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FIDELITY SUBROGATION UPDATE--UPDATED

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I. INTRODUCTION

Subrogation seeks to impose a loss on the party who, in equity and good conscience, ought to bear it. When an insurer pays for a loss in the first instance, subrogation allows the loss to be transferred to the party who ultimately caused it. The law of insurance subrogation always has been somewhat obscure, and it has evolved as one might expect--in fits and starts, without much uniformity or coherence. The lack of judicial consensus in this area has been noted in the past,¹ and that problem has continued over the last several years. This supplemental review covers recent developments in the law of fidelity subrogation by surveying both direct authorities in the fidelity insurance context and other instructive case law since 1991.

II. GENERAL PRINCIPLES

A. Insurer's Payment Under Obligation As Prerequisite

Subrogation rights may arise by contract (conventional subrogation), by equity (equitable subrogation), or by statute. Statutory subrogation usually applies only in specific contexts, such as worker's compensation or no-fault insurance²; far more common are subrogation clauses in insurance policies and the courts' application of equitable principles. The black letter elements required for application of equitable subrogation bear restating:

- (1) The payment must have been made by the subrogee [insurer] to protect his own interest;
- (2) The subrogee must not have acted as a volunteer;
- (3) The debt paid must be one for which the subrogee was not primarily liable;
- (4) The entire debt must have been paid; and
- (5) Subrogation must not work any injustice to the rights of others.³

The extent to which these elements apply to conventional subrogation is a very open question across the country and is addressed in Section III. A. below.

The very first element still causes lawsuits to be prosecuted through appeal. In *Vesta Insurance Co. v. Amoco Production Co.*,⁴ the insured argued that its insurer could not insist on credit for part of the insured's full recovery because final payment under the policy had not been made. The insurer advanced to its insured the maximum amount recoverable under the policy and filed a declaratory judgment action seeking to enforce the policy's allocation of recoveries provision, which was similar in effect to the standard fidelity bond's recoveries clause.

The Fifth Circuit agreed in principle that the insurer's subrogation rights arise only upon

payment under the policy. The court noted, though, that this argument won nothing for the insured: settlement with third parties before the insurer's payment could release the insurer by impairing its subrogation rights or give the insurer a separate cause of action against the insured for breaching the policy. Ultimately, the court agreed with the insurer and reversed the district court's refusal to refund the disputed advance payment to the insurer.

On the other hand, certain rights of subrogation are tied to the timing of the insurer's payment. In *Federal Deposit Insurance Co. v. Fidelity & Deposit Co. of Maryland*,⁵ the fidelity insurer sought to net out against the loss collateral held by FDIC as successor to the insured bank. The court held that F&D could have the benefit of the collateral only after it paid the loss and acquired the right of subrogation. The insurer viewed the question in terms of amount of loss incurred, but the government prevailed in turning the issue to subrogation. In effect, the court used subrogation to impose on the insurer the cost of liquidation and the risk that the collateral might not bring the value carried on the insured's books.

Fidelity insurers may want to have their liability under the policy and the alleged wrongdoer's fault decided in the same action. If subrogation rights are the only basis for the insurer's claim against the wrongdoer, and if those rights do not arise until after payment, how can the insurer accomplish its goal? In *National Union Fire Insurance Co. of Pittsburgh, PA v. Federal Deposit Insurance Co.*,⁶ the fidelity insurer sought a declaration that the insured bank made material misrepresentations in its application that allowed rescission of the bond, and the bank counterclaimed for coverage. The insurer was granted leave to bring a third-party action against 24 co-conspirators with the bank's former director. The bank sought to strike that third-party complaint on the ground that the insurer had no present subrogation rights because it had made no payment under the policy. No doubt wanting to keep 24 additional parties out of the case played a part.

The district court noted that Kansas law, applied in diversity, does require payment before an insurer becomes subrogated to the insured's rights. Federal law governs procedure, though, and Federal Rule of Civil Procedure 14(a) permits impleader of a party "who is *or may be* liable" for any part of the plaintiff's claim. The fidelity insurer's contingent subrogation rights could mature if payment were made, so the 24 wrongdoers "may be" liable to the insurer later. Therefore, the court permitted National Union to pursue its third-party complaint via this "procedural method for accelerating National Union's claims against the third-party defendants."⁷

Related to the payment requirement is the prohibition against "volunteers" acquiring rights by subrogation. This element can put the fidelity insurer in a dilemma: settle with the insured despite arguable policy defenses, and the insurer may have its own defenses used against it by the wrongdoer or the insured later. If the insurer has a doubtful defense and decides to compromise, then seeks to recover from a third party, that defendant may argue that the insurer was a volunteer and acquired no subrogation rights by its payment. If the insured settles with the insurer and then recovers more than its loss, so that the insurer seeks to share in the excess recovery, the insured may argue that it can keep the recovery because the insurer was a volunteer.

In *National Union Fire Insurance Co. of Pittsburgh, PA. v. Ranger Insurance Co.*,⁸ the

insurer discovered on the eve of trial, after having provided a defense from inception, that its policy excluded coverage for the accident. At that point, the insurer settled the claim and sought subrogation from Ranger, a second insurer who did have coverage. Ranger easily convinced the court that National Union was a volunteer and therefore had no right of subrogation. Despite being on the hook by virtue of its defense of the insured, National Union received no sympathy for what the court called its “own mistake and negligence.”⁹

Getting out of this trap is not easy. An insurer who had filed a declaratory judgment action on coverage, then settled the claim against its insured (under protest but without a signed nonwaiver agreement) was denied subrogation rights and held a volunteer in *Mt. Airy Insurance Co. v. Doe Law Firm*.¹⁰ The insurer argued that its payment, made with clear notice that it reserved the right to seek reimbursement if no coverage were found, was not voluntary. Also, the insurer raised the insured’s potential bad-faith claim for failing to settle within the policy limits as a form of economic duress. The supreme court of Alabama rejected these arguments and held the insurer to the consequences of its decision.

Other jurisdictions have been friendlier. In *Jorge v. Travelers Indemnity Co.*,¹¹ the insurer paid an uncertain claim and faced the accusation that it was a volunteer. The court was willing to consider virtually any reasonable interest the insurer might have as compulsion for paying sufficient to avoid volunteer status. Those interests included avoiding or controlling litigation, economic interests, and general business considerations. The court also noted that public policy favors a narrow reading of the volunteer doctrine in order to encourage settlements by insurers.

