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THE EXTENSION OF INSURANCE SUBROGATION

*Spencer L. Kimball** and *Don A. Davis†*

WHEN an insured loss occurs under circumstances that make a third person liable to reimburse the insured, there are various possible ways to adjust the loss among the three persons involved. One solution would permit the policyholder to recover both on the insurance and from the third person, *i.e.*, would permit double recovery for the loss. A second solution would give the third person the benefit of the insurance by denying recovery from him. A third solution would subrogate the insurer to the policyholder's rights against the third person. Combinations of these three solutions are possible by applying sometimes one and sometimes another.¹

Subrogation is either legal or conventional, *i.e.*, it is either the creation of the law (or more accurately of equity)² or it is the product of an agreement by the parties. In either case, the subrogation solution rests mainly on two notions. The first is that there is no justification for giving a third person, who is neither privy to a contract nor a specified beneficiary, any benefit under it. This is strengthened by the moralistic basis of tort law as it has developed in our system.³ Although the first notion is of less importance than the second, it does serve to eliminate the second alternative solution above, of extending protection of the

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¹ See 2 HARPER & JAMES, TORTS §§ 25.19-23 (1956). All three of these solutions occur in Swedish law. HELLNER, FÖRSÄKRINGSGIVARENS REGRESSRÄTT (The Insurer's Right of Subrogation) 258-59 (1953).

² 11 APPLEMAN, INSURANCE LAW AND PRACTICE § 6502, at 293 (1941); 8 COUCH, CYCLOPEDIA OF INSURANCE LAW § 1996 (1931); 5 POMEROY, EQUITY JURISPRUDENCE § 2349 (2d ed. 1918); SHELTON, SUBROGATION § 1 (2d ed. 1893).

³ See, *e.g.*, 2 HARPER & JAMES, TORTS §§ 12.1, 25.19 (1956). But see GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE, ch. 1 (1958). The practical reflection of this doctrine is the refusal to reduce recovery in the injured person's action against the tortfeasor when the former has already received money from an insurance company. See Annot., 13 A.L.R.2d 355 (1950), for the cases on personal insurance; Annot., 81 A.L.R. 320 (1932), for those on property insurance.

policy to the third person. The second notion is that most insurance contracts are in their nature contracts of indemnity—*i.e.*, that the insurer's only obligation is to make the insured whole. Of course it makes some difference how the policyholder is made whole. If it is done by an entirely unrelated transaction, such as the gift of a stranger to the contract, the indemnity idea would not apply to prevent recovery under the insurance contract.⁴ This notion tends to eliminate the first alternative solution above, of permitting the policyholder a double recovery.

It is clear that the range of legal subrogation could be extended by agreement, but in the past companies have made few efforts to extend it. Although subrogation clauses are very common in insurance policies, on the whole they merely confirm rights that would exist without them, and at most they alter the incidents of legal subrogation in some particulars.⁵ But in recent years new incentives for extending the range of subrogation have come into existence. Increasing use of insurance has led to duplicated coverage with respect to medical and hospital expenses. The companies urge that many claimants are unjustly enriched by the consequent double recovery.⁶ Moreover, rising loss ratios and vigorous price competition in some fields of insurance have led companies to seek for ways to effect marginal savings that

⁴ In such a situation there arises the difficult and important question of deciding how far subrogation applies to collateral transactions. For discussions of this question, see Campbell, *Non-Consensual Suretyship*, 45 YALE L.J. 69, 79 (carrier contracts), 99 (mortgage contracts) (1935); Friedman, *Landlords, Tenants and Fires—Insurer's Right of Subrogation*, 43 CORNELL L.Q. 225 (1957); King, *Subrogation Under Contracts Insuring Property*, 30 TEXAS L. REV. 62, 71-85 (1951) (in general); Comment, *The Right of a Paid Surety to Subrogation*, 44 MARQ. L. REV. 194 (1960) (depositor-bank contract). For general treatments, see 8 COUCH, *op. cit. supra* note 2, at § 2017; 2 RICHARDS, *INSURANCE* § 188 (5th ed. 1952); VANCE, *INSURANCE* § 134, at 786-90 (3d ed. 1951).

⁵ Compare *Insurance Co. of North America v. Fidelity Title & Trust Co.*, 123 Pa. 523, 16 Atl. 791 (1889) (insurer cannot demand formal assignment as condition of payment) with *Niagara Falls Ins. Co. v. Fidelity Title & Trust Co.*, 123 Pa. 516, 16 Atl. 790 (1889) (insured's refusal to assign a good defense to an action on a policy containing a covenant to assign in the subrogation clause). These two cases were decided on the same day and presumably about the same fire. Only the policies were different. See also *Hardware Mut. Ins. Co. v. Dunwoody*, 194 F.2d 666 (1952); 8 COUCH, *op. cit. supra* note 2, § 1997, at 6590; VANCE, *op. cit. supra* note 4, § 134, at 791; RESTATEMENT, *SECURITY* § 141, comment *a* (1941); King, *supra* note 4, at 62, 68. A change to *pro tanto* subrogation from subrogation only after full indemnity is dealt with *infra*, note 79.

⁶ See, e.g., Katz, *Automobile Medical Payments Coverage—A Changing Concept?*, 28 INS. COUNSEL J. 277 (1961); Explanatory Memorandum for Special Automobile Policy Form, dated Sept. 1, 1959, attached to Standard Provisions for Automobile Combination Policies, filed with Michigan Department of Insurance by National Bureau of Casualty Underwriters (esp. 3-5).

may make the difference between a loss and a modest profit.⁷ An extension of the applicability of subrogation, together with a tightening up of subrogation practices, offers itself as such a measure.

One recent development is the stipulation for subrogation rights in the medical payments coverage of the Special Automobile Policy of the National Bureau of Casualty Underwriters and the Package Automobile Policy of the Mutual Casualty Insurance Rating Bureau.⁸ Not only have the members of these bureaus stipulated for subrogation, but also many independent companies have recently issued policies with similar designations (*e.g.*, Special Merit, Safe Driver, or Package policies) which provide for subrogation under medical payments coverage.⁹ Interestingly, this change has not yet taken place in the standard family automobile policies issued by either the bureau companies or the independents.

A second development is the stipulation in at least some hospital and medical service plans for subrogation rights. Both the Michigan Hospital Service (Blue Cross) and Michigan Medical Service (Blue Shield) include such stipulations in their contracts, the former only since it was denied subrogation in the absence of such a stipulation by the Michigan Supreme Court.¹⁰ A similar development would also be possible in accident and health insurance policies. Although no evidence of it was found in the files of the Michigan Insurance Department, where a substantial number of such contracts were examined to ascertain whether there was any such movement, there is a slight trace of such a tendency in the case law.¹¹

⁷ Interviews with insurance company executives in Detroit, August 1961.

⁸ See Katz, *supra* note 6, at 276, 279.

⁹ An examination of the automobile policies on file with the Michigan Department of Insurance, Lansing, in February 1962, for about a hundred independent companies, showed twenty-two companies that now issue special automobile policies stipulating for subrogation on medical payments coverage. Approximately another twenty companies did not appear to provide for medical payments coverage at all. Personal interviews with various insurance company executives in Detroit in August 1961 emphasized to us the importance of these developments in the minds of insurance men.

¹⁰ Michigan Hosp. Serv. v. Sharpe, 339 Mich. 357, 63 N.W.2d 638 (1954), discussed at 860-62 *infra*; Letter from Manager, Workmen's Compensation-Subrogation Dep't, Mich. Blue Cross-Blue Shield, March 13, 1962. We have no information about the extent to which similar stipulations are used by corresponding plans in other states.

¹¹ See Application of Maak, 30 Misc. 2d 610, 222 N.Y.S.2d 845 (Sup. Ct. 1961).

The apparent resurgence of interest on the part of insurers¹² in securing subrogation rights and pursuing them more vigorously is unlikely to have competitive repercussions. If the novel inclusion of a subrogation clause were a more dramatic or more detrimental change in terms, it might be difficult to use it in a competitive market. But it is a nearly invisible method of compensating for the obvious consequences of competition.

In view of these developments, judicial treatment of insurance subrogation, whether legal or conventional, takes on increasing importance. The courts often hold legal subrogation to be inapplicable to certain insurance contracts, and the first inquiry of this article will be to try to determine where the law draws the line between policies to which legal subrogation applies and those to which it does not. Next, some of the cases by which the line has been drawn will be examined in an effort to ascertain the reasons for drawing the line in that place, and the present applicability of those reasons. Finally, and the prime objective of this paper, there will be an inquiry into the extent to which an insurer can effectively stipulate for subrogation rights that might not exist in the absence of agreement, *i.e.*, how far the contractual terms of the policy are effective to enlarge the non-consensual subrogation rights of insurers. This latter question cannot be definitive, for the cases are few, but the inquiry would seem to turn on the reasons for the limitations on legal subrogation, the extent to which the reasons have lost their force since the rules were initially developed, and the degree to which those reasons are outweighed by a public policy in favor of freedom to contract.

