What Every Defense Attorney Needs to Know About the Antisubrogation Doctrine

BY TIMOTHY J. KEANE *

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

in a matter may be a bit different in almost every case depending upon a broad array of factors including, but not limited to, whether the extent of the loss is already fixed, the extent of the loss or exposure, the amount of insurance available to the indemnitee, the priority of insurance coverage and whether the indemnitee has exposed coinsurers and/or excess insurers, whether the indemnitee has uninsured exposure, whether the indemnitee has co-defendants also entitled to indemnity from the indemnitor, the existence of other indemnitors, whether indemnitee and indemnitor are co-defendants or third-party plaintiff and third-party defendant, whether employers' liability coverage is triggered by a "grave injury", and whether the claims that can be asserted in good faith are for only contribution and common law indemnity or include viable claims for contractual indemnity.

In some instances an insurer's preclusion from becoming subrogated to the rights that one of its insureds has against another of its insureds may have no effect on the ultimate outcome of the matter due to the existence of other insurers and/or other parties whose rights to proceed against all others are not precluded. When a judgment can be entered and enforced against two or more defendants and the antisubrogation doctrine precludes one insurer of only one defendant from proceeding against a third-party defendant, against which defendant(s) the judgment gets entered may be quite relevant.

Though the fact pattern permutations are seemingly endless, and changing one seemingly insignificant fact while keeping twenty-five other key facts the same can change the outcome substantially, understanding of what the antisubrogation doctrine is and is not allows proper application of the doctrine on a case by case basis, as is required.

Perhaps the most important thing to understand about the antisubrogation doctrine is that when an insurer is precluded from becoming subrogated to the rights of one of its insureds (i.e., when the doctrine is implicated), only the insurer that has an obligation to the putative indemnitor is precluded. The antisubrogation doctrine is an infirmity that only disqualifies an insurer from seeking to recover (or recovering) in subrogation against its own insured.[12] The antisubrogation doctrine does not eliminate one insured's right to recover in indemnity from another insured and does or curtail insurers that insure the indemnitee, but not the indemnitor, from becoming subrogated to the indemnitee's rights.[13]

Examples

Assume a "grave injury" loss with projected maximum exposure of $5,000,000, a $1,000,000 primary CGL issued to a contractor, an unlimited employer's liability policy also issued to the contractor, another $1,000,000 primary CGL issued to an owner, and no excess insurance at all. Assume further that the $1,000,000 primary CGL issued to the contractor provides applicable coverage for both the contractor and the owner and that the CGL issued to the owner provides applicable coverage for only the owner. Plaintiff, an employee of the contractor, commences an action against only the owner and the owner commences a third-party action for common law and contractual indemnity against only the contractor. All agree that the owner will be held liable to plaintiff but that said liability will be only vicarious liability and that the owner will have a right of common law and contractual indemnity against the contractor.

The antisubrogation doctrine does not render such a third-party action dismissible.[14] Rather, the third-party action must be limited to preclude recovery to the extent that the loss is covered under the common insurance coverage, but allow recovery to the extent that the loss is not covered under the common insurance coverage. Since the amount of the loss is not yet fixed, it cannot be said that the contractor's CGL insurer is the only real party in interest, and thus, to uphold the owner's right to obtain indemnity from the contractor and the right of the insurer that issued the CGL to the owner to be subrogated to the owner's right, the third-party action must be permitted to proceed, subject only to the limitation that there can be no recovery to the extent that the loss is covered under the common insurance coverage.

Now assume, in the same hypothetical as above, that the insurer on the $1,000,000 primary CGL issued to the contractor settled with plaintiff, obtaining a complete release for the owner, for the sum of $950,000 with the entire amount paid by said insurer. Now, with the only recovery possible being for the benefit of the common insurer, the common insurer is the only real party in interest. Thus, in this hypothetical the third-party action (brought in the name of the owner but at this time continued only for the benefit of the common insurer) is subject to dismissal based upon the antisubrogation doctrine.