In *Vetter v. Security Continental Insurance Co.*,¹² the state life and health guaranty association arguably became responsible for certain claims against an insolvent insurer, paid those claims, and sought subrogation from the insolvent insurer’s successor. The court previously determined that the successor had acquired its predecessor’s liability for the claims. The successor company opposed subrogation by arguing that the guaranty association had a technical defense to any liability, so that it was a volunteer when it paid the claims.

The court of appeals applied a good-faith standard to the guaranty association’s decision to settle the claims and upheld subrogation.

In such a case, “where the liability is not clear and the insurance company acts in good faith to pay the loss,” even if the loss is subsequently determined to be outside of coverage, that “does not necessarily make the insurance company a volunteer.” . . . “[O]ne can be subrogated to the rights of another even if the debt in question is not paid pursuant to an unconditional or fully choate requirement of law * * *; rather, the potential for legal liability * * * can, in many cases, supply sufficient compulsion to support subrogation.”¹³

In the fidelity context, the insurer’s liability will be subject to policy defenses that include the intent of the alleged wrongdoer. Absent a confession by the wrongdoer, all settlements will be uncertain. Making settlement decisions in such doubtful circumstances may expose the insurer to the claim of volunteer status. Taking an assignment will enhance the insurer’s position in dealing with third parties, and expressly addressing recoveries with the insured in settlement

documents should minimize any disputes over amounts the insured might recoup. Being able to explain the insurer's good-faith reason for settling will give the court a basis for accepting subrogation rights in the face of attack, especially when the attacker also is the wrongdoer or other ultimately responsible party.

B. Subrogation Puts The Insurer In Its Insured's Shoes

The effect of subrogation is to substitute the insurer for the insured to recover from those who would owe some obligation to the insured. This basic premise, though, escapes some parties. For example, in *Travelers Indemnity Co. v. Stedman*,¹⁴ the fidelity insurer paid the dishonesty loss and obtained a judgment against the bank that honored the forged instruments. On motion for reconsideration, the bank asked the court to deny pre-judgment interest to the insurer because, having paid the insured's entire loss as of the date of payment, the insurer had kept the insured from losing any interest on its loss. The bank argued that the insurer stands in its insured's shoes, the insured could not recover interest from the bank, therefore neither should the insurer. The court properly considered the insurer's subrogation rights to be those the insured would have possessed had no insurance existed and upheld the award of pre-judgment interest.

Likewise, standing in the insured's shoes does not mean the insurer *becomes* the insured. In *Aetna Casualty & Surety Co. v. Kellogg*,¹⁵ the financial institutions bond insurer paid the insured bank's loss and went after a responsible third party. The defendant responded by trying to assert against the insurer a counterclaim the defendant had against the bank. The defendant's argument was that, if the insurer stands in the bank's shoes, then any claims that would have reduced the bank's recovery also should reduce the recovery of the bank's subrogee. The court rejected that argument and held that a subrogee is subject to the defendant's defenses against the insured subrogor but not to affirmative claims.

If the scope of other's rights against a subrogee has caused some litigation, the scope of the subrogee's rights has caused much more. The fidelity insurer for the Iowa state tax department paid an embezzlement claim but then sought subrogation to share in recoveries from the embezzler by the state revenue department in *Lumbermens Mutual Casualty Co. v. State of Iowa, Department of Revenue*.¹⁶ The insurer argued that the state's loss was reduced by the amount collected, which derived from the loss itself. The court instead held that the state suffered two losses: the embezzled funds and the tax on those funds. The insurer stood in the state's shoes as to the former loss, on which the state had recovered nothing, but not as to the tax loss, which was the state's basis for collecting. The fact that the tax recovery depleted the embezzler's assets was a mere consequence of the state's exercising its right to collect taxes, even though the tax applied only to funds replaced by the insurer.

Another example of a fidelity insurer's subrogation rights' being limited as compared to the insured's rights is *Fidelity & Deposit Co. of Maryland v. Bradley*.¹⁷ The insurer sued the embezzling employee for exemplary damages (which in Connecticut cover attorney's fees) and double damages for breach of fiduciary duty and for statutory treble damages for wrongful misappropriation. The court held that the insurer could recover its attorney's fees in the form of exemplary damages. Even though the insured could have recovered double and treble damages,

though, the court would not allow the insurer those remedies because such a windfall, exceeding the loss paid, would be “inconsistent with the purpose and concept of subrogation.”¹⁸

Federal Racketeering and Corrupt Practices Act (RICO) claims were allowed to be asserted by a subrogated fidelity insurer in *Federal Insurance Co. v. Parello*.¹⁹ There, the court stated that, if RICO claims can be assigned, they can be acquired by subrogation. The court did not discuss, however, the scope of remedies available to the insurer (i.e. treble damages) or whether the judgment would be capped at the amount of the insurer’s loss payment plus attorney’s fees. Insurers seeking to recover beyond their net loss and expenses should expect to meet resistance but also should explain the usual allocation of recoveries that dedicates any windfall to the insured.²⁰

Two federal district court orders in the same case analyze at length the various claims that a subrogated insurer might assert. *Employers Insurance of Wausau v. Musick, Peeler & Garrett*.²¹ The liability insurer for issuers of securities settled \$13 million in claims and sued the involved attorneys and accountants for contribution and equitable indemnity. The court held that equitable indemnity is not available for federal securities claims but is for state negligence and other claims. The court also allowed the claim for contribution to the extent the defendants were joint tortfeasors with the insureds. The claim for legal malpractice was improper because California does not allow such a claim to be assigned, so the court would not allow subrogation either.

Finally, the court held that the liability policy expressly excluded any intentional torts, that the insurer’s payments could not have included such claims, and that the insurer therefore could not be subrogated to them. The insurer did not argue that it paid intentional tort claims under a good-faith belief that it might have some liability on its policy. While a fidelity insurer could not assert the contribution claim, the other causes of action addressed by this case provide a good example of the scope of subrogation rights available against parties directly responsible for the loss.

Some courts have examined the scope of subrogation and limited the insurer’s access to “collateral rights.” These are rights other than against parties (such as tortfeasors, embezzlers, or other personally involved wrongdoers) directly responsible for the loss paid by the insurer. For instance, the insurer could not recover under its insured’s separate insurance policy under New York law in *National Union Fire Insurance Co. of Pittsburgh, PA. v. Ranger Insurance Co.*²²; an independent contract giving rise to “collateral rights” is not subject to subrogation in that jurisdiction. In *State Farm General Insurance Co. v. Stewart*,²³ a property seller’s fire insurer who paid for the loss after contract but before closing could not recover by subrogation under the sales contract, which the court considered too collateral to the loss paid. The court specifically noted that State Farm had not paid to satisfy any obligation of the buyer; of course, subrogation supposedly puts the insurer in the insured’s shoes, so the buyer’s obligation is exactly what the insurer attempts to enforce.