I. APPLICABILITY OF LEGAL SUBROGATION

If one uses sufficiently ambiguous terms, it is not difficult to draw the line dividing those policies of insurance on which legal subrogation has been said to be available from those on which

¹² Interviews with insurance executives in Detroit in August 1961 gave the impression that there was an increasing interest in subrogation recoveries. There are also some indications in the literature. See Katz, *supra* note 6; The National Underwriter (F & C ed.) Feb. 9, 1962, p. 32; The National Underwriter (F & C ed.) Feb. 23, 1962, p. 13; Sinnott, *Subrogation Investigations of Fires and Explosions*, INS. L.J., Jan. 1962, P. 41. But Lowry, *Recoveries in Fire Losses—An Increasingly Attractive Field for Lawyers*, with *Suggestions for Handling Subrogation Claims*, in A.B.A. SECTION OF INSURANCE LAW PROCEEDINGS 198 (1949) suggests by its existence that the resurgence of interest is of periodic occurrence.

it is not. Thus Appleman states that "the insurer is not subrogated to the insured's rights or to the beneficiary's rights under contracts of personal insurance . . ."¹³ Couch views subrogation as a doctrine intended merely to carry out the principle of indemnity.¹⁴ Both these approaches have an implicit defect, that the terms "personal insurance" and "contract of indemnity" are ambiguous. A somewhat higher degree of precision can be attained by listing the lines of insurance on which subrogation is available and those on which it is denied, as is done by Richards and Vance.¹⁵ This has its own difficulties as will appear from what follows. Despite its weaknesses, this latter approach is the most profitable one to follow. In most lines of insurance the result is clear, but in borderline cases the result is uncertain. Let us look only at those lines of insurance where subrogation is always or sometimes denied, in the absence of a contractual stipulation, for the objective of this article is to determine how far stipulation can change the rule in these cases.

In life insurance, there seems little doubt that, absent contractual stipulation, subrogation would be denied uniformly. Dicta are plentiful, but no cases actually decide the matter.¹⁶ One accident insurance case denies subrogation on a death claim,¹⁷ and perhaps that is sufficient authority for life insurance; in any case the dicta are so plentiful and so uniform that holdings are doubtless unnecessary to establish the proposition.¹⁸

Cases in accident insurance are few but, apart from special situations, are uniform in result. Subrogation against the tortfeasor is denied, the courts usually emphasizing that accident in-

¹³ 3 APPLEMAN, *op. cit. supra* note 2, § 1675, at 278.

¹⁴ 8 COUCH, *op. cit. supra* note 2, § 1997, at 6590.

¹⁵ RICHARDS, *op. cit. supra* note 4, § 184, at 656; VANCE, *op. cit. supra* note 4, § 134.

¹⁶ Two cases repeatedly cited for the proposition that there is no subrogation in life insurance actually have nothing to do with subrogation. *Mobile Life Ins. Co. v. Brame*, 95 U.S. 754 (1877); *Connecticut Mut. Life Ins. Co. v. New York & N.H.R.R.*, 25 Conn. 265 (1856). These cases are discussed at 849-50 *infra*. They have rather frequently been misread. See, e.g., 3 Appleman, *op. cit. supra* note 2, § 1675, at 278; 2 RICHARDS, *op. cit. supra* note 4, § 184, at 656; VANCE, *op. cit. supra* note 4, § 134, at 796; 3 COLUM. L. REV. 422 (1903); 7 MICH. L. REV. 177, 178 (1908). Accident insurance cases regularly assume that subrogation is not available in life insurance.

¹⁷ *Mercer Cas. Co. v. Perlman*, 62 Ohio App. 133, 23 N.E.2d 502 (1939).

¹⁸ Only one case casts any doubt on this general proposition, and it not very much, for it seems to misapply the subrogation idea. The holding could better rest on the *res judicata* idea. In any case it is authority only for a narrow range of problems. *Aetna Life Ins. Co. v. Tremblay*, 101 Me. 585, 65 Atl. 22 (1906).

surance is analogous to life insurance.¹⁹ The only real difficulty with accident insurance lies in rarely litigated peripheral areas, such as automobile medical payments or plans to cover medical expenses or hospitalization costs. A recent case in Michigan has made it clear that in the absence of contractual stipulation a hospital service plan (Blue Cross) is not subrogated to claims against the tortfeasors.²⁰ Medical payments coverage in the automobile insurance policy lies similarly on the periphery of accident insurance.²¹ No case has been found deciding the question whether, absent stipulation, subrogation is available in such insurance, though the circumstances raising the problem have existed countless times. However, the persistent failure to seek subrogation under the coverage is strong testimony to the tacit assumption of company counsel that it is not available.²² The problem could have been raised, but was not, in a recent Wisconsin case in which the company sought to avoid payment.²³ The fact that the case was argued by the company and was decided on quite another basis—an excessively technical one—is even stronger indication of the widespread assumption that legal subrogation is not available.

In workmen's compensation insurance, the question whether there is subrogation arises at two levels. It must first be asked

¹⁹ "The case seems to turn on whether a contract of casualty insurance [here, accident insurance] is one of indemnity like that of fire insurance. While there is some conflict, by the great weight of authority a life insurance contract is not of that kind but is strictly a valued policy A policy of casualty insurance, ordinarily, has much the same features as one of life insurance, though, it is true, it more nearly than one of life insurance has the indemnity feature." *Gatzweiler v. Milwaukee Elec. Ry. & Light Co.*, 136 Wis. 34, 37, 116 N.W. 633, 634 (1908). *Accord*, *Suttles v. Railway Mail Ass'n*, 156 App. Div. 435, 141 N.Y. Supp. 1024 (1913); *Mercer Cas. Co. v. Perlman*, 62 Ohio App. 133, 23 N.E.2d 502 (1939); *Aetna Life Ins. Co. v. Parker*, 30 Tex. Civ. App. 521, 72 S.W. 621 (1902), *modified*, 96 Tex. 287, 72 S.W. 168 (1903).

²⁰ *Michigan Hosp. Serv. v. Sharpe*, 339 Mich. 357, 63 N.W.2d 638 (1954), 43 A.L.R. 2d 1167. *Accord*, *Publix Cab Co. v. Colorado Nat'l Bank*, 139 Colo. 205, 338 P.2d 702 (1959) (relying on *Sharpe*). See also *Royer v. Eskovitz*, 358 Mich. 279, 100 N.W.2d 306 (1960).

²¹ However, it is authorized as a part of "personal injury liability insurance." *E.g.*, NEW YORK INS. LAW, § 46(13). But this is a matter of historical accident, and does not really indicate the nature of the coverage.

²² Personal interviews with various insurance companies, Detroit, Michigan, August 1961; see also Katz, *supra* note 6, at 279.

²³ *Kopp v. Home Mut. Ins. Co.*, 6 Wis. 2d 53, 94 N.W.2d 224 (1959). Perhaps an even more striking, though less direct, demonstration is afforded by *Severson v. Milwaukee Auto. Ins. Co.*, 265 Wis. 488, 61 N.W.2d 872 (1953), which held an injured person entitled to recover both under liability and medical payments coverages for the same damages, and *on the same policy*. After this decision it is no wonder that the companies would like a subrogation provision for medical payments.

whether the employer who pays compensation is subrogated to the rights of the employee against the tortfeasor. The second question is whether, in those cases in which there is insurance, the insurer is subrogated to any subrogation rights the employer may have.²⁴ The latter question is not different in principle from the question whether any liability insurer is subrogated to the rights of its policyholder to contribution or indemnity against third persons, in cases where the insurance policy covers the policyholder's liability. Both in principle and on the authorities it is clear that generally a liability insurer has legal subrogation to whatever rights the policyholder may have to contribution or indemnity.²⁵ In principle the same result should obtain in workmen's compensation insurance, though there are cases deciding the point both ways.²⁶

Nearly all of the workmen's compensation statutes deal explicitly with subrogation, usually providing that either the employer or his insurer is subrogated to the rights of the employee against any tortfeasor liable for the injuries. The exact scope and terms of the subrogation differ widely among the states,²⁷ and the details of the statutory provisions are of no special interest to us here. In general the statutes do not distinguish between the two levels of subrogation, but deal simultaneously with both of them.

Larson says that three states have no statutory provision for subrogation.²⁸ From these states, West Virginia, Ohio, and New Hampshire, we get some light on the question whether legal subrogation exists in workmen's compensation insurance, absent a statute, though the problem that is actually discussed in the

²⁴ *De Roode v. Jahncke Serv.*, 52 So. 2d 736, 743 (La. App. 1951) recognizes the two levels of inquiry. See also *Employers' Liab. Assur. Corp. v. Daley*, 183 Misc. 975, 51 N.Y.S.2d 567 (Sup. Ct. 1944).

²⁵ *Travelers' Ins. Co. v. Great Lakes Eng. Works Co.*, 184 Fed. 426 (6th Cir. 1911) (employers liability); *Preferred Acc. Ins. Co. v. Mustante Berman & Steinberg Co.*, 133 Conn. 536, 52 A.2d 862 (1947) (general liability); 8 APPLEMAN, *op. cit. supra* note 2, §§ 4932-34; 8 COUCH, *op. cit. supra* note 2, § 2022 (Supp. 1961).

²⁶ For cases denying subrogation at the second level even though the employer was by statute subrogated to the insured employee's rights, see *Henderson Tel. & Tel. Co. v. Owensboro Home Tel. & Tel. Co.*, 233 S.W. 743 (Ky. 1921), 35 HARV. L. REV. 343; *Hartford Acc. & Indem. Co. v. Englander*, 93 N.J. Eq. 188, 118 Atl. 628 (1921), 21 MICH. L. REV. 489 (critical) (suggesting different result under N.J. STAT. ANN. § 34:15-40 (1959)); *Texas & Pac. Ry. v. Archer*, 203 S.W. 796 (Tex. Civ. App. 1918). None of these cases is well reasoned.

²⁷ 2 LARSON, WORKMEN'S COMPENSATION § 74 (1961).

