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Insurance—Subrogation—Settlement Between Insured and Tortfeasor

In *Nationwide Mut. Ins. Co. v. Canada Dry Bottling Co.* the North Carolina Supreme Court was faced with the question of subrogation rights of an insurer. The insured's automobile was damaged by the agent of the defendant. The insurer and the insured agreed that the automobile had been damaged in an amount evaluated at $489.14. Fifty dollars was deducted as provided by the policy, and the insurer paid the insured $439.14. The insured instigated an action for property damages (no personal injury was involved) against the defendant for $1,300. The defendant moved that the insurer be made a party to the action, but upon the insured's objection, the court denied the motion. The insurer was said to have "acquiesced" in the denial of the motion. A settlement was made between the insured and the defendant for $400 that was embodied in a consent judgment containing a release of all claims against the defendant. Having become by virtue of its payment to the insured partially subrogated to the claim against the defendant, the insurer brought action against the defendant for recovery of the $439.14. In the present action, the Supreme Court affirmed the trial court's striking of the defendant's pleading of the release as a defense, indicating that a tortfeasor cannot defeat subrogation rights of an insurer by procuring a release from the insured, where the tortfeasor had knowledge of the insurer's payment to the insured.

While this general proposition is rather clear, other aspects of the case and the events going before it present questions.

In the action by the insured against the defendant the latter's motion to have the insurer joined was denied. This ruling was not appealed, so was not before the Court in the instant case. But it remains relevant. As in the federal courts and most other state

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2 See *Federal Procedure*, 17(a).
3 See *Federal Procedure*, 17(a).
jurisdictions, the North Carolina statute requires that an action be brought by, or in the name of, the real party in interest. Where insured property is damaged, the owner of the property has a single and indivisible cause of action against the tortfeasor for the total amount of the loss. In most courts if the insurer has fully indemnified the insured for his loss, the insurer must bring the subrogation suit in its own name, since it is entitled to all fruits of the action and is considered to be the real party in interest. But where the insurer pays only a part of the loss, the insured and the insurer both own portions of the substantive right against the tortfeasor. In this situation the insured generally is a necessary party in any suit against the tortfeasor and is the only plaintiff who may sue alone for the entire claim. When he sues alone he holds the proceeds of judgment as trustee for the insurer to the extent payment was made by the latter. This is an aspect of the rule against splitting a single cause of action and is designed to prevent the tortfeasor from having to defend two actions for the same wrong. But as to the status of the insurer as a party in this partial subrogation situation, the courts differ. North Carolina cases have held that the trial court has discretion to join the insurer as a proper party. On the other hand

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5. N.C. GEN. STAT. § 1-57 (1953).
9. There might be a question as to whether the insurer has completely paid for the loss when the exact amount of the loss has not been determined. It seems that defendant-tortfeasor is entitled to have this question put in issue. Therefore, when the insured sues, the defendant may plead in defense that there has been complete payoff, so that the insured is not the real party in interest. Jewell v. Price, 259 N.C. 345, 130 S.E.2d 668 (1963); Smith v. Pate, 246 N.C. 63, 97 S.E.2d 457 (1957).
10. Ibid.
the federal courts generally hold that the insurer is a necessary party, and even though the insured is allowed to sue alone in its own name, if the defendant-tortfeasor objects, the insurer must be made a party. But in any event the cause of action remains in this situation single and indivisible.

The defendant here argued before the present court that its intention and that of the insured was that the settlement was to be of the entire claim, so that anything that should go to the insurer is being held by the insured, and the insurer's action should be against the insured. But this argument proved to be unsupportable when confronted with the cases clearly holding that the insurer's subrogation rights cannot be defeated by settlement and release. Thus, defendant could be said to have waived any policy in his favor deriving from the real party in interest and indivisible cause of action rules (viz. not having to defend two lawsuits) and has effectively split an initially single cause of action, so that now the way is open to the insurer to bring his subrogation action. Had the defendant allowed insured's action to go to final judgment, no suit would have been maintainable by the insurer. The insured would have been trustee for insurer's share.