Likewise, an underinsured motorists insurer paid \$750,000 to its insured and obtained a trust agreement as to its insured’s right to recover against any entity legally responsible for the injuries in *Ness v. Ford Motor Co.*²⁴ The insured then sued Ford and sought a declaration against

the insurer as to any right to share in any recovery. The court held that the subrogation rights arising under the policy were ambiguous and, based on equity, denied subrogation as to the collateral products liability action against Ford. As for the trust agreement, which would have given the insurer enforceable rights, the court found a lack of consideration to support that agreement. One lesson of this case is to document the settlement with insureds and support it with consideration other than the loss payment, especially if that payment is for policy limits.

Other authorities have approved insurers' subrogation claims to collateral rights. In *Fireman's Fund Insurance Co. v. Wilshire Film Ventures, Inc.*,²⁵ a camera lessor's insurer paid for lost or stolen equipment and sought to recover through subrogation against the lessee, who contractually agreed to return the equipment or pay for it. Balancing the equities of the two parties, the court held that the lessee breached its contract, so its equities were less than those of the insurer, who had honored its insurance policy.²⁶

The supreme court of Minnesota determined that an insurer may expand the scope of its subrogation to collateral rights by express policy language in *Medica, Inc. v. Atlantic Mutual Insurance Co.*²⁷ The health insurer paid for injuries on the premises of three churches and sought recovery from the churches' liability carrier. The churches were not alleged to be at fault for the injuries, and their liability policies provided that the insurer would pay medical bills arising from accidents without regard to fault. The court did not address equitable subrogation, which could have limited recovery claims to tortfeasors, but looked instead to the specific language of the two different health policies under which payment had been made.

One of the policies had a subrogation clause providing that the insurer would be subrogated to the rights of the insured against anyone who may be responsible to pay for the injuries. Under that clause, the court allowed the health insurer to assert the collateral claim against the liability insurer. The other health policy form had only a "right of recovery" clause limited to payments that the insurer had no responsibility to make. Because the insurer normally could not be subrogated for payments it had no responsibility to make, and contrasting that language with the express subrogation clause in the other policy, the court concluded that the second policy did not provide for subrogation against the liability insurer.²⁸ Language of recovery such as that in some fidelity bonds, as opposed to provisions for subrogation to rights, may leave the door open for courts to restrict the scope of rights granted to the insurer.

One other qualification on the scope of subrogation rights is the rule that an insurer cannot pursue subrogation against its own insured. Subrogation does permit an insurer to recover from its insured amounts exceeding the insured's total loss and expense,²⁹ but this rule prevents a subrogated insurer from shifting any part of the loss back to one protected under the policy. In *MacMillan Inc. v. Federal Insurance Co.*,³⁰ the directors and officers liability insurer sought contribution and subrogation against two directors for their conduct in opposing a hostile takeover attempt that resulted in 11 lawsuits. The insurer wanted to recover any defense costs it would be required to reimburse to the insured company under its policy.

The district court held that the insurer could not pursue subrogation rights against the directors, who were its insureds. The insurer argued that the directors acted outside the bounds of their capacities as directors and should be treated as outsiders for purposes of subrogation.

The court disagreed and indicated that, had the directors burned corporate headquarters, their actions might have been in such a capacity that subrogation would be allowed. Acting as directors, though, meant that they were insureds, and subrogation would permit the insurer to avoid the coverage that the policy was intended to afford.³¹

This limited restriction has little impact in the fidelity context, where the wrongdoer usually is an employee of the insured and officers and directors often are expressly excluded from coverage. Even when the principal wrongdoer is a third party, as occurs under banker's bond cases, courts have been willing to allow subrogation against officers of the insured who negligently failed to prevent the loss. In *Krawczyk v. Bank of Sun Prairie*,³² the bank's fidelity insurer paid the loss and moved to be substituted for the bank against the vice president and trust officer who negligently allowed third parties to convert trust funds. No dishonesty was attributed to the officer, just negligence that was a "substantial cause" of the loss.³³ The court nevertheless held that the officer was more like a dishonest, defaulting employee, against whom subrogation is allowed, than like a director or officer who is merely negligent in failing to catch a wrongdoer. By this analogy, the court permitted the fidelity insurer to pursue its claims against the vice president and his D&O insurer.

III. FULL COMPENSATION ELEMENT

A. Effect Of Policy Language On Equitable Requirements

One element of equitable subrogation is the requirement that the full debt or loss of the insured must be paid. This requirement also is known as "full compensation," "full payment," and "full recovery." In short, equity will not give the insurer subrogation rights unless and until the insured has recovered its total loss from all sources, including the insurance policy. Applied strictly, this element prevents the insurer from asserting any actions or obtaining any reimbursement while the insured remains out of pocket, even if the insurer has paid its limits.³⁴

This element is so well settled that insurers routinely attempt to override it by policy language. These attempts, constituting one of the most active areas of subrogation litigation, continue to meet with mixed success. With some exceptions, clear and express language allowing subrogation before the insured has obtained full recovery will be enforced.

Where the policy stated that upon payment, "those rights [of the insured] are transferred to us [the insurer] to the extent of our payment," the court refused to superimpose equity's full compensation rule and stated as follows:

The parties here were free to negotiate the terms of the contract of insurance, including the subrogation provision with its consequent effect on premiums and the amount of liability coverage. We decline to upset the settled expectations of the parties as reflected in the policy of insurance by overlaying inapplicable equitable principles which contravene the contract terms and forge a new agreement between the parties.³⁵

Similar language was given the same result in *Higginbotham v. Arkansas Blue Cross and*

Blue Shield,³⁶ where the court acknowledged the full compensation rule under equity but stated:

Without discounting the equitable properties of subrogation, we can conceive of no sound reason why broad principles of equity should be imbued with dominance over clear and specific provisions of a contract agreed to by the parties, at least where public policy considerations are wanting.

Despite receiving only \$25,000 for his injuries, an amount not fully compensating the insured, the court enforced the policy's right of subrogation for the insurer.³⁷

The District of Columbia Court of Appeals reached the same conclusion on a slightly different issue in the fidelity context in *National Union Fire Insurance Co. of Pittsburgh, PA. v. Riggs National Bank*.³⁸ Deciding that the superior equities doctrine (weighing the interests of competing parties to decide whether to enforce subrogation) does not apply to conventional subrogation, this influential court concluded that parties should be free to contract without imposition of unexpected equitable principles. The financial institutions bond insurer received the insured depositor's rights to pursue the bank that honored forged endorsements. The court surveyed the various analytical approaches to the question before deciding that the insurer agreed to accept only that risk that the law places on the insured, not risk that third parties must bear.³⁹ As with the superior equities doctrine, the D.C. court presumably would not add the full compensation rule to modify the policy's subrogation clause.

