

Bill as Introduced

HB 1259 – AS INTRODUCED

2010 SESSION

10-2257
06/03

HOUSE BILL **1259**

AN ACT relative to subrogation claims and liens in civil actions.

SPONSORS: Rep. Nixon, Hills 17; Rep. Rowe, Hills 6; Rep. Craig, Hills 9; Rep. McEachern,
Rock 16

COMMITTEE: Judiciary

ANALYSIS

This bill requires the court to order a division of expenses and costs in subrogation claims and liens.

Explanation: Matter added to current law appears in *bold italics*.
Matter removed from current law appears [~~in brackets and struck through~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Ten

AN ACT relative to subrogation claims and liens in civil actions.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 New Section; Subrogation Claims. Amend RSA 507 by inserting after section 7-i the following
2 new section:

3 507:7-j Subrogation Claims. Whenever a subrogation claim pursuant to a contract of insurance
4 or a Medicaid or statutory lien is asserted for reimbursement of medical expenses as to a plaintiff's
5 recovery against a third party, the court in which the action is pending shall order such division of
6 expenses and costs, including attorneys' fees, between the plaintiff and the insurance carrier, the
7 medical provider, or the state, as justice may require. Reimbursement shall not exceed 2/3 of the
8 amount claimed by the insurance carrier, the medical provider, or the state.

9 2 Effective Date. This act shall take effect January 1, 2011.

HB 1259 - AS AMENDED BY THE HOUSE

03Mar2010... 0777h

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10-2257
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6 attorneys' fees, between the plaintiff and the insurance carrier and the medical provider, as justice
7 may require.

8 2 Effective Date. This act shall take effect January 1, 2011.

CHAPTER 364
HB 1259 - FINAL VERSION

03Mar2010... 0777h
05/12/10 1925s

2010 SESSION

10-2257
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 Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

CHAPTER 364
HB 1259 - FINAL VERSION

03Mar2010... 0777h
05/12/10 1925s

10-2257
06/03

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Ten

AN ACT relative to subrogation claims and liens in civil actions.

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- 1 364:1 New Section; Subrogation Claims. Amend RSA 507 by inserting after section 7-i the
2 following new section:
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4 is asserted for reimbursement of medical expenses as to a plaintiff's recovery against a third party,
5 the court in which the action is pending shall order such division of expenses and costs of the action,
6 including attorneys' fees, between the plaintiff and the insurance carrier and the medical provider,
7 as justice may require.
8 364:2 Effective Date. This act shall take effect January 1, 2011.
9 Approved: July 23, 2010
10 Effective Date: January 1, 2011

Amendments

Senate Judiciary
May 5, 2010
2010-1925s
06/04



Amendment to HB 1259

1 Amend RSA 507:7-j as inserted by section 1 of the bill by replacing it with the following:

2

3 507:7-j Subrogation Claims. Whenever a subrogation claim pursuant to a contract of insurance
4 is asserted for reimbursement of medical expenses as to a plaintiff's recovery against a third party,
5 the court in which the action is pending shall order such division of expenses and costs of the action,
6 including attorneys' fees, between the plaintiff and the insurance carrier and the medical provider,
7 as justice may require.

Amendment to HB 1259
- Page 2 -



2010-1925s

AMENDED ANALYSIS

This bill requires the court to order a division of expenses and costs of the action in subrogation claims and liens.

Committee Minutes

AMENDED
SENATE CALENDAR NOTICE
JUDICIARY

Printed: 04/28/2010 at 8:28 am

- ✓ Senator Deborah Reynolds Chairman
- ✓ Senator Bette Lasky V Chairman
- ✓ Senator Matthew Houde
- ✓ Senator Sheila Roberge
- ✓ Senator Robert Letourneau

For Use by Senate Clerk's Office ONLY	
<input type="checkbox"/>	Bill Status
<input type="checkbox"/>	Docket
<input type="checkbox"/>	Calendar
Proof: <input type="checkbox"/>	Calendar <input type="checkbox"/>
	Bill Status

Date: April 28, 2010

HEARINGS

Tuesday

5/4/2010

JUDICIARY

SH 103

2:00 PM

(Name of Committee)

(Place)

(Time)

EXECUTIVE SESSION MAY FOLLOW

Comments: THE PURPOSE OF THIS AMENDED NOTICE IS TO REMOVE HB 1306 AND RESCHEDULE IT TO 5/5/10 AT 2:00 P.M.

- | | | |
|---------|--------|---|
| 2:00 PM | HB1133 | relative to the duration of involuntary emergency admissions. |
| 2:15 PM | HB1134 | (New Title) authorizing federal law enforcement officials to take emergency law enforcement action to temporarily detain persons when assisting local law enforcement officials or upon witnessing a crime. |
| 2:30 PM | HB1185 | relative to retired judges over 70 years of age. |
| 2:45 PM | HB1215 | relative to gender neutral references in certain public assistance statutes. |
| 3:00 PM | HB1223 | relative to notice in class action cases under the consumer protection act. |
| 3:15 PM | HB1259 | relative to subrogation claims and liens in civil actions. |

Sponsors:

HB1133

Rep. Stephen Shurtleff

HB1134

Rep. Stephen Shurtleff

HB1185

Rep. Robert Rowe

Rep. Frank Emiro

Rep. Mary Gorman

Sen. Peter Bragdon

Rep. William O'Brien

Sen. Robert Letourneau

Rep. David Nixon

HB1215

Rep. David Bickford

HB1223

Rep. Gary Richardson

Rep. Janet Wall

Rep. David Nixon

Rep. Robert Rowe

Rep. William O'Brien

HB1259

Rep. David Nixon

Rep. Robert Rowe

Rep. James Craig

Rep. Paul McEachern

Gail Brown 271-3076

Sen. Deborah Reynolds

Chairman

Judiciary Committee

Hearing Report

TO: Members of the Senate

FROM: Susan Duncan, *Senior Legislative Aide*

RE: Hearing report on **HB 1259** – *AN ACT relative to subrogation claims and liens in civil actions.*

HEARING DATE: May 4, 2010

MEMBERS OF THE COMMITTEE PRESENT: Senators Reynolds, Lasky, Roberge, Letourneau and Houde

MEMBERS OF THE COMMITTEE ABSENT: No one

Sponsor(s): Representative Nixon with Representatives Rowe, Craig and McEachern

What the bill does: This bill requires the court to order a division of expenses and costs in subrogation claims and liens.

