What Every Defense Attorney Needs to Know About the Antisubrogation Doctrine

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All defense attorneys know that there is something called "antisubrogation", that it may have an effect in many cases they are handling, and that it is, therefore, something they must understand. Although many defense attorneys cannot explain antisubrogation on the spot if asked to do so, with a little review they can master the doctrine if it becomes relevant in a matter they are handling.

Of course, it is relevant in many tort liability actions where there are multiple parties defendant, and it happens that attorneys sometimes misunderstand antisubrogation. Sometimes the doctrine, though applicable, is overlooked completely and sometimes, though inapplicable, the doctrine is successfully argued. This may occur because analysis of whether the antisubrogation doctrine applies and what effect the antisubrogation doctrine may have in any matter requires both an insurance coverage analysis and a tort liability defense analysis.

We are discussing the common law antisubrogation doctrine applicable in tort liability actions addressed by the Court of Appeals in *Pennsylvania General Insurance Co. v. Austin Powder Co.*[1] and *North Star Reinsurance Corp. v. Continental Insurance Co.*[2] We are not here discussing the 2009 statute limiting a motor vehicle insurer's ability to recover no fault benefits in subrogation and we are not discussing waiver of subrogation that arises from express provisions in insurers' policies. There are over 200 reported decisions addressing the antisubrogation doctrine in New York and there is a small degree of conflict in the authorities. As this note is, at most, a primer and not a treatise, we address here the substantial weight of the authorities.

Subrogation

An understanding of the antisubrogation doctrine must begin with at least a rudimentary understanding of subrogation in the context of liability insurance. When an insured owes an obligation to one party (for instance, money damages due an injured plaintiff in a personal injury action) and a liability insurer satisfies its insured's obligation to that party (by paying the injured plaintiff), that liability insurer typically acquires its insured's right to recover the entire amount paid from any other party that is obligated to indemnify its insured (or to recover a portion of the amount paid from any party that owes its insured a portion in contribution).[3] It is frequently stated that subrogation permits an insurer to "stand in the shoes" of its insured:

> Subrogation, an equitable doctrine, entitles an insurer to "stand in the shoes" of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse (see, *Pennsylvania General*, 68 NY2d at 471; 16 Couch on Insurance 2d § 61:37 [rev ed]; Keeton and Widiss, Insurance Law § 3.10[a]). Subrogation allocates responsibility for the loss to the person who in equity and good conscience ought to pay it, in the interest of avoiding absolution of a wrongdoer from liability simply because the insured had the foresight to procure insurance coverage (see, 16 Couch on Insurance 2d § 61:18 [rev ed]). The right arises by operation of law when the insurer makes payment to the insured (see, 16 Couch on Insurance 2d §§ 61:4 [rev ed]).[4]

The Antisubrogation Doctrine

Where an insurer is obligated to defend and/or indemnify two or more insureds pursuant to (a) the same policy ***or*** (b) a General Contractor's Liability (GCL) or Commercial General Liability (CGL) policy and an Owners and Contractors' Protective policy (OCP) purchased from the insurer by the same party, pursuant to the antisubrogation doctrine such an insurer (and only such an insurer) is precluded from becoming subrogated to the rights of any one of its insureds against any other insured the insurer is obligated to defend and/or indemnify pursuant to the same policy or combination of policies.

The antisubrogation doctrine was expressly adopted by the Court of Appeals in *Pennsylvania General* to preclude an insurer that had already paid an entire loss on behalf of one insured on a liability policy from seeking to recover the amount paid through prosecution of that insured's indemnity claim against another insured on the same liability policy. With the entire loss already paid by the sole primary insurer, neither the insured nor any excess insurer had a financial interest in the indemnity claim. Thus, prosecution of the indemnity claim was pursued for the sole benefit of the primary insurer that also insured the putative indemnitor.