While the above courts allowed fairly general subrogation clauses to supersede the equitable requirement of full compensation to the insured, others have required more. In *Hershey v. Physicians Health Plan of Minnesota, Inc.*,⁴⁰ the court allowed subrogation where the policy provided for reimbursement "before payment of any other existing claims, including any claim by you for general damages . . . regardless of whether you have been fully compensated." The insured offered competing authority where subrogation had been denied because the policy only provided that the insurer's rights "shall be considered as the first priority."⁴¹ The court distinguished that case and result because Hershey's policy expressly said "regardless of whether you have been fully compensated."

Continuing along the spectrum, less specific language has been detrimental to subrogation rights in the face of incomplete recovery by the insured. In *Shelter Insurance Companies v. Frohlich*,⁴² the Nebraska supreme court agreed that the policy could allow subrogation before complete recovery, but a clause providing for subrogation to "all the rights of recovery" for "any payment" under the policy was insufficient. While the courts considering such language have not explained the insufficiency, perhaps they are unwilling to presume the parties intended to give the insurer all of the insured's rights no matter how small the insurer's payment.

In *Duncan v. Integon General Insurance Corp.*,⁴³ a clause requiring the insured to "1. Hold in trust for us . . . and 2. reimburse us to the extent of our payment" if the insurer makes "a payment" was inadequate. The supreme court referred to strong considerations of public policy and equitable principles concerning subrogation, noting that "some jurisdictions declare that any insurance policy provision which modifies the complete compensation rule is unenforceable and

void.”⁴⁴ This reference may be a hint of the court’s leaning against such clauses, although the court chose not to reach that question because the policy did not expressly contravene the full compensation rule.

Finally on this question of policy language versus equitable principles, the federal circuit courts have been examining federal common law in the context of the Employee Retirement Income Security Act (ERISA). State law, not federal common law, will govern coverages such as fidelity and D&O policies, but the approaches taken by the courts are instructive. In *Barnes v. Independent Automobile Dealers of California Health & Welfare Benefit Plan*,⁴⁵ the ERISA plan sought to be discharged from its obligations to its insured, who had impaired the plan’s subrogation rights by releasing a tortfeasor. The plan document required the insured to do nothing to harm any future rights of subrogation, so the plan had standing to object to the release even before it made payment. The Ninth Circuit held that the full compensation rule applies to the plan notwithstanding the language addressing the plan’s rights even before payment.⁴⁶

In *Cutting v. Jerome Foods, Inc.*,⁴⁷ Judge Posner wrote for the panel and engaged in an extensive “on-the-one-hand/on-the-other” discussion of the merits of the “make whole rule” before affirming the plan administrator’s interpretation in favor of subrogation rights without full compensation as “not unreasonable.” Rejecting this approach, the Eleventh Circuit recently held that full compensation is the default rule under federal common law unless overridden by express plan language in *Cagle v. Bruner*.⁴⁸ With such varied views of the full compensation rule among both state and federal courts, any generalization is too risky. Clear policy language may be disregarded on public policy grounds, and anything less may be ignored. The safest route to date is to obtain the insured’s rights and causes of action as part of the settlement or payment of the loss, so long as that agreement is supported by consideration.

B. When Is The Insured “Fully Compensated” For Subrogation Purposes?

As noted above, the full compensation rule (when applicable) requires that the insured recover all of its loss from whatever sources, including the insurance policy. If the insurer has paid what it is going to pay, the court must determine whether the insured has recovered in full. The easiest situation is a single tortfeasor or wrongdoer who suffers a judgment in favor of the insured. In that case, the judgment is collateral estoppel or issue preclusion as to the amount of the insured’s loss and prevents relitigation of that question in subsequent actions by the insurer.⁴⁹ Most matters settle before judgment, however, and the insured will argue that the settlement, though reasonable, did not compensate fully for all loss incurred.

The difficulty of this situation for the insurer is demonstrated in *Schulte v. Frazin*.⁵⁰ The insured and the tortfeasor settled for \$2.4 million after the insurer had paid \$90,000 under the policy. The settling parties invited the insurer to participate in a court hearing to determine whether any subrogation rights existed; the insurer’s participation was less than vigorous. The trial judge decided that the insured had not been made whole and extinguished the insurer’s subrogation lien. The court of appeals reversed, then was itself reversed by the supreme court.

The court refused to allow the insurer to compete with the insureds for limited funds available from the tortfeasor. The insureds presumably were able to settle with the tortfeasor at

a higher level because they agreed to indemnify the tortfeasor against any subrogation action. The court honored the effect of the indemnity agreement by noting that any subrogation by the insurer would have the insureds reimbursing their own insurer for its claim payment. The ruling therefore effectively allowed insureds to cut off their insurer's subrogation rights, regardless of whether they are fully compensated. The court did not address impairment of subrogation, probably because the trial court had concluded that the settlement did not fully compensate the insureds.

This finding was based on a hearing at which the tortfeasor presented evidence to uphold a settlement "far below the policy limits."⁵¹ The insureds presented evidence to uphold a settlement that they were willing to accept, notwithstanding the insurer's rights, and to avoid any duty of indemnification running to the tortfeasor. What evidence could the insurer present to rebut the combined efforts of the insured and the tortfeasor? The supreme court was not concerned about the possibility of collusion between those parties to the insurer's detriment, however, depending on their counsel to "act ethically."⁵² Another problem with such settlement hearings, if not collusive, is that they can devolve into substantial trials on damages, which is part of the reason motivating parties to settle in the first place.⁵³

One court's solution to these problems was to exercise its full equitable powers to impose its own allocation of recoveries, and the court of appeals affirmed. In *Esparza v. Scott & White Health Plan*,⁵⁴ the insured ignored the insurer's rights by settling with and releasing the tortfeasor for less than his policy limits. The court held that the insured was "hiding disingenuously behind the 'made whole' rule."⁵⁵ The insurer, though, had waited until settlement to intervene in the insured's action against the tortfeasor, thereby sleeping on its rights and expecting the insured to look out for another's interests. The trial court awarded the insurer exactly half the amount it had paid under its policy, plus its attorney's fees seeking the subrogation recovery. The court of appeals considered this an equitable allocation of the insured's recovery, which totalled \$1.6 million.