Now, change the hypothetical again to reflect that the insurer on the $1,000,000 primary CGL issued to the contractor and the insurer on the $1,000,000 primary CGL issued to the owner both had to exhaust their $1,000,000 limits, and in addition $500,000 was required from the owner's personal assets to settle the case with plaintiff, i.e., a gross settlement of $2,500,000.

Once again, the antisubrogation doctrine does not render such a third-party action dismissible. Again, the third-party action must be limited to allow recovery

to the extent that the loss is not covered under the common insurance coverage but to preclude recovery to the extent that the loss is covered under the common insurance coverage.

Because the owner and the insurer on the CGL issued to the owner paid $500,000 and $1,000,000 respectively, the contractor's CGL insurer is not, in this hypothetical, the only real party in interest. The owner and the insurer on the CGL issued to the owner can collectively recover $1,500,000 from the contractor, but due to the antisubrogation doctrine the insurer on the CGL issued to the contractor cannot be subrogated to the owner's right to recover from the contractor.

As mentioned above, there are scenarios in which the antisubrogation doctrine will have no effect on the amount the various insurers must ultimately pay. In the $2,500,000 settlement hypothetical, the contractor's $1,000,000 CGL limit was exhausted once it paid on behalf of the owner, but it would also have been exhausted had it remained available to satisfy the contractor's indemnity obligation to the owner, and thus, the antisubrogation doctrine did not alter the amounts that the contractor's CGL and employer liability insurers had to pay. However, in the $950,000 settlement hypothetical, the contractor's CGL insurer ultimately had to pay the entire loss.

Had antisubrogation not been an issue (for instance, as would have been the case if the insurer that issued the CGL to the owner been the sole primary insurer for the owner, i.e., obligated to exhaust without a right of contribution from the insurer that issued the CGL to the contractor), once the loss was passed through to the contractor on the basis of both common law and contractual indemnity the contractor's employer liability insurer would typically be responsible for at least half of the loss, or $475,000 in that hypothetical.

It has been recognized that application of the antisubrogation doctrine may result in what seems to be a windfall for employer liability and excess insurers. The Court of Appeals in *North Star* was aware that the rule it addressed did not concern an insurer's efforts to *"recoup[] the insurance proceeds from its insured"*, but rather concerned efforts to shift losses to employers' liability and excess insurers:

> As is apparent in the present cases, the mutual insurer, as subrogee of the owner, can fashion the litigation so as to minimize its liability under the GCL. By failing to assert a contractual indemnification claim on the owner's behalf, the insurer can trigger coverage under other insurance policies held by the contractor such as a workers' compensation or excess policy (see, *National Union*, 790 F Supp at 492; Covert, 117 Misc 2d at (1080).[15]

Against the background of the Court of Appeals' discussion of employers' liability and excess insurers, not surprisingly an insurer's preclusion under the antisubrogation doctrine against proceeding under a conflict of interest and seeking to recoup amounts from one's own insured has been understood to inure to the benefit of the putative indemnitor's other insurers.[16] This is not surprising when considered in light of the obligation of utmost good faith running from an insurer handling a mutual insured's defense to the insured's other insurers.[17]

Based, as it is in part, on the need for the insurer to avoid an inherent conflict of interest, an insurer is precluded from becoming subrogated to rights against its own insured as soon as the insurer becomes obligated to defend the putative indemnitor.[18] Regardless of whether the two insureds are co-defendants asserting cross-claims or third-party plaintiff and third-party defendant in a third-party action, the common insurer is precluded from becoming subrogated to one insured's claim against another insured under the same or a related policy.[19]

An insurer may be under an obligation to the insured indemnitee and/or one or more of the indemnitee's other insurers to, in the name of the insured indemnitee, commence a third-party action or assert a cross-claim against its own insured (the indemnitor). Although the antisubrogation doctrine precludes an insurer from commencing or maintaining a third-party action or asserting a cross-claim against its own insured for the insurer's own benefit, the antisubrogation doctrine does not preclude an insurer from commencing or maintaining a third-party action or asserting a cross-claim against its own insured when there is exposure to the insured indemnitee and/or one or more of the indemnitee's other insurers.

