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OVERLAPPING COVERAGES IN LIABILITY CONTRACTS; SUBROGATION

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The subjects here discussed are relatively simple; yet there is no uniformity in the results except in certain broad areas. Rather than dealing with specific citations of authority, it would then seem better to discuss the places where conflict arises.

Within the last twenty-five years, approximately, a considerable transition has taken place in approaching the coverages of automobile policies. At one time, liability insurers used to require their policyholders to pledge that they did not carry other insurance of like character. It is difficult to understand why this situation ever arose. It may have been an outgrowth of fire coverages, or health and accident provisions, in which a moral hazard actually might exist where excessive protection is carried.

Thereafter, instead of making this a matter of warranty, policies frequently provided that in the event there should be any other valid or collectible insurance, the basic policy would be void. Let us suppose that a man had two such policies, each of which had a like provision of this character. Each then would attempt to disclaim liability because of the existence of the other contract. As we are all aware, not all of the insurance contract is written in the language of the policy; much of it is written by the courts when confronted with this situation. And, when confronted with this problem, their answer was succinct: "Gentlemen, this is ridiculous. A man who pays for two policies should not wind up with none. These provisions are mutually repugnant; we will hold you both liable, and you may share the risk." In the event one policy was for $20,000 and another for $5,000, such companies would usually wind up dividing the risk proportionately, the company having the larger risk bearing its fair proportion of the loss.

Probably the major problem in policy construction in this area which we have had in recent years has arisen through the overlapping features of the omnibus clause and the drive-other-cars provisions. An omnibus clause is simply the "definition of the insured" provision in the policy which provides that the term "insured" shall include the person named in the policy and any person operating the automobile with the permission of the named insured, other than certain excluded persons or agencies. The "drive-other-cars" clause provides

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basic coverage for the insured and members of his family when any of them drives a different automobile, provided it is not one owned or regularly used by the insured or other members of the family.

It would be pleasant to give an absolute result which is always reached by the courts. This cannot be done. But it would be safe to say that in the overwhelming majority of those cases that have been presented, it is held that the omnibus clause provides the primary coverage and that the drive-other-cars provision constitutes secondary or excess coverage—the theory being, apparently, that the insurance follows the car, so far as the primary coverage is concerned. It is surprising, in view of the almost unanimous nature of the results, that many companies will still contest this matter and try to insist that the other company share its burden. The writer has a case pending where one insurance company is insisting that a declaratory judgment be sought requiring a second company to carry the burden or to share it equally—even though it has been explained that no obligation would arise upon the second company until the first company has spent its policy proceeds.

There are differences in results where peculiar questions are presented, such as in California where a primary responsibility is held to obtain and a pro rata sharing of the risk to result. And, again, cases will arise where one company is definitely upon a risk while another company is relieved entirely of its obligation. Let us assume, for example, that one policy expires at midnight and the accident happened, or is believed to have happened, at 2:00 a.m. Perhaps the actual time of the occurrence cannot be determined, such as if all persons involved are killed and the wreckage is not discovered until the following day. The actual result may depend upon whether the collision happened before midnight or after midnight. That, then, becomes a factual issue to be determined as any other factual issue.

Or, a situation may arise to prevent the effectiveness of one of the possibly overlapping contracts. Let us consider, for a moment, the omnibus clause. An exception is normally contained restricting the omnibus clause from extending where the vehicle was in the care, custody, or control of a garage or place of repair. In such event, the policy would not lend its protection, and if a drive-other-cars proviso became applicable, it might then constitute primary coverage. More likely, there may be a garage policy then available to spread its cloak of protection over the risk. But, let us suppose an even more involved situation where there is no direct insurance upon the automobile at all—but where there may be a drive-other-cars endorsement plus a non-ownership policy issued to an employer. In such event, the courts are prone to say that the coverage will follow the driver,

since it cannot follow the car. The driver is closer to the hazard than is the employer, so the driver's company will normally become the primary carrier, and the non-ownership coverage will then constitute excess protection.

In some situations, a primary carrier may refuse to come in and to defend, either from ignorance of the law or plain stubbornness. In that event, the excess carrier may determine that the case should be settled, or that a large judgment might result. Usually in such a situation it would have rights similar to that of the insured to whom the insurance company refuses to discharge its obligation; it may then come in, defend, or settle as it sees best, and if it acts with reasonable judgment, seek a reimbursement from the carrier which is primarily liable. *One word of caution:* the excess carrier must be certain both in this relationship, as well as in subrogation matters which we will discuss subsequently, that it not place itself in the position of acting as a volunteer. A volunteer may not recover the money it has expended, but if it is paying under a legal right or under a legal threat, that is normally sufficient to induce a reasonable man, or even a reasonable company, to act.

