

# NY Wrongful Death Law Revamp Retains Original's Drawbacks

By **Nicholas Tam, Payne Tatich and Stephanie McDougall** (December 21, 2023)

The New York Legislature passed the latest version of the Grieving Families Act on June 6, 2023.

With the New York City Mayor's Office of State Legislative Affairs and various business and medical groups recently voicing their opposition to the bill,[1] pressure is mounting on Gov. Kathy Hochul to decide the legislation's fate before the looming deadline.

If passed, the law will likely face legal challenges in courts across the state since New York businesses, local governments, insurance companies, individuals, and the judiciary would likely shoulder the burdens imposed by the legislation.

New York's current wrongful death statute allows a child, parent, spouse or representative of an estate to bring a wrongful death lawsuit for pecuniary injuries.[2] These persons may recover for losses of financial support, household services, parental guidance and inheritance, as well as medical expenses for the injury that caused the decedent's death and funeral expenses.[3]

Often left out of the discussion, the estate may also recover damages by way of a "survival claim," if the decedent experienced conscious pain and suffering before their death.[4] These damages are not inconsequential — in some cases they reach seven figures if the decedent suffered for several hours.[5]

Wrongful death actions must be brought within two years of the decedent's death.[6] Longer periods apply if the decedent's death resulted from medical malpractice or there is a pending criminal case related to the death.[7] Survival claims, however, are governed by a three-year statute of limitations.[8]

Proponents of the Grieving Families Act seek to radically expand New York's wrongful death law. Observers may recall that in January 2023, Hochul vetoed the original bill passed by the Legislature.[9]

She cited expert belief that the legislation would "drive up already-high health insurance premiums, adding significant costs for many sectors of our economy, particularly hospitals that are still recovering from the pandemic and struggling to stay afloat — including public hospitals that serve disadvantaged communities." [10]

The governor added that this bill, and the general public, "would benefit from careful analysis before, not after, passing sweeping legislation." The governor also emphasized that "empirical data and the experiences of other states[] should be analyzed ... to ensure we have the information we are lacking now as we evaluate any more significant expansions to the law." [11]



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Hochul's veto drew support from Kathryn Wylde, of the Partnership for New York City, who said that

such a drastic policy shift in long-established law and practice must be evaluated on how it will impact the health and finances of all New Yorkers, who already face high health care and insurance costs, and whose safety net hospitals continue to struggle to support New York's most vulnerable populations.[12]

Four months after Hochul's veto, legislators submitted a revised version of the Grieving Families Act that purportedly addressed criticisms of the vetoed bill.[13] The revised bill, S.6636, extends the current statute of limitations from two to three years, but applies to "all causes of action that accrue on or after July 1, 2018, regardless of when filed."

The revised legislation also expands the types of damages recoverable to include grief or anguish caused by the decedent's death, as well as losses of love, society, protection, comfort, companionship and consortium. Finally, the proposed law broadens the class of persons entitled to recover damages to "surviving close family members," including a "spouse or domestic partner, issue, foster-children, step-children, step-grandchildren, parents, grand-parents, step-parents, step-grandparents, siblings, or any person standing in loco parentis to the decedent."

The "in loco parentis" determination is to be made by the finder of fact — typically, a jury — "based upon the specific circumstances relating to the person's relationship with the decedent." [14]

If the governor approves the bill, legal challenges to S.6636 will follow. The legislation increases the scope of liability for pending wrongful death claims and imposes new legal obligations regarding past events; the bill will likely face a constitutional challenge based on its retroactivity.[15]

Unlike prospective legislation, the retroactive application of legislation must be justified by a rational legislative purpose.[16] Since retroactive legislation poses issues with fairness, more serious than prospective legislation, justification for S.6636 may not pass muster.[17]

For example, in 2020, the New York Court of Appeals, the state's highest court, in Regina Metropolitan Co. LLC v. New York State Division of Housing & Community Renewal declared the retroactive application of various legislative changes unconstitutional, including a legislative alteration of the method for determining rent overcharges.

Specifically, Regina criticized the legislation as creating a "retroactivity period [that] cannot be characterized as brief ... [s]uch a vast period of retroactivity upends owners' expectations of repose relating to conduct that may have occurred many years prior to the recovery period." [18]

Regina concluded that the lawmakers failed to present a rational justification for retroactivity, finding no indication that "the legislature considered the harsh and destabilizing effect on owners' settled expectations[.]" [19]

Furthermore, the Court of Appeals noted a particular concern regarding the "unfairness of retroactive application" and whether "it is an acceptable price to pay for the countervailing benefits." [20] Similarly, the Court of Appeals in James Square Associations LP v. Mullen

found in 2013 that retroactive tax liability imposed on businesses violated due process.[21]

Due process is one of the primary issues underpinning the potential legal challenges to S.6636. To comport with due process, lawmakers must have a persuasive reason for the harsh impacts of retroactivity,[22] and the rational basis for the legislation must be commensurate with the degree of retroactivity.[23]

The legislation's retroactive application to claims that accrued on or after July 1, 2018, calls into question the rationale for this seemingly arbitrary date.

