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Code Pleading - Real party in Interest - Right of Gubrogee - Insurer to Sue in Its Own Name

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COMMENT

CODE PLEADING—REAL PARTY IN INTEREST—RIGHT OF SUBROGEE - INSURER TO SUE IN ITS OWN NAME.

THE APPLICATION of the real party in interest statute[1] to a suit against a tort-feasor after the insurance company has been subrogated to the rights of the aggrieved party[2] has led to a variety of results in the courts. The cases divide themselves into two categories: (1) where the insurer has paid the full loss or more, and (2) where the insurer has paid part of the loss.

WHERE THE INSURER PAYS THE ENTIRE LOSS OR MORE

There is authority for the rule that the insurer *must* sue in its own name when the insured has been fully compensated through insurance.[3] In the case of *Cox v. Cincinnati Traction Co.*[4] the defendant interposed a defense to an action by the insured to the effect that the insurer had been subrogated to the claims of the plaintiff-insured by payment to the insured of the entire loss, and that the insurer was the real party in interest who should bring the suit. In sustaining the argument of the defendant the court commented upon the statute in the following manner: "It is not directory, but mandatory. Its purpose was to bring the actual claimant for relief before the court, and was a proper and necessary part of the reformed procedure which sought to abolish the fictions obtaining under the old practice."[5] One of those fictions was the use of the name of the subrogor or assignor as nominal plaintiff in such a suit. This requirement was formal only because the insured had no substantive right of action and hence the change wrought by the codes did not affect any of the substan-

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[1] N.D. Rev. Code §28-0201 (1943). "Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another may be brought in the name of the state of North Dakota."

[2] *But cf.* Weber v. United Hardware & Implement Mutuals Co., 75 N.D. 581, 31 N.W. 2d 456 (1948).

[3] Waters v. Schultz, 233 Mich. 143, 206 N.W. 548 (1925); Cunningham v. Seaboard Air Line Ry., 139 N.C. 427, 51 S.E. 1029 (1905); Allen v. Chicago & N.W. Ry., 94 Wis. 93, 68 N.W. 873 (1896); *cf.* Lord & Taylor, Inc. v. Yale & Towne Manufacturing Co., 230 N.Y. 132, 129 N.E. 346 (1920).

[4] 45 Ohio C.C. 824 (1923).

[5] *Id.* at 828.

tive rights of the parties involved.[6] The courts which hold that a defendant cannot raise the objection that the suit is not brought by the real party in interest when the insured is bringing suit place much emphasis upon the reasoning that the wrongdoer has no right to the benefits of the insurance[7] but these courts fail to realize that the code framers intended to adopt the equitable rules as to parties[8] and that the insured had no right of action in equity before the introduction of the codes.[9] The Supreme Court of the United States in *United States v. Aetna Casualty & Surety Co.*[10] said, "If the subrogee has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name."[11]

Some courts hold that the insurer *may* sue in its own name as contrasted with the rule that the insurer *must* sue in its own name.[12] In *City of New York Insurance Co. v. Tice*[13] the Kansas Supreme Court was confronted with the peculiar situation of the insurer suing alone after the insured had been fully compensated for his loss by a partial payment by the insurer and the remaining amount by the wrongdoer to whom the insured had executed a release from all liability. The court held that the insurer could maintain the action in its own name even though it did not pay the full loss to the insured because, "The essential fact is that the insured no longer has a financial interest in the outcome."[14] The court argued that there was no splitting of a cause of action here because the insured brought no action and if it were conceded that it was a splitting, the wrongdoer had waived his objection by taking a release while he had full knowledge of the rights of the insurer.[15] Generally where the court holds that the insurer may sue alone, the insurer is already a party to the action and the de-

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[6] Clark and Hutchins, *The Real Party in Interest*, 34 Yale L.J. 259 (1925).

[7] Illinois Central Ry. v. Hicklin, 131 Ky. 624, 115 S.W. 752 (1909); *accord* Hume v. McGinnis, 156 Kan. 300, 133 P.2d 162 (1943).

[8] *See* Bonde v. Stern, 73 N.D. 273, 283, 14 N.W. 2d 249, 253 (1944).

[9] Clark and Hutchins, *op. cit. supra* note 6, at 271.

[10] 70 S. Ct. 207 (1949).

[11] *Id.* at 215. Fed. R. Civ. P. 17 (a) on real party in interest is almost identical with N.D. Rev. Code §28-0201 (1943).

[12] Travelers Insurance Co. v. Great Lakes Eng. Works Co., 184 Fed. 426, (6th Cir. 1911); *accord* Harrington v. Central States Fire Ins. Co., 169 Okla. 255, 36 P. 2d 738 (1934).

[13] 159 Kan. 176, 152 P.2d 836 (1944).

[14] 159 Kan. 176, 162 P.2d 836 at 840.