Such a result may be preferable to the potential for no recovery should the court decide the insured has not been fully compensated and deny any subrogation at all. The insurer must be prepared to argue that its policy overrides the full compensation rule altogether and, failing that, go forward to establish that the insured either has been compensated or should be estopped to deny it. Keeping a concerned eye on the potential for collusion between the insured and any responsible third parties may generate evidence to convince the court that the insured is "hiding disingenuously behind the made whole rule."⁵⁶

One point occasionally raised to combat the full compensation argument is that the insured's actions so prejudice the insurer's interests as to be impairment of subrogation. While an impairment defense usually occurs before payment under the policy, an insurer may use it to argue that an insured should not be heard to complain about less than full recovery. In *Provident Life & Accident Insurance Co. v. Bennett*,⁵⁷ the health insurer paid and sought reimbursement from its insured after it learned about a settlement between the insured and the tortfeasor's liability carrier. The insured argued that subrogation did not apply because he had not been made whole, and the insurer responded that settlement for less than the tortfeasor's policy limits conclusively establishes full recovery. The supreme court disagreed with the insurer, holding that

the trial court must consider all of the circumstances of the settlement to decide if the full compensation rule bars subrogation.

The Second Circuit Court of Appeals has held that an insured who releases a responsible third party bears the burden of showing no prejudice to the subrogated insurer in *Gibbs v. Hawaiian Eugenia Corp.*⁵⁸ If the third party knows or has reason to know of the subrogation rights, the insured's release does not affect those rights. If on the other hand the release prejudices the insurer's rights, then the insurer either avoids liability on its policy if it has not paid or recovers from its insured any payment that it has made. Placing the burden on the releasing insured who did not preserve its insurer's rights is appropriate and greatly improves the insurer's chance of enforcing subrogation to recover its loss payment.

Moreover, in *Time Insurance Co. v. Opus Corp.*,⁵⁹ the insured and the tortfeasor willfully excluded the insurer from their settlement negotiations. The insurer asserted equitable subrogation because it lacked a subrogation clause in its policy, so the court acknowledged the applicability of the full compensation rule. The settlement, however, occurred after ample notice from the insurer of its subrogation claims, and the court held that "such a settlement does not defeat the insurer's subrogation rights."⁶⁰ The court had no trouble with clear notice on these facts, although Minnesota apparently would not follow the "has reason to know" standard of the *Gibbs* case.⁶¹ Insurers should investigate to identify potential targets of subrogation at an early stage and, before paying the insured, provide actual notice to all concerned that any unapproved settlement may not prejudice the insurer's rights.

C. Who Is The Real Party In Interest Under Subrogation?

When full compensation is not required for the insurer to obtain subrogation rights, both the insurer and the insured may have claims against third parties.⁶² The insured will seek recovery of the deductible and any uncovered or compromised amounts, and the insurer will look to collect its loss payment and expenses if permissible under state law. Both the court and the third parties will want to know who owns the right to sue, that is, who is the real party in interest.

The policy may, by assignment, vest either the insured or the insurer with the claim for litigation purposes and allocate any recoveries between them. If not, then presumably either party may sue the responsible third parties, and the other party should intervene to protect its interests. In some jurisdictions, though, the cause of action is split between insurer and insured so that separate actions, or separate claims in the same action, are possible. For instance, in *Fidelity & Deposit Co. of Maryland v. Gaspard*,⁶³ the fidelity insurer settled with its insured and received a partial assignment of the insured's rights. The insurer sued the wrongdoer in federal court, and the insured sued the same party in state court. *Gaspard* moved to dismiss F&D's action for failure to join the insured as an indispensable party. Because the cause of action against *Gaspard* could be split, the court found the insured not indispensable and denied the motion.

The splitting of the cause of action can create difficulties. In *Julson v. Federated Mutual Insurance Co.*,⁶⁴ the fire insurer paid its limits and sued the tortfeasors. The insureds intervened to protect their interests in the excess loss. The insurer settled its claims with the tortfeasors and

expressly preserved the insureds' rights to continue with their claims, but the insureds then claimed against the insurer for settling with the tortfeasors in alleged bad-faith disregard of the insureds' rights. The basis of their claim was that they could not afford to continue their action against the tortfeasors after the insurer ceased prosecuting its claims. The court found such alleged prejudice insufficient to bar the insurer from settling its claims as it wished.⁶⁵

Likewise, in *Winkelman v. Excelsior Insurance Co.*,⁶⁶ insureds sued their insurer for settling with tortfeasors on subrogation claims before the insureds were made whole. The court noted that insurers have independent claims and may pursue them separately from those of their insureds. In this case, the tortfeasor's liability insurer notified Excelsior and the Winkelmans that the liability policy would pay only so much to resolve both sets of claims, thereby causing insurer and insured to compete for recovery. Insurer took the deal, while the insureds elected to sue the tortfeasor and their own insurer as well. The court rejected the Winkelmans' argument and stated that, while the insurer may not be made whole if the insureds are not, that rule does not bar the insurer's recovery from third parties; until the insureds are made whole, the insurer simply must account to the insureds for any recoveries.

The federal rule about the effects of splitting the cause of action is not clear. Federal Rule of Civil Procedure 17(a) governs the real party in interest, but state law in diversity can put the cause of action into the hands of two parties simultaneously and lead to trouble. For example, in *National Union Fire Insurance Co. of Pittsburgh, PA. v. Sun*,⁶⁷ the broker's blanket bond insurer paid under its bond and sought recovery from the wrongdoers by subrogation. After National Union's payment but before it sued, the insured became engaged in litigation with one of the wrongdoers and failed to assert a compulsory counterclaim. The court barred recovery by National Union in its subrogation action because of the insured's failure. Under New York law, the cause of action was split but somehow also resided with the insured in full, so the insured's mistake in its suit could prejudice rights belonging to National Union in its later suit.⁶⁸ The court did not address any remedy available to the insurer for this impairment of subrogation.

The question of the real party in interest also arises where the insurer takes a loan receipt upon payment under the policy.⁶⁹ If the arrangement is considered enforceable in the forum jurisdiction, the insurer should be able to sue in the insured's name, control the litigation, and recoup its loss payment from any recovery. In *T.S.I. Holdings, Inc. v. Buckingham*,⁷⁰ the court noted the "great split of authority among the various federal courts as to the validity of loan receipt agreements." Following Tenth Circuit and Kansas law, the district court judge enforced the loan receipt in this case.⁷¹

A final example shows that a straightforward approach may work best in dealing with the real party in interest problem. In *Keystone Floor Products, Inc. v. Home Insurance Co.*,⁷² the insured sued its fidelity insurer, who third-partied in the alleged wrongdoer. With all three concerned entities before it, the court simply adjudicated the amount owed by the insurer under its bond, held that this amount was the same as the dishonest employee's liability over to the insurer, and resolved all issues. The insured had claimed a much larger loss than the court found to be covered, but the judge carefully considered each element of the insured's claims and awarded an amount within the policy limits. Had the loss exceeded the limits, Pennsylvania law

would have required full compensation to the insured before the insurer could recover on its subrogation claim.