Who supports the bill: Representative Nixon; Attorney Charles Douglas

Who opposes the bill: Mark Vattes on behalf of America's Health; George Roussos on behalf of NNADIC; Bonnie Packard of Orr and Reno on behalf of Harvard Pilgrim

Summary of testimony received:

- Representative Nixon introduced the legislation and explained that this provides for situations after wrong-doing where there is a division of recovery between an HMO or insurance company and the recovering plaintiff.
- He said that the bill tries to provide a formula identical to what happens with Worker's Compensation cases.
- He noted that RSA 281-A: 14 shows with liens against recovery that the court will make a determination "as justice may require" and that generally, the award is reduced by 1/3, but that there are exceptions depending on the case.
- He said that in non-worker's compensation cases, there is no statutory guidance and that it can be difficult to get cases concluded. He said that there is no real way now to provide for

what happens – and that there are exceptions to the arguments. He used as an example an accident where there is \$300,000 in medical bills and the uninsured motorist cap is \$100,000.

- He said that in one case, they agreed to pursue the uninsured motorist coverage and BC/BS waived subrogation funds in order to benefit a little boy who had been very badly injured. The moneys were used to set up a trust fund to care for the child.
- He said that the current statutory scheme works very well in the worker's compensation area and that he doesn't understand why folks would oppose this – it is just an equitable settlement adjustment.
- He remarked that if the state feels that there is an equitable formula, then more often than not, they agree to it.
- Senator Reynolds remarked that they heard a bill in the Commerce Committee that was defeated on the Senate floor. She said that the bill was a little different and asked him to please distinguish between the two. Representative Nixon responded that Representative Richardson's bill was a small, courageous attempt to correct the Beneditto (?) ruling, which still remains in effect.
- Senator Letourneau, in citing a case involving a Cadillac from Massachusetts, where there is mandatory automobile insurance, but it was an uninsured vehicle, asked how the case was perceived from that aspect. Representative Nixon said that in the case in question, there were no assets to go after.
- Senator Lasky asked how the bill came to be amended in the House. Representative Nixon responded that they agreed to a proportional share – which happens a lot, but isn't guaranteed. He asked the Committee members why not latch onto the success of the Worker's Compensation system.
- Senator Houde asked if this would pertain only to post-judgment matters. Representative Nixon responded that it could be negotiated – but it would not bind anyone to a particular formula. He said that it would serve as a guide in the case of a disagreement.
- Senator Reynolds, in referencing RSA 507: 7, asked if this elevates subrogation claims.
- Attorney Roussos testified in opposition. He said that this applies to health insurance liens and that they would have a lien to get back to what they have paid out on behalf of the patient. He said that if all the bill did was to set out equity, their objection would be a lot less.
- But he noted that this bill goes a whole lot further, but perhaps that was unintentional. He said that if their intention was to only deal with the expenses incurred by the patient . . . but that as the bill currently reads, whenever there is a claim for subrogation. He said that the way he reads it, it would be the amount of the lien – the entire amount of the lien, not just expenses.
- Senator Reynolds, in using his scenario and the lien for medical expenses, would this divide the "pot" up more ways. Attorney

Roussos responded that in the case of \$50,000 in medical expenses and a settlement of \$150,000 – what is done in Worker's Compensation, attorneys fees and costs would be 1/3 or \$50,000. With health insurance, you already paid out \$50,000 but should you reduce your costs by 1/3? He said his concern is that it cost \$50,000 and they collected \$150,000 – that they had to settle but his clients injuries were really \$500,000 – so it is not fair to give that much to the insurance company. That would require hearings every time. He said that the Worker's Comp analogy gives him hope that they can work something out and suggested a middle ground here.

- Senator Reynolds noted that if we're talking about an amendment here to work out a compromise Attorney Roussos commented that it wouldn't take long – they would use similar language in a new section.
- Senator Letourneau noted that if he's going to collect on his Blue Cross coverage but then Anthem wants to take his coverage away. Attorney Roussos agreed that under his example he would be paying a lot more for his coverage.
- Bonnie Packard presented written testimony in opposition to the proposed legislation.
- Attorney Douglas testified in support. He said that the proposed language does not dictate anything but leaves it up to the court to decide. He said that in Senator Letourneau's example, it could happen, and the court in which the case is pending, the judge would make a fair allocation.
- Senator Houde asked if under the scenario, the plaintiff could actually get nothing. Attorney Douglas responded that it is basically the same language and that he didn't see a functional difference. He agreed that it could be reworded, but that he didn't see a material difference. He asked to avoid a Committee of Conference and go along with the wording.

Fiscal Impact: Not applicable.

Action: Senator Lasky moved "Ought to Pass with Amendment." Senator Roberge seconded the motion. The Committee voted 4 to 0 in support. Senator Houde will report the bill out of Committee.

sfd

[file: HB 1259]

Date: May 8, 2010

Date: May 4, 2010
Time: 3:28 p.m.
Room: State House Room 103

RLB

The Senate Committee on Judiciary held a hearing on the following:

HB 1259 relative to subrogation claims and liens in civil actions.

Members of Committee present: Senator Reynolds
Senator Lasky
Senator Houde
Senator Roberge
Senator Letourneau

The Chair, Senator Deborah R. Reynolds, opened the hearing on HB 1259 and invited the prime sponsor, Representative David Nixon, to introduce the legislation.

Representative Nixon: Thank you very much, Madam Chair, members of the Senate Judiciary Committee. Thank you for the honor of being with you. I have been sitting back there and saying the more I keep my mouth shut, the more bills I co-sponsored. I don't want to disappoint my friends with the orange labels in the back. So, I will take a whack at HB 1259.

