The Office of General Counsel issued the following opinion on January 28, 2008 representing the position of the New York State Insurance Department.

RE: HMO as No-Fault Subrogee

Question Presented:

Where an insured does not appeal, by either litigation or arbitration, a no-fault insurer's denial of benefits, does an HMO that pays the benefits on account of an alleged personal injury arising out of the use or operation of a motor vehicle have standing, as subrogee, to proceed against an automobile operator's no-fault insurer under a claim of equitable subrogation in the New York State Supreme Court?

Conclusion:

No. An HMO is not entitled to subrogate its recovery pursuant to New York Insurance Law § 5105(a) (McKinney 2007), because it does not fit the definition of "insurer" under the no-fault insurance law scheme. Furthermore, the inquirer has not provided the Office of General Counsel with sufficient facts to determine whether the HMO performed services that would bring it within the definition of a "health service provider" under Insurance Law § 5102(a)(1).

Facts:

The inquirer reports that he represents HMOs in subrogation actions. A no-fault insurer denied benefits to an insured based on an alleged failure of the insured to notify the insurer within 30 days of the accident. Although the insured allegedly had proof of submission of the claim to the no-fault insurer within 30 days, the insured did not appeal, by either litigation or arbitration, the denial of benefits. Instead, the insured's HMO paid for the insured's medical services. The inquirer asks whether the HMO has a cause of action under a claim of equitable subrogation[1] against the no-fault insurer in court.

Analysis:

Article 51 of the New York Insurance Law, also known as the Comprehensive Motor Vehicle Insurance Reparations Act, governs payments to reimburse a person for basis economic loss because of personal injury arising out of the use or operation of a motor vehicle, irrespective of fault. Commonly, Article 51 is referred to as "no-fault." Under no-fault, an insured who has been in a motor vehicle accident can claim first party benefits from her motor vehicle insurer of up to $50,000 to cover "basic economic loss" as defined in Insurance Law § 5102(a)(4). As the inquirer correctly points out, an HMO does not fall within the scope of an insurer under Article 51 of the Insurance Law. Therefore, an insured cannot claim no-fault benefits from an HMO. Nor is an HMO entitled to subrogate its recovery pursuant to Insurance Law § 5105(a).

Section 65-3.11 of New York Comp. Codes R. & Reg. (NYCRR), tit. 11, § 65-3 (Regulation 68-C) permits direct payment to providers of health care services of benefits covered under Insurance Law § 5102(a)(1). In most no-fault cases, an insured assigns her benefits under Insurance Law § 5102(a)(1) to the health service provider. In exchange, the health service provider undertakes the responsibility of bringing the claim against the no-fault insurer, including appeals of any denial by that insurer. With respect to such assignment, the Office of General Counsel cannot determine, based on the facts provided here, whether the HMO provided health care services that would bring it within the scope of Insurance Law § 5102(a)(1).

However, a recent court decision, Health Insurance Plan of Greater New York v. Allstate Insurance Co., 2007 N.Y.Slip Op 33925(U) (Sup. Ct. N.Y. Co. November 20, 2007), found that an HMO, as a health insurer, is not a "provider of health care services" under 11 NYCRR § 65-3.11 because courts have consistently afforded the regulation a narrow construction. In fact, Health Insurance Plan of Greater New York v. Allstate Insurance Co., supra, went even further and held that to allow an HMO to maintain a claim against an automobile insurer under the

principle of equitable subrogation would create an entirely new right of action, unsupported by long-settled subrogation principles. The court acknowledged, however, that the HMO might have a subrogation cause of action against the individual whose vehicle struck the injured party—the "third-party tortfeasor."

Finally, § 52.16 of 11 NYCRR Pt. 52 (Regulation 62) permits an HMO contract to provide a no-fault exclusion. That provision states:

> (c) No policy shall limit or exclude coverage by type of illness, accident, treatment or medical condition, except as follows:
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> (8) treatment provided in a government hospital; benefits provided under Medicare or other governmental program (except Medicaid), any State or Federal workers' compensation, employers' liability or occupational disease law; benefits to the extent provided for any loss or portion thereof for which mandatory automobile no-fault benefits are recovered or recoverable; services rendered and separately billed by employees of hospitals, laboratories or other institutions; services performed by a member of the covered person's immediate family; and services for which no charge is normally made.

In other words, if benefits are recovered or recoverable from no-fault, an HMO may opt to exclude those benefits from coverage. But our office does not have sufficient facts here to determine whether the inquirer's client's HMO contract contains a no-fault exclusion.

For further information you may contact Senior Attorney Sapna Maloor at the New York City office.

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[1] Subrogation recovery is the principle under which an insurer that has paid a loss under a policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy. See Garner, Bryan A., Black's Law Dictionary, 8th Edition (1999).