The Court of Appeals has recognized that there "are limits on retroactive imposition of liability even when it is related to a rational statutory goal," according to Regina.[24] Along these lines, "retroactive legislation that reaches 'particularly far' into the past and that imposes liability of a high magnitude relative to impacted parties' conduct raises 'substantial questions of fairness.'"[25]

Courts have scrupulously applied this test because, according to the Regina decision, "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration' and '[i]ts responsiveness to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.'"[26]

### **Economic Impacts of the Grieving Families Act**

Opponents of the bill, including a number of business, trade, insurance and medical groups, authored a letter to Hochul explaining how the proposed law would carry significant financial repercussions for businesses and deter new companies from entering the New York market.[27]

These critics contend that, based upon data compiled by an actuarial firm, the Grieving Families Act would increase the annual insurance premiums paid by New York residents and business by approximately \$2.14 billion, an 11.1% increase across medical professional liability, automotive liability and general liability lines.[28]

Medical organizations have cited New York's liability climate and high medical liability and insurance costs as an important factor to physicians considering where they want to practice.[29] These costs, they argue, would inevitably increase the cost of delivering patient care and lead physicians to retire early or practice elsewhere.[30]

Tom Stebbins from the Lawsuit Reform Alliance of New York said, "Paying more people more money costs more. The funds have to come from somewhere. That's just common sense. In the case of liability costs, that money comes from the premiums collected by insurance companies."[31]

The bill's critics also argue that S.6636 was passed without an adequate fiscal analysis. Further, they argue, the revised bill is only marginally different from the legislation Hochul vetoed in January 2023, where she cited the potential adverse impact to business and the healthcare system.[32]

In vetoing the original Grieving Families Act, Hochul acknowledged in an op-ed that there was a lack of evaluation on the impact of the bill on the "economy, small businesses, individuals, and the state's complex health care system." [33]

The bill's critics from the local government and public sectors have similarly stated that increased liability costs would significantly impact municipal governments, small business and healthcare facilities.[34]

Barbara Van Epps, executive director of the New York State Conference of Mayors and Municipal Officers, said that "before increasing liability in this way, lawmakers need to bring all stakeholders to the table to carefully craft a well-balanced bill, and analyze how it will impact both the public and private sector."

### **Impact on Courts and Increased Litigation Costs**

Trial and appellate courts already buckle under the weight of backlogged dockets following the COVID-19 pandemic. While the disposition of civil matters has increased by 36% since 2021, this progress has been slowed by staffing shortages caused by an unprecedented rate of attrition in the court system due to resignations and retirements in 2022.[35]

The trial courts only resumed full trial capacity in the late summer of 2022.

Currently, a claim for wrongful death may only be asserted by a distributee of the decedent's estate pursuant to the hierarchy set forth in New York Estates, Powers and Trusts Law, Section 1-2.5.[36] The proposed bill, however, will enlarge this class of potential plaintiffs to include grandparents, stepparents, cousins and other persons deemed by the finder of fact to be "close family members."

Significantly, while the current law only permits one person to assert a wrongful death claim, S.6636 does not place a limit on the number of family members able to assert claims. The expansion of the pool of potential plaintiffs, statute of limitations and scope of available damages will undoubtedly prolong the lifespan and complexity of wrongful death lawsuits and, consequently, place further strain on the courts.

Also, with this proposed bill, the discovery period will become longer and more arduous. As the proposed legislation will allow a wrongful death lawsuit to be brought by numerous family members, attorneys will be tasked with investigating the substance of not only each party's relationship with the decedent but also proof of emotional and financial injuries resultant from the decedent's death.

This will be a significant undertaking involving fact-specific inquiries into each party's mental health, medical, financial and employment history, significantly driving up litigation costs. There will be an increased number of witness depositions and an amplified volume of paper discovery, which, in turn, will require additional court conferences to monitor deadlines and motion practice to address disputes.

Still further, jury trials will be drastically affected. The plaintiffs bar may be less inclined to resolve cases prior to trial, especially in situations where counsel is able to construct a strong damages argument that will overshadow weaker liability claims.

The duration of trials will be lengthened as jurors will be called to evaluate the substance of each party's relationship with the deceased and injuries resultant from their death, which will entail testimony from each claimant and submission of proof of damages.

Further, the retroactivity portion of S.6636 poses a particular problem for cases already on the court's trial calendar. Courts will have to reopen discovery, thereby placing lengthy delays in cases that were close to resolution.

New York state does not limit noneconomic damages. The increase in parties asserting claims for emotional injuries caused by the decedent's wrongful death will cause jury verdicts to skyrocket. This will result in the appellate courts being tasked to determine the sustainable value for damages related to grief and its sequelae.

