

ANTISUBROGATION IN A NUTSHELL

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The antisubrogation rule and its rationale

It is easy to put the antisubrogation rule in a nutshell. Keeping it there is another matter.

In its most frequent formulation, the antisubrogation rule says an insurer “has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered.” *North Star Reinsurance Corp. v. Continental Ins. Co.*, 82 N.Y.2d 281, 294, 604 N.Y.S.2d 510, 516 (1993). This is so even if the insured has contractually agreed to indemnify the party whose rights have been subrogated to the insurer, because “the public interest in assuring integrity of insurers’ relations with their insureds and in averting even the potential for conflict of interest in these situations must take precedence over the parties’ private contractual arrangements.” *Pennsylvania General Ins. Co. v. Austin Powder Co.*, 68 N.Y.2d 465, 472, 510 N.Y.S.2d 67, 71 (1986); *Jefferson Ins. Co. of New York v. Travelers Indem. Co.*, 92 N.Y.2d 363, 681 N.Y.S.2d 208 (1998). The purposes of that rule are (a) “to prevent the insurer from passing the incidence of loss to its own insured” who paid for coverage and (b) “to guard against the potential for conflict of interest that may affect the insurer’s incentive to provide a vigorous defense for its insured.” *North Star Reinsurance Corp. v. Continental Ins. Co.*, 82 N.Y.2d at 294-295, 604 N.Y.S.2d at 516-517.

The antisubrogation rule proceeds from the assumption that the real party in interest in a third-party action is not the defendant/third-party plaintiff, but its insurance company. The defendant/third-party plaintiff usually has no actual out-of-pocket cost for its own defense and usually does not pay any part of a judgment or settlement out of its own funds: its insurance company bears those costs for it. Therefore, when a defendant/third-party plaintiff defended by an insurance company impleads a third-party defendant, the courts view the defendant/third-party plaintiff’s insurance company as the real party in interest in the third-party action, and view the third-party action as an effort by that insurance company to subrogate itself to the rights of its insured (the defendant/third-party plaintiff) against a wrongdoer responsible for the loss (the third-party defendant).

When the same insurer is on both sides of a third-party claim, potential conflicts of interest and opportunities for mischief abound. The courts' chief concern is that the insurer can fashion the litigation so as to minimize liability under its own policy(ies), while passing liability on to either the insured or the insured's other insurers. For example, a third-party defendant's CGL insurer might mount a less-than-vigorous defense to the third-party plaintiffs' claims for common law indemnity and contribution (which it does not cover), to trigger the indemnity obligation of the WC carrier (which does cover those kinds of claims). Another potential concern would be that the CGL carrier – if it controlled or influenced the defense of the third-party plaintiff – could instruct counsel for that party not to prosecute its contractual indemnity claim forcefully, or perhaps even not to assert it in the first place, to avoid triggering its own contractual liability coverage for the third-party defendant.

Even in the absence of such deliberate gamesmanship, the courts see other potential for conflicts of interest. For example, it may be that the interests of a third-party defendant can be fully protected only through a vigorous defense of the defendant/third-party plaintiff. However, if the CGL carrier could recoup some or all of its liability for the defendant/third-party plaintiff from the third-party defendant's WC coverage, then it would have that much less incentive to defend the defendant/third-party plaintiff against plaintiffs' claims. See *Pennsylvania General Ins. Co. v. Austin Powder Co.*, 68 N.Y.2d at 472, 510 N.Y.S.2d at 71.

“Claim arising from the very risk for which the insured was covered”

A critical factor in determining whether the antisubrogation rule applies to a claim is whether the claim arises from the risk for which the third-party defendant was covered by the common insurer; *i.e.*, whether the claim arises from an incident for which the common insurer's policy covers the third-party defendant. *Pennsylvania General Ins. Co. v. Austin Powder Co.*, 68 N.Y.2d at 471, 510 N.Y.S.2d at 70; *North Star Reinsurance Corp. v. Continental Ins. Co.*, 82 N.Y.2d at 295, 604 N.Y.S.2d at 516. In a typical construction accident case, in which the third-party defendant was also the plaintiff's employer, the CGL insurer will cover that third-party defendant only for the third-party plaintiff's claim of contractual indemnity, not for any claim of common law indemnity or contribution. One might therefore be tempted to argue that only the contractual indemnity claims ought to be dismissed under the antisubrogation rule, but that the common law indemnity and contribution claims are not subject to the rule. However, that

argument has been rejected by the courts. *Leyden v. Square Arch Realty Corp.*, 164 Misc.2d 769, 626 N.Y.S.2d 352 (Sup. Ct. 1995); *Pierce v. City of New York*, 160 Misc.2d 600, 610 N.Y.S.2d 731 (Sup. Ct. 1994); *Kurtin v. National R.R. Passenger Corp. (Amtrak)*, 1996 WL 194296, *4 (S.D.N.Y.). The following excerpt from the decision in *Pierce v. City of New York* illustrates the courts' reasoning:

... When [third-party defendant subcontractor] purchased the liability policy it sought to insure against two risks. First, it sought to protect [third-party plaintiff general contractor] from any claims with respect to the work [third-party defendant subcontractor] performed, including those for bodily injury asserted by [third-party defendant subcontractor's] employees. Second, it sought to fund any liability it might have to [third-party plaintiff general contractor] as a result of the broad indemnification clause contained in the contract between them. To achieve this latter purpose [third-party defendant subcontractor] specifically included contractual liability coverage in the policy. Allowing the causes of action for contribution and indemnity to be asserted, to the extent that they seek damages up to the limit of the liability policy, would sanction the insurer's subrogation against its insured for the very risk for which the insured sought and received coverage. *Id.*, 160 Misc.2d at 602, 610 N.Y.S.2d at 733.

