SUING YOUR OWN INSURED

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1. Issue

A defense often-raised by many tortfeasors in an attempt to defeat a subrogee's claim has been the doctrine forbidding subrogation against one's own insured. This time-honored maxim provides:

> No rights of subrogation can arise in favor of the insurer against its own insured, since by definition subrogation arises only with respect to the rights of the insured against third persons to whom the insurer owes no duty.[1]

This doctrine protects policyholders from an overreaching carrier who attempts to shift the incidence of a loss from itself to its own insured and thus avoid the purchased coverage.[2] An analysis of this defense requires a definition of who is "an insured" entitled to the doctrine's protection. "An insured" can be defined in most instances as the party entitled to chosen policy coverages for the specific risk insured. So, it is crucial to evaluate the nature of the coverages obtained rather than merely examining the declaration sheets or endorsements inserts to identify "an insured".

2. Discussion

A. Instances Where Subrogation Against "An Insured" Is Clearly Appropriate

There are some instances where suit against "an insured" can be prosecuted. A subrogee may sue its own insured where the insured commits an intentional act vitiating coverage, such as an arsonist burning his property for profit.[3] Where the insurer paid an innocent spouse or mortgagee, the "insured/ arsonist" is considered a non-insured or nominal insured by virtue of the policy violation.[4] Also, where the interests of co-insureds are not joint and severable, such as a partner acting outside the scope of the partnership business, the insurer of the reimbursed innocent co-insured partner or partnership may subrogate against the tortfeasor-partner.[5]

B. Instances Where Subrogation Against An Insured Is Clearly Inappropriate

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[1] Turner Construction Co. v. John B. Kelly Co., 442 F. Supp. 551, 552-53 (E.D. Pa. 1976) (citations omitted); 16 Couch on Insurance 2d, Section 61:136 (2d Ed. 1966).
[2] St. Paul Fire & Marine Ins. Co. v. Murray Plumbing & Heating Corp., 135 Cal.Rptr. 120 (Cal.Ct. of App. 1976).
[3] British American Assurance Co. v. Boeing, 134 F.2d 256 (10th Cir. 1943).
[4] See also, Fireman's Fund Ins. Co. v. Wheeler, 548 N.Y.F.2d 870 (1989) (insurer who issued a policy to a corporation can subrogate against the president of the corporation on the grounds that he caused a fire because he is not an insured).
[5] Hartford Fire Ins. Co. v. Advocate, 560 N.Y.S.2d, 331, 569 N.E.2d 1026 (1990).

In many instances, it is inappropriate for an insurer to subrogate against a party identified as a named insured under the policy; by definition, subrogation exists only with respect to the insurer against third persons to whom insurer owes no duty.[6]

In addition, a carrier cannot maintain a subrogation action against a named "co-insured" of the one to whom it paid a claim.[7] This rule is correctly applied when both the reimbursed party and the party whose negligence has caused the loss are named insureds under the same policy.

This rule is also applied in very limited circumstances by operation of law when the negligent party is deemed an "implied co-insured" under the insurance policy. For example, under an automobile insurance policy, where the carrier agrees to cover named insureds and others driving a car with the insured's permission, the carrier will likely be precluded from subrogating against a permissive driver who damages the vehicle.

There is an increasing trend in the courts to confer "implied co-insured" status upon a tortfeasor merely where a special relationship exists between the tortfeasor and the named insured. For example, a lessee is sometimes considered an implied co-insured under a lessor's fire insurance policy and vice-versa.[8] However, co-insured status only exists in the special

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[6] 16 Couch on Insurance 2d, §61:136 (Second Ed. 1983 & Supp. 1991).

[7] General Insurance Co. of America v. Stoddard Wendle Ford Motor, 87 Wash.2d 973, 410 P.2d 904 (1966).

[8] Some jurisdictions merely confer implied co-insured status based upon the parties' relationship and "public policy" considerations, which has resulted in some conflicting case law within the same jurisdictions. Compare, Regent Ins. Co. v. Economy Preferred Ins. Co., 749 F. Supp. 191 (C.D.M. 1990) (allowing subrogation by a landlord's insurer against the negligent tenant) with McGinnis v. LaShell, 519 N.E.2d 699 (Ill.App. 1988) (subrogation by a landlord's insurer against the negligent tenant prohibited).