[15] Other jurisdictions support this view. Atchison T. & S. F. Ry. v. Home Ins. Co., 59 Kan. 432, 53 Pac. 459 (1898); Conn. Fire Ins. Co. v. Erie Ry., 73 N.Y. 399 (1878). *Contra*: Casualty Reciprocal Exch. v. Kansas City Public Service Co., 230 Mo. App. 468, 91 S.W. 2d 227 (1936).

fendant is contesting his right to bring the action; whereas if the court holds that the insurer must sue alone, the insurer is not a party to the action but the defendant is attempting to bring it in as a real party in interest.[16] It is a logical conclusion, therefore, that a holding that the insurer may bring the action in its own name does not preclude a later holding by the same court that it must sue in its own name.

WHERE THE INSURER PAYS PART OF THE LOSS

Courts agree that in this circumstance the insurer cannot sue alone;[17] but there is ample authority supporting the right of the insured to sue alone.[18] The Oklahoma Supreme Court in *Harrington v. Central States Fire Insurance Co.*[19] said, "The reason for the rule is that the wrongful act is single and indivisible, and gives rise to but one liability. If it were otherwise, if one insurer may sue, then if there were a number each could do likewise, and if the aggregate of all policies falls short of the actual loss the assured owner could sue for the balance, and the alleged wrongdoer would be compelled to defend a multitude of suits." [20]

Many courts hold that the insurer and the insured *may* join in an action against the tort-feasor when the insurer has paid part of the loss.[21] This result is justified by virtue of the permissive joinder of parties statute.[22] The Supreme Court of California in *Fairbanks v. San Francisco & N. P. Ry.*[23] held that the insurer and the insured may join because the negligent act which gave rise to the suit in that case was the single cause of the damage and if all of the damages could not be recovered in the same action, the defendant might be sued twice for the single wrongful act.

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[16] *Compare* Cox v. Cincinnati Traction Co., 45 Ohio C.C. 824 (1923), *with* Travelers Insurance Co. v. Great Lakes Eng. Works Co., 184 Fed. 426 (6th Cir. 1911).

[17] Aetna Ins. Co. v. Hannibal & St. J. Ry., 1 Fed. Cas. 207, No. 96 (E.D. Mo. 1874); Continental Ins. Co. v. H. M. Loud & Sons Lumber Co., 93 Mich. 139, 53 N.W. 394 (1892).

[18] Flor v. Buck, 189 Minn. 131, 248 N.W. 271 (1933); Solberg v. Mpls. Willys-Knight Co., 177 Minn. 10, 224 N.W. 271 (1929); *accord*, Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 143 Neb. 404, 9 N.W. 2d 807 (1943).

[19] 169 Okla. 255, 36 P.2d 738 (1934).

[20] 169 Okla. 255, 36 P.2d 738, at 740.

[21] Home Ins. Co. v. Lack, 196 Ark. 878, 120 S.W. 2d 355 (1938); B. & O Ry. v. Day, 91 Ind.App. 347 , 166 N.E. 668 (1929); De Carli v. O'Brien, 150 Ore. 35, 41 P. 2d 411 (1935).

[22] N.D. Rev. Code §28-0205 (1943).

[23] 115 Cal. 579, 47 Pac. 450 (1897). Nor did the fact that the insured claimed an additional element in damages in the nature of lost business profits prevent joinder in this case.

The compulsory joinder of parties statute[24] has been invoked by numerous authorities to sustain the proposition that the insurer and the insured *must* join when the insurer has paid part of the loss.[25] Both parties have substantive rights in the claim and the defendant is entitled to have the insurer, who claims against him, set forth his claims because the defendant may have defenses against one party which he does not have against the other.[26] In *Pratt v. Radford*[27] the Supreme Court of Wisconsin held that the insurer and the insured were united in interest and that since the statute[28] was imperative, the insurance company and the injured party must be parties to the action. This court pointed out that in Wisconsin if the wrongdoer paid the insured knowing that the latter had received part payment of the loss from the insurer, the defendant would still be liable to the insurance company. The U. S. Supreme Court has held that in the instance of partial payment by the insurer, the latter and the insured are necessary parties, but not indispensable parties.[29] This means that the defendants may compel their joinder but it is not essential to a final decree that they join.[30] A comparison of the cases holding that the insurer and the insured must join with those holding that they may join reveals that the same court may consistently decide cases in both groups because if it is conceded that insurer and insured must join, they certainly may join.[31]

In recent years the insurance companies have developed a method under which they have generally succeeded in keeping their names out of suits against tort-feasors even though the insured persons have been paid in full or in part. By the use of what is termed a loan receipt, the insurers have turned over the amount of the insurance under an agreement with the

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[24] N.D. Rev. Code §28-0208 (1943).

[25] Sisson v. Hassett, 155 Misc. 667, 280 N.Y.Supp. 148 (1935); Simpson v. Hartranft, 157 Misc. 387, 283 N.Y.Supp. 754 (1935); *cf.* Northwest Door Co. v. Lewis Investment Co., 92 Ore. 186, 180 Pac. 495 (1919).

[26] Verdier v. Marshallville Equity Co., 70 Ohio App. 434, 46 N.E.2d 636 (1940).

[27] 52 Wis. 114, 8 N.W. 606 (1881).

[28] See note 24 *supra.*

[29] United States v. Aetna Casualty and Surety Co., 70 S.Ct. 217 (1949).

