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Real Party in Interest—Insurance—Partially Subrogated
Insurer's Standing To Sue

In Southeastern Fire Ins. Co. v. Moore\(^1\) the North Carolina Supreme Court held that payment by an insurance company of the damage done to insured's car, less fifty dollars deductible under the policy terms, did not entitle the insurer to sue the third party tort-feasor in its own name. The court found that the insurer had sought "to split an indivisible cause of action" and that it was not the real party in interest. Also, the insured had received the money in the form of a "loan" repayable only in the event of his recovery from the tort-feasor, and the court intimated that this arrangement was not a payment entitling the insurer to subrogation.

Under common law rules of pleading, all actions had to be maintained in the name of the person whose legal right had been affected.\(^2\) So, in a tort case, only the injured party himself could be the plaintiff. Subsequently, code pleading and the Federal Rules adopted real party in interest provisions embodying the practice followed in equity of allowing any person with a substantial beneficial interest in the claim to sue in his own name.\(^3\) Under these provisions, including the North Carolina statute,\(^4\) the following rules are applied. When an insurer pays an insured's claim on a policy it becomes subrogated pro tanto to any right of action which the insured may have against a third party responsible for the loss.\(^5\) When the insurer has paid the entire loss sustained, the insured having no further beneficial interest in the claim, the former may sue the tort-feasor in its own name.\(^6\) However, the rule against splitting a cause of action requires that the legal title to the right of action for the entire claim must remain in the insured when the payment by the insurer does not cover the whole loss.\(^7\) Upon recovery, the insured holds all proceeds in excess of the previously uncompensated amount of

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\(^{3}\) CLARK, CODE PLEADING § 24 (2d ed. 1947).
\(^{4}\) CLARK, op. cit. supra note 2, § 21; 3 MOORE, FEDERAL PRACTICE ¶ 17.03 (2d ed. 1948).
\(^{5}\) N.C. GEN. STAT. § 1-57 (1953). The real party in interest must have some interest in the subject matter of the litigation, and not merely an interest in the action itself. Choate Rental Co. v. Justice, 211 N.C. 54, 188 S.E. 609 (1936).
\(^{6}\) CLARK, op. cit. supra note 2, § 24; 3 MOORE, op. cit. supra note 3, ¶ 17.09; N.C. GEN. STAT. § 58-176 (1950).
\(^{7}\) Yorkshire Ins. Co. v. United States, 171 F.2d 374 (3d Cir. 1948); Burgess v. Trevathan, supra note 6; Powell & Powell, Inc. v. Wake Water Co., supra note 6; 29 AM. JUR. INSURANCE § 1358 (1940); 46 C.J.S. INSURANCE § 1211 (1945); CLARK, op. cit. supra note 2, § 24; 3 MOORE, op. cit. supra note 3, ¶ 17.09.
his claim as trustee for the insurer. The latter rule is designed to protect the tort-feasor from the inconvenience and expense of being forced to defend against more than one action for a single indivisible wrong. There remains a problem when an insurer finds it necessary or advisable to sue the tort-feasor in the company name when it has not paid the full amount of the insured's loss. The question, then, is how the insurer can secure a surrender of all beneficial interest in the claim from the insured and vest the title of real party in interest in itself.

Generally, there are two methods by which this may be done. First, assignment appears to provide the surest and most practical solution to the problem. Whether an assignment to the insurer of the insured's entire right of action is made for additional consideration or not, such an assignment will enable the insurer to sue for the full amount of the loss. Care must be taken in drawing an assignment without further consideration to specify that the assignment is absolute and final and that the assignor (insured) has forever parted with all beneficial interest in the claim to be litigated. This is necessary to avoid the possibility that the assignment be found to be one for collection only and thus invalid in North Carolina. Another caveat should be observed if the assignment is in exchange for additional consideration. It should be made clear that the insurer is purchasing the insured's claim, and not making an additional payment pursuant to the policy. The latter would presumably constitute a payment in excess of the insurance contract

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8 Powell & Powell, Inc. v. Wake Water Co., 171 N.C. 290, 88 S.E. 426 (1916). But cf. Patitucci v. Gerhardt, 206 Wis. 358, 240 N.W. 385 (1932), where the court held that the trial judge should always join the insurer whenever the latter's existence in the case comes to the judge's attention, though it is not reversible error to fail to do so.