²⁸ But see N.H. REV. STAT. ANN. § 281:14 (Supp. 1961).

cases is the first level of subrogation, of the employer to the rights of the employee against the tortfeasor. They seem to announce a uniform result, that there is no such subrogation without a statute.²⁹

Even in states in which statutes provide for subrogation, the question whether legal subrogation exists independently of the statute may still arise in a variety of ways. Though some of the cases in which this question arose held that there was legal subrogation without any statutory provision for it, it is not irrelevant that the state's general legislative policy in favor of subrogation had been made clear, but that for technical reasons the case lay outside the reach of the statutory provisions. This fact diminishes greatly the force of the cases. On the whole, it would seem that on the authorities there is no subrogation of the employer to the rights of the employee absent a statutory provision to that effect.³⁰

²⁹ *Crab Orchard Improvement Co. v. Chesapeake & O. Ry.*, 115 F.2d 277 (4th Cir. 1940), *cert. denied*, 312 U.S. 702 (1941), 40 COLUM. L. REV. 1452 (1940). In this case the federal court, applying West Virginia law held that an employer who had to pay increased amounts to state compensation fund because of an injury to an employee could not recover on subrogation, indemnity or simple tort theories. See *Mercer v. Ott*, 78 W. Va. 629, 89 S.E. 952 (1916) (employee's recovery from tortfeasor bars subsequent state compensation claim). *Contra*, *Powell v. Wagner*, 178 F. Supp. 345 (E.D. Wis. 1959) (payment of medical bills by Industrial Commission does not diminish recovery from tortfeasor or insurer); *McCullough v. Varick Co.*, 90 N.H. 409, 10 A.2d 245 (1939) (subrogation clause in policy does not subrogate insurer to employee's rights); *Holland v. Morley Button Co.*, 83 N.H. 482, 145 Atl. 142 (1929) (recovery from tortfeasor no bar to statutory recovery from employer); *Midvale Coal Co. v. Cardox Corp.*, 152 Ohio St. 437, 89 N.E.2d 673 (1949) (employer permitted direct recovery against tortfeasor whose act was also breach of contract with employer); *Decker Constr. Co. v. Mathis*, 122 N.E.2d 38 (Ohio Ct. C.P. 1953) (refusing to extend *Midvale* absent contractual relationship). In *Truscon Steel Co. v. Trumbull Cliffs Furnace Co.*, 120 Ohio St. 394, 166 N.E. 368 (1929), the court relied on OHIO REV. CODE ANN. § 4123.82 (Page 1958) which was intended to prevent competition by private insurers with the state fund; subrogation was denied.

³⁰ *Jacobson v. Doan*, 136 Colo. 496, 319 P.2d 975 (1957) (subrogation denied beyond statutory figure despite higher benefits in policy); *Geneva Constr. Co. v. Martin Transfer & Storage Co.*, 4 Ill. 2d 273, 122 N.E.2d 540 (1954) (statutory subrogation provision technically unconstitutional but legal subrogation nevertheless available); *De Roode v. Jahncke Serv.*, 52 So. 2d 736 (La. App. 1951); *Stinchcomb v. Dodson*, 190 Okla. 643, 126 P.2d 257 (1942) (defense based on an inadequate assignment to reciprocal exchange, subrogation still available). *Contra*, *United States Fid. & Guar. Co. v. Elam*, 198 Tenn. 194, 278 S.W.2d 693 (1955) (employee's agreement to subrogation implied from acceptance of services beyond statute). For an assertion that subrogation provisions of the workmen's compensation act are merely declaratory of the common-law rule, see *Fidelity & Cas. Co. v. St. Paul Gas Light Co.*, 152 Minn. 197, 200, 188 N.W. 265, 266 (1922) (dictum). In *Potoczny v. Vallejo*, 170 Pa. Super. 377, 85 A.2d 675 (1952), the City of Philadelphia was required by statute to pay firemen, injured in the course of their employment, regular wages during the period of incapacity. The city was held to be subrogated to a fireman's claim against a tortfeasor. *Contra*, *City of Birmingham v. Walker*, 267 Ala. 150, 101 So. 2d 250 (1958).

II. REASONS FOR DENYING LEGAL SUBROGATION

An old book on insurance, Joyce, states that "marine and fire insurance is a contract of indemnity, and it is for the purpose of carrying out this principle that the doctrine of subrogation has been adopted. In other words, in the absence of this doctrine, the insured might often recover more than a full indemnity, and to prevent such a result the courts have adopted the rule that the insured shall be entitled to only one full indemnity for the injury sustained, and from this the doctrine of subrogation has arisen."³¹ There is ample basis in the case law for thus tying the indemnity principle and subrogation closely together. On the authorities, subrogation is justified by the indemnity character of the insurance contract, and denial of subrogation must rest on the fact that the contract of insurance in question is not an indemnity contract.³²

Uniformly, life insurance is said not to be an indemnity contract. Equally uniformly it is said to be "well settled that an insurer making payment under a life policy is not entitled to be subrogated to any rights against a tort-feasor who may have wrongfully brought about the death of the insured."³³ This proposition is regularly supported by citation to two cases which are alike both in facts and in reasoning. In the earlier,³⁴ the insurer issued a life policy on a man who was thereafter killed in a railroad accident. The insurer, having paid the administratrix, sought to recover the sum from the railroad. The latter pleaded that in ignorance of the policy it paid the administratrix 5,000 dollars in full satisfaction and discharge of claims. The plaintiff demurred

³¹ 5 JOYCE, *INSURANCE* § 3537, at 5880 (2d ed. 1917); 3 APPLEMAN, *op. cit. supra* note 2, § 1675, at 278. Essentially the same statement appears in 8 COUCH, *op. cit. supra* note 2, § 1997, at 6590.

³² "That doctrine [subrogation] does not arise upon any of the terms of the contract of insurance . . . it is a doctrine in favour of the underwriters or insurers in order to prevent the assured from recovering more than a full indemnity; it has been adopted solely for that reason." *Castellain v. Preston*, 11 Q.B.D. 380, 387 (1883). "A contract of insurance against fire is only a contract of indemnity, and I think that the foundation of the doctrine of subrogation is to be found in the principle that no man should be paid twice over in compensation for the same loss." *Driscoll v. Driscoll*, 1 Ir. R. 152, 159 (1918). "It follows that where the indemnity feature is not present in the insurance contract . . . the subrogation feature has no application." *Crab Orchard Improvement Co. v. Chesapeake & O. Ry.*, 115 F.2d 277, 281 (4th Cir. 1940). See also *Bradburn v. Great W. Ry.*, L.R. 10 Ex. 1 (1874).

³³ VANCE, *op. cit. supra* note 4, § 134, at 796.

³⁴ *Connecticut Mut. Life Ins. Co. v. New York & N.H. R.R.*, 25 Conn. 265 (1856). The second case to the same effect was *Mobile Life Ins. Co. v. Brame*, 95 U.S. 754 (1877).

and the case was decided on the demurrer. By thus demurring, the plaintiff relinquished any claim in right of the policyholder. Indeed, action was brought in the name of the insurer itself, and in its own right. Patently the case decides nothing about the law of subrogation, and holds only that the insurer has no direct action against the tortfeasor. One of the court's reasons, that the death of a human being is not actionable, would indeed preclude subrogation in life insurance cases, but that reason is not susceptible of extension to other than death cases, nor has it survived the intervening century intact.³⁵ The court's second reason for denying liability was that the damage to plaintiff was remote and indirect, inasmuch as there was no privity of contract between insurer and tortfeasor.³⁶

Only a single case deals directly with subrogation on a death claim, and that under an accident insurance policy.³⁷ It holds that subrogation is not available. The court emphasized the absence of an indemnity feature as a ground for denying recovery; in general its reasoning is neither clear nor satisfactory. In particular, the court does not explain what it means when it says that the insurance contract has no indemnity feature. This is more complicated than it is generally assumed to be, and the complexity begins to show up in accident insurance cases. A leading case says:

"The case seems to turn on whether a contract of casualty insurance ["casualty" seems to mean "accident" here] is one of indemnity like that of fire insurance. While there is some conflict, by the great weight of authority a life insurance contract is not of that kind but is strictly a valued policy; a stipulation to pay a sum certain upon the happening of a specified contingency Under such a policy the amount payable has no necessary relation to damages actually suffered by the beneficiary. The insured buys and pays for the right to have from another a specified sum upon the happening of a specified event. Payment for the insurance is in the nature

³⁵ Every American state now has a statutory remedy for wrongful death. PROSSER, *TORTS* § 105, at 710 (1955). *Aetna Life Ins. Co. v. Moses*, 287 U.S. 530 (1933), is a workmen's compensation case subrogating the insurer on a death claim. See also *Reutenik v. Gibson Packing Co.*, 132 Wash. 108, 231 Pac. 773 (1924).

³⁶ *Accord*, *Insurance Co. v. Brame*, 95 U.S. 754 (1877). *Rockingham Mut. Fire Ins. Co. v. Boshier*, 39 Me. 253 (1855), denies recovery to the company in its own name on a fire policy, though subrogation would be available.

³⁷ *Mercer Cas. Co. v. Perlman*, 62 Ohio App. 133, 23 N.E.2d 502 (1939).

of an investment. The money value of the thing covered by the insurance does not enter into the transaction at all."³⁸

In subsequent cases the characterization of life insurance as an "investment" contract was seized upon. Subrogation is attached to indemnity policies; it is not available in contracts of "investment."³⁹ But the word "investment" must not be taken in its more obvious meaning. Ordinary, limited payment, and endowment life insurance contracts written on a level premium basis are investment contracts in a very literal sense. But short term life insurance is not. It is no more an investment contract in the ordinary sense of that phrase than is fire or liability insurance. Yet surely the same subrogation rule would be uniformly applied by all courts to both ordinary and term life insurance. At least we have nowhere seen any suggestion that term life insurance should be regarded as an indemnity contract because it lacks an investment feature, nor that any distinction should be drawn for subrogation purposes between ordinary and term life insurance. Moreover, accident insurance cases uniformly deny subrogation, though an accident policy is very little, if any, more of an "investment" contract in the ordinary sense than is a fire policy. Rather, what the above quotation seems to make clear is that the crucial distinction is not between indemnity and investment but between a policy that merely makes the policyholder whole and one that pays a specified sum on the happening of the event insured against; *i.e.*, it is a "valued" policy that is to be regarded as an "investment" or "non-indemnity" contract, for purposes of subrogation.