> However, in July 1992, the Illinois Supreme Court ruled that a tenant obtains the status of a co-insured with the landlord absent agreement to the contrary. Dix Mutual Insurance Co. v. LaFramboise, 1992 W.L. 180090 (Ill. July 30, 1992). Ten other jurisdictions preclude subrogation merely by virtue of the parties' landlord/tenant status: Sutton v. Johndahl, 532 P.2d 478 (Okla.App. 1975); Alaska Insurance Co. v. RCA Alaska Communications, Inc., 623 P.2d 1216 (Alaska 1981); Liberty Mutual Fire Insurance Co. v. Auto Spring Supply Co., 131 Cal.Rptr. 211 (Cal.App. 1976); Safeco Insurance Co. v. Weisgerber, 767 P.2d 271 (Idaho 1989); New Hampshire Insurance Group v. Laombard, 399 N.W.2d 527 (Mich. App. 1986); Reeder v. Reeder, 348 N.W.2d 832 (Neb. 1984); Safeco Insurance Co.

relationship context where lease or contractual provisions shift the risk of loss from one party to the other evidencing the parties' intention to create co-insured status.[9]' It is important to examine carefully the leases or contract documents to determine the coverages agreed upon and the risks chosen to be borne by the respective parties; and where there is no agreed shifting of the risk of loss, subrogation is permissible.[10]

C. Instances Where Subrogation May Be Appropriate Where Insured Is Not Sued For Legal Liability That The Insurance Company Agreed To Cover Or The Co-Insured Does Not Have An Insurable Interest In the Damaged Property

There are some instances where subrogation will be permitted against a named co-insured under a policy. In these cases, it is important to consider two issues: (1) what type of insurance was secured; and (2) what is the co-insured/tortfeasor's insurable interest in the damaged property. The first issue typically arises in cases where a payment is made under a builder's risk policy, and the owner or general contractor had obtained the policy and had named by endorsement subcontractors "as their interest may appear". The question raised is whether a negligent subcontractor who causes a loss is conferred "co-insured" status so as to bar the subrogating carrier's claim. While some courts bar subrogation claims under the pretext that

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v. Capri, 705 P.2d 659 (Nevada 1985); Fashion Place Investments, Ltd. v. Salt Lake County Mental Health, 776 P.2d 941 (Utah App. 1989); Monterey Corp. v. Hart, 224 S.E.2d 142 (Virginia 1976); Cascade Trailer Port _v., Beeson, 749 P.2d 761 (Wash.App. 1988); Dix Mutual Insurance Co. v. LaFramboise, supra.

There are a number of cases from other jurisdictions that do not find per se implied co-insured status: Page v. Scott, 567 S.W.2d 101 (Ark. 1978); Britton v. Wooten, 817 S.W.2d 443 (Kentucky 1991); Zoppi v. Taurig, 598 A.2d 19 (N.J.Super. 1990); Newbaurer v, Hostettler, 485 N.W.2d 87 (Iowa 1992). See also 6A Appleman, Insurance Law and Practice, §4055 (1991 Supp.) (criticizing the recent trend of finding tenants to be co-insured under the Sutto analysis and its progeny.

[9] Remy v. Michael D's Carpet Outlets, 391 Pa.Super. 4376, 571 A.2d 446 (1990), allocatur granted, 527 Pa. 634, 592 A.2s 1301 (1991) (tenant not an implied co-insured where lease did not require owner to provide fire insurance for tenant's benefit, and required tenant to carry liability insurance).

[10] See e,g,. Abra-By-Products. Inc. v. Agway, 347 N.W.2d 142 (N.D. 1984) (where lessor's property that was not subject to its lease with tenant/tortfeasor was damaged in fire, tenant is not an implied co-insured under landlord's fire policy).

public policy considerations will be promoted,[11] the better approach involves an analysis of type of the risk insured.[12]

In Turner Construction Company v. John B. Kelly Company,[13]" for example, two fire insurers, as subrogees of a general contractor, sued a subcontractor (Kelly) whose negligence allegedly caused a fire. The general contractor's fire insurance policy provided coverage for subcontractors, as additional insureds, "as their interests may appear". The federal district court ruled that the subcontractor's status as an additional insured would not relieve the subcontractor for its legal liability as a result of its negligence in causing damage to the property of others. The court noted that the purpose of the contract language was "to give the subcontractors an interest in the building according to the amount of the subcontractor's work and materials already utilized. The clause was not inserted to make Kelly a co-insured for all purposes."[14]

The second issue to consider is considering subrogation against co-insureds involves determining the co-insured's insurable interest in the damaged property. In one line of cases, courts have allowed subrogation against a named co-insured where the co-insured/tortfeasor does not maintain an insurable interest in the covered damaged property.[15] In these cases, the courts analyze the nature of the risk insured in order to ascertain a party's claim to co-insured status. These cases have not been widely followed, but do represent a more thorough judicial assessment of the issue of who is an insured.

D. Instances Where 7he Subrogating Property Insurer Provides Liability Coverage To A Tortfeasor Under A Separate Unrelated Liability Policy.

The bar against suing one's own insured has been incorrectly extended by some courts to preclude subrogation. actions beyond situations in which a single insurance policy is

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[11] Baugh-Belarde Constr. Co. v. College Utilities, 561 Pa.2d 1211 (Alaska 1977); Glen Falls Ins. v. Globe Indemnity Co., 214 La. 467, 38 So.2d 139 (1948); TransAmerica Ins. Co. v. Cage Plumbing & Heating Co., 443 F.2d 1051 (10th Cir. 1970).