[30] Fed. R. Civ. P. 19(b). See Shields v. Barrow, 17 How. 130 (U.S. 1854), for the indispensable party test.

[31] *Compare* De Carli v. O'Brien, 150 Ore. 35, 41 P.2d 411 (1935), *with* Home Mutual Ins. Co. v. Ore. Ry. & Navigation Co., 20 Ore. 569, 26 Pac. 857 (1891); see Gaugler v. Chicago, M. & P. Ry., 197 Fed. 79 (D. Mont. 1912), where the court decided not only that the insurer and the insured may join, but that they were compelled to do so.

insured in which he promises to repay the loan only in the event that the suit against the wrongdoers is unproductive. The validity of the loan receipt has been sustained by the United States Supreme Court in the case of *Luchenback v. McCahan Sugar Refining Co.*,[32] and by many other courts.[33] The effect of a holding that the loan receipt is valid is that there has been no payment and the insured is the only real party in interest.[34] Courts which find the loan receipt invalid hold that what the insurer has termed a loan is really a payment and the rules of that jurisdiction in regard to who should bring the action against the tort-feasor apply as in the ordinary case of partial or full payment of the loss.[35] Insurance companies that use the loan receipt transaction do so with the purpose in mind of keeping their names out of suits upon the well-known grounds that juries have an innate prejudice against insurers.[36] Some authorities have stated that the insurer's fear of an unfair trial is a problem for the legislature, but of course if loan receipts are upheld as valid the insurer achieves his objective without the aid of the legislature.[37]

The presence of a provision in an insurance contract giving the insurer the right to recover damages from the wrongdoer, or an assignment by the insured after payment by the insurer does not exclude subrogation of the insurer to the rights of the insured.[38] In *Offer v. Superior Court of City and County of San Francisco*[39] the Supreme Court of California states the relationship between subrogation and assignment in the following manner: "The better view is that a court of law may deal with subrogation as it may with assignment, and when the right of action to which a plaintiff asks to be subrogated is a legal right of action a court of law may treat a plaintiff who is entitled in equity to subrogation as an assignee, and allow him to maintain an action of a legal nature upon the

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[32] 248 U.S. 139 (1918).

[33] Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 143 Neb. 404, 9 N.W.2d 807 (1943); Merrimack Mfg. Co. v. Lowell Trucking Corp., 181 Misc. 372, 46 N.Y.S.2d 736 (1944); Phillips v. Clifton Mfg. Co., 204 S.C. 496, 30 S.E.2d 146 (1944).

[34] Shiman Bros. & Co. v. Nebraska Nat. Hotel Co., 143 Neb. 404, 9 N.W.2d 807 (1943); Phillips v. Clifton Mfg. Co., 204 S.C. 496, 30 S.E.2d 146 (1944).

[35] Purdy v. McGarity, 262 App. Div. 623, 30 N.Y.S.2d 966 (1941); Scarborough v. Bartholomew, 22 N.Y.S.2d 635 (1940).

[36] Merrimack Mfg. Co. v. Lowell Trucking Corp., 181 Misc. 372, 46 N.Y.S.2d 736 (1944).

[37] Purdy v. McGarity, 262 App. Div. 623, 30 N.Y.S.2d 966 (1941).

[38] Note, 10 Ind. L.J. 528 (1935).

[39] 194 Cal. 114, 228 Pac. 11 (1924).

right to which he claims to be subrogated."[40] In other words the same legal principles in regard to who should sue the evildoer after the insurer has paid a part or the whole of the loss to the insured apply whether there was an express assignment or not.[41]

North Dakota has not decided the problems presented in this comment. There are only a few general statements by the court of this state concerning the real party in interest statute which indicate to a slight degree what the thoughts of the court are upon the subject.[42] A ruling that the insurer must sue in its own name upon payment of the entire loss appears to conform with the equitable precedents which the code framers intended to apply to suits at law; and a ruling that the insurer and the insured must join upon partial payment of the loss would seem to follow logically. Compulsory joinder of the insurer and the insured where part of the loss is covered by insurance eliminates any argument which charges the plaintiffs with splitting a cause of action and subjecting the defendant to several suits on the same breach of duty. On the other hand a ruling upholding the validity of the loan receipt transaction would afford the insurer ample protection where the insurer utilizes such a device to avoid any chance of jury prejudice against insurers.

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[40] 194 Cal. 114, 228 Pac. 11, 13 (1924).

[41] See note 38 *supra*.

[42] See Bonde v. Stern, 73 N.D. 273,283, 14 N.W.2d 249, 253 (1944), where the court in commenting generally upon the codes said, ". . . the provisions of the Code of Civil Procedure, with which we are here concerned, are enactments of rules of equity pleading and are applicable in all actions whether at law or in equity. And when a question arises as to their use, construction or application, equitable precedents may be looked to for guidance." In *American Soda Fountain Co. v. Hogue*, the court spoke concerning the real party in interest statute in the following manner: "The object of the statute is to give the beneficial owners the right to sue in their own right without regard to the technical title as shown by the contract." 17 N.D. 375, 377, 116 N.W. 339, 340 (1908).