9 This problem may arise where the insured has for some reason left the state after the accident and, after being informed of the need for his co-operation, fails to co-operate with the insurer. Plaintiff's attorney informed this writer that the insured in the principal case, while still within the state and legally bound by the "loan" agreement to co-operate, was reluctant to participate even to the small extent of signing the verification. Perhaps such reluctance may be appreciated when it is considered that the most the insured can realize from a recovery against the tort-feasor would be the deductible amount not covered by the insurance minus, usually, one-third which the insurer keeps for the expense of prosecuting the action. For obvious reasons it is not advisable to compel the insurer's primary witness to join in the action against his will.


11 Federal Reserve Bank v. Whitford, 207 N.C. 267, 176 S.E. 584 (1934); Bank v. Rochamora, 193 N.C. 1, 136 S.E. 259 (1927); Martin v. Mason, 158 N.C. 436, 74 S.E. 343 (1912). See generally 3 Moore, op. cit. supra note 3, § 17.09, where Professor Moore comments that states following this rule have given substantive effect to the real party in interest provision where only procedural effect was intended by the original code-drafters. Under the Federal Rules an assignee for collection only is the real party in interest. Rosenblum v. Dingfelder, 11 F.2d 406 (2d Cir. 1940). Where such assignment is to a partial subrogee, the North Carolina rule would seem by implication to treat the respective claims of insurer and insured as separate causes of action. There appear to be no North Carolina cases directly in point.
and would be a violation of the anti-discrimination provision of the state's insurance laws.12

The other method involves the permissive splitting of a cause of action, which may be done in several ways. Generally, this can be accomplished only with the consent of the defendant. While it can be assumed that he will not consent if it would leave him liable to face prosecution in more than one suit for a single tort, it is possible to split the cause and still give him protection against multiplicity of suits.13 The insured can give the tort-feasor a release or a covenant not to sue for the uncompensated part of the claim. By accepting the release or covenant the tort-feasor consents to the splitting, but since the insured is now barred he will have to face only one suit for the loss.14 The consideration for the covenant or release can be any nominal amount if the tort-feasor is unwilling to pay the insured the actual amount of his uncompensated loss. It is essential that such a release clearly recite that only the part of the loss not covered by insurance is to be released. A release of the entire claim may result in a complete bar to action by either the insured or the insurer against the tort-feasor.15 For this reason it may be safer from the standpoint of the insurer to have the insured use a covenant, which is only a bar to suit by the covenanator (insured) rather than a bar to action on the claim itself.16

In Service Fire Ins. Co. v. Horton Motor Lines,17 a case similar to the principal one, the insurer commenced an action in its own name against the tort-feasor just prior to the running of the statute of limi-

12 N.C. Gen. Stat. §§ 58-44.3, -198 (1950). Quaere, what is the difference, other than in form, between a payment in excess of the insurance contract and a purchase by insurer of insured's claims, when the net result in either case would be to vest the real party in interest title in the insurer?

13 This is not to say, however, that the defendant cannot waive his right to this protection. This may be done by filing answers on the merits to separate complaints of the insurer and insured or simply by failing to enter a timely objection to the standing to sue of the insurer in a separate action by the latter. In failing to object the defendant impliedly consents to a splitting of the cause of action. Southern Stock Fire Ins. Co. v. Southern Ry., 179 N.C. 290, 102 S.E. 504 (1920).


15 Fidelity Ins. Co. v. Atlantic Coast Line Ry., 165 N.C. 136, 80 S.E. 1069 (1914), held that insurer was barred from suing the tort-feasor who had paid a judgment held by the insured for the entire loss. Powell & Powell, Inc. v. Wake Water Co., supra note 14, held that where tort-feasor has knowledge of insurer's rights prior to settlement, such release will be effective only as to insured's uncompensated loss, unless the payment was in excess of this loss, in which case the release would be a defense pro tanto to the extent of the excess amount paid. But see Casualty Reciprocal Exch. v. Kansas City Pub. Serv. Co., 230 Mo. App. 468, 91 S.W.2d 227 (1936), where insurer was barred even though tort-feasor had knowledge of subrogation rights prior to the settlement with insured. Contra, Camden Fire Ins. Ass'n v. Bleem, 132 Misc. 22, 227 N.Y. Supp. 746 (Buffalo City Ct. 1928); Brighthope Ry. v. Rogers, 76 Va. 443 (1881). These cases held that a release of tort-feasor by insured after subrogation had occurred is ineffective as a release of insurer's claim, regardless of notice to tort-feasor.