In such an instance the indemnity or contribution claim must be asserted, but the indemnity or contribution claim must be asserted for the benefit of the indemnitee and/or the indemnitee's other insurers who remain, under such circumstances, the real parties in interest.[20] Such a claim may not be asserted for the benefit of the common insurer as the antisubrogation doctrine precludes an insurer from prosecuting, for its own benefit, a claim against its own insured.[21]

The doctrine does not preclude an insurer from prosecuting, for the benefit of one insured or co-insurers, a claim against its own insured, and prosecuting such a claim is sometimes required, but an insurer cannot have a stake in the claim against its own insured. It cannot be a real party in interest vested against its own insured. The rule, when an

insurer must prosecute (for the benefit of one insured or co-insurers) a claim against its own insured the insurer cannot prosecute the claim for its own benefit, effectively removes the financial interest the insurer would otherwise have in seeing that the defense it affords the insured indemnitor is unsuccessful.

How is Compliance with the Antisubrogation Doctrine Enforced?

In the first instance insurers enforce the antisubrogation doctrine by refraining from maintaining claims against their own insureds for their own financial benefit. Most insurers respect the mandate of the antisubrogation doctrine, do not knowingly violate the rule, and when called upon to come into conformance with the rule, do so.

When the antisubrogation doctrine is raised as a defense to an indemnity claim, the courts limit recovery on the indemnity claim in accordance with the antisubrogation doctrine to allow recovery to the extent that the loss is not covered under the common insurance coverage. For example, recovery on an indemnity claim may be, "*limited to an amount in excess of the applicable insurance policy limits, because indemnification is barred by the antisubrogation rule up to the amount of the applicable insurance policy limits*".[22]

Where the antisubrogation doctrine has not been addressed in underlying tort litigation, the courts will address the effect of the doctrine in a declaratory judgment action or a coverage action brought after judgment is entered in the underlying tort action or after the underlying tort action is settled with a reservation of rights.[23]

The New York State Superintendent of Insurance has jurisdiction to investigate violations of the antisubrogation doctrine and on at least one occasion the Attorney General of the State of New York has brought an action for "Violation of the Common Law Anti-Subrogation Rule".[24]

Conclusion

If the antisubrogation doctrine is implicated it may have no effect whatsoever, but it may have a multimillion dollar effect on who ultimately must pay what amount in a matter. Proper analysis of whether the antisubrogation doctrine is implicated and what effect it may have requires both coverage analysis and liability defense analysis. Such analysis is particularly likely to be of value when any insurer in the matter has multiple insureds under one policy or related policies and where there are multiple parties defendant in high value tort litigation.

* **Timothy J. Keane** is a partner at Quirk and Bakalor, P.C. and President of DANY.

1 *Pennsylvania General Insurance Co. v. Austin Powder Co.*, 68 N.Y.2d 465, 510 N.Y.S.2d 67 (1986).

2 *North Star Reinsurance Corp. v. Continental Insurance Co.*, 82 N.Y.2d 281, 604 N.Y.S.2d 510 (1993).

3 There are sometimes important distinctions between an insurer's right to equitable subrogation and an insurer's right to contractual subrogation, but in most cases the insurer's policy will afford it a broad right of contractual subrogation.

4 *North Star, supra.* This quote addresses equitable subrogation based upon a third-party's wrongdoing. An insurer's right of contractual subrogation typically does not require evidence of wrongdoing on the part of the third party against which the subrogee can proceed.

5 *Pennsylvania General, supra.*

6 *North Star, supra,* at Fn. 4; *see also Hartford Acc. and Indem. Co. v. Michigan Mut. Ins. Co.*, 61 N.Y.2d 569, 463 N.E.2d 608, 475 N.Y.S.2d 267 (1994).