In German terminology it is customary to divide insurance into "damage" insurance and "personal" insurance. The latter is also often called "sum" insurance,⁴⁰ though as we shall see, there

³⁸ *Gatzweiler v. Milwaukee Elec. Ry. & Light Co.*, 136 Wis. 34, 37, 116 N.W. 633, 634 (1908).

³⁹ "[T]he defendant is not entitled to have the damages reduced because the plaintiff had purchased and paid for the right to have indemnity in case he sustained accidental injuries. The sums paid for such insurance are in the nature of an investment, which, like other investments made by the plaintiff, ought not to inure to the benefit of the defendant. The only parties interested in such a contract of insurance are the plaintiff and the insurer." *Campbell v. Sutliff*, 193 Wis. 370, 374, 214 N.W. 374, 376 (1927). "The fund out of which such payments were made was created in part by the plaintiff's contributions made under a contract with strangers to the defendant, and the tort-feasor was no more entitled to be credited with the sums repaid to the plaintiff under such contracts than it would be to his withdrawal of his accumulations in a savings bank." *Cornish v. North Jersey St. Ry. Co.*, 73 N.J.L. 273, 274, 62 Atl. 1004, 1005 (1906).

⁴⁰ Section 1 of the German *Versicherungsvertragsgesetz* (Insurance Contract Law) dis-

is some difficulty with these divisions. The German Insurance Contract Law⁴¹ is divided into a general part and a number of special parts, one of which deals with "damage" insurance.⁴² In the part dealing with damage insurance is a section providing for the subrogation of the insurer against the policyholder.⁴³ Thus, the distinction drawn in German law is, basically, the distinction that is suggested here for American law, *i.e.*, between a contract of indemnity and a valued contract. But in the borderline cases, German insurance law has the same kind of problems that perplex us, and we shall refer later to the disposition made of the problem in Germany.

If the boundary between subrogation and no subrogation, in the absence of stipulation, is to be settled by distinguishing between indemnity and valued contracts, as suggested, it must be decided whether to examine and classify individual contracts or only whole lines of insurance, despite some or even many deviant individual contracts within the line. Though all, or nearly all, life insurance contracts are valued or "sum" contracts, it is more difficult to speak with the same assurance about other lines of insurance. For example, in marine insurance and fire insurance⁴⁴

tinguishes *Schadenversicherung* or damage insurance, in which the obligation of the insurer is to compensate the policyholder for the damage actually suffered, and *Personenversicherung* or personal insurance, in which the obligation is to pay an agreed sum. The term *Summenversicherung* may be found in, *e.g.*, GIERKE, *VERSICHERUNGSRECHT* I:78 (1937). It is quite apparent that the latter term is inappropriate for medical expenses coverage, where the compensation principle applies. What is less apparent is that the term *Personenversicherung* is also inappropriate, at least if such coverage is treated as *Schadenversicherung*, as the sources often treat it. See, *e.g.*, PRÖLSS, *VERSICHERUNGSVERTRAGSGESETZ* § 67, at 257 (12. Auflage 1960): "[w]ohl aber für den Kur- und Heilkostenersatz in der Unfallversicherung . . . der in den Bereich der Schadensversicherung fällt."

⁴¹ *Versicherungsvertragsgesetz*, most readily accessible in PRÖLSS, *VERSICHERUNGSVERTRAGSGESETZ* (12. Auflage 1960), a standard and convenient commentary on the code.

⁴² *Schadenversicherung* (damage insurance) is the subject of the second part, *Lebensversicherung* (life insurance) of the third, *Unfallversicherung* (accident insurance) of the fourth, and a fifth part has some concluding general provisions. *Krankenversicherung* (health insurance) has no special part, and its treatment provides some of the problems of interpretation with which German lawyers must deal.

⁴³ § 67.

⁴⁴ Many state statutes require valued policies for fire insurance on real property. For a brief history and analysis of the Wisconsin valued policy law, see KIMBALL, *INSURANCE AND PUBLIC POLICY* 240-46 (1960); see also PATTERSON & YOUNG, *CASES ON INSURANCE* 120 n.3 (4th ed. 1961); VANCE, *op. cit. supra* note 4, § 157, at 883; Galphin, *The Valued Policy Statute and the Standard Fire Insurance Policy*, ABA SECTION OF INSURANCE, 1954 PROCEEDINGS 142. Statutes are collected in 1 JOYCE, *op. cit. supra* note 31, § 163, which is somewhat antedated; but no accessible collection of more recent date seems to exist.

there are many valued policies. If the distinction between indemnity and valued contracts is made on an individual contract basis, there should be no subrogation on the numerous valued marine or fire insurance policies, especially in those marine insurance policies where the valuation clause is decisive for a partial as well as a total loss.⁴⁵ But there seems to be no case where subrogation has been denied in fire or marine insurance because the particular policy in question was valued. Nor does it seem likely that any court would deny subrogation in such a case. The classification is made for the whole line, despite the deviant contracts.

In view of the large number of deviant contracts in fire and marine insurance and the lesser but still significant number in accident and health insurance, it is hard to justify fixing the boundary between lines of insurance when it would be almost as easy and far more responsive to the purpose of the distinction to consider the terms of the individual contracts. German law would make it easier to justify the classification of entire lines inasmuch as in Germany valued policies seem unknown in damage insurance.⁴⁶ But, like us, the Germans do have some difficulty with contracts in the fields of accident and sickness insurance, where many contracts contain provisions both for the payment of actual damage suffered, and of fixed sums. Like American contracts, German insurance policies in accident and sickness insurance often promise to recompense the insured for hospital and medical costs, including doctors' fees, in addition to the promise to pay the traditional scheduled sums.

Sickness insurance is easy to handle in German law, since there is no explicit treatment of it in the Insurance Contract Law. The General Policy Conditions for sickness insurance, which are in-

⁴⁵ See An Act to Codify the Law relating to Marine Insurance, 6 Edw. 7, c. 41, § 27 (1906); 2 ARNOULD, MARINE INSURANCE § 1260 (14th ed. 1954); GILMORE & BLACK, ADMIRALTY 80-85 (1957); PATTERSON & YOUNG, *op. cit. supra* note 44, at 109-10. The *St. Johns*, 101 Fed. 469 (S.D.N.Y. 1900), was a case subrogating the insurer in a total loss case despite an extreme undervaluation.

⁴⁶ An examination of the General Policy Conditions (see note 47 *infra*) for the various kinds of *Schadenversicherung* shows that uniformly the coverages are conceived as indemnity, not valued, coverages. This is even true for the General Conditions for transport insurance at sea (ocean marine) where our practice makes much use of valued policies. Finke, *Werbung und Wettbewerb in der Versicherung*, Teil B, 2. Ordner (a loose-leaf service providing full text of the current General Conditions for all lines of insurance). PRÖLSS, *op. cit. supra* note 41, also provides the text of most of the General Conditions, though not that for ocean marine.

corporated in each policy by reference,⁴⁷ describe certain of the coverages in such a way that they are regarded as damage insurance. Others are treated as personal insurance.⁴⁸ Thereafter, the General Policy Conditions stipulate for subrogation for the former.⁴⁹

Accident insurance is given special attention in the German Insurance Contract Law. In general, the subrogation provision, which is in another special part dealing with damage insurance, is not applicable to accident insurance. However, the General Policy Conditions for accident insurance contain, as a collateral and supplementary coverage that has the appearance of an afterthought, provision for reimbursement for certain costs of treatment, including doctors' fees.⁵⁰ This has the appearance of damage insurance, and in fact is so treated in the German sources, with the consequence that subrogation is available.⁵¹

The net result is that even though it would be easier for German law to classify for subrogation purposes by whole lines, instead it comes rather close to distinguishing between damage and sum insurance, and between subrogatable and non-subrogatable claims, on the basis of individual coverages. This coincides in most instances with the division between lines of insurance, but does not do so in accident insurance, where a part of the contract is treated as damage insurance though most of it is treated as sum insurance.

In American law, it seems likely, however, that there exists an unarticulated feeling that somehow fire and marine insurance are indemnity contracts in some general conceptual sense, while life and accident are not. Then the valued policy cases would have to be explained for fire and marine insurance by suggesting that the valuation provision is merely a kind of liquidated damages clause, used for practical convenience, without changing the basic

⁴⁷ The General Policy Conditions (Allgemeine Versicherungsbedingungen) are terms very carefully worked out through consultation between the regulatory agency and the insurance industry, incorporated by reference in each policy. For a brief discussion of this aspect of German insurance regulation, see Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 493-95 (1961).

⁴⁸ Prölss so concludes in his annotation to the first section of the General Policy Conditions for Sickness Insurance. PRÖLSS, *op. cit. supra* note 41, at 670.

⁴⁹ *Id.* at 681-82, § 11(1); 670, § 1 Anm. 1.

⁵⁰ *Id.* at 739-40.