17 225 N.C. 588, 35 S.E.2d 879 (1945).
The defendant demurred on the ground that the insurer was not the real party in interest. After the statutory period had expired the insurer's motion to join the insured as a party plaintiff was granted. On appeal the court sustained the overruling of the demurrer on the ground that the statute of limitations is a plea in bar and may not be raised by demurrer. Although not put in issue by the demurrer, the following questions were present: When a partially subrogated insurer institutes an action in its own name before the statute of limitations has run, does the subsequent barring of the insured's claim by the statute also leave the insurer barred? Or does the expiration of the statute period result in the insurer becoming the "only party having an enforceable claim" and thus the legal real party in interest? An affirmative answer to the first question would be predicated upon the contention that the insurer was not the real party in interest before the statute ran and that the subsequent barring of the insured's claim should in no way alter that fact. Accordingly, under the doctrine of derivative rights of subrogation, the subrogee (insurer) should accede to no greater rights than those of the subrogor (insured), who would be barred by the statute. An affirmative answer to the second question perhaps could be sustained by reasoning that after the statute has run the insurer holds the only legally enforceable claim against which the tort-feasor could be forced to defend. Therefore, the defendant would be afforded the same protective rights embodied in the rule against splitting a cause of action and would not have to face a multiplicity of suits. Unfortunately, the court here did not meet this issue, and it has not yet been decided in this state. Although the latter position apparently has been accepted by one federal court, it would not appear safe to rely solely upon this method to vest the real-party title in a partially subrogated insurer. However, if no alternative were available, it might be argued as a last resort to avert the possibility of leaving the insurer remedyless in statute-of-limitation cases.

There is one other procedure possibly available to the insurer, that of waiver by the insured of his right in the claim. The plaintiff in the principal case endeavored to invoke this doctrine against the defendant's contention that the insurer was not the real party in interest. In a sworn affidavit, the insured expressly "disavowed any interest in said

18 Id. at 591, 35 S.E.2d at 881.
19 In regard to the plaintiff-insurer's right to sue in its own name after the running of the statute, the court, through Justice Barnhill, said: "What the respective rights of the parties may be in the event it is made to appear... that Medlin's [the insured's] claim for damages, in part, is still outstanding and unsatisfied, but his right of action is barred by the statute of limitations, so that the plaintiff [insurer] is now the only party having an enforceable claim, must be reserved for decision at the trial below. The facts there developed will control the ruling of the court." Ibid.
20 Yorkshire Ins. Co. v. United States, 171 F.2d 374 (3d Cir. 1948).
21 250 N.C. at 352, 108 S.E.2d at 618.
cause of action” and further declared “that she has no interest in this cause of action and that the sole remaining interest to be determined . . . is that of the Southeastern Fire Insurance Company . . . .” It was argued that the following testimony of the insured in open court under oath also constituted a waiver: “I have not filed any suit in connection with this automobile accident; I do not presently have any interest in it.” The plaintiff contended that if the current action were allowed to proceed to judgment through reliance upon these statements by the insured, then the insured would be estopped to institute any subsequent action against the defendant. The court, while it apparently recognized the plaintiff’s contention, did not discuss the question of waiver in its opinion. Thus, the criteria by which the court will be guided in this area remain unknown. If this jurisdiction is to allow such a waiver at all, it is difficult to envision a more appropriate opportunity for its application than that presented by the principal case. Waiver of rights ranging from those established under ordinary contracts and tort claims to those granted by the Constitution of the United States are frequently permitted under proper circumstances. There appears to be no valid reason why waiver by the insured in the situation at hand should not be allowed.