HB 1259 very simply provides for the situation where, after a recovery against the wrongdoing or negligent person, a division of the recovery is to be made as between a healthcare, HMO or healthcare provider and insurance company, enter Blue Cross Blue Shield, and the recovery plaintiff. All this bill tries to do is to derive a formula for that division of recovery identical to the formula now in place and it has worked since 1957 in workers' compensation cases whereby, in the case of a worker injured in the course of his or her employment by the negligence of a third party, he has a right, she has a right to what is called a third party action against the wrongdoer. Out of that recovery, by statute, 281:14 the person or entity that provided benefits, workers' compensation benefits, has a lien against that recovery. That lien is satisfied by the court as justice may require.

In practice, 99 44/100% of the time, it is reduced by one-third or something in that vicinity because that is generally a proportionate share of the recovery.

JLB

There are exceptions to that rule, but they depend on the circumstances of the particular case. Maybe a very difficult liability case where a lower proportion of recovery is found equitable by the court and/or agreed by the parties which happens most of the time.

In non-workers' compensation situations, there is no guidelines, there is no measuring stick, so to speak. So, oftentimes it is very difficult to get a case concluded because agreement cannot be reached as between the entity that has provided benefits, medical and hospital expenses to the injured party on the one hand, and the injured party through his/her attorney. There is no real way now to provide for what happens when that difference of opinion arises.

I should say, and I notice that the gentleman from Anthem Blue Cross Blue Shield signed up to oppose this bill, that there are exceptions to that disagreement probability. For instance, I had the honor of representing the little son of a police officer in Manchester who was riding with his father to the dump and was seat belted in the right hand side of the pick-up with his sister between them and the uninsured motorist from Massachusetts, I hate to say I was born there, driving a Cadillac, crossed the center line, hit the pick-up truck the little fellow was in, knocked it sideways along the road about a hundred feet and tore his right arm to shreds. Thirty operations, \$300,000 in medical bills.

The guy who did it had no insurance, no assets, nothing. So, he had to rely on his uninsured motorist insurance, that is the father did for his son, which we agreed to collect because there was only \$100,000. Most people in New Hampshire think they are fully covered if they have \$100,000 per person liability uninsured motorist insurance. I have told you before and I will tell you again, I always recommend a minimum of \$250,000 per person, \$500,000 per accident plus a million dollar umbrella with uninsured motorist protection.

In any event, we agreed to pursue the uninsured motorist aspect of the case without fees and then Anthem Blue Cross Blue Shield, having paid the benefits, that is to say, the medical and hospital expenses, agreed in connection with our agreement not to charge any fees. That is so-called subrogation claim in its entirety so that we were able to put that recovery in a trust fund under the court supervision for the benefit of the little boy who, by the way, is playing baseball as we speak. There are some happy results.

But, in the absence of any guidelines, which this bill would provide, they are not always that happy. It isn't everybody that is always as generous as in this case with Blue Cross Blue Shield. This bill merely provides that the

court has jurisdiction to make an equitable division of the proceeds based on the circumstances, as justice may require. If it is a very difficult liability case and a very small recovery as opposed to the amount of the medical bills, the court has the discretion or would have to make an equitable adjustment in how much has to go back to the healthcare provider or the healthcare insurer and vice versa if it is an easy case and a lot is recovered, then the court has jurisdiction, at the request of the insurer, to raise the ante, so to speak, for its benefit. That's all this bill would do.

I don't understand that it works so well in the workers' compensation area, why there should be any problem with it because it isn't a situation where the injured victim or plaintiff is telling the insurer how much he is going to get back; it is a situation where the plaintiff, through counsel, has an opportunity to say what he/she thinks is fair and the beneficiary, or I should say the outfit that has provided the benefits, has the right to say what it thinks is fair and the courts decide it. I might say the State thinks this is an equitable formula because in state workers' compensation cases, the allocation is decided by the Governor and Council and oftentimes, depending on the equity on the liability tax, the state waives its lien in its entirety, but more often than not, it agrees to a standard two-third/one-third formula, that is to say, it agrees to a reduction of about one-third in a payback. Thank you very much.

Senator Deborah R. Reynolds, D. 2: Thank you. Representative, I do have a couple of questions and other members do, too.

But, we have a bill in the Senate Commerce Committee that Representative Richardson was the prime sponsor of that had to do with third party actions in workers' comp cases that was defeated on the Senate floor, I think a week or so ago. I think that the goal of that bill was somewhat different from this. I think it was trying to address the DiBenedetto, a portion of the damages issue.

Could you very briefly distinguish that issue from this because this is 507, which is subrogation claims where there is an uninsured motorist claim? Is that what I'm hearing? There may be a defendant, but he is judgment proof. Is that what this is?

Representative Nixon: No. This would be all subrogation claims. It happens to be under RSA 507. The difference between this bill and Representative Richardson's bill, which I was a co-sponsor of, that was a small attempt, courageous but unsuccessful, to correct the worst inequity in a sense of the DiBenedetto case ruling which in effect says and now says continuingly that, even if an employer was at fault in respect to the injuries that were the result

RMB

of a recovery from the jury, that employer, that is to say that employer's insurance carrier, could still get his lien paid back as per the workers' compensation statute, even though its fault may have contributed more than anybody else's to the injuries which were the subject of both proceedings. That is to say the third party action as well as the division action.

That is not the situation we're talking about here. We're talking about here and unfortunately this bill will not affect the DiBenedetto doctrine, draconian as it is, at all and that still remains the law.

Senator Deborah R. Reynolds, D. 2: Thank you, Representative. I don't know who had their hand up first. Senator Letourneau?

Senator Robert J. Letourneau, D. 19: Just a couple of questions actually. The first one that you talked about the case where the Cadillac was uninsured from Massachusetts. And, we all know that Massachusetts has a mandatory insurance law. What was the, how was the case perceived for your client under that respect? Can you go after a person or his assets or anything?