⁵¹ *Id.* at 257.

thrust or nature of the policy. But why is this not true for the valuation in policies of life and accident insurance as well?⁵² Is it because one can indemnify another against the loss of property by replacing the property with money, but that life or bodily integrity are not commensurate with money? Of course, it is easier to make a person whole with respect to a property loss than with respect to a loss of life or of limb. But personal insurance is seldom designed to compensate for the loss of these intangible things; rather it is designed to compensate for the accompanying economic losses. In this respect it indemnifies in a general, non-quantitative sense just as much as do fire and marine insurance. If there is a difference, it is only one of degree. No one would deny the indemnity character of a policy of fire or theft insurance on an animal or a painting. But in fact, the loss of a beloved animal or a favorite painting may far transcend the economic loss. Yet it is the latter against which the insurance is taken out, and which makes it "indemnity" insurance. Moreover, even in personal insurance there is an underlying assumption that in a general way, this kind of insurance too is legitimated because it indemnifies for economic loss actually suffered even if there is not a precise quantitative equivalence between loss and reimbursement. How can such insurance be justified without an assumption that loss of life or limb can in considerable measure be commuted into a money payment? This notion is deeply imbedded in the doctrine of insurable interest, especially in the older cases, where the assumption is frequently made that the insurable interest in human life must be an economically valuable and not merely sentimental interest.⁵³ Academic writers emphasize this indemnity element, too, when they speak of the economic value of a man's life, or of capitalizing the earning power of a life, as the basis for a life insurance program.⁵⁴ This latent and subtle

⁵² 1 MAY, INSURANCE §§ 7, 8 (4th ed. 1900) states this position forthrightly. *But see* 1 COUCH, INSURANCE § 1.9 (2d ed. 1959).

⁵³ An Act for Regulating Insurance Upon Lives, 14 Geo. III, c. 48 (1774), in § III provided: "[I]n all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount of value of the interest of the insured in such life or lives, or other event or events." The difficulties created by such a blatant indemnity idea in life insurance are apparent. For discussion of this statute and of the American cases, see Patterson, *Insurable Interest in Life*, 18 COLUM. L. REV. 381 (1918). *Id.* at 410 suggests that a pecuniary interest in the life insured is an essential prerequisite for insurable interest.

⁵⁴ DUBLIN, *THE MONEY VALUE OF A MAN*, chs. 6, 8, 11 (rev. ed. 1947); GREGG, *LIFE*

indemnity element of life insurance becomes very patent and clear in life insurance taken out by a creditor on a debtor's life, or by a corporation on the life of a key employee, or by one partner on the life of another. It is the economic loss that legitimates the policy, and in a general conceptual way it has an indemnity thrust.⁵⁵ Yet we have found no suggestions anywhere that any life insurance contract, however clear might be its indemnity aspect in the individual case, should be held to be so much an indemnity contract as to warrant the application of doctrines of subrogation.

The foregoing discussion is equally pertinent to accident insurance, where both the indemnity aspect is even stronger because it more nearly approaches an arithmetical equivalence of loss and reimbursement, and the valued policy character is much less clear and less pervasive than in life insurance. While it is true that fixed sums are usually provided for the loss of an arm, a leg, or of life, or of working time lost, they need not be. Nothing prevents an insurance company from writing insurance against loss of wages (to the extent that they are actually lost and not just for a stated sum per week), or to reimburse for out-of-pocket expenses for medical or hospital services. Many policies do the latter. Even when the policy provides for a fixed sum, the amount is often intended to be closely related to anticipated loss and thus is a "liquidated damages clause," as much as is the valuation clause in fire or marine insurance. A leading case does say that a "policy of casualty⁵⁶ insurance, ordinarily, has much the same features as one of life insurance, though, it is true, it more nearly than one of life insurance has the indemnity feature. The amount stipulated to be paid is a fixed sum as to each particular injury specified or is computable without any such definite data as in case of the loss of property."⁵⁷ But we find little recognition in subsequent cases of the variability of accident and health insurance, and in those cases in which the matter has arisen, such as the Michigan Hospital Service case, the indemnity character of the

AND HEALTH INSURANCE HANDBOOK 4-6, 17-19 (1959); HUEBNER & BLACK, LIFE INSURANCE 13 (5th ed. 1958); MCGILL, LIFE INSURANCE 4 (1959); MAGEE, LIFE INSURANCE 332 (1958).

⁵⁵ Patterson, *supra* note 53, points out that some life insurance contracts do and some do not have an indemnity "purpose."

⁵⁶ "Casualty" here means "accident."

⁵⁷ Gatzweiler v. Milwaukee Elec. Ry. & Light Co., 136 Wis. 34, 37, 116 N.W. 633, 634 (1908).

particular coverage was not acknowledged.⁵⁸ Many individual policies, or at least coverages within them, simply do not correspond to the classification apparently set up in the doctrines for the whole line. Unlike the German law, ours does not seem to make the accommodation for the atypical coverage. The refusal to apply subrogation doctrines in accident insurance even seems to carry over to the medical payments coverage in automobile insurance, despite the fact that it is a coverage having the appearance of indemnity insurance, embedded in a contract that is largely indemnity in nature.

Sometimes the indemnity-valued policy (or damage-sum) distinction is linked with, or perhaps is confused with, another reason for denying recovery. That is the non-identity of loss. Thus, in one case subrogation of the accident insurer was denied on the ground that the policy did not indemnify for the identical loss for which the tortfeasor was responsible.

"The accident policy undertakes to indemnify the insured whether his injuries are the result of negligence or not, while the person or corporation inflicting the injuries can be held liable only for negligence, and since so many elements enter into the estimate of the loss in the case of one that do not enter into or form any part of the other, there is wanting that identity of damage or loss that would entitle the insurer to subrogation on payment of the claim against him."⁵⁹

If this identity of loss argument were taken seriously, it would prevent subrogation far beyond the personal insurance field. The language used above would be applicable, with very slight changes, to most if not all cases of fire, collision, or liability insurance where subrogation is standard practice. It expresses an argument of the most doubtful validity.

One difficulty with respect to subrogation applies only to

⁵⁸ 339 Mich. 357, 63 N.W.2d 638 (1954). *But see* 7 MICH. L. REV. 177-79 (1908). We are struck by the frequency with which accident and health policies on file in the Michigan Insurance Department use the word "indemnity." *But Suttles v. Railway Mail Ass'n*, 156 App. Div. 435, 141 N.Y. Supp. 1024 (1913) makes it clear that the use of the word alone does not make the policy one of indemnity. This is sound, but neither is the use of the word irrelevant. *Cf. Lemaitre v. Nat'l Cas. Co.*, 195 Mo. App. 599, 186 S.W. 964 (1916).

⁵⁹ *Aetna Life Ins. Co. v. Parker*, 30 Tex. Civ. App. 521, 523, 72 S.W. 621, 622 (1902), *modified*, 96 Tex. 287, 72 S.W. 168 (1903); *Holland v. Morley Button Co.*, 83 N.H. 482, 145 Atl. 142 (1929); *Newark Paving Co. v. Klotz*, 85 N.J.L. 432, 91 Atl. 91 (1914), *aff'd*, 86 N.J.L. 690, 92 Atl. 1086 (1914); see also *Suttles v. Railway Mail Ass'n*, 156 App. Div. 435, 141 N.Y. Supp. 1024 (1913).

cases where there is death. In the older common law, there was no action for the death of a human being, nor did an action for personal injuries survive the death of the claimant. Clearly in such circumstances subrogation would not be available, but for reasons having nothing to do with subrogation itself. Where such rules have been altered or abrogated, subrogation should be available unless there are other reasons for denying it. Naturally a person concerned with subrogation in a claim involving death would have to examine with care the wrongful death and survival statutes, to see whether they are wide enough in scope to give a cause of action which is available to him.

In personal insurance there remains another related difficulty. At common law it seems to have been well settled that causes of action for personal injuries were not assignable.⁶⁰ Largely non-assignability was based on the absence of survival and, where statutes have made causes of action survive the death of the injured person, very generally the causes of action have become assignable. But this is not universally true. In some jurisdictions such claims are still not assignable.⁶¹ However, it is by no means clear that legal subrogation should be limited in the same way as assignment, despite a tendency to refer to it as an "equitable" assignment. The term "assignment" suggests something voluntary, even when it is modified by "equitable," and there is nothing voluntary about legal subrogation. It is created by the law (or by equity) in order to do justice, and certainly should not be limited by doctrines developed to circumscribe voluntary assignments.⁶² When the subrogation is conventional, then the problem is a little more difficult. It is discussed below.

⁶⁰ RESTATEMENT, CONTRACTS § 547 (1932); Annot., 40 A.L.R.2d 500, 502 (1955).

⁶¹ Annot., 40 A.L.R.2d 505-12 (1955).

