The Volunteer Defense

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Those involved in pursuit of subrogation claims have little to fear from the so-called “volunteer” defense. This phantom defense is most often invoked by opponents who know little about property insurance claims and even less about subrogation. Subrogation defendants typically attempt to pursue a volunteer defense in circumstances where there was a dispute or compromise regarding coverage or scope with respect to the first-party claim, although the defense may sometimes attempt to raise coverage arguments that were not even considered during the adjustment of the claim.

The following quotation is typical of the standard followed in most jurisdictions in determining who is and who is not a “volunteer”:

As a general rule a person making payment is a mere volunteer not entitled to subrogation if in making payment he has no right or interest of his own to protect and acts without obligation, moral or legal, and without being requested to do so by a person liable on the obligation.

Ohio Casualty Group v. Royal-Globe Insurance Companies, 413 N.E.2d 678, 679 (Ind. App. 1980). While it is true that a “pure volunteer” or “gratuitous intermeddler” may have no subrogation rights, Blair v. Claflin, 310 Mass. 186, 37 N.E. 501 (1941); MacAleese’s Case, 308 Mass. 513, 33 N.E.2d 280 (1941), it is difficult to imagine a circumstance in which an insurer’s payment to its insured would qualify as “voluntary” under the standard quoted above. The defendants in a subrogation case have no right to attempt to litigate the specific scope and extent of the subrogated insurer’s contractual obligations to its insured, because those issues are simply of no concern to the
defendants, who are strangers to that contractual relationship:

This method of ascertaining the value of the property injured or destroyed [prescribed under the policy] is a matter of contract between the insurer and the assured, and with which the wrongdoer, or tortfeasor, can have no concern, as he is not a party to the contract... The measure of damages, so far as the present defendant is concerned, is the fair market value of the property destroyed, at the time and place of its destruction... If this be equal to, or in excess of, the sum paid by plaintiff [insurer/subrogee] to the owners of the property, the defendant is in no position to complain.

Fireman’s Fund Insurance Company v. Rowland Lumber Company, 186 N.C. 269, 119 S.E. 362, 364 (1923). accord Agriculture Ins. Co. v. Smith, 262 Cal. App.2d 772, 777-78, 69 Cal. Rptr. 50 (1968) (“A subrogation action by an insurer is not a suit on the insurance contract, but an independent action in which equitable principles are applied to shift a loss for which the insurer has compensated its insured to one who has caused the loss.”)

In Jorge v. Travelers Indemnity Co., 947 F. Supp. 150 (D.N.J. 1996), the court held that “the liability of an insurer need not be ‘ironclad’ in order for it to settle a claim without a subsequent finding that the payment to the insured was voluntary.” 947 F. Supp at 156, citing Weir v. Federal Ins. Co., 811 F.2d 1387, 1395 (10th Cir. 1987). A payment cannot retrospectively be deemed to have been “voluntary” if it was made “with a reasonable or good faith belief in an obligation or personal interest in making that payment.” Id. (emphasis in original), quoting Weir, 811 F.2d at 1395. The Jorge court specifically identified several types of interests that serve as satisfactory “compulsion” that will “free the subrogation-seeking party from classification as a volunteer.” Id. at 155. These include, among others, the interest in settling a fairly disputed obligation and the interest in avoiding litigation with the insured. Id.

The Jorge court also addressed the oft-cited public policy basis for interpreting “volunteer” status narrowly in the insurance/subrogation context: if an insurer’s right to subrogate were jeopardized by its failure to wage an all-out battle with its insured over all possible defenses, insurers would be discouraged from promptly resolving claims, and more litigation would result. Id. at 156. The court concluded that, “[t]his result cannot be supported upon the principles of either equity or common sense.” Id. at 156-57.

Moreover, if an insurer were to take a more hard-nosed approach with its insured because of concerns over the “volunteer” doctrine, that normally would not allow the tortfeasor to escape ultimate liability. The policyholder that is unable to fully recoup its losses from its own insurer would presumably look directly to the tortfeasor to make up the difference. Thus, courts generally recognize that rigid application of the “volunteer” doctrine would serve no purpose, other than to breed more litigation.

The Jorge decision applies a generally accepted view of the law. See, e.g., Transamerica Ins. Co. v. South, 125 F.3d 392, 397 (7th Cir. 1996) (explaining that “the potential for legal liability to the subrogor, as well as the disruption of normal relations and the frustration of reasonable expectations can, in many cases, supply sufficient compulsion to support subrogation”); Weir v. Federal Ins. Co., 811 F.2d 1387, 1395 (10th Cir. 1987) (supporting the legal conclusion of Jorge as discussed above); State Farm Mut. Auto Ins. Co. v. Northwestern Nat’l Ins. Co., 912 P.2d 983, 986 (Utah 1996) (adopting, in subrogation context, the Seventh Circuit’s position requiring only “a reasonable or good faith belief in an
obligation”); American Continental Ins. Co. v. PHICO Ins. Co., 512 S.E.2d 490, 495 (N.C. Ct. App. 1999) (explaining that a subrogated insurer had not acted as a volunteer if its payment protected “a real or supposed right or interest”); Dampskibsaktieselskabet v. Bellingham Stevedoring Company, 457 F.2d 889, 892 (9th Cir. 1972) (“a reasonable good faith belief that one is obliged to pay is sufficient for application of the equitable doctrine of subrogation”).


Where the circumstances would lead a reasonable man to conclude that the damage was apparently caused by an incident covered by the insurance contract, there is no need for the insurer to delay the payment of the claim for damages until all possibilities of becoming a volunteer are exhausted.


Of course, the defendants may properly argue, in an appropriate case, that the damages claimed in a subrogation case exceed the damages recoverable under the legal and evidentiary standards applicable to third-party claims. However, the defendants will normally have no right to second-guess the insurer’s decisions and actions in resolving the first-party claim. Because the “volunteer” defense will rarely, if ever, present a legitimate issue for trial, the defendants should normally be precluded from offering evidence or making arguments at trial regarding the rationale or justification for the insurer’s decision to pay the claim, and appropriate motions in limine should be filed whenever such arguments are anticipated.

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