Representative Nixon: Well, we, at our expense, we hired an investigator to see if the guy driving the Cadillac had any assets worth pursuing and there were none. Everything was mortgaged to the hilt. And the fact that he did not have insurance as Massachusetts law requires, that did not avail us either. And, so, the only recourse for that particular family was the uninsured motorist insurance they happened to have with State Farm, by the way, which is an insurance company that you have heard about in the past and it is not easy to deal with. But in this case, they recognized that there was no way that anything less than the full policy was anywhere near adequate for the damages and injuries and they paid it without too much of a fuss.

Senator Robert J. Letourneau, D. 19: Thank you.

Senator Deborah R. Reynolds, D. 2: Senator Lasky?

Senator Bette R. Lasky, D. 13: Thank you, Madam Chair. Good afternoon, Representative Nixon. I wanted to know about the bill as introduced, reimbursement shall not exceed 2/3 of the amount claimed. Basically, what you're saying, how did it come about to be amended?

Representative Nixon: Well, it started out the idea was that the usual, when I say oftentimes agreed to fund is that whoever has the subrogation claim agrees to pay or have deducted from its right of recovery a proportionate

RUB

share of the recovered costs, which ordinarily reduces its claim by a third. That happens a lot. But, it isn't guaranteed and there are situations where, like the one that I described earlier, and other situations where there was a substantial recovery with little effort that the standard one-third or fixed one-third/two-thirds division would not probably be equitable.

Plus, there is the success that has been had with the workers' compensation third party recovery distribution and why not latch onto that and that's all this bill does by the private situation as opposed to non-workers' compensation situations.

Senator Bette R. Lasky, D. 13: Thank you.

Senator Deborah R. Reynolds, D. 2: Senator Houde?

Senator Matthew Houde, D. 5: Thank you, Madam Chair. Thank you, Representative Nixon for taking the question. I'm assuming this would only pertain to situations that were post-judgment as opposed to negotiations?

Representative Nixon: I'm sorry. I'm having trouble hearing you, Senator.

Senator Matthew Houde, D. 5: Would this pertain only to post-judgment matters or you can negotiate a resolution presumably?

Representative Nixon: You can negotiate right now and you would be able to negotiate after this bill passes, if it does hopefully with your good judgment. It takes effect January 1, 2011, which means there is some lag time to allow the insurance industry to get used to the idea as well as other people. It would not bind anybody by any specific formula.

But, there is the precedential value, so to speak, from the workers' compensation experience which would hopefully gives this some impetus in terms of reasonableness and also to serve as a guide the judge or whoever is going to decide the apportionment in case of disagreement.

Senator Deborah R. Reynolds, D. 2: Follow up. Representative, what I'm looking at, this is a new provision of RSA 507:7. So, does this doesn't really create a new cause of action, but it sort of elevates subrogation claims to being part of the post-judgment process. Is that the concept here?

Representative Nixon: Yes. I think that is a fair way to put it.

JHB

Senator Deborah R. Reynolds, D. 2: Okay. Thank you. We are going to hear from Mr. Roussos in a second, but do want to thank you. Any other questions of Representative Nixon?

Representative Nixon: Thank you for your courtesy and I'm sorry to take so much of your valuable time.

Senator Deborah R. Reynolds, D. 2: Thank you very much, Representative.

I would like to hear from Mr. George Roussos, if he is here.

I want to note that Paula Rogers, on behalf of Anthem Health Plans, has signed in in opposition, does not wish to speak. Mark Vattes, on behalf of America's Health Insurance Plan, also signed in in opposition. So, welcome Mr. Roussos.

Attorney George Roussos: Thank you very much, Madam Chairman, members of the Committee. My name, for the record, is George Roussos and I am here today representing the New Hampshire Association of Domestic Insurance Companies and the American Insurance Association, and I would also like to say a few words about this bill from the perspective of Harvard Pilgrim Healthcare.

First of all, this bill, as Representative Nixon mentioned, applies to health insurance liens when money has been paid out by the health insurer as part of their contract to provide. If there is a recovery against somebody else who is responsible for producing those medical bills, then they would have a lien to get back what they have paid. This applies to settlements and judgments alike and so would this bill, as I read it. It would apply to any settlement case as well.

As Representative Nixon mentioned, very often when these cases are settled, there is a negotiation that involves the health insurance company saying I know you spent attorneys' fees and so forth that represent a third of the recovery and we will reduce the amount of our lien by that amount, recognizing the expenses. That is a relatively common practice, but it is not required and it does not always occur.

If all this bill did was to set out the equity of sharing expenses if someone had a third party recovery, I think our objection to this bill would be a lot less than it is right now. There is a certain fairness to it. As I say, it is represented in practice. But, this bill goes a whole lot further than that and it is possible, listening to Representative Nixon, that that is unintentional.

JTB

I haven't had a chance to talk with him about that, but my point is this. If this bill's intention is to do what workers' comp does, and I will come to that in a second, then it would apply to the division of the expenses incurred by the plaintiff in the third party action and order a division of those expenses as a deductible. But, what the bill, as it reads, says that whenever there is a claim for subrogation asserting reimbursement of medical expenses, the court shall order such division of expenses and costs, including attorneys' fees between the plaintiff and the insurance carrier and the medical provider, as justice may require.

The way I read that is that it would, when you're talking about reimbursement of medical expenses, they are talking about the amount of the lien. So, the ability to adjust would apply to the entire amount of the lien, but it wouldn't be based just on the expenses. That's a question that we can easily clear up if that is consistent with Representative Nixon's intentions with respect to the bill.

Senator Deborah R. Reynolds, D. 2: Attorney Roussos, can I just ask you a question?

Attorney Roussos: Yes.

Senator Deborah R. Reynolds, D. 2: Are you concerned about a scenario where Anthem has a lien for medical expenses under a healthcare policy, but there is also a liability carrier involved and you're concerned about dividing that pot up more in more ways? Is that what your concern is?

Attorney Roussos: Thank you, Madam Chair. Let me try, by an example. If there is a health insurance lien, let's say of \$50,000 and there is a settlement of, let's say, \$150,000. Then, what I'm saying is it is done in workers' comp and it would be more agreeable than to go further, to say that \$150,000 involved attorneys' fees and costs that were asserted. So, the \$50,000 was costs. So, health insurance paid out \$50,000, but you should reduce your \$50,000 lien by a third as well because it cost us this much money to recover that much money.