⁶² *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949), held that an anti-assignment statute, applicable to federal tort claims, does not prevent workmen's compensation subrogees from recovering from the government inasmuch as subrogation is an involuntary transfer. "There are many Oklahoma cases holding that tort actions cannot be assigned, but we find no case holding that such actions are not subject to the equitable adjustment of rights called subrogation . . . We cannot believe that the legislature could have intended to abolish the beneficial doctrine of subrogation in tort cases as an indirect result of a statute, the primary purpose of which was to abolish nominal parties to lawsuits." *American Fid. & Cas. Co. v. All American Bus Lines*, 179 F.2d 7, 11 (10th Cir. 1949). *Staples v. Central Sur. & Ins. Corp.*, 62 F.2d 650 (10th Cir. 1932), held that subrogation was not an assignment for diversity of citizenship purposes. *Remsen v. Midway Liquors, Inc.*, 30 Ill. App. 2d 132, 174 N.E.2d 7 (1961); *City of New York Ins. Co. v. Tice*, 159 Kan. 176, 152 P.2d 836 (1944) (anti-assignment statute applicable to all tort claims

We think it clear that there are significant indemnity aspects of all forms of life and disability insurance, as well as of other kinds of insurance. Despite this reality, the continued insistence that life and accident insurance are not of an indemnity nature probably reflects an attitude, which may well be justified, that on the whole the amount of available recompense from all life and accident insurance and from any tortfeasor and his insurer is likely to be inadequate to meet the needs of the victim or his survivor. As a broad generalization, it may be true that victims of personal injuries are undercompensated, but this would only be valid as a generalization. Moreover, if one isolates certain kinds of loss, as happens whenever the context is a subrogation suit under the medical payments coverage of an automobile policy, or under hospitalization or medical expense protection, fairly often there is not only adequate but duplicated protection. A workman injured on the job may be protected by the workmen's compensation laws, by a hospital and medical service plan or by a group or individual accident policy, and may also have a right of action against a solvent or insured tortfeasor. In the end, despite the cost of pursuing each of his remedies, he may be overcompensated for a loss that in many instances is purely economic. At least he may be doubly compensated for the economic loss, and quite adequately compensated by a sympathetic jury for the less tangible losses, such as pain and suffering. In such cases there is little reason to deny subrogation to the insurer who pays the tangible economic loss, such as out-of-pocket hospital or medical expenses, merely on the questionable ground that accident insurance has no "indemnity" nature. If the word "indemnity" means anything, it comprehends these cases.⁶³ We conclude, therefore, that at least in those cases where there is insurance against a loss measurable in economic terms, the insurer should be legally subrogated quite as readily as in fire or collision insurance, once there has been full indemnification of the insured. Denial of legal

does not prevent subrogation); RESTATEMENT, RESTITUTION § 162, comment *h* (1937). *Contra*, *Fifield Manor v. Finston*, 54 Cal. 2d 632, 354 P.2d 1073 (1960), 59 MICH. L. REV. 1256 (1961), 8 U.C.L.A.L. REV. 668, 671 (1961), 109 U. PA. L. REV. 443, 447 (1961); *City of Richmond v. Hanes*, 203 Va. 102, 122 S.E.2d 895 (1961).

⁶³ In Swedish law, there is no subrogation in life insurance or ordinary accident or sickness coverage, but there is subrogation for medical fees and other out of pocket expense on the same basis as with other kinds of insurance. HELLNER, FÖRSÄKRINGSGIVARENS REGRESSRÄTT (The Insurer's Right of Subrogation) 260 (1953).

subrogation should reflect the lack of adequate indemnification to the insured in the individual case, and nothing more. The failure by the courts to allow legal subrogation in at least some cases of accident and health insurance is an unfortunate result. So far we have spoken only of cases lacking contractual stipulation for subrogation, and thus only of legal subrogation. We turn now to the question how far agreement may alter the doctrines of subrogation applicable in the absence of explicit stipulation.

III. CONVENTIONAL SUBROGATION

Quite commonly insurance policies contain stipulations for subrogation of the insurer to the claims of the policyholder. In most of these policies it makes little difference, since the subrogation right already exists as the creation of equity. In only a handful of cases has it been necessary to decide whether a subrogation clause actually created a new right.

The most important such instance arose in a pair of Michigan cases, involving the same injured persons and tortfeasors.⁶⁴ In the first, a participant in the Michigan Hospital Service plan (Blue Cross) was injured in an automobile accident caused by a negligent third person. The participant was hospitalized and the expenses were paid by the service plan, in accordance with the contract. Then the participant settled with the tortfeasor and gave a release framed to include liability for the hospital expenses. The service plan demanded from its subscriber that he pay over to the plan the amounts received from the tortfeasor to the extent of the hospital bill; it also made a claim directly against the tortfeasor in the same action, alleging that the tortfeasor had full knowledge of the plan's interest, and thus was not discharged by the release. The hospital care certificate did not contain a subrogation clause. The court denied subrogation, explaining the result in a most unsatisfying opinion. The opinion stated that this was not an insurance contract.⁶⁵ It also said there was no question that the service "was purchased with the understanding that hospital care would be furnished the purchaser 'whenever

⁶⁴ *Michigan Hosp. Serv. v. Sharpe*, 339 Mich. 357, 63 N.W.2d 638 (1954); *Michigan Medical Serv. v. Sharpe*, 339 Mich. 574, 64 N.W.2d 713 (1954).

⁶⁵ *Michigan Hosp. Serv. v. Sharpe*, 339 Mich. 357, 370, 63 N.W.2d 638, 639 (1954). See Annot., 167 A.L.R. 322 (1947).

needed.' . . . Plaintiff thus had a *primary obligation* to provide service in accordance with the terms of the contract."⁶⁶ It follows from this formulation, of course, that no subrogation is available. What the court fails to see is that the statement that the service plan had a "primary obligation" begs the question, for that is merely an alternative way of formulating the proposition that subrogation is not available. The question whether there is a primary obligation (and hence no subrogation) is much more difficult than the court thinks, for there is no clear test of the primacy of obligations. Whether the transaction is technically insurance is not of the essence, for the problems of subrogation, or of primacy of obligation, are not peculiar to insurance, and depend on general considerations of fairness that are equally applicable in either case. A vigorous dissent insisted not only that the transaction was insurance, but also that subrogation was available. Despite the weakness of the analysis in the prevailing opinion, the case does decide, for Michigan, that a hospital service plan is not subrogated to claims against tortfeasors, in the absence of a contractual stipulation therefor.

The service certificate in the second case, involving medical and surgical benefits (Blue Shield), rather than hospitalization (Blue Cross), contained an express stipulation for subrogation. The justice who wrote the opinion had dissented in the earlier case. Accepting the previous result, he stated emphatically that the only distinction between the two cases was the presence of the subrogation clause in the second, and upheld the service's claim to be subrogated on the basis of that difference:

"Enrichment of plaintiff is not unjust if pursuant to the express agreement of the parties, fairly and honestly arrived at before hand. It is neither unjust, unfair nor inequitable to give effect to an agreement which was not induced by mistake, overreaching, fraud or misrepresentation To agree with defendants that the subrogation clause gave plaintiff no rights whatsoever is to read it out of the agreement by rendering it meaningless. This a court may not do."⁶⁷

The earlier case had already suggested the distinction: "It is

⁶⁶ *Id.* at 373, 63 N.W.2d at 641. (Emphasis added.)

⁶⁷ *Michigan Medical Serv. v. Sharpe*, 339 Mich. 574, 577, 64 N.W.2d 713, 714 (1954).

conclusive that by the very language of the contract not one iota of intent on the part of plaintiff to recover for hospital services rendered upon accidental injury may be adduced."⁶⁸

In the earlier case, the court had held that the hospital service plan was not insurance.⁶⁹ Nor, one would suppose, could the medical service plan consistently be regarded as insurance. But this does not lessen the importance of the case to the insurance field. Subrogation doctrines are not peculiar to insurance, but as remedial or restitutionary doctrines created by equity or by contract apply in similar manner to insurance and to like contracts that are not quite insurance.⁷⁰ The same emphasis on the freedom of the parties to stipulate for subrogation should apply to transactions on both sides of the uncertain boundary between insurance and related contracts. Viewed as insurance, this plan would be disability insurance, to which legal subrogation has apparently not applied in the past, but to which conventional subrogation seemingly can be extended, in the view of the Michigan court.

Frequent dicta suggest that parties to a contract are free to stipulate for subrogation. The leading case holding that legal subrogation did not apply to accident insurance suggests as much: "If it be true that in the absence of some stipulation to the contrary a contract of casualty insurance is not . . . one of indemnity giving rise in the circumstances of this case to the right of subrogation as against the party wrongfully causing the injury, and yet the parties might give it that character by a stipulation to that effect, so far

⁶⁸ *Michigan Hosp. Serv. v. Sharpe*, 339 Mich. 357, 369-70, 63 N.W.2d 638, 639 (1954).

⁶⁹ Most of the cases deciding this question have dealt with the question whether the service plans are subject to the laws regulating insurance. See, e.g., *Group Health Ass'n v. Moor*, 24 F. Supp. 445 (D.D.C. 1938), *aff'd sub nom. Jordan v. Group Health Ass'n*, 107 F.2d 239 (D.C. Cir. 1939); *California Physicians' Serv. v. Garrison*, 28 Cal. 2d 790, 172 P.2d 4 (1946); *Commissioner of Banking & Ins. v. Community Health Serv.*, 129 N.J.L. 427, 30 A.2d 44 (1943); *State ex rel. Fishback v. Universal Serv. Agency*, 87 Wash. 413, 151 Pac. 768 (1915); Annot., 167 A.L.R. 322 (1947).

⁷⁰ The generality of the doctrines of subrogation is suggested by the terms of RESTATEMENT, RESTITUTION § 162 (1937): "Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder." One would have difficulty in finding authorities that distinguish between insurance and other contracts for the purpose of deciding a subrogation case. See also RESTATEMENT, SECURITY § 141, comment *a* (1941).

as we can discover there was no such stipulation in the contract in question.”⁷¹ There may be only a single case refusing effect to an express subrogation clause;⁷² there are a few cases in which the question has come up explicitly in which the decision has been favorable to subrogation. In addition to the medical service case in the text above, a recent New Jersey case gave effect to a stipulation for subrogation of the insurer under the medical payments coverage of an automobile policy, though there seems to be no legal subrogation in medical payments insurance.⁷³ A recent New York case subrogated a commercial disability insurer under a group policy covering medical expense benefits,⁷⁴ and subrogation in the guise of a provision for a trust to be held by the injured policyholder for the benefit of the insurer was upheld in Illinois under an Uninsured Motorist’s Endorsement.⁷⁵

In answering the question whether stipulation can extend the range of subrogation beyond the scope of legal subrogation, the important and pervasive public policy in favor of freedom to contract comes into play. Despite a considerable erosion of the force of this public policy in the twentieth century, it is still an important factor in the decision of cases.⁷⁶ Only considerations of substantial weight can overcome it, and then generally only at the behest of the legislature. Overt interference by the courts with the free decisions of fully competent parties is relatively infrequent and occurs in limited classes of cases. What must be decided is whether there are here considerations of enough weight to overcome the presumption that agreements should and will be enforced in accordance with their terms.