Analysis of jury awards pursuant to New York Civil Practice Law and Rules, Rule 5501(c), requires an award be set aside if it deviates materially from reasonable compensation.[37] This determination is made, in part, by comparing the award to recent awards sustained by the appellate division for similar injuries.[38] This process will further lengthen the life and cost of the lawsuit.

If approved by Hochul, the Grieving Families Act will transform the landscape of wrongful death law in New York. This legislation will increase the potential for damages, raise insurance premiums, burden hospitals and courts, stifle the economy, and subject parties to the unsettling effects of retroactive legislation.

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[1] Nicholas Liu, City Joins Business, Medical Groups in Lobbying Against Grieving Families Act Backed by Hoylman-Sigal, Chelsea News (Nov. 24, 2023), <https://www.chelseanewsny.com/news/city-joins-business-medical-groups-in-lobbying-against-grieving-families-act-backed-by-hoylman-sigal-YN2906177>.

[2] EPTL §§ 5-4.1, 5-4.3, 5-4.5

[3] EPTL §§ 5-4.3, 5-4.4

[4] EPTL § 11-3.2

[5] Matter of 91st St. Crane Collapse Litig. ("Kurtai"), 154 A.D.3d 139 (1st Dep't 2017) (\$9.5 million); *Launders v. Steinberg*, 39 A.D.3d 57 (1st Dep't 2007) (\$5 million).

[6] EPTL § 5-4.1

[7] *Id.*

[8] CPLR 214

[9] Maya Kaufman, Lawmakers to introduce Grieving Families Act after Hochul veto, Politico Pro (May 1, 2023), <https://subscriber.politicopro.com/article/2023/05/lawmakers-to-introduce-amended-grieving-families-act-after-hochul-veto-00094695>.

[10] Kathy Hochul, Let's Agree on Helping Grieving Families Before Today's Midnight Deadline, Daily News (Jan. 30, 2023), <https://www.nydailynews.com/2023/01/30/hochul-to->

legislature-lets-agree-on-helping-grieving-families-before-todays-midnight-deadline/.

[11] Id.

[12] Kathryn Wylde, Partnership Statement on the Grieving Families Act, Partnership for New York City (Jan. 30, 2023), <https://pfnyc.org/news/partnership-statement-on-the-grieving-families-act/>.

[13] Eric Andrew and David Adams, Unpacking NY's Revamped Wrongful Death Bill, Law 360 (May 4, 2023), <https://www.law360.com/insurance-authority/articles/1604339/unpacking-ny-s-revamped-wrongful-death-bill>.

[14] S.B. S6636, 23-24 Legis. Sess. (N.Y. 2023).

[15] Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

[16] Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984).

[17] Regina Metro. Co., LLC v. New York State Div. of Hous. and Cmty. Renewal, 35 N.Y.3d 332 (2020).

[18] Id. at 379.

[19] Id. at 383.

[20] Id. at 370 (citing Gleason v. Gleason, 26 N.Y.2d 28 (1970) and Landgraf, 511 U.S. at 244).

[21] James Square Assocs. LP v. Mullen, 21 N.Y.3d 233 (2013).

[22] Holly S. Clarendon Trust v. State Tax Comm'n, 43 N.Y.2d 933 (1978).

[23] Regina Metro., 35 N.Y.3d at 332.

[24] Regina Metro., 35 N.Y.3d at 382.

[25] Id.

[26] Id. at 370.

[27] Nick Garber, Local Governments Join Push Against Bill That Would Expand Damages Allowed In Wrongful-Death Lawsuits, Crain's New York Business (Oct. 30, 2023), <https://www.craigslist.com/politics-policy/local-governments-join-push-against-wrongful-death-bill-urging-hochul-veto>.

[26] Review of New York Bills S.74-A/A.6770: Proposed Expansion of New York's Wrongful Death Act. Milliman, May 27, 2021, <https://acrobat.adobe.com/link/track?uri=urn%3Aaaid%3Ascds%3AUS%3A42984d27-86c9-48c7-96d0-e93c85f7bbdd&viewer%21megaVerb=group-discover>.

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[31] Kathy Hochul, Let's Agree on Helping Grieving Families Before Today's Midnight Deadline, Daily News (Jan. 30, 2023), <https://www.nydailynews.com/2023/01/30/hochul-to-legislature-lets-agree-on-helping-grieving-families-before-todays-midnight-deadline/>.

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[33] Press Release, New York State Unified Court System, Acting Chief Judge Cannataro Delivers 2023 State of Our Judiciary Address (Feb. 28, 2023).

[34] EPTL § 1-2.5.

[35] CPLR 5501(c).

[36] See *Donlon v. City of New York*, 284 A.D.2d 13 (1st Dep't 2001).