What I'm saying is, if that is what this bill is intended to do, I can see some fairness in that. As I say, it is consistent with what happens a lot of time. But, my concern is that this bill says instead, taking the same numbers. Health insurer, your lien is \$50,000. We collected \$150,000. But, judge, we only collected a fraction of what this case was worth because there wasn't enough insurance, because we had liability problems, whatever. We had to settle for 150, but my client was really injured and his injuries were like \$500,000. So, I only got a fraction, he is only collecting a fraction from the

JLB

defendant in the third party case and it is not fair to give any more than that fraction to the health insurer. So, reduce your lien to nothing or reduce it some very small amount as justice may require.

There is no standard that is set forth in the bill other than the very broad standard of whatever a judge says is fair. So, we would say... That would require, I think, hearings virtually every time there is a settlement or a judgment in a case, there is going to be an argument between many that say my client didn't receive everything he was entitled to, so in fairness, judge, reduce or eliminate that health insurer's lien and we would like to avoid that.

Now, that's me and that's got to be my wife. I'm not going to take it. She's the only one who calls me.

Senator Deborah R. Reynolds, D. 2: We won't tell her you wouldn't take the call.

Senator Robert J. Letourneau, D. 19: Bring home a loaf of bread.

Attorney Roussos: So, sorry about that. The workers' comp analogy and this gives me hope that maybe we can work something out that Representative Nixon talks about does exactly what I am suggesting would be kind of a middle ground here. I can give you the language. I only have the one copy.

But, the relative section 281-A:14, I(b), which establishes the lien that the carrier or the employer has on recoveries. Then, 281-A:13, IV, which says when there is a recovery against a third person, the commission, arbitrator or the Superior Court shall order such division of expenses and costs of action, including attorneys' fees, between the employer and the employer's carrier and the employee as justice may require.

So, in other words, that is a division of expenses that I was talking about, the one-third that we used for sake of example. It would probably be easier to look at than try to follow what I'm talking about, if I could just pass it up to you, Madam Chair.

Please see Attachment #1.

Senator Deborah R. Reynolds, D. 2: I really appreciate this. I just have a few comments. One is that you're talking about amending the workers' comp statute, which is a different sort of approach than Representative Nixon had.

Attorney Roussos: No, I'm not talking about that.

JRB

Senator Deborah R. Reynolds, D. 2: Okay. Go ahead.

Attorney Roussos: Representative Nixon, I believe, cited the workers' comp statute as something that has worked for a long time and fairly divided up money in that case between a third party and a comp carrier who had a lien and drew the analogy.

Senator Deborah R. Reynolds, D. 2: Okay. You want to use similar language?

Attorney Roussos: Similar language that has the same meaning, but amending the same section and create a new section as Representative Nixon proposes in this bill.

Senator Deborah R. Reynolds, D. 2: Okay.

Attorney Roussos: I'm following his analogy.

Senator Deborah R. Reynolds, D. 2: Okay. My thoughts would be this. I want the Committee members to ask any questions they have, but we will probably be spending a few moments here shortly execing on other bills and it might be helpful to speak with Representative Nixon and if you guys can resolve the language, I think that would be helpful to the Committee. Were you done with your testimony?

Attorney Roussos: Yes. Sure.

Senator Deborah R. Reynolds, D. 2: Okay. Are there any questions that any committee members have? Okay. Senator Letourneau?

Senator Robert J. Letourneau, D. 19: Thank you. I'm a Blue Cross Anthem customer. I'm in an automobile accident and the guy that hits me doesn't have any insurance. It doesn't matter where he is from. I'm going to collect my injuries on my Anthem policy because I am insured for that and I pay for that. That is something I pay for. I have uninsured motorist, but it is very low coverage. Maybe I'm put out of work for the rest of my life and I'm in a wheelchair. Anthem wants to come in and take all the money that I paid for my insurance away because I got a settlement. Is that what you're saying?

Attorney Roussos: It is possible in the analogy that you might. That is possible.

Senator Robert J. Letourneau, D. 19: Why am I paying for insurance then?

Attorney Roussos: You would be paying a hell of a lot more for insurance if they didn't have liens to recover when there is a third party recovery. That goes into keeping the rate lower than it would be otherwise.

Senator Robert J. Letourneau, D. 19: Alright.

Attorney Roussos: That is part of the rate for health insurance.

Senator Deborah R. Reynolds, D. 2: Any further questions? Seeing none, Mr. Roussos, is this your only copy? Did you want to keep this to show Representative Nixon?

Gail Brown: I will go make copies.

Senator Deborah R. Reynolds, D. 2: Any other questions for Mr. Roussos? Seeing none, is there anyone else here who wanted to testify relative to HB 1259?

Bonnie Packard: Madam Chair, if I may?

Senator Deborah R. Reynolds, D. 2: No problem. Come forward.

Ms. Packard: Bonnie Packard, representing Harvard Pilgrim.

Senator Deborah R. Reynolds, D. 2: Why don't you feel free to have a seat? So we can make a record, if you want to wait just a second until we have Gail come back and then you can speak.

Ms. Packard: Okay. I would be happy to.

Senator Deborah R. Reynolds, D. 2: Okay. Great. That would be great.

Attorney Charles Douglas: I would like to sign in favor, if I could.

Senator Deborah R. Reynolds, D. 2: Did you want the form to sign?

Attorney Douglas: I didn't get to sign in.

Senator Deborah R. Reynolds, D. 2: No problem. Did you want to testify?

Attorney Douglas: I don't have to, but depending on what is said, I might want to respond. So, I will kind of reserve.

Senator Deborah R. Reynolds, D. 2: Okay.

LWB

Attorney Roussos: Spoken like a lawyer.

Senator Deborah R. Reynolds, D. 2: Do you mind just coming up and stating for the record who you are?