For the present the question is put aside whether certain social problems, such as automobile accidents, are so serious as to justify

⁷¹ *Gatzweiler v. Milwaukee Elec. Ry. & Light Co.*, 136 Wis. 34, 38, 116 N.W. 633, 634 (1908).

⁷² *Fifield Manor v. Finston*, 54 Cal. 2d 632, 354 P.2d 1073 (1960), a non-insurance case criticized in 59 MICH. L. REV. 1256 (1961), 109 U.C.L.A.L. REV. 668 (1961), 109 U. PA. L. REV. 443 (1961). See also *City of Richmond v. Hanes*, 203 Va. 102, 122 S.E.2d 895 (1961).

⁷³ *Smith v. Motor Club*, 54 N.J. Super. 37, 148 A.2d 37, *aff’d*, 56 N.J. Super. 203, 152 A.2d 369, *petition for certification denied*, 30 N.J. 563, 154 A.2d 451 (1959).

⁷⁴ *Application of Maak*, 30 Misc. 2d 610, 222 N.Y.S.2d 845 (Sup. Ct. 1961).

⁷⁵ *Remsen v. Midway Liquors, Inc.*, 30 Ill. App. 2d 132, 174 N.E.2d 7 (1961). The court emphasized that the trust agreement produced subrogation.

⁷⁶ HAVIGHURST, *THE NATURE OF PRIVATE CONTRACT* 95 (1961); Pound, *The Role of the Will in Law*, 68 HARV. L. REV. 1, 16 (1954).

legislative intervention that would eliminate or alter beyond recognition the institution of subrogation. The question is also put aside whether insurance commissioners have power to decline to approve contract forms containing novel stipulations for subrogation and thus determine these public policy questions themselves. This article deals only with the question whether conventional subrogation should be allowed by the courts in the absence of a legislative declaration of policy. By putting the discussion in this limited frame of reference, the only question raised is whether courts are justified in refusing to give effect to freely contracted-for stipulations for subrogation. The question is formulated in this way despite recognition of the fact that these are contracts of adhesion, not freely negotiated contracts. But our law takes no explicit account of this except in its *contra proferentem* rule of interpretation.

What policy considerations are there of the sort that can affect the decision of a court applying common-law principles that would lead the court to deny effect to the subrogation clause? We have seen that it is not even clear why *legal* subrogation should be denied in life or accident insurance cases, and this article has concluded that it rests either on a notion that the contract is in its nature not one of indemnity, or on a notion that in most such cases there is doubt whether there has in fact been indemnification. In either case it is difficult to see any reason to limit the effect of a subrogation clause. If it is doubtful whether a contract is of an indemnity nature, the existence of a subrogation clause should settle the question.⁷⁷ The medical payments coverage, or hospital or medical service plans, should be disposed of easily by this argument. With a subrogation clause they become, if they were not already, indemnity contracts. If it is not doubtful, and the contract seems "in its nature" not to be an indemnity contract but something else, then the question may be a bit harder. However, the question whether a contract is or is not an indemnity contract would seem to be a question of fact, turning on the actual intention of the parties.⁷⁸ What does one mean by an in-

⁷⁷ SHELTON, SUBROGATION § 239 (2d ed. 1893). See also 1 COUCH, *op. cit. supra* note 52, § 1:16.

⁷⁸ See 2 HARPER & JAMES, TORTS § 25.22, at 1352 (1956). *But see* Employers' Liab. Assur. Corp. v. Daley, 183 Misc. 975, 51 N.Y.S.2d 567 (Sup. Ct. 1944).

demnity contract except that the obligation of the indemnitor is to make the indemnitee whole, and no more, and why can not such a contract be created whenever the parties want? Why should not the subrogation clause be as determinative here as in cases where the outcome is doubtful in the absence of a stipulation? The only situation in which there might seem to be difficulty is where it is hard to conceive of full indemnification, as when life or bodily integrity is involved. Yet a stipulation that purports to make such a contract one of indemnity could and perhaps should be interpreted as one to reimburse for the economic consequences of the insured event. Whenever there has been full compensation for such harm, why should not the stipulated-for subrogation follow? It should not matter that the full indemnification that is precedent to subrogation will seldom exist; this goes only to the frequency of subrogation claims, not to their propriety. Nor should it matter that measurement of the harm is extremely difficult; to determine this very question is a normal task of the legal system, with which courts and lawyers are well acquainted. Such determinations must constantly be made in personal injury litigation. But there seems to be an even stronger reason for freely allowing conventional subrogation. In those lines of insurance in which subrogation normally exists, there are frequent stipulations for subrogation *pro tanto*, so that the insurer will be entitled to first recovery on any amounts recoverable from a tortfeasor.⁷⁹ If one can stipulate in property insurance for subrogation prior to a full indemnification why should a life or disability insurer not be allowed to do the same? The fact that full indemnification is unusual, difficult to prove, or even difficult to conceive, in such lines of insurance, is irrelevant, for *ex hypothesi* the settlement of all questions between insurer and insured has been made independent of full indemnification. No doubt any contract providing for subrogation *pro tanto* should be

⁷⁹ Accepted doctrine generally requires full indemnity before subrogation. Annots., 91 A.L.R. 855 (1934); 53 A.L.R. 304 (1928); 46 A.L.R. 857 (1927); 32 A.L.R. 568 (1924); 9 A.L.R. 1596 (1920). This seems to be true also in fire insurance. *Ward v. Concordia Fire Ins. Co.*, 218 Mo. App. 98, 262 S.W. 450 (1924); *McConnell v. Conaway*, 62 Ohio App. 335, 23 N.E.2d 970 (1939). One writer has suggested that the subrogation clause of the National Standard Automobile Insurance Policy was drafted as it was in order to get around the full indemnity rule. Billings, *The Significance of Subrogation in Automobile Insurance Practice*, 1948 Ins. L.J. 707, 709. But see King, *Subrogation Under Contracts Insuring Property*, 30 TEXAS L. REV. 62, 68 (1951).

carefully scrutinized by the court, but it should then be fully enforced in accordance with its terms.

The Oregon Supreme Court had to deal with a different method of achieving the same result in *Barmeier v. Oregon Physicians' Service*.⁸⁰ The court felt it unnecessary to decide whether the hospital service contract was a contract of insurance, though it hinted that it probably was not, nor did it decide whether legal subrogation was applicable to the contract in suit. The contract contained a clause providing that the benefits were not applicable in the event of injury or illness caused by the negligence or wrongful act of another, except to the extent that the injured person should make all reasonable efforts to recover from the tortfeasor and be unable to do so. The injured plaintiff recovered enough from the tortfeasor to cover the medical and hospital expenses, without being able to get enough to pay for general damages. Despite the lack of full indemnity in this situation the court interpreted the contract so as to relieve the defendant physicians' service from liability. This clause was in substance, though not in form, a subrogation clause. All arguments in favor of permitting the company to stipulate for a reduction in liability if money is recoverable from the tortfeasor are equally applicable to a stipulation for subrogation, except the argument based on form. It may be urged with some force that while the clause in the *Barmeier* case is a part of the definition of the service's obligation, a subrogation clause actually transfers a right of action and is, therefore, an assignment, even if the two clauses have identical purposes. This argument cannot be wholly discounted; form does matter a great deal in the law. If a subrogation clause is an assignment, any policy that exists in the state to prohibit assignment would presumably apply. We have seen that it is not difficult to distinguish assignment from legal subrogation. It can also be argued that there are important differences between conventional subrogation and assignment. Though both are voluntary trans-

⁸⁰ 194 Ore. 659, 243 P.2d 1053 (1952). The limitation of coverage to achieve the results that would normally be achieved by a valid subrogation clause is very common. Many medical expense or hospitalization plans specify that the policy does not cover costs for which insured is entitled to reimbursement under workmen's compensation or similar laws, or services rendered by Veterans Administration hospitals, or services rendered by any government hospital unless there is an unconditional obligation to pay for the services.

fers, the latter is a transfer of a much more specific nature than is subrogation. Assignment involves dangers of maintenance or champerty; subrogation does not. Assignment generally involves some consideration moving from the assignee. Subrogation involves no explicit consideration, and at most contemplates some reduction in a consideration moving from the assignor. Assignment is the transfer of a subsisting debt; subrogation comes into being by the payment of the debt. There are many reasons, thus, for treating conventional subrogation as a very peculiar kind of assignment, if it is assignment at all. It is difficult to know how far courts would distinguish between assignment and conventional subrogation in order to uphold the latter while denying validity to the former. In *Michigan Medical Serv. v. Sharpe*⁸¹ the court gave effect to the subrogation stipulation, but in Michigan a cause of action for personal injuries is now assignable.^{81a} On the other hand, a recent New Jersey case⁸² gave effect to a stipulation for subrogation in medical payments insurance despite the fact that New Jersey apparently still regards personal injury actions as unassignable.⁸³ In *City of New York Ins. Co. v. Tice*⁸⁴ the Kansas Supreme Court upheld a subrogation claim under collision coverage although this kind of claim could not be assigned. The court treats the case as one of conventional subrogation, since there was a subrogation clause. Realistically, however, the distinction the court made between conventional subrogation and assignment must be regarded as dictum, albeit a singularly persuasive one, since even in the absence of the subrogation clause subrogation would surely have been upheld. The California case of *Fifield*

⁸¹ 339 Mich. 574, 64 N.W.2d 713 (1954).

