, 424 N.Y.S.2d at 364 (Meyer, J., dissenting). The dissent concluded, however, that the record contained no indication that the amount of the fee excluded by the appellate division represented the fee on a fee; therefore, the proper course should have been to order a rehearing before the arbitrator to determine that issue, since the arbitrator has exclusive authority to compute the award. Id. at 100, 400 N.E.2d at 306, 424 N.Y.S.2d at 365 (citing In re Country-Wide Ins. Co. (Barrios), 43 N.Y.2d 685, 686, 371 N.E.2d 789, 401 N.Y.S.2d 26, 27).
241 See note 216 supra.
242 The general rule that a party may not be held liable for his adversary's litigation expenses, see, e.g., Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 247 (1975); Hall v. Cole, 412 U.S. 1, 4 (1973), may be altered only by statute or agreement. City of Buffalo v. J.W. Clement Co., 28 N.Y.2d 241, 262-63, 269 N.E.2d 895, 908, 321 N.Y.S.2d 345, 364 (1971); 1 S. SPEISER, ATTORNEY'S FEES ch. 13.1 (1973); see CPLR §§ 909 & 8303 (McKinney 1976 & Supp. 1979-1980). This "American rule" grew out of the 19th century beliefs that every man could adequately represent himself in our judicial system, and that since judges "discovered" law, lawyers were an unnecessary luxury. See Kuenzel, The Attorney's Fee: Why Not A Cost Of Litigation?, 49 Iowa L. Rev. 75 (1963). Numerous commentators have suggested
though statutes in derogation of the common law should be narrowly construed, the Fresh Meadows majority apparently concluded that the legislative intent of section 675 superseded this principle.

It is submitted, however, that the Fresh Meadows decision, while laudable in theory, does little to achieve its purpose of insulating the claimant from financial loss. Subsequent to the accrual of the Fresh Meadows’ cause of action, the Superintendent of Insurance promulgated regulations limiting the amount that may be awarded for counsel fees. Since the maximum award under the new regulations is substantially less than the rates currently being charged by attorneys, it appears that the only party truly bene-


See N.Y. STAT. § 92 (McKinney 1971). The majority noted the purpose of section 675—"to indemnify the claimant against economic loss"—would be thwarted if the arbitrator’s authority to award all fees was restricted. 49 N.Y.2d at 98, 400 N.E.2d at 305, 424 N.Y.S.2d at 364. But see note 245 and accompanying text infra. For a comprehensive discussion of the need for no-fault, see R. Keeton & J. O’Connell, Basic Protection for the Traffic Victim (1965).

The holding contravenes prior case law requiring express authority to recover counsel fees sustained in enforcing an award of fees. See Doyle v. Allstate Ins. Co., 1 N.Y.2d 439, 136 N.E.2d 484, 154 N.Y.S.2d 10 (1956). In Doyle, the defendant-carrier had issued the plaintiff a liability policy containing a provision that the carrier would defend all lawsuits arising out of the plaintiff’s use of his property. Id. at 441, 136 N.E.2d at 485, 154 N.Y.S.2d at 11-12. When the carrier refused to defend a nuisance action instituted against the insured, the plaintiff retained his own counsel. Id., 136 N.E.2d at 485-86, 154 N.Y.S.2d at 12. Thereafter, the plaintiff sued the carrier to recover the expenses of both defending the prior action and bringing the subsequent suit. Id. at 442, 136 N.E.2d at 486, 154 N.Y.S.2d at 12. The Court of Appeals held that although the defendant was liable for the costs incurred by the plaintiff in defending the nuisance action, the plaintiff was not entitled to an award of the expenses of the second action. Id. at 444, 136 N.E.2d at 487, 154 N.Y.S.2d at 14. The Court stated that “[t]he legal expenses necessarily incurred by the plaintiff . . . in seeking legal redress for the wrong, while a loss in a sense resulting from the wrongful act of the defendant, are not recoverable as general or special damages.” Id. (citing 1 CLARK, NEW YORK LAW OF DAMAGES § 145 (1925)). See Johnson v. General Mut. Ins. Co., 24 N.Y.2d 42, 246 N.E.2d 713, 298 N.Y.S.2d 937 (1969); Rekemeyer v. Empire Mut. Ins. Co., 60 App. Div. 2d 492, 401 N.Y.S.2d 478 (3d Dep’t 1978).

See [1978] 11 N.Y.C.R.R. § 65.16(c)(7), 65.17(k) & note 216 supra.

According to the regulations, the amounts that may be awarded as counsel fees are: $25 per hour for preparatory services, with a maximum of $250, and $40 per hour for personal appearances before an arbitrator or court. Additionally, unless the dispute is of such a unique nature that extraordinary skills are required—a rare instance in no-fault litiga-
fitted is the attorney, who is guaranteed a minimum payment from
the award, leaving the client liable for the difference. In order to
remedy this apparently unintended anomaly, it is suggested that
the regulations be amended to permit recovery against the carrier
on a scale that more closely reflects typical retainer agreements.

Richard L. O'Toole

**JUDICIARY LAW**

*Jud. Law § 479: State constitutionally may prohibit attorneys from soliciting by mail*

In order to increase public awareness of the availability and
cost of legal assistance, the Supreme Court has held that a state
may not prevent an attorney from advertising the nature and fees
of his services. Although the Court acknowledged the need for

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247 Notwithstanding the monetary restrictions contained in the regulations, the claim-
ant remains contractually liable to his attorney for fees in excess of those awarded. It should
be noted that the regulations initially promulgated included a provision prohibiting the at-
torney from charging his client an amount in excess of the fees permitted by the regulations.

248 An increase in the permissible award of fees would enhance a claimant's ability to
retain competent counsel, since the successful attorney would be assured of adequate remu-
neration. It is submitted that a more realistic restriction might authorize an increased
award, calculated at an hourly rate for small claims and a contingency for larger claims,
since this would simulate typical private fee arrangements. See generally S. SPEISER, At-
torney's Fees ch. 1 (1973). A regulation of this nature would alleviate the difficulties of
computing the award by permitting the arbitrator or the court to award fees similar to those
the claimant would have paid his attorney, absent the statutory provision allowing recovery
from the carrier.

to the narrow question whether it was constitutionally permissible for a state to bar an
attorney from truthfully advertising the availability and cost of his services in a newspaper.
In finding that a state could not bar such conduct, the Bates Court reaffirmed its decision in