Ms. Packard: I will wait until Gail gets to her seat. Madam Chair, for the record, my name is Bonnie Packard and I'm from the law firm of Orr & Reno, a non-lawyer. I am the Director of Government Relations and I have a letter here in opposition to HB 1259 on behalf of our client.

Please see Attachment #2.

Senator Deborah R. Reynolds, D. 2: Okay. Thank you, Bonnie. And, your client, just for the record is?

Ms. Packard: Harvard Pilgrim.

Senator Deborah R. Reynolds, D. 2: Harvard Pilgrim. Okay. Did you have any other testimony, Bonnie, that you wanted to offer?

Ms. Packard: Madam Chair, as a non-lawyer, I do not want to.

Senator Deborah R. Reynolds, D. 2: Okay. Thank you, Bonnie. Any questions of Bonnie Packard? Seeing none. Attorney Douglas, did you?

Attorney Douglas: I just wanted to support Representative Nixon's bill because it really does not dictate anything except to leave it up to the court because, in the instance that Senator Letourneau gave, that can happen and even Mr. Roussos agrees, it could come to pass that all the recovery goes to health care liens and the victim gets nothing.

So, I think, because each case is different, this says the court in which the action is pending. So, if it is Coos County Superior Court or Rockingham, the judge who has the file will know and use his or her judgment as to what a fair allocation is. That's all this does and I think it makes imminent sense.

Thank you, Madam Chair.

Senator Deborah R. Reynolds, D. 2: Thank you. Any questions for Attorney Douglas? Senator Houde?

Senator Matthew Houde, D. 5: Thank you, Madam Chair. Thank you. A quick question.

Attorney Douglas: Yes, sir.

Senator Matthew Houde, D. 5: Thank you, Mr. Douglas, for taking the question. What I just heard you say with respect to a client will get nothing. Does that suggest a broader interpretation that Mr. Roussos is concerned about?

Attorney Douglas: I don't have the language of the workers' comp statute in front of me and I so I don't want to speak what the intent of the sponsor of the bill is. But, I think it is basically, as David just gave it to me, to me it is the same language.

Senator Deborah R. Reynolds, D. 2: It looks very similar to me.

Attorney Douglas: I don't see a functional difference. It says expenses and costs of the action, including fees between the employer or the employer's carrier. Honestly, I think it is lawyers could reword it, but if you look at 281-A:13, IV, I don't see a material difference, Senator.

Senator Matthew Houde, D. 5: Okay.

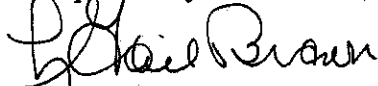
Attorney Douglas: I just think, to avoid having a committee of conference and all that, I would just go with the language as the Representative's bill. I think it does the same thing. Thank you.

Senator Deborah R. Reynolds, D. 2: Thank you. Any other questions of Attorney Douglas? Seeing none, thank you very much.

Is there anyone else here to testify relative to HB 1259? Seeing none, I am going to close the hearing.

Hearing concluded at 3:55 p.m.

Respectfully submitted,



L. Gail Brown
Senate Secretarial Supervisor
9/20/10

2 Attachments

(d) If the contract of employment was not expressly for service exclusively outside of this state.
II. However, recovery of damages in an action at law or recovery of workers' compensation under the law of any other state shall bar recovery of workers' compensation under the law of this state.

Source. 1988, 194:2, eff. July 1, 1989.

Section 281-A:13

281-A:13 Liability of Third Person. -

I. (a) An injured employee, in addition to the benefits of this chapter, may obtain damages or benefits from or proceed at law or otherwise against another person to recover damages or benefits if:

- (1) An injury for which compensation is payable under the provisions of this chapter has been sustained; and
- (2) The circumstances of the injury create in another person a legal liability to pay damages in respect thereto, or a contractual obligation to pay benefits under the uninsured motorist provision of any motor vehicle insurance policy; and
- (3) ~~The action has not been barred under RSA 281-A:8.~~

(b) The employer, or the employer's insurance carrier, shall have a lien on the amount of damages or benefits recovered by the employee, less the expenses and costs of action, to the extent of the compensation, medical, hospital, or other remedial care already paid or agreed or awarded to be paid by the employer, or the employer's insurance carrier, under this chapter, less the employer's or the employer's insurance carrier's pro rata share of expenses and costs of action as determined in paragraph IV.

II. (a) The administrator of an employee's estate may, in addition to damages or benefits obtained under this section payable to the employee's dependents, obtain damages or benefits from or proceed at law or otherwise against another person to recover damages or benefits if:

- (1) The death of the employee has resulted under circumstances creating in another person a legal liability to pay damages in respect thereto, or a contractual obligation to pay benefits under the uninsured motorist provisions of any motor vehicle insurance policy;
- (2) The action has not been barred under RSA 281-A:8; and
- (3) Damages or benefits obtained under this section shall be in addition to the benefits of this chapter payable to the employee's dependents.

(b) The employer, or the employer's insurance carrier, shall have a lien on the amount of damages or benefits recovered which remain after deduction of such of the expenses itemized in RSA 556:14 as are not paid by the employer or the employer's insurance carrier, and after deduction of the distributive share of any person to whom nothing is payable under RSA 281-A:26, to the extent of the compensation, medical, hospital, or other remedial care and funeral expenses already paid or agreed or awarded to be paid by the employer, or the employer's insurance carrier, under this chapter.

III. (a) No settlement by an employee or, in case of death, by the administrator of the employee's estate, of the employee's or said administrator's claim for damages or benefits at law or otherwise against such third person shall be binding until approved by the commissioner or, if an action has been brought, by the court or arbitration proceeding in which such action is pending or to which the writ is returnable. The commissioner or the court or the arbitrator, as the case may be, shall make provisions for payment to the employer or the employer's insurance carrier of the amount of the lien after expenses and costs of action have been paid.

(b) (1) In any case in which the employee or, in case of death, the administrator of the employee's estate neglects to exercise the employee's right of action by failing to proceed at law or otherwise against such third person for a period of 9 months after the injury, the employer or the employer's insurance carrier may so proceed and shall be subrogated to the rights of the injured employee or, in case of death, to the rights of the administrator to recover against such third person.

