

## **ANTI-SUBROGATION DOCTRINE**

### **DEFINITION**

The anti-subrogation doctrine is a defense to subrogation claims based upon the logical conclusion that an insurance company standing in the shoes of its insured cannot sue that insured. The defense is also known as the “suing your own insured” doctrine. The defense includes the implied co-insured doctrine and “economic waste” doctrine recently articulated in Connecticut.

The doctrine originally developed to keep a potentially unscrupulous insurance company from paying a claim on a policy and then attempting to recover those same monies from its named insured on that policy if the insured’s negligence had caused the loss. The logical rationale was that since the carrier stands in the shoes of its insured, it would, in effect, be suing itself in any such action. Put differently, subrogation rights only arise against third parties. The doctrine was expanded to include plaintiffs and defendants insured under different policies of insurance (one property, the other casualty) issued by the same carrier. Home Ins. Co. v. Pinski Bros., Inc., 500 P.2d 945, 160 Mont. 219 (1972); Keystone Paper Converters, Inc. v. Neemar, Inc., 562 F. Supp. 1046 (E.D. Pa. 1983).

The second expansion was in the landlord/tenant context where courts have interpreted that a party not named as an insured was an implied co-insured under the policy, thus precluding subrogation, because part of the rent payment was used to pay the insurance premium for the landlord’s property policy on the building. Sutton v. Jondahl, 532 P.2d 478 (Okla. App. 1975).

The most recent expansion by the Connecticut Supreme Court recognizes the weakness of the implied co-insured rationale but, as a matter of public policy, determined that the equitable concern of “economic waste” outweighed the usual roles of insurance and contract law. DiLullo v. Joseph, 259 Conn. 847 (2002).

## **TYPICAL FACT SITUATION**

The anti-subrogation doctrine can arise in any case where the defendant has liability insurance and that carrier is related to or the same as the property insurer. The implied co-insured doctrine typically arises in the context of the landlord tenant relationship and generally precludes claims by the landlord's carrier against a tenant. In the construction arena, the issue is often whether a subcontractor is an "insured" on the entire project or limited to its work. Turner Const. Co. v. John B. Kelly Co., 442 F. Supp. 551 (E.D. Pa. 1976). The "economic waste" doctrine articulated in Connecticut also involves the landlord tenant relationship and a lease that does not specifically address the issue such that the court referred to it as a "default" situation.

## **PRACTICE TIPS**

A memorandum of law addressing the anti-subrogation doctrine can be found at (Document ID#1310253/045174.000 Phila 1 Library). There are several arguments available to attack the anti- subrogation doctrine.

1) The rationale is unsound and clever defendants will secure small policies with as many liability carriers as possible to completely defeat the equitable doctrine of subrogation. Fashion Tanning Co., Inc. v. Fulton County Elec. Cont., 536 N.Y.S.2d 866 (App. Div., 3d Dept. 1989).

2) Chinese Wall Defense – The property and liability carriers will not share confidential information at the expense of either insured thus alleviating the concern that an unscrupulous insurance company will take advantage of one or both of its insureds.

3) The insurance carriers are not the same. Some insurers are separate companies with the same parent or have related names but are really operated as separate companies.

4) If there is a large deductible, self-insured retention, or an excess insurer, then some part of the claim may be barred and some part of the claim vulnerable.

Any argument against the anti-subrogation doctrine should start with the contention that the defendant is asking for an unbargained for, unpaid for, windfall because of the fortuity that the parties' respective insurers are either the same or related companies. The carrier is not suing itself if the plaintiff and defendant are different and more than one policy is involved. Its rights as subrogee of the plaintiff-insured under a property policy are wholly separate and distinct from the duty owed to an entirely different party (defendant-insured) under a separate contract of liability insurance. The plaintiff is not the insurance company but the insurance company as subrogee of its insured.

It is an immutable principle of Anglo-American jurisprudence that the purpose of the tort law is to adjust losses and afford compensation for injuries sustained by one person as a result of the conduct of another. The equitable doctrine of subrogation advances this fundamental underpinning of common law. Based in equity, it is the principle that one who is not a volunteer and has made payment on a debt for which he or she is only secondarily responsible takes over that party's rights and remedies against the third party primarily responsible for such debt. The goal of subrogation is to place the burden of the debt on the person who should bear it in equity and good conscience.

Common sense, and indeed some state statutes, mandate that insurance rates are set giving due consideration to past and prospective loss experiences. Applying sound actuarial analysis in underwriting, insurers calculate the total anticipated losses for policy periods and

establish an appropriate pro-rata amount of premiums to charge insureds for each policy period.

Those who incur higher losses should pay higher premiums.

In short, the goal of tort law to place the burden of payment for negligently causing harm does not disappear due to the introduction of insurance in the modern world. People universally protect their assets by arming themselves with property and liability insurance. Premiums for such insurance are determined, in large part, by the loss history of the insured. An individual with many losses will, and should, pay more than those who have had few or none. Insurance is not, in and of itself, a risk transfer mechanism between parties unless they specifically agree to such an intent. This fundamental principle should not change due to the fortuity that the same insurer writes a property policy for one insured and a liability policy for a separate company that negligently causes harm to the other.

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