There are at least two asserted reasons why either the insurer is not considered to be a necessary party or joinder is denied where it is deemed a proper party. One is that the right of subrogation is equitable, and therefore the legal rights of the subrogor against third persons are unaffected by the subrogation. However, once subro-

Trevatham, 236 N.C. 157, 72 S.E.2d 231 (1952). See N.C. Gen. Stat. § 1-68 (1953), which provides that, "All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs . . . ; and N.C. Gen. Stat. § 1-69 (1953), which provides that, "All persons may be made defendants . . . who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination of the questions involved." See Note, 31 N.C.L. Rev. 224 (1953).


12 See note 2 supra.

13 E.g., Powell & Powell v. Wake Water Co., 171 N.C. 290, 88 S.E. 426 (1916), where the court indicated that while the cause of action was indivisible, it had been divided by the act of the parties.

14 See note 8 supra.

gation is established, the subrogee's right to pursue the one liable to the insured assumes the nature of the insured's rights, which are legal in the typical case of a tortfeasor who has damaged the property of the insured. Moreover, in the case where full payment for the loss is made and subrogation is total, the subrogee alone must bring the action. Therefore, the insured’s rights are affected, and to say that the equitable nature of the subrogee’s rights determines his status as a party is not true. The second reason is a desire to avoid jury prejudice arising from the knowledge that the injured party’s loss is covered by insurance. While this is often perhaps a realistic argument, much of its force is lost when, as in North Carolina, juries know that insurance is a requirement for vehicle registration and that consequently the defendant is (or should be) insured also. The effect of the denial of the defendant’s request that the insurer be joined is to make it impossible for him to settle the entire claim by settlement with the sole plaintiff the court has allowed against him. So, if the policy operating here is to protect the insurer for the above reasons, it is at least debatable whether they carry enough force to outweigh the desirability of the defendant’s being able to bring the insurer into the action and settle the whole claim. A complete settlement, of course, could be made without the insurer in court, but the prospect is not good. As matters now stand, if defendant is liable, the insurer is virtually assured of recovering the full amount of its payment, so there is really no reason for it to settle. But were the insurer brought into court in the original action it might find it more desirable to negotiate.


18 See note 7 supra.

At least one writer feels this is not a legitimate consideration: This problem is not met by the courts, and correctly so. The problem is not to change the application of the law, but to defeat the prejudice, if one does exist. There are at least two ways to defeat this prejudice. One is a procedural method to be used to keep the jury from knowing an insurance company is involved in the litigation (referring to payment by the company in the form of a loan receipt), the other is through education of the public in the ideals of justice so they are not prejudiced when they sit as jurors.

In the federal courts the insurer may be brought in on defendant's motion, so the settlement problem does not arise. Some well considered cases by other state courts hold that both the insured and the insurer should be required to join.\textsuperscript{19} Even if the North Carolina notion be retained that the insurer is only a proper party, there are strong judicial recommendations that it be joined since it has an ascertainable interest in the subject matter of the controversy.\textsuperscript{20} In the present situation, where the defendant who wants to try to settle fails in his effort to have the insurer brought in, he and the courts are faced with another lawsuit by the insurer.

Another problem with the rule as it stands is that the defendant risks double payment when he settles. In the instant case the Court "noted" that the insured's action against the defendant was for damages in the amount of $1,300,\textsuperscript{21} but did not discuss the significance of this fact. Of course, at the present stage of the proceedings the full amount of damages has not been determined. The insurer is asking for the $439.14 it paid to its insured. If the actual damage is determined to be greater, this figure will still be the limit of the insurer's recovery, because it had subrogation rights to no more. There is, of course, no further liability to the insured because of the release. But if damages are ascertained to be somewhat close to $400,\textsuperscript{22} it would appear that the defendant is perhaps going to have to pay twice—that is, he has already paid $400 for the release, and, if unsuccessful in the present action, will have to pay the insurer $439.14 more. Are there procedures available so that he might avoid this?