(2) If the employer or the employer's insurance carrier recovers from such other person damages

or benefits, after expenses and costs of action have been paid, in excess of the amount of the lien as defined in this section, then any such excess shall be paid to the injured employee or, in case of death, to the administrator of the employee's estate for distribution in accordance with the provisions of RSA 556:14.

(c) The procedure for approval of a settlement and for safeguarding the rights of the employee or, in case of death, the rights of the administrator of the employee's estate in such cases shall be the same as is provided for protecting the rights of the employer or the employer's insurance carrier in case of a settlement made or an action at law or otherwise brought by the employee or the administrator of the employee's estate under this section.

IV. Whenever there is a recovery against a third person under paragraph I, II, or III, the commissioner, the arbitrator, or the superior court, as the case may be, shall order such division of expenses and costs of action, including attorneys' fees, between the employer or the employer's insurance carrier and the employee as justice may require.

V. Whenever the lien created by paragraph I, II, or III is in the state of New Hampshire by virtue of benefits paid to or on behalf of a state employee, the governor and council, upon petition by the injured employee, may, in their discretion, waive all or part of the lien.

VI. Any provision in any agreement which requires employers or the employer's insurance carrier to waive any rights of subrogation granted pursuant to this chapter is hereby prohibited.

Source. 1988, 194:2, eff. July 1, 1989. 2004, 3:1, eff. March 5, 2004.

Section 281-A:14

281-A:14 Employee's Fault. – The employer shall not be liable for any injury to a worker which is caused in whole or in part by the intoxication, as defined in RSA 281-A:2, XII-a, or by the serious and willful misconduct of the worker. The provision as to intoxication shall not apply, however, if the employer knew that the employee was intoxicated.

Source. 1988, 194:2. 1990, 254:10, eff. Jan. 1, 1991.

Section 281-A:15

281-A:15 Computing Average Weekly Wages; After-Tax Earnings. –

I. Except as provided in paragraphs II and III of this section and of RSA 281-A:32 and subject to RSA 281-A:28, 281-A:28-a and RSA 281-A:31-a, but including those persons under RSA 281-A:15, II-a, an average weekly wage shall be computed by using the method in subparagraph (a) or (b), or (c) that yields the result more favorable to the injured employee:

(a) By dividing the gross earnings of the injured employee in the service of the same employer during the preceding 26 weeks by that number of weeks; or

(b) By dividing the gross earnings of the injured employee in the service of the same employer during a period exceeding 26 weeks but not exceeding 52 weeks by the appropriate number of weeks.

(c) If, however, by reason of the shortness of time during which the employee has been in the employment of the employer or because of the nature or term of the employment, it is inequitable to compute the average weekly wage using the method in subparagraph (a) or (b), regard may be had to the rate of pay designated in the injured employee's agreement of employment or to the gross earnings of persons in the same grade employed at the same work by the same employer or, if there are no persons so employed, by persons of the same grade employed in the same class of employment in the same locality.

II. Except as provided in paragraph III, the average weekly wage for any of the following injured while on duty shall be deemed to be the average weekly wage that entitles such employee to 100 percent

Orr&Reno
Professional Association

One Eagle Square, P.O. Box 3550
Concord, NH 03302-3550
Telephone 603.224.2381
Facsimile 603.224.2318
www.orr-reno.com

William L. Chapman
George W. Roussos
Howard M. Moffett
James E. Morris
John A. Malmberg
Martha Van Oot
Douglas L. Patch
James P. Bassett
Emily Gray Rice
Steven L. Winer
Peter F. Burger
Lisa Snow Wade
Susan S. Geiger
Richard Y. Uchida
Jennifer A. Eber
Michael D. Ramsdell
Jeffrey C. Spear
Connie Boyles Lane
Judith A. Fairclough
Todd C. Fahey
Vera B. Buck
James F. Laboe
Robert S. Carey
John M. Zaremba
Courtney Curran Vore
Justin M. Boothby
Heidi S. Cole
Jeremy D. Eggleton
Rachel A. Goldwasser
Joshua M. Pantescio
John L. Arnold
Michael T. Cretella

May 4, 2010

The Honorable Deborah R. Reynolds, Chair
Senate Judiciary Committee
State House
Concord, New Hampshire 03301

Re: HB 1259

Dear Madam Chair:

I write on behalf of our client Harvard Pilgrim Health Care in opposition to HB 1259. The key concept behind an insurer filing a subrogation claim to recover medical expenses it paid for one of its members who is now seeking recovery of those costs from a third party is that medical expenses incurred by an insured person should be covered, but should not be paid twice. The proposed language removes any predictability that health insurers will be able to recover for expenses they have paid for covered services.

For example, Harvard Pilgrim, according to the terms and conditions of its policies provides coverage for covered medical expenses that insured's may have incurred as the result of an injury or illness. If a person sues a third party as a result of that injury or illness and receives a financial award, insurers have the right to recover their costs of claims paid from the medical expenses.

Recovery of costs Harvard Pilgrim has already paid for the person's medical expenses is one step in keeping premium rates affordable since the development of premium rates from one year to the next is based in part on what the insurer experienced as costs in one year trended forward to the next. To the extent our costs are higher because we are unable to recover the money we spend to medical expenses when the person has been awarded money for that purpose, then premiums will increase at a grater rate.

The proposed bill makes recovery much less predictable since it ties recovery to the judge's discretion. Preventing insurers from being reimbursed for the costs of care they have covered, when an injured person has been awarded

Maureen D. Smith
(Of Counsel)

money by the court to cover the cost of care only increases costs for the entire system. Those costs are reflected in health insurance premium rates and provide a greater incentive for people to sue when they have suffered an injury since they expect to keep a larger portion of the recovery from a third party.

The increasing cost of health care and the corresponding rise in premium rates is a problem that the State of New Hampshire, like other states and the federal government, is trying to deal with. Passage of HB 1259 will only make the problem worse.

