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INSURANCE - RIGHT OF INSURER AGAINST AN INSURED WHO HAS RELEASED THE TORTFEASOR AFTER RECEIVING PAYMENT FROM THE INSURER

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INSURANCE — RIGHT OF INSURER AGAINST AN INSURED WHO HAS RELEASED THE TORTFEASOR AFTER RECEIVING PAYMENT FROM THE INSURER — Plaintiff insured the defendant against loss on his car due to collision, paid its liability when the defendant's car was damaged by a third party, and took an assignment of plaintiff's claim against the third party to that extent. Defendant then released the third party from liability and plaintiff brought this action to recover the amount paid to the defendant. *Held*, plaintiff could recover from defendant only for the loss it had sustained by the release, and since plaintiff had failed to prove it could have recovered anything from defendant, it had shown no cause of action. *Century Ins. Co. v. Joachim*, 17 N. J. Misc. 229, 8 A. (2d) 191 (1939).

The insurer, on paying to the insured the amount of the loss for which it is liable, acquires the right to be subrogated, pro tanto, to the insured's right of action against a third party who is responsible for the compensated loss.[1] The insurer is, however, subrogated only to such rights as the insured could enforce, and its right may as a general rule be defeated by release given before or after the loss.[2] Nevertheless, a release by the insured to the wrongdoer will not destroy the insurer's claim, if the wrongdoer paid less than the full amount of

[1] Sea Ins. Co. of Liverpool, England v. Vicksburg, S. & P. Ry., 86 C. C. A. (5th) 544, 159 F. 676 (1908); Ocean Accident & Guarantee Corp. v. Hooker Electrochemical Co., 240 N. Y. 37, 147 N. E. 351 (1925); Aetna Ins. Co. v. Hann, 196 Ala. 234, 72 So. 48 (1916).

[2] 36 A. L. R. 1267 (1925); 8 COUCH, CYCLOPEDIA OF INSURANCE LAW, § 2001 (1931); Pacific Fire Ins. Co. v. L. A. D. Motors Corp., 136 Misc. 594, 240 N. Y. S. 372 (1930).

damages and obtained the release with knowledge of the insurer's payments.[3] Where the release given to the wrongdoer is binding on the insurer, it may recover from the insured at least any excess [4] (not exceeding the amount paid as insurance) received by the insured over the amount of his loss.[5] Some cases, however, have allowed the insurer to recover the amount which it paid, allowing the insured the expense of collection, regardless of whether the insured has recovered the full amount of his loss.[6] These cases are supported by the arguments that had the release been given before the insurer had paid, then the insured could not recover from the insurer, and should not be in any better position because he had collected from the insurer first and then given his release; [7] and that the insured cannot claim that his loss was greater than the amount received for the release, as he did not ascertain his claimed loss by prosecuting the case through to a final judgment.[8] However, it would appear that the majority view [9] is more desirable, as otherwise the insurance has not served its purpose, namely that of protecting the insured from loss, for which he has paid. Two bases for allowing the insurer to recover from the insured in this situation have been developed by the courts: (1) that the insured becomes a trustee for the insurer of the fund paid by the wrongdoer, which the insurer may recover in a suit in equity; [10] (2) that the law creates an implied promise on the part of the insured to repay an amount paid as indemnity for damages suffered when the party who caused such damages has also made good the damages to the injured party.[11] The first theory is the one which has been most widely recognized by the courts passing on this question. It would seem that the theory on which recovery

[3] Hamilton Fire Ins. Co. v. Greger, 246 N. Y. 162, 158 N. E. 60 (1927); Wolverine Ins. Co. v. Klomparens, 273 Mich. 493, 263 N. W. 724 (1935); Kidd v. Hillman, 14 Cal. App. (2d) 507, 58 P. (2d) 662 (1936).

[4] The excess is the total amount received by the insured minus the loss and any costs of collection incurred. Shawnee Fire Ins. Co. v. Cosgrove, 85 Kan. 296, 116 P. 819 (1911). It has been held, however, that the cost of collection is not receivable by the insured where he has given the release with intent of defeating the insurer's right of subrogation. Illinois Automobile Ins. Exchange v. Braun, 280 Pa. 550, 124 A. 691 (1924).

[5] American Bonding Co. v. Silberman, 207 Ill. App. 466 (1917); Shawnee Fire Ins. Co. v. Cosgrove, 85 Kan. 296, 116 P. 819 (1911).

[6] Illinois Automobile Ins. Exchange v. Braun, 280 Pa. 550, 124 A. 691 (1924); Monmouth County Mutual Fire Ins. Co. v. Hutchinson, 21 N. J. Eq. 107 (1870); Pontiac Mutual County Fire & Lightning Ins. Co. v. Sheibley, 279 Ill. 118, 116 N. E. 644 (1917).

[7] Illinois Automobile Ins. Exchange v. Braun, 280 Pa. 550, 124 A. 691 (1924).

[8] Pontiac Mutual County Fire & Lightning Ins. Co. v. Sheibley, 279 Ill. 118, 116 N. E. 644 (1917).

[9] 36 A. L. R. 1267 at 1270 (1925).

[10] Monmouth County Mutual Fire Ins. Co. v. Hutchinson, 21 N. J. Eq. 107 (1870); Watson v. Travelers Mutual Casualty Co., 146 Kan. 623, 73 P. (2d) 64 (1937); Railroad Co. v. Blaker, 68 Kan. 244, 75 P. 71 (1904).

[11] Hamilton Fire Ins. Co. v. Greger, 246 N. Y. 162, 158 N. E. 60 (1927); Darrell v. Tibbits, L. R. 5 Q. B. Div. 560 (1880); Universal Ins. Co. v. Millside Farms, 119 N. J. L. 534, 197 A. 648 (1938).

is based, whether at law or equity, is of importance mainly in determining the form of the trial, as the courts do not differ as to the measure of recovery, regardless of the theory adopted.

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