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Horn: Subrogation in Insurance Theory and Practice

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RECENT BOOKS

SUBROGATION IN INSURANCE THEORY AND PRACTICE. By *Ronald C. Horn.* Homewood, Illinois, Richard D. Irwin, Inc. 1964. Pp. xxv, 371. $6.95.

Subrogation has long been one of the mysteries of the insurance business. The law of subrogation has been inadequately stated and understood; statistical or even descriptive information about insurance company practices and recoveries has been very difficult to procure. Indeed, a curious thing about the insurance business—a business that necessarily deals statistically with great masses of information—is the large amount of relevant and useful information that is not accessible.[1]

In this state of knowledge about subrogation, the appearance of this book raised hopes that unfortunately it did not satisfy. Fuller reflection upon the difficulties of the task has led this reviewer to a more generous appraisal of the actual accomplishment than he would first have made. But a definitive treatment of the subject remains far in the future. This is not to suggest that Mr. Horn purported to write the final statement on subrogation as he holds modest enough views of his own accomplishment. However, the broad sweep of the title and the comprehensiveness of the coverage led at least one hopeful reader to expect more than could be found.

The book begins with a discussion of subrogation theory, by which the author seems to mean the legal doctrine of subrogation and other relevant legal doctrines. This is the least satisfying and least original part of the book, as one would expect from the fact that the author is not a lawyer. He does not handle legal materials with the sure touch one might expect from hands more accustomed to writing about legal problems. Despite a remarkably wide range of information and substantial understanding of the relevant legal materials, a certain lack of sophistication is evident. For example, the author continually returns to a notion expressed in his very first paragraph that, "as long as our society feels that, in equity and good conscience, debt should be ultimately discharged by the party(ies) primarily responsible, subrogation seems an indispensably important means of effecting that end."[2] If the sentence were modified to say that subrogation is a very useful tool to achieve that end, the sentence would be more nearly accurate. But even then the idea is far

1. An even more striking example is the difficulty that exists in getting reliable comparisons of cost in participating life insurance. Professor Belth of Indiana is trying to fill a part of that gap, mainly by developing some standards for measuring comparative cost. BELTH, PARTICIPATING LIFE INSURANCE SOLD BY STOCK COMPANIES (1965) deals with the problem to some extent. Other work on which he is engaged will attack the problem even more directly and fully.

2. P. 3.

less meaningful and profound than the author supposes, for the determination of who is to be regarded as "primarily responsible" is very complex. The presence or availability of insurance is a relevant consideration in the inquiry, while the expense and uncertainty of subrogation is another. The placement of primary responsibility is the conclusion of the syllogism, not a premise of it. By way of illustration, the primary liability shibboleth leads to an apparent belief that considerable expense is justified in efforts by one insurer to make subrogation recoveries against another, not simply as a matter of self-interest, but so that the insurer of the person primarily responsible will pay. Knock-for-knock agreements are criticized, therefore, not because of the danger that policyholders may be cheated out of their deductibles, but "because of the inequities they yield in the ultimate rate structures."[3] The possibility of saving in the total cost of insurance protection is apparently unimportant. While is is quite true, as the author rightly points out, that no lawyer has yet produced a comprehensive treatment of the law of insurance subrogation, many aspects of the subject have been treated, and sometimes better and with more sophistication than by this book.

Perhaps least adequate of all was the treatment of the "subrogation devices"—the loan receipt, the trust receipt, the subrogation receipt.[4] One might have expected from an insurance scholar a much more searching inquiry into the battle of the forms between insurers and carriers that centered on the loan receipt and the "benefit of insurance" provision of the bill of lading than one would expect from an ordinary lawyer, but the treatment is so sketchy as to be almost trivial.[5] The author's understanding of the relationship of these forms to the real party in interest statutes seems adequate, but it also adds nothing to existing literature.[6]

In the part of the book treating "Subrogation Practice," there is some discussion that is much more valuable than the "theoretical" part and makes a real contribution. For example, the chapter on the use of arbitration contains a great deal of useful and otherwise relatively inaccessible information.

In the third part, entitled "Empirical Aspects of Subrogation," the author makes an effort to accumulate statistical information about subrogation recoveries. This he had to do by questionnaires

3. P. 162.

4. The chapter treating them was placed by the author in the next part, dealing with "Subrogation Practice," but seems to the reviewer to serve as a bridge between theory and practice.

5. Compare the treatment in Campbell, *Non-Consensual Suretyship*, 45 YALE L.J. 69, 79-85 (1935), which is a study the author seems to have missed.

6. On this subject, see also Van Orman, *Subrogation Devices*, in Best's Insurance News, April 1950 (Fire & Cas. Ed.).

sent to insurance companies, since even the elaborate annual reports the companies must make to the insurance departments do not provide the desired information. The data gathered was too sketchy to be very conclusive, but the author realizes that fact as well as anyone else and comments at length on the difficulties of learning what he desired. Aside from reluctance to disclose the information, many companies did not separate subrogation from various other items in their records; some of them recorded recoveries on a net basis, while others utilized a gross basis. Moreover, the deductions made from the gross to obtain the net were not always the same. One of the recommendations the author puts forward is that the annual statement blank be amended to make subrogation information accessible and that uniform accounting rules be established to make it meaningful. It is unfortunate that the statistical information gathered by Mr. Horn is not more comprehensive than it is, but it is still very useful. Moreover, it is substantially all that is available.

From his statistical or empirical part, the author then proceeds to a discussion of the special problems of certain kinds of insurance, dealing once again both with subrogation doctrine or theory and subrogation practice. Here is some very useful information about, for example, the actual practices of the Blue Cross and Blue Shield Plans.[7]

The value of this book will differ greatly from one audience to another. For the lawyer seeking authority for his case, it will not prove very useful, although if his case compels him to acquire somewhat more detailed knowledge of the subrogation practices of insurance companies, he may find it helpful. To the insurance man seeking to acquire a general knowledge of subrogation, it will undoubtedly serve better than any other single source. It is not a small book, and its pages contain much useful information. There is a valuable collection of forms and other information in the appendices. This must be accounted a successful book—a useful contribution to the literature. Such criticism as is here made of it is perhaps testimony rather to the complexities of the problem and the difficulties of definitive statement than to any inadequacy of the author's performance.

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7. These practices were profoundly affected by Michigan Hosp. Serv. v. Sharpe, 339 Mich. 357, 63 N.W.2d 638 (1954), and Michigan Medical Serv. v. Sharpe, 339 Mich. 574, 64 N.W.2d 713 (1954). See also the discussion of these cases in Kimball & Davis, *The Extension of Insurance Subrogation*, 60 MICH. L. REV. 841, 860-62 (1962).