IV. MISCELLANEOUS ISSUES

A. Waiver of Subrogation

Insureds may try to prevent recovery by the insurer, either in competition for the same sources or directly by way of reimbursement, by raising waiver of subrogation. In *Provident Life & Accident Insurance Co. v. Bennett*,⁷³ the insured provided information leading the insurer to conclude, and confirm in writing to the insured, that no third parties were responsible for the loss. When the insured later recovered from a tortfeasor, the insurer understandably asserted its subrogation rights to be reimbursed. The insured argued that the insurer had waived those rights, both in the confirming letter and by doing nothing while the insured pursued the tortfeasor. The prejudice claimed was leading the insured to settle for an amount that did not account for any reimbursement to the insurer, then trying to share in that amount. The insurer denied knowing that the insured was settling with the tortfeasor until after the deal was done. The court reversed summary judgment for the insurer because of the fact disputes.

Sometimes, the insurer may choose to leave the recovery rights with the insured, particularly if a better settlement under the policy can be reached. Waiver of subrogation can benefit the insurer financially and avoid the uncertainty and expense of pursuing third parties on shaky grounds. The effect of such a waiver of subrogation on the insured's rights was addressed in *Pacific Gas & Electric Co. v. Allen*,⁷⁴ where the nonemployee co-conspirators tried to argue that the fidelity insurer's loss payment of \$1 million should be credited against their liability. Amazingly, the trial court agreed, apparently believing that the insurer's payment, coupled with the express waiver of subrogation, somehow extinguished the co-conspirators' liability to the extent of the payment. The court of appeals reversed what it called this "perplexing" grant of credit to the wrongdoers and held that the insurer's waiver of subrogation meant that no rights ever were transferred from the insured in the first place.⁷⁵

B. Limitations Governing Subrogation Rights

The subrogated insurer asserts its own right to be subrogated, arising by contract, statute, or equity, as well as its insured's rights when it stands in its insured's shoes. The period of limitations applicable is not clear. In *Resolution Trust Corp. v. Continental Insurance Co.*,⁷⁶ the court held that the insurer was barred from suing on its conventional subrogation claim because suit was not filed within one year from the discovery of the loss. The court thus applied the limitations period governing the insured's underlying cause of action. The court in *Green v. Daimler Benz, AG*⁷⁷ used the same analysis by applying the Pennsylvania limitation on property damage actions.

In *Provident Life & Accident Insurance Co. v. Williams*,⁷⁸ however, the court held that the cause of action for subrogation does not accrue until the insurer makes payment, and the period of limitations to be applied is that for implied contracts. This analysis ignores the underlying cause of action and focuses on the insurer's subrogation right. In light of these different

approaches, insurers should determine the shorter arguable limitation period applying to either the underlying rights or subrogation as a “cause of action.”

C. Subrogation In Bankruptcy

The Bankruptcy Code, 28 U.S.C. § 509, recognizes subrogation rights in limited circumstances, including the requirement that the subrogee have been liable with the debtor on or otherwise secured the underlying debt that the subrogee paid. This requirement on its face appears to include sureties but exclude insurers, who are liable only on their policies and who do not provide security. Nevertheless, the bankruptcy courts continue to recognize insurers’ subrogation rights, albeit without much explanation about the application.

In *In re Vorbeck*,⁷⁹ both the fidelity insurer and the insured sued the dishonest officer in an adversary proceeding to recover, respectively, the loss paid and the residual amount of the defalcation. Without mention of enforcing subrogation in the absence of bankruptcy code authorization, splitting of the cause of action, or the full recovery rule, the bankruptcy court ruled that the insurer was entitled to recover what it had paid and the insured was entitled to the balance of the embezzled funds. Likewise, the court in *In re Squyres*⁸⁰ without discussion applied Illinois law to grant the subrogated insurer a constructive trust in the insured/debtor’s tort recover.

One of the few cases discussing the basis for subrogation in bankruptcy is *In re Photo Mechanical Services, Inc.*⁸¹ After surveying the cases that apply (1) Section 509(c) alone, (2) either equitable subrogation principles or Section 509(c), or (3) the code plus equitable principles, the court stated that the requirement that the subrogee be a co-debtor on the underlying obligation applies to *all* of the above approaches. “No line of analysis allows a party to seek subrogation where the debtor and the party asserting a right to subrogation are not co-debtors.”⁸² The court denied subrogation to the guarantor because its transaction was not to pay a debt on which it was a co-debtor but to purchase rights for purpose of setoff. By the same analysis, the insurer does not pay a debt that it shares with the debtor/insured but instead pays on its policy. As shown above, though, insurers rarely face a challenge when presenting their subrogation claims in bankruptcy.⁸³

IV. CONCLUSION

The law of fidelity subrogation draws from general insurance principles, equity, the laws of the states and federal common law, and public policy considerations. The competitive nature of subrogation guarantees that insurers, insureds, and responsible third parties will continue to challenge the application of subrogation in all of the various fact patterns imaginable. Courts and litigants need to understand the reason and basis for subrogation--to shift the loss where it belongs and maintain the allocation of risk that insurance affords. Failure to achieve that understanding inevitably will lead to less efficient mechanisms (such as premium adjustments and statutory schemes) for placing risk and loss.