The problem identified by the Court of Appeals is that in such an instance permitting the insurer to

prosecute, for its own financial benefit, an indemnity claim against another insured that the insurer was obligated to defend pursuant to the policy under which the insurer made its payment would allow the insurer to "*pass the incidence of loss*" back to its own insured, thereby breaching its obligation to defend one of its insureds even though the insurer accepted a premium to protect that insured against such a claim. The Court of Appeals wrote:

> The insurer's right of subrogation, long recognized as a matter of equity, has traditionally been applied to claims against third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse (citations omitted). A third party, by definition, is one to whom the insurer owes no duty under the insurance policy through which its loss was incurred (citations omitted). On the other hand, it has often been said that an insurer may not be subrogated to a claim against its own insured, at least when the claim arises from an incident for which the insurer's policy covers that insured (see, e.g., Chrysler Leasing Corp. v. Public Administrator, 85 A.D.2d 410, 448 N.Y.S.2d 181; Beck v. Renahan, 26 A.D.2d 990, 275 N.Y.S.2d 1010, *affg.* 46 Misc.2d 252, 259 N.Y.S.2d 768; 16 Couch, *op. cit.* §§ 61:133, 61:134; see *also*, Hartford Acc. & Indem. Co. v. Michigan Mut. Ins. Co., 61 N.Y.2d 569, 475 N.Y.S.2d 267, 463 N.E.2d 608). The principal, although alluded to in our prior decisions (Hartford Acc. & Indem. Co. v. Michigan Mut. Ins. Co., *supra*, p. 573, 475 N.Y.S.2d 267, 463 N.E.2d 608), has never been formally addressed by this court. Having considered the relevant authorities, we now conclude that the rule is a sound one. To allow the insurer's subrogation right to extend beyond third parties and to reach its own insured would permit an insurer, in effect, "to pass the incidence of the loss * * * from itself to its own insured and thus avoid the coverage which its insured purchased" (Home Ins. Co. v. Pinski Bros., 160 Mont. 219, 226, 500 P.2d 945, 949, *supra*).
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> The rule against allowing subrogation claims against an insured is based, in part, on the potential for conflict of interest that is inherent in these situations (see, e.g., Chrysler Leasing Corp. v. Public Administrator, *supra*; Home Ins. Co. v. Pinski Bros., *supra*, 500 P.2d p. 949). Here, for example, the interests of the insured indemnitor, Austin Powder, can only be fully protected through the vigorous defense of the indemnitee, Bison Ford. Yet, if indemnification from Austin Powder could be had for losses sustained on Bison Ford's behalf, Liberty Mutual would have less incentive to defend Bison Ford from claims made against it. As a consequence, allowing indemnification might sanction an indirect breach of the insured's obligation to defend its insured Austin Powder. Furthermore, it would sanction a direct breach of the primary obligation the insurer undertook-the obligation to indemnify Austin Powder from loss (see, Home Ins. Co. v. Pinski Bros., *supra*, p. 949.[5]

When an insurer's right to subrogation arises from an insurance policy that is separate from and unrelated to the insurance policy pursuant to which the insurer must defend an indemnitor, the common law antisubrogation doctrine has no application.

For instance, where the same insurer issues unrelated automobile liability policies to unrelated motorists whose cars just happen to collide, or where a building owner and a maintenance contractor place their general liability coverage separately, but coincidentally, with the same insurer, the antisubrogation doctrine will not preclude the insurer from standing in the shoes of an insured under one policy to enforce a right against someone who is an insured under an unrelated policy issued by the same insurer.[6]

However, where the same insurer issued a CGL to a contractor and an OCP or Railroad Protective policy purchased by that contractor for the protection of the owner, the Court of Appeals held that the antisubrogation doctrine precluded the mutual insurer from standing in the shoes of the owner (its insured under the OCP) to pursue the contractor (its insured under the CGL). The Court again held that, "*[p]ublic policy requires this exception to the general rule both to prevent the insurer from passing the incidence of loss to its own insured and to guard against the potential for conflict of interest that may affect the insurer's incentive to provide a vigorous defense for its insured*", and extended the rule articulated in *Pennsylvania General:*

> The policy considerations underlying *Pennsylvania Gen.*, preventing the insurer from recouping the insurance proceeds from its insured, and avoiding the potential for conflict of interest when the parties' insurer is subrogated against an insured, are equally applicable herein. The OCP and GCL were purchased together as coverage against the same risk and paid for by the same party (citations omitted), and, as in *Pennsylvania Gen.*, the covered loss occurred. Application of *Pennsylvania Gen.* is warranted because the two policies are integrally related and indistinguishable from a single policy in any relevant way.[7]

Is the Antisubrogation Doctrine Implicated?