The doctrine of subrogation is equitable in origin with the result that a right of subrogation normally would exist even if the insurance contracts did not expressly so provide. But insurance policies generally do provide that if the insurer makes payment under the collision or comprehensive provisions of the policy, it has a right to recover such damages from the wrongdoer responsible therefor. The purpose of the doctrine is to place the loss ultimately upon the one actually responsible for the occurrence. Our system of litigation in the United States is based, fundamentally, upon the fault doctrine—and it is just, under that doctrine, that the innocent be indemnified by the blameworthy.

Subrogation claims are not limited to suits against the driver of a vehicle. Under different forms of insurance contracts, they cover many facets of different situations. For example, a bonding company may have an obligation, either because of a default in the act of a public official, or a public contract, where a cause of action may arise under the doctrine of subrogation. Subrogation may arise against the manufacturer of a product under a breach of warranty situation. In Illinois, actions have been permitted by way of subrogation to an automobile insurance company against the operators and owners of a dramshop under the Illinois dramshop statute.[1] That law provides briefly that if any person is sold or given alcoholic liquors and becomes intoxicated, then any person who is injured or

1. Dworak v. Tempel, 17 Ill. 2d 181, 161 N.E.2d 258 (1959).

his dependents may recover the injuries sustained, up to a certain limit, against the licensee or owners.[2]

Closely related to the doctrine of subrogation is the doctrine of indemnification. However, a true indemnification situation carries with it certain other problems. A true indemnification situation ordinarily involves a person who is technically liable under the law, without actually being personally at fault—or if at fault, to a lesser degree than the true wrongdoer. For example, a master may have to pay a third person injured by his servant because of the operation of the doctrine of *respondeat superior,* but may recoup such damages from his servants. A railroad employee may be knocked off the top of the freight train by the projecting arm of an illegally constructed loading platform, and the railroad be permitted to recover from the one who erected such obstruction. A hotel has been permitted to recover against a contractor doing work upon its premises, where such contractor permitted a dangerous situation to remain which caused injury to a patron of the hotel. It is considered just and equitable that the one primarily responsible reimburse the one secondarily responsible under the law.

Turning back to the matter of a volunteer, interesting cases have arisen where a company had no duty to pay. In that situation, the courts have been prone to say that if the company paid without a legal duty to do so, it acted as a volunteer and had no standing to enforce a subrogation action. An attorney advising a company in such a situation should be certain that its duty is clearly denoted, in order to prevent difficulties in future cases.

Twenty years or more ago, there was considerable litigation as to the person who might maintain a subrogation suit. In many states, that still is a troublesome matter. Ordinarily, the insurer does not want to be named as a party plaintiff but desires to use the name of its insured. If the insured retains any property interest at all, by reason of the deductible feature of the policy, the rule is ordinarily that he may sue for the entire amount in his own name, even though that state may have a "real party in interest" statute. In other states, the action may be brought in the name of the insured "for the use of" the insurance carrier. In very few jurisdictions, any more, is the artifice of a "loan receipt" still employed.

Problems have arisen where the wrongdoer's carrier pays the injured insured a few dollars for a release of his personal injuries and the deductible portion of his policy. In some such instances, a general release is occasionally taken. If that company is aware of the existence of the subrogation rights (and usually its inclusion of the

2. Ill. Rev. Stat. c. 43, § 135 (1955).

deductible feature would demonstrate this), the release is not binding to destroy the subrogation rights of the insured's carrier. The insurer of the wrongdoer is estopped to set up such a defense, as it would be tantamount to a fraud. And if such insured should effectively destroy the subrogation rights of his carrier, his company would have a right to recover back from him any payment which it had formerly made to him or on his behalf.

The most interesting development in the subrogation field has been the split cause of action. In many states, two suits will lie separately—one for personal injury and one for property damage. Suppose, then, the insurance carrier pays out three hundred dollars and sues in a subrogation claim in a magistrate's court, but loses, and fails to prosecute an appeal. In the absence of statute, such a result might constitute an estoppel by judgment, which necessarily involves the determination of issues of negligence or contributory negligence, and may prevent a later prosecution of a suit by the insured for his own personal injuries. There have been several decisions to the effect that a settlement by one's insurer with another cannot be introduced in evidence against the insured in enforcing his personal cause of action, since he cannot control the action of the company—but here there is a different situation where a judgment has actually been rendered conclusive of certain issues. In Illinois, to avoid this result, the statute was changed two years ago to provide that either the company or the insured might maintain an action and that the result of neither suit would bar nor impair the right of the other. Absent such statute, if the insured could demonstrate that the company handled its litigation negligently and by its negligent action destroyed his valid suit, it is quite possible that he might be able to recover damages based upon the value of his suit.

There are no absolutes in these fields. The results vary widely from one jurisdiction to another. But it is apparent that in the consideration of most of these problems, the results in general conform to common sense.