There is some language in the opinion of the principal case which indicates that the court may have based its decision in part upon the “loan receipt” signed by the insured. The original purpose for the use of the “loan” device by insurance companies was to prevent the real party in interest title from leaving the insured and vesting in the insurer upon full payment of the insured’s loss. The assumption was that the

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22 Record, p. 13.
23 Id. at 19.
24 250 N.C. at 352, 108 S.E.2d at 618.
25 Patton v. United States, 281 U.S. 276 (1930) (waiver of a constitutional right); Minneapolis Threshing Mach. Co. v. Hutchins, 65 Minn. 89, 67 N.W. 807 (1899) (waiver of right under a contract); People v. Brady, 257 App. Div. 1000, 13 N.Y.S.2d 789 (1939) (waiver of a right under the statute of limitations); Pascal v. Burke Transit Co., 229 N.C. 435, 50 S.E.2d 534 (1948). Cf. N.C. GEN. STAT. § 97-10 (1946), wherein the North Carolina Workman's Compensation Act provides that if the employer of the injured employee does not sue the third party tort-feasor within six months after the date of the injury, he waives this right, and the employee may bring the action himself, although the employer will still share in the recovery.
26 The court, through Justice Denny, quoted with approval 46 C.J.S. Insurance § 1209 (1946) : “Insurer's rights to subrogation accrue on payment of the insurance claim; but until payment of the claim on the policy no rights to subrogation accrue. An advance by insurer of the amount of insurance to insured under an agreement reciting that the amount was received as a loan to be repaid only from such recovery as might be had from the other party is not a payment entitling the insurer to subrogation.” 250 N.C. at 354, 108 S.E.2d at 620.
27 The receipt read, in part: “Received from the Southeastern Fire Insurance Company the sum of Four Hundred Sixty-One and 96/100 Dollars ($461.96) as a loan, without interest, repayable only in the event and to the extent of any net recovery the insured may make from any person . . . liable for the loss . . . .” Record, addendum, p. 1.
use of the insured's name would result in a more sympathetic treatment by the jury than if the insurance company itself brought the action.\textsuperscript{20} Where the insurance covers the entire loss, the question of who is the real party in interest may depend upon whether there as been in fact a loan or a full payment.\textsuperscript{20} However, this loan device is of very doubtful utility in the case of a claim arising under an automobile collision policy containing a deductible clause. Regardless of whether the insurer has paid or loaned the amount of the damage, less the deductible figure, the court will require the use of the insured's name as the real party in interest\textsuperscript{21} unless one of the procedures outlined above is employed to vest this title in the insurer.

**ALLAN W. MARKHAM**

**Torts—Insulating Negligence in North Carolina**

The doctrine of insulating negligence and the task of predicting how the court will hold in an intervening negligence situation continue to be problems in North Carolina. The issue of insulation arises when one party through a negligent act or omission has created an unreasonable risk of harm to others and a second actor through a subsequent act or omission brings the risk to reality to the injury of the plaintiff. The problem is whether the two tort-feasors may be held jointly liable or whether the first tort-feasor is insulated by the later negligence of the second tort-feasor. Our court has said that the problem of insulating negligence is one of proximate cause\textsuperscript{3} and that the test is whether the

\textsuperscript{20} Quaere, whether this assumption is valid today where often there is an insurer behind the plaintiff in automobile damage suits, and most jurors are aware of this fact.

\textsuperscript{21} In Cunningham & Hinshaw v. Seaboard Air Line Ry., 139 N.C. 427, 51 S.E. 1029 (1905), it was determined by the jury that the "loan" was in fact a full and final payment of the plaintiff-insured's claim by the insurer, thereby divesting the insured of any standing to sue on the claim. Contra, Sosnow, Kranz & Simcoe, Inc. v. Storatti Corp., 269 App. Div. 122, 54 N.Y.S.2d 780 (1945), where a suit in the insured's name under a similar loan agreement was permitted, as it did not prejudice the defendant, i.e., it would not allow the plaintiff a double recovery nor make the defendant liable to multiple suits for the same wrong. Accord, McCann v. Dixie Lake & Realty Co., 44 Ga. App. 700, 162 S.E. 869 (1932).

\textsuperscript{3} The court will not, however, raise the issue ex nulo nato if the defendant does not object. Southern Stock Fire Ins. Co. v. Southern Ry., 179 N.C. 290, 102 S.E. 504 (1920).