

## CAN CONTRIBUTION CLAIMS BE ASSERTED AGAINST A TORTFEASOR OTHERWISE IMMUNE TO A DIRECT SUBROGATION ACTION?

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### APPROACH ONE: CONTRIBUTION MAY BE PURSUED

The Superior Court of Delaware handled a similar issue involving a contribution claim and whether it was barred by the anti-subrogation rule. *Great Am. Assurance Co. v. Fisher Controls Int'l, Inc.*, 2003 WL 21901094 (Del. Super. Aug. 4, 2003). In that case, plaintiff insurer sued several defendants for a loss at a refinery. Those defendants sought contribution from another party as a joint tortfeasor. *Id.* at \*1. Instead of dealing with a waiver of subrogation, the third party defendant was a co-insured under plaintiff insurer's policy. The third party defendant moved for summary judgment arguing that since it could not be directly liable to the plaintiff insurer, it could not be considered a joint tortfeasor and, therefore, not liable for contribution to the original defendants. *Id.* at \*2.

The Court held that because all the defendants in that case, including the third party defendant, "may all have jointly injured [the party to whose rights the plaintiff insurer was subrogated], the third-party claims for contribution... are viable and must survive [a] motion for summary judgment." *Id.* at \*5. Further, unlike the holding in *Holmes* discussed *infra*, no set-off is allowed and the implications are for the plaintiff insurer paying for the third party defendant's portion of liability were considered irrelevant to the decision. *Id.*

The Western District of Pennsylvania, Western District of New York and The Supreme Court of Maine are also in accord with this position. *See, gen., Lexington Ins. Co. v. People's Natural Gas Co.*, No. 89-0611 (W.D.Pa. Nov. 1, 1991); *Emery Waterhouse Co. v. Lea*, 467 A.2d 986 (Me. 1983); *Fireman's Fund Ins. Co. v. New York Mech. Gen.*, 712 F.Supp. 312 (W.D.N.Y. 1989).

### APPROACH TWO: DISMISSAL OF CONTRIBUTION CLAIMS AND SET-OFF

The United States Court of Appeals for the First Circuit dealt with a different aspect of this problem and reached a unique conclusion. *New Amsterdam Cas. Co. v. Holmes*, 435 F.2d 1232 (1st Cir. 1970). The rule in that jurisdiction, applying Rhode Island law, is to provide a set-off in damages by the amount a defendant would have been able to recover by way of contribution. *Id.* at 1235. In that case, a fire during a construction project was caused by multiple parties and damaged the property of the general contractor. *Id.* at 1233. Some of those responsible were sub-contractors co-insured under the general contractor's insurance policy, others were not. *Id.* The general contractor's insurer, once subrogated to the cause of action, sued only those parties not covered under their insurance company. *Id.* Those defendants then joined some of the insured sub-contractors in contribution claims. *Id.*

The court framed the issue as follows: the question was not whether the defendants were jointly or severally liable to the plaintiff insurer, but whether they had jointly injured the party in whose shoes plaintiff insurer stood. *Id.* at 1234-5. Phrased this way, it would appear the Court allows a contribution claim in this instance to stand. However, the Court equally recognized the risk of "circuitry of action;" if the contribution claim succeeded, the insured sub-contractors would end up collecting from the plaintiff insurer for their liability. *Id.* at 1235. Thus, the Court dismissed the contribution claims while at the same time protecting the right of contribution; thus the mandatory set-off in damages. *Id.*

Holding similarly is the Court of Appeals of Georgia. *Glazer v. Crescent Wallcoverings, Inc.*, 451 S.E.2d 509 (Ga. Ct. App. 1994). In that case, the court interpreted a waiver of subrogation similar to the hypothetical, *supra*. *Id.* at 492. In that case, a tenant suffered a loss due to a fire. *Id.* Tenant and landlord's contract contained a provision waiving rights of recovery against each other for any cause insured against under their respective fire insurance policies. *Id.* Tenant's insurer, once subrogated to the claim, brought a products liability suit against several defendants. *Id.* Those defendants in turn sought contribution from the landlord. *Id.*

The Court in *Glazer* held that because "the tenants and landlord agreed not to sue each other before any loss occurred,... no cause of action by plaintiffs against landlord ever arose." *Id.* at 495. Therefore, "since the product defendants and landlord never were or could have been jointly liable to plaintiffs, the product defendants had no 'right' to contribution to be waived." *Id.* The court made no mention of mandatory set-offs in damages.