1. See Gregory R. Veal, *Subrogation: The Duties and Obligations of the Insured and Rights of the Insurer Revisited*, 28 TORT & INS. L.J. 69 (1992); DIRECTOR & OFFICER LIABILITY INS., Chapt. 8 (Business Laws, Inc. 1993) (hereinafter cited as "VEAL").
2. See Unified School District No. 259 v. Sloan, 871 P.2d 861, 867 (Kan. App. 1994) (references to statutes restricting subrogation rights in worker's compensation, no-fault, and uninsured motorist insurance contexts; demonstrates lack of public policy restraint on parties from contracting for subrogation in other contexts).
3. *In re Photo Mechanical Services, Inc.*, 179 B.R. 604, 618 (Bankr. D. Minn. 1995), *quoting* 73 AM. JUR. 2D, *Subrogation* § 3 (1974).
4. 986 F.2d 981 (5th Cir. 1993).
5. 827 F. Supp. 385 (M.D. La. 1993).
6. 887 F. Supp. 262 (D. Kan. 1995). The trial court faced the same arguments earlier in the case when the bank opposed leave to file the third-party action. The court was not persuaded at that stage, as detailed in its unreported decision, and reached the same conclusions upon full briefing of the motion to strike.
7. *Id.* at 265. For reasons "stated on the record" at a hearing the day before the order, the court denied the insurer's motion for summary judgment on the merits.
8. 599 N.Y.S.2d 347 (A.D. 1993).
9. *Id.* at 349. While even the insurer admitted that it had no coverage in this case, the court's reasoning would apply just as well if the insurer had a defense of uncertain strength. The ultimate determination of coverage, not the insurer's intent, governs volunteer status, according to the Ranger court.
10. 668 So. 2d 534 (Ala. 1995).
11. 947 F. Supp. 150, 155 (D.N.J. 1996).
12. 555 N.W.2d 10, 14 (Minn. App. 1996) (review granted Jan. 29, 1997).
13. *Id.* (citations omitted). The defense of the guaranty association was that the insolvent insurer was not licensed at the time of the claims so that the association was not required to cover its insolvency. The court noted that the guaranty statute did not say when the insolvent insurer had to be licensed to be covered, and the insurer in question had had a license before in the state. With the defense being subject to a good-faith dispute, the court found the payments to be sufficiently involuntary. *See also* Firemen's Fund Insurance Co. v. Maryland Casualty Co., 21 Cal. App. 4th 1586, 26 Cal. Rptr. 2d 762 (1994) (also recognizing good-faith payment exception to volunteer doctrine).
14. 925 F. Supp. 345, 349 (E.D. Pa. 1996).
15. 856 F. Supp. 25 (D.N.H. 199).
16. 564 N.W.2d 431 (Iowa 1997).
17. Slip op., CV 940544726, 1997 WL 804898 (Conn. Super. Dec. 22, 1997).
18. *Id.*, slip op. at 6. The court repeatedly noted that subrogation is limited to the extent of the amount paid by the insurer. *See* Utica Mutual Insurance Co. v. Denwat Corp., 778 F. Supp. 592 (D. Conn. 1991) (insurer not subrogated to insured's punitive damages claim; although public policy would not protect wrongdoer from such claim if purpose were punishment, in Connecticut punitives are compensatory).

19. 767 F. Supp. 157 (N.D. Ill. 1990).
20. See VEAL, at Section III "Bond Language" and recoveries provisions quoted in fn. 13-14 and 17.
21. 871 F. Supp. 381 (S.D. Calif. 1994), amended in 948 F. Supp. 942 (1995).
22. 599 N.Y.S.2d 347 (A.D. 1993).
23. 681 N.E.2d 625 (Ill. App. 1997).
24. 835 F. Supp. 453 (N.D. Ill. 1993).
25. 60 Cal. Rptr. 2d 591 (1997).
26. To reach this result, the court had to distinguish cases where subrogation was denied against parties merely breaching an obligation to procure insurance. The distinction is difficult to understand: in both cases, the insurer's equities should prevail because it paid as required and the other party otherwise would escape a contractual obligation. Perhaps the court assumed the defendant in this case had its own insurance, so subrogation cast the loss on the insurer for the party best able to avoid the loss. To avoid burdening parties without insurance whose only fault is failing to obtain it, courts have refused to impose subrogation losses. A different result, though, might advance society's encouragement of parties to spread risk by obtaining insurance. See also *Western States Insurance Co. v. Louis Olivero & Associates*, 670 N.E.2d 333 (Ill. App. 1996) (insurer may pursue insured's attorneys who, with notice of insurer's subrogation rights, released the full recovery to the insureds in violation of those rights; action for conversion allowed).
27. 566 N.W.2d 74 (Minn. 1997).
28. Refusing to allow a subrogation claim to collateral rights in the absence of express policy language indicates that Minnesota might restrict equitable subrogation to collateral rights.
29. *Vesta Insurance Co. v. Amoco Production Co.*, 986 F.2d 981 (5th Cir. 1993) (insurer can obtain reimbursement for insured's excess recovery).
30. 764 F. Supp. 38 (S.D.N.Y. 1991).
31. *Id.* at 42. The court distinguished *Hartford Fire Insurance Co. v. Advocate*, 560 N.Y.S.2d 331 (App. Div. 1990), in which a partner of the insured limited partnership was the arsonist who burned the premises, thus acting as an outside tortfeasor and exposing himself to subrogation.
32. 553 N.W.2d 299 (Wisc. App. 1996).
33. *Id.* at 304. The court had to distinguish *First National Bank v. Hansen*, 267 N.W.2d 367 (Wisc. 1978), where subrogation was not allowed against the bank's directors for failing to catch the dishonest employee. Active involvement in the loss apparently was the court's rationale.
34. See *Shelter Insurance Cos. v. Frohlich*, 498 N.W.2d 74, 78-79 (Neb. 1993); *Duncan v. Integon General Insurance Corp.*, 482 S.E.2d 325 (Ga. 1997); *L.Z. Gentry v. American Motorist Insurance Co.*, 867 P.2d 468 (Okla. 1994); *Complete Health, Inc. v. White*, 638 So. 2d 784 (Ala. 1994).
35. *Capitol Indemnity Corp. v. Strike Zone, S.S.B. & B. Corp.*, 646 N.E.2d 310, 311-312 (Ill. App. 1995) (insurer paid over \$461,000 for airplane crash, insured recovered almost \$700,000 from tortfeasor, insurer granted reimbursement for loss payment under conventional subrogation).
36. 849 S.W.2d 464 (Ark. 1993), followed by *Unified School District No. 259 v. Sloan*, 871 P.2d 861, 866 (Kan. App. 1994).