^{81a} *Grand Rapids & I.R. Co. v. Cheboygan Circuit Judge*, 161 Mich. 181, 126 N.W. 56 (1910).

⁸² *Smith v. Motor Club*, 54 N.J. Super. 37, 148 A.2d 37, *aff'd*, 56 N.J. Super. 203, 152 A.2d 369, *petition for certification denied*, 30 N.J. 563, 154 A.2d 451 (1959).

⁸³ *Goldfarb v. Reicher*, 112 N.J.L. 413, 171 Atl. 149, *aff'd*, 113 N.J.L. 399, 174 Atl. 507 (1934); *Weller & Lichtenstein v. Jersey City, St. Ry. Co.*, 68 N.J. Eq. 659, 61 Atl. 459 (1905); and see *Zurich Gen. Acc. & Liab. Ins. Co. v. Ackerman Bros.*, 124 N.L.J. 187, 11 A.2d 52 (1940), in which after an employee recovered under the New York Workmen's Compensation Act, and the claim was assigned to the New York employer's insurance carrier who then brought suit in New Jersey against the tortfeasor, it was held that the assignment provided for by New York statute was subrogation and was valid.

⁸⁴ 159 Kan. 176, 152 P.2d 836 (1944). *Katz, Automobile Payments Coverage—A Changing Concept?*, 28 INS. COUNSEL J. 277 (1961), relies too heavily on this case, not recognizing it as dictum; see also *Redmon v. Salisbury Co.*, 178 Kan. 639, 290 P.2d 809 (1955).

Manor v. Finston,⁸⁵ dealing with a contract outside the insurance institution but rather closely related to it, denied effect to a subrogation clause and placed the denial explicitly on the ground that subrogation is assignment and assignment of such a cause of action is forbidden by the California statutes.

The limited case law is thus equivocal. There is authority for distinguishing between assignment and conventional subrogation, and there is authority for treating them as the same. But at most the objection is one that relates to form and it can surely be evaded by techniques that insurance companies use now. Trust receipts and loan receipts are two devices of long standing that are useful to avoid any questions about assignability or that other similar technical problem to which we have not yet adverted—real-party-in-interest statutes that compel the insurer to appear in the subrogation suit in its own right, when it would prefer to be active but anonymous.⁸⁶ Moreover, the device of restricting coverage used in the *Barmeier* case⁸⁷ would seem to be equally effective. A technical objection is thus met with an equally technical evasive device. Unless there are policy reasons of much greater weight than any we have been able to perceive that militate against conventional subrogation in those insurance contracts that have not previously been thought of as indemnity contracts, insurance companies should be able to stipulate for subrogation at will and on any terms they wish, whether by that name or in the guise of a loan agreement, a trust arrangement, or a limitation on coverage.

CONCLUSIONS

The distinction that has been drawn hitherto between indemnity and investment contracts in discussing legal subrogation is a tenuous one, or at least has been somewhat ineptly applied. Legal subrogation ought to be extended by courts considerably beyond the generally assumed range of its application, to all contracts in which there is, in fact, a full indemnification of the policyholder. In particular, the court should act to eliminate a

⁸⁵ 54 Cal. 2d 632, 354 P.2d 1073 (1960).

⁸⁶ 2 RICHARDS, INSURANCE 692-701 (5th ed. 1952); see also *City of Richmond v. Hanes*, 203 Va. 102, 122 S.E.2d 895 (1961).

⁸⁷ *Barmeier v. Oregon Physicians' Serv.*, 194 Ore. 659, 243 P.2d 1053 (1952).

great many of the double recoveries that are now possible where accident and health insurance overlaps with workmen's compensation, claims against solvent tortfeasors, or other sources of compensation. Moreover, on the basis of existing doctrine the courts have little justification for denying to insurance companies freedom to stipulate for subrogation in cases where the courts have thus far not recognized legal subrogation. This would seem to apply not only in cases like medical payments or hospital expenses coverages where the contract is in reality an indemnity contract, but also to accident insurance generally or to life insurance, where it is much less clearly so. The subrogation stipulation should be completely effective to define the terms of the subrogation right, whatever the kind of insurance.

This leads to a more important and ultimate question with which this article does not deal. An extension of subrogation may have as one result that it eliminates a double recovery—a windfall—to the policyholder. In general, this is a salutary consequence. Windfalls and excessive recoveries are widely thought to produce a moral hazard, and thus to be objectionable. Moreover, they increase the cost of insurance without serving any useful purpose. On the other hand, an extension of subrogation may have a different consequence that has much less social utility. To allow subrogation contracts the umbrella of protection that is or can be afforded by the insurance policy, so that it does not protect, in even a limited sense, those persons against whom subrogation is claimed, and who would or could receive a measure of protection in the absence of subrogation. To determine whether this consequence is desirable, one must enter into a detailed consideration of the context of each kind of insurance policy and its social purpose. This involves a critical examination of the costs and consequences to society as a whole of various methods of loss distribution. The extension of subrogation is likely to involve increased total costs, since it tends to necessitate two insurance policies, one against property loss and the other against liability, when the first alone could do the job. It also tends to increase the burdens of courts. But the problem is complex and this is not the place to enter judgment.⁸⁸

⁸⁸ For an introduction to the writing and cases raising the ultimate policy issues, see

The policy considerations that might lead to the abrogation of subrogation are considerations that are peculiarly within the competence of the legislature and not of the court, since they involve major changes in received common-law doctrine in order to solve social problems of serious magnitude. The automobile accident problem is an obvious candidate for a study directed to such wide-ranging changes. Some provocative things have already been written on this subject.⁸⁹ Fire insurance might equally be suggested for consideration, at least in the event that insurance companies should move to make subrogation claims more frequently in fire insurance. There has been some recent indication of a renewed interest in pursuing fire insurance subrogation claims more frequently and more systematically than before.⁹⁰ One recent speaker who urged additional attention to fire subrogations told of a nearly overlooked subrogation case. A dwelling was damaged by fire caused by an over-heated furnace. An inquisitive adjuster investigated and found that a diaphragm was installed upside down by an employee of the manufacturer of the furnace. The error was missed by the company's inspector, by the distributor, by the heating contractor who installed it, by the electrician who wired the furnace and turned it on, by the gas company inspector, and by the county inspector. Naturally, a subrogation suit resulted against these various potential defendants.⁹¹

What would be the consequence of such subrogation suits? In general it would be to shift the loss from the owner of the building to the fire insurer, thence to the negligent person, and finally to the latter's liability insurer. In the end the litigation would probably be fought between two insurance companies. In the absence of liability insurance the probable consequence would

GREGORY & KALVEN, *CASES ON TORTS* 689-787, esp. 767 (1959); 2 HARPER & JAMES, *TORTS* §§ 25.19-23 (1956); JAMES, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. REV. 537, 557 (1952). See also the discussion of the Beveridge plan in England and resulting legislation in FRIEDMANN, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241, 253-58 (1949); HELLNER, *FÖRSÄKRINGSGIVARENS REGRESSRÄTT* (The Insurer's Right of Subrogation) (1953); EHRENZWEIG, Book Review, 2 AM. J. COMP. L. 562 (1953).

⁸⁹ See *ibid.*

⁹⁰ See authorities cited note 12, *supra*.

⁹¹ National Underwriter (F & C ed.), February 9, 1962, p.32.

be bankruptcy for the tortfeasor. There is little social advantage in a repeated shifting of the loss, especially from one insurer to another. The gain to the insurer is apt to be illusory, for what it gains in a case in which it is the fire insurer, it loses in another in which it is liability insurer. Moreover, repeated transfer of losses is an expensive matter, and socially it is much more efficient to handle the money only once, especially if litigation costs can thereby be avoided. In general, loss insurance should be more efficient than liability insurance as a way to distribute the cost of fires in our society. This social saving can be achieved fairly easily by abrogating subrogation altogether in fire insurance, except perhaps for carefully defined cases of willful destruction or grossly negligent destruction of the property.⁹² Although a strong case can doubtless be made for such a change, as a major improvement in our arrangements for handling such problems, it makes drastic changes in our private law, as this article has tried to show. Such a change is one that courts have been reluctant to make, for it brings strangers within the protection of the policies in violation of the principle that persons not parties to contracts and not intended beneficiaries should not have rights under them. For this reason, it is a change that will probably have to be made by the legislature, if it gets made at all. But there may be other ways to approach the problem. One is for fire insurance companies voluntarily to give up subrogation rights in certain classes of cases. At least one state insurance commissioner has urged this upon fire insurance companies as a matter of claims practice.⁹³ Another approach would be the revision of the insurance policy itself, to abrogate subrogation and, in effect, to extend the umbrella of protection to include the tortfeasor who is merely negligent. In fire insurance this has a special difficulty, that the insurance policy is a statutory one, but this is not a serious difficulty for other lines of insurance. However, it is important in this article only to suggest that there may be many problems to

⁹² Swedish law has abrogated subrogation in indemnity insurance in cases of ordinary negligence, but not in cases of international torts, gross negligence, or strict liability. HELLNER, *op. cit. supra* note 88, at 260-61. It is not apparent why strict liability should be classified with intentional torts for this purpose. Friedman, *Landlords, Tenants and Fires—Insurer's Right of Subrogation*, 43 CORNELL L.Q. 225 (1957), deals with one narrow aspect of this larger problem.

⁹³ Hon. Donald Knowlton of New Hampshire, in a statement made about 1950, and confirmed by letter of October 19, 1961, to the author.

which abrogation of subrogation would be a desirable solution, and that the conclusions of this paper are limited to cases where there has not been a special examination of such problems. Abrogation should be carefully considered in each separate context, and any change that is made may well have to be a legislative and not a judicial act.