\textsuperscript{22}That the insurer and the insured agreed that damages sustained were $489.14 would indicate that the amount probably will be rather close.
Where the insurer pays the full amount of the loss to its insured, it is the real party in interest. But the first action having terminated with the settlement and before damages were assessed, it was not known whether the insurer had fully indemnified the insured. If it now appears that the $439.14 covers the entire damages, and the insurer should have been the real party in interest, the defendant could argue that it would be inequitable for the insured to retain the settlement money where it was not the proper party in the suit. The countervailing argument is that the defendant has waited too long to raise the issue and will be estopped to allege at this point that the party he settled with was not the real party in interest. The more serious difficulty is that the insured is not in the present suit; and, as discussed below, it seems unlikely that the defendant join the insured in order to make the argument.

It would seem that the general principles of indemnity would require that the defendant not be subjected to this possible double payment. If the insured has been fully indemnified by the payment from its insurer, and is allowed to keep the settlement money, there would appear to be an inequity. Balance could be restored by requiring the insured to return to the insurer all above the amount required to compensate him for his loss. But it is difficult to see how the defendant can effect this result. While there are many cases which allow the insurer to obtain reimbursement of money obtained by its insured who settles with the tortfeasor, they depend upon the insured having by such settlement cut off the insurer's rights to

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28 Authority for this argument might be found in the court's statement in Phillips v. Alston, 257 N.C. 255, 259, 125 S.E.2d 580, 583 (1962): While a tortfeasor is entitled to have the total damages ascertained in one action, he cannot, when he has knowledge of insurer's rights by virtue of its payment to the owner, defeat those rights by making payment to and taking a full release from the owner. The payment so made and release taken will be construed as a mere adjustment of the uncompensated portion of the loss. (Italics added.) It appears from this that the court would not allow the defendant to settle before putting in issue whether there has been full payment by insured, and then later maintain that there had indeed been full payment.

24 Vance says that: the basis of the contract of insurance on property is indemnity. Indemnity is its sole legitimate purpose, and any contract that contemplates a possible gain to the insured by the happening of the event upon which the liability of the insurer becomes fixed is contrary to the proper nature of insurance, and, in the absence of statute, will not be allowed. Vance, The Law of Insurance 101 (3d ed. 1951).
go against the tortfeasor. But in this case the insurer's subrogation rights were not destroyed, making it doubtful that such a reimbursement possibility is open. Moreover, the insurer has not chosen to proceed for reimbursement but has brought an action against the defendant. The question then becomes whether, if reimbursement is possible, the defendant can have the insured joined as a party. While there are some possible analogous decisions, they are not really very closely related and the prospect seems doubtful.

Unless it was fairly evident that damages were going to run to a significantly larger figure, the defendant, who paid for a settlement with the insured and still faces a subrogation action by the insurer, has made a rather bad bargain. The danger of such a bargain could be avoided, and just settlement encouraged, if procedural devices were available to require that all parties needed for final and complete settlement could be joined in the suit.

ROBERT L. THOMPSON

Jury—Allowing Challenge for Cause to a Prospective Juror
Opposed to Capital Punishment

In State v. Childs defendant was found guilty of rape and burglary in the first degree and sentenced to death. Appeal was made on the ground inter alia that the trial judge erred in granting the State's challenges for cause to prospective jurors on the ground that they had conscientious scruples against the infliction of the

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25 See cases collected in 29A A.M. JUR. INSURANCE § 1736 (1960).
26 One sued by subrogated insurer for having destroyed the property may require all other insurance companies participating in paying the loss to be made parties to the action. Powell & Powell v. Wake Water Co., 171 N.C. 290, 88 S.E. 426 (1916). While a fire insurance company, which pays a loss, is proportionately subrogated to the insurer's right of action against the tortfeasor, the insurer must work out his remedy through the insured, so, where several insurance companies each paid part of a loss, it was proper, where separate actions by the several insurance companies were consolidated, to make the insured a party. Lumberman's Mut. Ins. Co. v. Southern R.R., 179 N.C. 255, 102 S.E. 417 (1920). See United States v. Aetna Cas. & Sur. Co., 338 U.S. 366 (1949) where the Court held that where an insurer has become partially subrogated to the rights of an insured under the Federal Tort Claims Act, both are "necessary parties" but not "indispensable parties" and either party may sue, although in such case the United States upon timely motion may compel their joinder.