37. See also *Fields v. Farmers Insurance Co.*, 18 F.3d 831, 834 (10th Cir. 1994) (anticipating Oklahoma law, subrogation clause covering “any right” of the insured overrides full payment); *Vesta Insurance Co. v. Amoco Production Co.*, 986 F.2d 981 (5th Cir. 1993) (conventional subrogation overrides equitable principles in Texas); *Julson v. Federated Mutual Insurance Co.*, 562 N.W.2d 117 (S.D. 1997) (no statement in policy requiring full compensation, subrogation clause therefore enforced (although insureds could not prove they were not fully compensated, either)); *but compare Complete Health, Inc. v. White*, 638 So. 2d 784 (Ala. 1994) (insurer, not insured, has burden on full compensation issue).
38. 646 A.2d 966 (D.C. App. 1994), *on certified question from* 5 F.3d 554 (D.C. Cir. 1993).
39. 646 A.2d at 971, *citing* *VEAL* at 75-76. On appeal after remand, the D.C. Circuit reversed the trial court’s finding that the insured had agreed implicitly to bear the risk of fraudulent endorsements on its checks. The FIB insurer finally won and received pre-judgment interest of over \$100,000. 93 F.3d 885 (D.C. Cir. 1996).
40. 498 N.W.2d 519, 520 (Minn. App. 1993).
41. *Id.*, *citing* *Allum v. MedCenter Health Care, Inc.*, 371 N.W.2d 557 (Minn. App. 1985). See also *Medica, Inc. v. Atlantic Mutual Insurance Co.*, 566 N.W.2d 74, 77 (Minn. 1997) (equitable principles will apply to conventional subrogation unless policy “clearly and explicitly provides to the contrary.”)
42. 498 N.W.2d 74, 76-81 (Neb. 1993) (citing numerous cases requiring express policy provision contrary to full compensation rule).
43. 482 S.E.2d 325, 326 (Ga. 1997).
44. *Id.* at 327, *citing* *Wine v. Globe American Casualty Co.*, 917 S.W.2d 558 (Ky. 1996) (superimposing equitable rule of full compensation on policy provision, but allowing subrogation nevertheless because of release and trust agreement expressly so providing); *but compare Jindra v. Diedrich Flooring*, 511 N.W.2d 855 (Wis. 1994) (full payment not required despite same subrogation clause as in *Wine*; separate reimbursement clause, similar to fidelity bond allocation of recoveries, allowed insurer to share in insured’s recovery).
45. 64 F.3d 1389 (9th Cir. 1995).
46. Although the trial judge had ruled that the insured’s attorney’s testimony denying full compensation was insufficient, the circuit court reversed. The court’s repeated mention of the plan’s failure to pay the claim before asserting subrogation rights indicated the underlying rationale for the result. *Id.*
47. 993 F.2d 1293 (7th Cir. 1993).
48. 112 F.3d 1510 (11th Cir. 1997).
49. See *Bartunek v. Geo. A. Hormel & Co.*, 513 N.W.2d 545 (Neb. App. 1994).
50. 500 N.W.2d 305 (Wisc. 1993).
51. *Id.* at 311 (Steinmetz, J., dissenting and citing to the court of appeals’ decision).
52. *Id.* at 310 (“While it may be true that there are some individuals in all professions and trades who are incapable of ethical behavior, this court cannot and should not decide cases on such scare tactics”).
53. See *Provident Life & Accident Insurance Co. v. Williams*, 858 F. Supp. 907 (W.D. Ark. 1994) (court laments over requirement of trying full compensation dispute instead of dismissing settled lawsuit).
54. 909 S.W.2d 548 (Tex. Civ. App. 1995).

55. *Id.* at 552.

56. *Id.*

57. 483 S.E.2d 819, 825 (W. Va. 1997). The insured argued that the health insurer should have notified the liability carrier of the former's subrogation rights, while the insurer argued that the insured should have disclosed those rights. The supreme court held that the insured had a duty to disclose its insurer's subrogation rights if the insured knew of those rights; because of fact disputes, the court reversed summary judgment for the insurer.

58. 966 F.2d 101 (2d Cir. 1992).

59. 519 N.W.2d 470 (Minn. App. 1994).

60. *Id.* at 474. The tortfeasor, a general contractor on whose site the insured was injured, had made its own determination that the insurer had no enforceable subrogation rights. This was the contractor's explanation of why it disregarded the insurer in its settlement with and release by the insured. The release nevertheless had no effect.

61. GroupHealth, Inc. v. Heuer, 499 N.W.2d 526 (Minn. App. 1993) (absent *actual* notice of insurer's rights, tortfeasor can assert insured's release).

62. Where full compensation is applied strictly, this question does not arise. Until the insured is made whole, the insurer has no present rights and the insured owns the claims. Anything the insured does or fails to do that prejudices the insurer's potential subrogation rights may be an impairment that gives the insurer a right of recovery against the insured. See VEAL § VII, at 80-82.

63. Slip op. 96-3438, 1997 WL 335598 (E.D. La. Jun. 17, 1997).

64. 562 N.W.2d 117 (S.D. 1997).

65. *Id.* at 121. The court noted that the policy apportioned between the insured and insurer any costs of collecting under a subrogation claim, so the insurer certainly had no duty to incur all of the insureds' litigation expenses.

66. 650 N.E.2d 841 (N.Y. 1995).

67. Slip op. 93-Civ.-7170, 1994 WL 463009 (S.D.N.Y. Aug. 25, 1994).

68. The court had little sympathy for the insurer, whom the court accused of "gamesmanship" in not intervening in the action between the insured and the wrongdoer. The court did note, though, that the insurer had other wrongdoers to pursue. *Id.* at fn. 9. See also Krueger v. Cartwright, 996 F.2d 928, 931-932 (7th Cir. 1993) (partial subrogation creates two real parties in interest under Rule 17(a)).

69. See VEAL at 77.

70. 885 F. Supp. 1457 (D. Kan. 1995), *citing* 6A Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 1546, fns. 10-11.

71. *Cf.* Green v. Daimler Benz, AG, 157 F.R.D. 340 (E.D. Pa. 1994) (although state law would have allowed insurer to sue in insured's name, Rule 17 requires the insurer to sue in its own name; substitution allowed because the parties' confusion was understandable). Particularly in federal court, loan receipts are important tools for the insurer if enforceable.

72. Slip op. Civ. A. No. 92-1998, 1992 WL 94918 (E.D. Pa. April 20, 1992).

73. 483 S.E.2d 819, 822-823 (W.Va. 1997).
74. 28 Cal. App. 4th 174, 33 Cal. Rptr. 2d 522 (1994).
75. 28 Cal. App. 4th at 183, 33 Cal. Rptr. 2d at 528.
76. Slip op. Civ. A. No. 90-0611, 1992 WL 116038 (E.D. La. May 5, 1992).
77. 157 F.R.D. 340, 342 fn. 6 (E.D. Pa. 1994).
78. 858 F. Supp. 907 (W.D. Ark. 1994).
79. Slip op. Bankr. No. 92-21825-CNC, 1993 WL 726350 (Bankr. E.D. Wisc. Oct. 15, 1993).
80. 172 B.R. 592 (Bankr. C.D. Ill. 1994).
81. 179 B.R. 604, 618-619 (Bankr. D. Minn. 1995).
82. *Id.* at 619.
83. See *Reliance Insurance Co. v. Enstar Group*, 192 B.R. 579 (Bankr. M.D. Ala. 1996) (denying subrogation to D&O insurer on other grounds but without question of subrogation in bankruptcy)

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