Where (1) an insurer is obligated to defend two or more insureds on a single policy (or on related OCP or Railroad Protective and CGL policies), (2) two or more of those insureds are subject to liability, directly or indirectly, arising from the same injury or loss, and (3) one of those insureds has a right of indemnity or

contribution against another of those insureds, the antisubrogation doctrine will preclude such an insurer from becoming subrogated to the rights one of its insureds has against another of its insureds.

The first step is to determine whether any insurer has more than one insured subject to direct (to plaintiff) or indirect (indemnity or contribution) liability in a matter. The antisubrogation doctrine has potential application in any matter in which a single liability insurer has at least two insureds on a single policy or on a CGL and an OCP or Railroad Protective policy.

Such insureds may be "Named Insureds", "Additional Named Insureds", "Additional Insureds", expressly named, covered by virtue of the "*Who is an Insured*" provision, insured pursuant to a blanket additional insured endorsement, a "permissive user", or insured in any manner at all.[8] Matters in which at least two insureds on a single policy or in a CGL/OCP combination are frequently subject to exposure include, but are not limited to, construction accident litigation (owners, general contractors, and subcontractors), premises liability cases (landlords, tenants, and maintenance contractors), and motor vehicle accident litigation (owner, lessor, lessee, driver's employer, and/or driver). If there is not a single insurer with at least two insureds on a single policy (or on a CGL and an OCP), then there is no need for further consideration of the antisubrogation doctrine.

The second step is to determine whether any insurer with more than one insured subject to exposure in the matter owes a duty to defend both insureds. An insurer may have two insureds subject to liability, but if the insurer does not owe one of its insureds a duty to defend in the matter the antisubrogation doctrine does not preclude the insurer from standing in the shoes of another insured to proceed against that insured.[9]

In addressing the facts in the *North Star* case (one of three sets of facts the Court of Appeals addressed in the *North Star* decision), the Court of Appeals wrote, "*because exclusions in the GCL rendered that policy inapplicable to the loss, the anti-subrogation rule does not apply in that case.*"

This scenario presents itself in many different forms, including when the injured person is a contractor's employee and coverage for the named insured contractor is excluded under a standard CGL "employee injury exclusion" but available to the owner as an additional insured under the same CGL. The injured employee sues the owner, for whom there is additional insured coverage under the CGL issued to the contractor, and the CGL insurer defends the owner. Alleging that plaintiff's injuries are "grave", the owner seeks common law indemnity from the contractor (plaintiff's employer) and with coverage excluded under its CGL the contractor (plaintiff's employer) is defended only under its employer's liability policy.

It may seem peculiar that the CGL insurer – which issued the policy under which it is defending the owner not to the owner, but rather to the contractor – is permitted to stand in the owner's shoes and pursue the owner's common law indemnification claim against the contractor (who paid the insurer's premium), but the courts have consistently held that where the CGL insurer has no obligation to defend its named insured (the contractor) against liability arising from injuries to the contractor's own employees, there is no violation of the antisubrogation doctrine when the CGL insurer proceeds against its own insured standing in the shoes of the owner.[10]

It must be emphasized that in such an instance, due to the employee injury exclusion, the CGL insurer's policy places it under no obligation whatsoever to defend against the very claim it is prosecuting (a claim of injury to the contractor's employee), and thus, the CGL insurer is not, in such an instance, avoiding any coverage that the contractor purchased.[11]

The third step is to determine whether one of the insureds that the insurer is obligated to defend has a right of indemnity or contribution against another of the insureds that the insurer is also obligated to defend.

If one insurer is obligated to defend two or more insureds on a single policy (or on a CGL and OCP), two or more of those insureds are subject to liability directly or indirectly arising from the same injury or loss, and one of those insureds has a right of indemnity or contribution against another of those insureds, the antisubrogation doctrine is implicated and applies to preclude that insurer from becoming subrogated to the rights one of its insureds has against another of its insureds.

Where the Antisubrogation Doctrine is Implicated, What is the Effect?

As discussed above, the antisubrogation doctrine precludes an insurer that has two insureds from becoming subrogated to the rights that one of its insureds has against another of its insureds. But what does this mean in any particular action?

One of the things that make it difficult to fully appreciate and understand the antisubrogation doctrine is that even after ascertaining that it is implicated, further analysis is required to determine whether it will have any effect, and if so, what effect, in a matter. Where it is implicated its ultimate effect