7 *North Star, supra.*

8 *Jefferson Ins. Co. v. Travelers Indem. Co.*, 92 N.Y.2d 363, 681 N.Y.S.2d 208 (1998).

9 *Id.*

10 See, e.g., *Larson v. City of New York*, 214 A.D.2d 413, 625 N.Y.S.2d 898 (1st Dept. 1995).

11 Change the facts ever so slightly, by adding a claim for contractual indemnity and a CGL policy containing an "insured contract" exception to the employee injury exclusion, and the antisubrogation doctrine would preclude the CGL insurer from standing in the shoes of the owner.

12 The antisubrogation doctrine has also been applied to preclude a self-insured car rental company from obtaining indemnity from a car rental customer, though the self-insured car rental company was permitted to seek indemnity for amounts in excess of the statutory minimum insurance it was obligated to maintain for the customer. *See, ELRAC, Inc. v. Ward*, 96 N.Y.2d 58, 724 N.Y.S.2d 692 (2001).

13 *See, e.g., Flowers v. K.G. Land New York Corp.*, 219 A.D.2d 579, 631 N.Y.S.2d 177 (2d Dept. 1995); *see also, Aprea v. Willets Point Contracting Corp.*, 215 A.D.2d 708, 627 N.Y.S.2d 76 (2d Dept. 1995).

14 *Id.*

15 *North Star, supra.*

16 *See generally, National Union Fire Insurance Company of Pittsburgh, Pa. v. Hartford Insurance Company of the Midwest*, 248 A.D.2d 78, 677 N.Y.S.2d 105 (1st Dept. 1998).

17 *Hartford Acc. and Indem. Co. v. Michigan Mut. Ins. Co.*, 93 A.D.2d 337, 341 (1st Dept 1983), *aff'd*, 61 N.Y.2d 569 (1984).

18 *Cuzzi v. Brook Shopping Center, Inc.*, 287 A.D.2d 403, 731 N.Y.S.2d 717 (1st Dept. 2001).

19 *Pennsylvania General, supra; see also, Pitruzello v. Gelco Builders, Inc.*, 304 A.D.2d 302, 757 N.Y.S.2d 280 (1st Dept. 2003); *Cuzzi supra.*

20 See Note 12.

21 *Bruno v. Price Enterprises*, 299 A.D.2d 846, 848, 752 N.Y.S.2d 180, 182 (4th Dep't 2002); *Pennsylvania General, supra; North Star, supra.*

22 *Bruno, supra.*

23 *AIU Ins. Co. v. Nationwide Mutual Ins. Co.*, 62 A.D.3d 421, 878 N.Y.S.2d 52 (1st Dept. 2009); *Federal Insurance Company v. North American Specialty Ins. Co.*, 47 A.D.3d 52, 847 N.Y.S.2d 7 (1st Dept. 2007) (*Federal's claim that CUIC manifested a "conscious disregard" for Federal's rights [citation omitted] by allowing one of its insureds, the owners, to escape liability in violation*

of the antisubrogation rule, thereby removing one of its policies [OCP] from the layer of coverage that had to be exhausted before triggering Federal's excess coverage, sufficiently states a cause of action for bad faith); *Liberty Mutual Ins. Co. v. Aetna Cas. & Surety Co.*, 235 A.D.2d 523, 652 N.Y.S.2d 764 (2d Dept. 1997), (insurer unable to enforce a lower "*step down*" coverage limit applicable to putative indemnitor due to antisubrogation doctrine); *National Union Cas. Co. v. State Insurance Fund*, 227 A.D.2d 115, 641 N.Y.S.2d 665 (1st Dept. 1996); *Travelers Indemnity Co. v LLJV Dev. Corp.*, 227 A.D.2d 151, 643 N.Y.S.2d 520 (1st Dept. 1996).

[24] *State of New York v. Elrac, Inc., Snorac, Inc., and Enterprise Rent-a-Car Company, Inc., (N.Y. Sup. Ct., Index No. 402073/00).*