Sincerely,



Bonnie B. Packard
Director of Government Relations

CC: Senator Bette R. Lasky, Vice Chair
Senator Matthew S. Houde
Senator Sheila Roberge
Senator Robert J. Letourneau

Speakers

Voting Sheets

Senate Judiciary Committee

EXECUTIVE SESSION

Bill # HB 1259

Hearing date: 5/4/10

Executive session date: 5/9/10

Motion of: OTP

VOTE: 4-0

Made by Reynolds
Senator: Lasky
 Houde
 Letourneau
 Roberge

Seconded Reynolds
by Senator: Lasky
 Houde
 Letourneau
 Roberge

Reported Reynolds
by Senator: Lasky
 Houde
 Letourneau
 Roberge

Motion of: OTP/A 1925

VOTE: 4-0

Made by Reynolds
Senator: Lasky
 Houde
 Letourneau
 Roberge

Seconded Reynolds
by Senator: Lasky
 Houde
 Letourneau
 Roberge

Reported Reynolds
by Senator: Lasky
 Houde
 Letourneau
 Roberge

<u>Committee Member</u>	<u>Present</u>	<u>Yes</u>	<u>No</u>	<u>Reported out by</u>
Senator Reynolds, Chairman	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Lasky, Vice-Chair	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Houde	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Letourneau	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Roberge	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

*Amendments: _____

Notes: _____

Committee Report

STATE OF NEW HAMPSHIRE
SENATE
REPORT OF THE COMMITTEE

Date: May 6, 2010

THE COMMITTEE ON Judiciary

to which was referred House Bill 1259

AN ACT relative to subrogation claims and liens in civil actions.

Having considered the same, the committee recommends that the Bill: .

OUGHT TO PASS WITH AMENDMENT

BY A VOTE OF: 4-0

AMENDMENT # 1925s

Senator Matthew Houde
For the Committee

L. Gail Brown 271-3076

New Hampshire General Court - Bill Status System

Docket of HB1259

Docket Abbreviations

Bill Title: relative to subrogation claims and liens in civil actions.*Official Docket of HB1259:*

Date	Body	Description
12/10/2009	H	Introduced 1/6/2010 and Referred to Judiciary; HJ 6 , PG.234
01/15/2010	H	Public Hearing: 1/26/2010 2:00 PM LOB 208
02/09/2010	H	Executive Session: 2/16/2010 10:00 AM LOB 208 (Continued 2/18/2010 10:00 AM LOB 208 If Necessary)
02/18/2010	H	Committee Report: Ought to Pass with Amendment #0777h for Mar 3 CC (Vote 13-0); HC 17 , PG.805
02/18/2010	H	Proposed Committee Amendment #0777h; HC 17 , PG.845
03/03/2010	H	Amendment #0777h Adopted, VV; HJ 20 , PG.1146
03/03/2010	H	Ought to Pass with Amendment #0777h: MA VV; HJ 20 , PG.1146
03/24/2010	S	Introduced and Referred to Judiciary; SJ 11 , Pg.261
04/19/2010	S	Hearing: May 4, 2010, Room 103, State House, 3:15 p.m.; SC17
05/06/2010	S	Committee Report: Ought to Pass with Amendment 1925s, 5/12/10; SC19
05/12/2010	S	Committee Amendment 1925s, AA, VV; SJ 18 , Pg.475
05/12/2010	S	Ought to Pass with Amendment 1925s, MA, VV; OT3rdg; SJ 18 , Pg.475
05/12/2010	S	Passed by Third Reading Resolution; SJ 18 , Pg.497
05/19/2010	H	House Concurs with Senate AM #1925s (Rep Cote): MA VV; HJ 46 , PG.2226
06/02/2010	S	Enrolled; SJ 21 , Pg.777
06/02/2010	H	Enrolled; HJ 51 , PG.2322
07/28/2010	H	Signed by the Governor 07/23/2010; Effective 01/01/2011; Chapter 0364

NH House

NH Senate

Contact Us

New Hampshire General Court Information Systems
 107 North Main Street - State House Room 31, Concord NH 03301

Other Referrals

COMMITTEE REPORT FILE INVENTORY

H31259 ORIGINAL REFERRAL _____ RE-REFERRAL

1. THIS INVENTORY IS TO BE SIGNED AND DATED BY THE COMMITTEE SECRETARY AND PLACED INSIDE THE FOLDER AS THE FIRST ITEM IN THE COMMITTEE FILE.
2. PLACE ALL DOCUMENTS IN THE FOLDER FOLLOWING THE INVENTORY IN THE ORDER LISTED.
3. THE DOCUMENTS WHICH HAVE AN "X" BESIDE THEM ARE CONFIRMED AS BEING IN THE FOLDER.
4. THE COMPLETED FILE IS THEN DELIVERED TO THE CALENDAR CLERK.

DOCKET (Submit only the latest docket found in Bill Status)

COMMITTEE REPORT

CALENDAR NOTICE on which you have taken attendance

HEARING REPORT (written summary of hearing testimony)

HEARING TRANSCRIPT (verbatim transcript of hearing)
List attachments (testimony and submissions which are part of the transcript) by number [1 thru 4 or 1, 2, 3, 4] here: 1-2

SIGN-UP SHEET

ALL AMENDMENTS (passed or not) CONSIDERED BY COMMITTEE:

- AMENDMENT # 1905 _____ - AMENDMENT # _____
_____ - AMENDMENT # _____ _____ - AMENDMENT # _____

ALL AVAILABLE VERSIONS OF THE BILL:

AS INTRODUCED AS AMENDED BY THE HOUSE
 FINAL VERSION _____ AS AMENDED BY THE SENATE

PREPARED TESTIMONY AND OTHER SUBMISSIONS (Which are not part of the transcript)

List by letter [a thru g or a, b, c, d] here: _____

EXECUTIVE SESSION REPORT

OTHER (Anything else deemed important but not listed above, such as amended fiscal notes):

IF YOU HAVE A RE-REFERRED BILL, YOU ARE GOING TO MAKE UP A DUPLICATE FILE FOLDER

DATE DELIVERED TO SENATE CLERK

9/23/10

[Signature]
COMMITTEE SECRETARY