Radical Changes to New York's Wrongful Death Law Advocated by State Legislature

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The New York legislature is attempting to monetize the incalculable—emotional pain and suffering from losing a loved one. Referred to as the Grieving Families Act Assembly Bill A6698 (Grieving Family Act or the bill) passed through both the New York Senate and Assembly this summer and now awaits approval or veto from Governor Hochul.

Among the startling proposed changes to the New York Estates, Powers, and Trust Law (NY EPTL), NY EPTL § 5-4, the bill seeks to include non-economic damages, the addition of "surviving close family members," the expansion of the statute of limitations and retroactive application of the bill's proposed provisions.

The Grieving Family Act proposes to allow recovery for both pecuniary and emotional damages in wrongful death actions. If passed, the bill would permit recovery for the following types of non-economic losses in addition to the economic losses already permitted under the NY EPTL (reasonable expenses of the action or settlement, reasonable funeral expenses and reasonable medical expenses for the injury causing death)[1]:

(1) Grief or anguish caused by the decedent's death;

(2) Loss of love, society, protection, comfort, companionship and consortium resulting from decedent's death;

(3) Pecuniary injuries that result from the decedent's death that include the loss of services, support, assistance and the loss or diminishment of inheritance; and

(4) Loss of nurture, guidance, counsel, advice, training and education resulting from decedent's death.

The bill not only categorically expands plaintiffs' potential damages, it also extends the wrongful death statute of limitations from two years under the NY EPTL to three years after the decedent's death.[2]

The bill further seeks to enlarge the pool of people that can potentially recover in wrongful death cases. Per the NY EPTL *§ 1-2.5.*, recovery in wrongful death cases is exclusively limited to "distributees"[3], which include the decedent's spouse and children. If the decedent does not have children or a spouse, then living parents are deemed distributees.[4] If neither of those categories of individuals exist, then the distributees are the decedent's living siblings or children of predeceased siblings.[5] The Grieving Family Act removes the distributee hierarchy followed by the NY EPTL and allows any "surviving close family member" to recover in wrongful death cases. The bill defines "surviving close family members" as:

+ Decedent's spouse or domestic partner;
+ Children;
+ Foster-children;
+ Step-children;
+ Step-grandchildren;
+ Parents;
+ Grandparents;
+ Step-grandparents;
+ Siblings; and
+ Any other person standing *in loco parentis* to the decedent.

This seemingly small distinction between distributees and “close family members” has huge implications. For example, under the current law, a decedent's sibling could only recover if the decedent has no spouse, children or living parents. Under the proposed law, a decedent's sibling could recover damages alongside the decedent's spouse, children and living parents. The pool of eligible wrongful death plaintiffs skyrockets under the proposed law.

This potential change in the EPTL's damages scheme will also have a profound impact on any individual or company defending a wrongful death claim, as the act **retroactively applies to any wrongful death claims “…that accrue on July 1, 2018, to present, regardless of when filed.”** The retroactive application applies to a newly anointed distributee under the proposed law, who was not entitled to recovery under the existing law. For example, under this proposed law, a sibling of a decedent who died on July 2, 2018, could come forward and file a claim seeking “grief and aguish” damages even though the sibling would have been precluded from doing so under the existing law at the time of the decedent's death.

The bill is the latest iteration of a bill that New York Governor Hochul has already vetoed. A substantively identical bill passed through New York's Senate and Assembly in 2022, only to be vetoed by the Governor in January 2023, who voiced concerns about its impact on the insurance industry and medical providers.[6] The drafters of the new bill made minor adjustments despite the Governor's broad concerns.

Under the proposed law, the floodgate of potential wrongful death plaintiffs could result in an avalanche of unanticipated wrongful death lawsuits against entities and individuals. These entities and individuals will make claims on their own general liability insurance policies and professional liability insurance policies, including medical malpractice. Increased unexpected third-party claims could lead to the exhaustion of existing insurance policies and losses for insurers. To offset losses and unexpected claims, insurers may raise premiums for insureds with third-party liability policies. Moreover, increased medical malpractice claims could result in increased medical care costs to patients and to providers of medical care still recovering from the harsh economic impact imposed by the pandemic. The actual impact of the bill will turn on Governor Hochul's veto or approval. Until then, New York's wrongful death damages scheme awaits a potential systematic overhaul.

A copy of the proposed law is linked here.

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[1] NY Est. Powers & Trusts Law § 5-4.4(b).

[2] NY Est. Powers & Trusts Law § 5-4.1(1).

[3] A distributee is a person entitled to take or share in the property of a decedent under the statutes governing descent and distribution. NY Est. Powers & Trusts Law § 1-2.5 (McKinney).

[4] NY Est. Powers & Trusts Law §4-1.1. and §5-4.4(a).

[5] NY Est. Powers & Trusts Law § 4-1.1.

[6] Bill Hutchinson, New York Gov. Kathy Hochul vetoes Grieving Families Act, angering some loved ones of Buffalo massacre, ABC NEWS, (Jan. 31, 2023),https://abcnews.go.com/US/new-york-gov-kathy-hochul-vetoes-grieving-families/story?id=96789738.

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