[12] Turner Constr. Co. v. John B. Kelly Co., 442 F. Supp. 551 (E.D. Pa. 1976); Paul Tishman Co. v. Carney & DelGuidice. Inc., 36 A.D.2d 273, 320 N.Y.S.2d 396, 316 N.E.2d 875 (1971); McBroome-Bennett Plumbing. Inc. v. Villa France, Inc., 515 S.W.2d 32 Crex. 1974); Public Serv. Co. of Okla v. Blach & Veatch Consulting Engineers, 328 F.Supp. 14 (N.D.Okla. 1971); Travelers Ins. Co. v. Dj~jkey, 799 P.2d 625 (Okla. 1990).

[13] 11 442 F.Supp. 551 (E.D. Pa. 1976).

[14] Id. at 554. The court was convinced that the parties never intended to have Kelly insured for its legal liability. Id. at 554-55.

[15] See e.g., Commerce & Industry Ins. Co. v. Admon Realty, Inc., 168 A.D.2d 321, 562 N.Y.S.2d 655 (1990) (subrogation allowed by a shoe manufacturer's insurer against a managing agent of the building leased by the manufacturer - notwithstanding the fact that the managing agent was an additional insured under the manufacturer's insurance - on the grounds that the managing agent had no insurable interest in the damaged goods); McGuigan v. Carillo, 165 A.D.2d 811, 560 N.Y.S.2d 153, (App.Div. 1990) (insurer not precluded from subrogating against its own additional insured who had no property interest in the property that was the subject of the loss).

involved. In Home Ins. Co. v. Pinski Bros., Inc.,[16] the Montana Supreme Court held, in a case of first impression, that:

> Home, as a subrogated insurer of one of its policyholders (the Deaconess Hospital) has sued another of its policyholders (the architects) who it has insured against the very liability [under a separate and unrelated policy] ... To permit the insurer to sue its own insured for a liability covered by the insurance policy would violate basic equity principles, as well as sound public policy.[17]

While Pinski and its progeny have imposed a complete bar against subrogation,[18] not all courts have mechanistically applied the Pinski holding. The doctrine will not apply when the tortfeasor is a self-insurer because of a high self-retention limit or deductible.[19] Also, where the tortfeasor's liability insurer is merely an affiliated company owned by the same corporate parent as the subrogating insurer, the subrogation claim will not be barred on the grounds that the subrogee is suing its own insured.'[20]

Other factual scenarios have not yet been raised. For example, what if ABC Insurance Company pays $500,001.00 to its insured, but also happened to write an excess policy covering the tortfeasor for liability limits above $500,000.00? Is ABC Insurance Company completely barred even though most of its claim falls below the excess limits? Or, what if ABC Insurance Company wrote the first $10,000.00 of coverage for the tortfeasor who had adequate excess or umbrella coverage with another liability carrier. Can ABC Insurance Company collect for an amount above the $10,000.00 first layer of coverage? Certainly, a variety of factual patterns suggest that the Pinski doctrine should be refined, limited or rejected since the results yielded do not promote the policies underlying the doctrine barring subrogation claims by an insurer against one's own insured. Rather, the results only seem to promote some vague concepts of judicial economy at the expense of historically sound tort and insurance law risk allocation schemes.[21]

3. Objectives

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[16] 160 Mont. 219, 500 P.2d 945 (1972).
[17] Id. at 222, 500 P.2d at 948-49.
[18] National Union Fire Ins. Co. v. Pittsburgh, Pa. v. Engineering Science, Inc., 673 F.Supp. 380 (N.D.Cal. 1987); aff'd, 884 F.2d 1208 (9th Cir. 1989); Neeman v. Keystone Paper Converters, 562 F.Supp. 1046 (E.D. Pa. 1983); Stafford Metal Works, Inc. v. Cook Paint & Varnish Co., 418 F.Supp. 56 (N.D. Tex. 1976).
[19] Transport Trailer Serv. Inc. v. Upjohn Co., 506 F.Supp. 442 (E.D. Pa. 1981).
[20] Fashion Tanning Co. v. Fulton County Electric Contractors, Inc., 142 A.D.2d 465, 536 N.Y.S.2d 866 (1989).
[21] For a thoughtful review of this issue, see Cozen, S.A., (Property) Subrogation Against One's Liability) Insured - A Prophylactic Bar That Is Legally Insupportable and Intellectually Unsound, 42 Fed. of Ins. & Corp. Counsel 3 (Fall 1991).

When the "You can't sue your own insured" defense is raised, the insurance practitioner must first look to the dec sheet or policy endorsements to determine if the tortfeasor is truly "an insured". If the tortfeasor is not named, then consider whether the tortfeasor is an implied co-insured. Careful attention must be given to the parties' intentions which are typically memorialized in writings. If there is no shifting of the risk of loss, co-insured status should not be implied.

If the tortfeasor is named, then consider whether it is a nominal or noninsured, or ascertain the interests insured. Finally, if the subrogating insurer also insured the tortfeasor under a separate unrelated liability policy, consider the recent exceptions to the Pinski doctrine as means to avoid suit dismissal.

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