There are cases in which courts have found that a third-party claim did not "arise from the risk for which the third-party defendant was covered by the insurer," but in each of those cases the insurer's policy did not apply to **any** of the third-party claims. *E.g.*, *Layaw v. Maguire Ford-Lincoln-Mercury Inc.*, 219 A.D.2d 73, 639 N.Y.S.2d 544 (3rd Dep't 1996) [third-party claim for contractual indemnity was expressly limited to sums in excess of applicable coverage]; *McGurran v. DiCanio Planned Development Corp.*, 216 A.D.2d 538, 628 N.Y.S.2d 773 (2nd Dep't 1995) [third-party defendant's policy excluded employee bodily injury coverage and did not include contractual liability coverage]; *Rosato v. Karl Koch Erecting Co., Inc.*, 865 F.Supp. 104 (E.D.N.Y., 1994) [third-party defendant's policy excluded employee bodily injury coverage and did not include contractual liability coverage]; *Wright v. E.S. McCann and Son, Inc.*, 216 A.D.2d 73, 628 N.Y.S.2d 70 (1st Dep't 1995) [third-party defendant neglected to have third-party plaintiff added to policy as an additional insured, even though contract required it to do so].

Thus, if the CGL insurer's policy insures the third-party defendant against the third-party plaintiff's contractual indemnity claim, then **all** of that third-party plaintiff's third-party claims against the third-party defendant will be deemed to "arise from the risk for which the third-party defendant was covered by the insurer." *Pierce v. City of New York*, 160 Misc.2d 600, 610

N.Y.S.2d 731 (Sup. Ct. 1994); *Travelers Indem. Co. v. LLJV Development Corp.*, 227 A.D.2d 151, 643 N.Y.S.2d 520 (1st Dep't 1996) [insurer covered third-party defendant for contractual indemnity claim]; *Leyden v. Square Arch Realty Corp.*, 164 Misc.2d 769, 626 N.Y.S.2d 352 (Sup. Ct. 1995) [insurer covered third-party defendant for contractual indemnity claim]. If the rule were otherwise, an insurer could fashion the third-party litigation so as not to trigger coverage under its own policy, and thereby limit its own liability to the detriment of one or both of its insureds, which is precisely what the antisubrogation rule is intended to prevent. *Id.*

No exception merely because third-party defendant has other insurance

The existence of other insurance covering the third-party defendant does not give rise to an exception to the antisubrogation rule. To avoid even potential conflicts of interest, the courts usually dismiss all the third-party claims whenever the antisubrogation rule applies, even if the third-party defendant also has other insurance from different insurers covering some of those third-party claims. Thus, the fact that a third-party defendant has WC coverage from another insurer that insures against the common law indemnity and contribution claims would be deemed a “mere fortuity,” not warranting an exception to the antisubrogation rule. *Pennsylvania General Ins. Co. v. Austin Powder Co.*, 68 N.Y.2d at 472, 510 N.Y.S.2d at 71; *Kurtin v. National RR Passenger Corp. (Amtrak)*, 1996 WL 194296, *4 (S.D.N.Y.); *Washington v. New York City Indus. Development Agency*, 215 A.D.2d 297, 627 N.Y.S.2d 343 (1st Dep't 1995); *Cox v. International Paper Co.*, 234 A.D.2d 757, 651 N.Y.S.2d 230 (3rd Dep't 1996); *Walters v. City of New York*, 159 A.D.2d 423, 553 N.Y.S.2d 115 (1st Dep't 1990).

No “procedural” exception for declaratory judgment actions

There is no “procedural” exception to the antisubrogation rule for declaratory judgment actions. That is, the courts apply the antisubrogation rule, not just to third-party actions between insured parties with the same insurer, but also in declaratory judgment actions between insurers seeking coverage determinations. If the antisubrogation rule requires the dismissal of a third-party claim, any attempt by the common insurer, after having paid a judgment or settlement, to obtain reimbursement from one of the third-party defendant's co-insurers, will be rejected. *National Cas. Co. v. State Ins. Fund*, 227 A.D.2d 115, 641 N.Y.S.2d 665 (1st Dep't 1996). Therefore, even if the CGL insurer settles a claim with its own dollars, subject to a complete reservation of all its rights against another insurer, and then begins a separate declaratory

judgment action against that other insurer, the antisubrogation rule will apply in that declaratory judgment action to the same extent it would have applied in the underlying claim. *E.g.*, *National Union Fire Ins. Co. of Pittsburgh, Pa. v. State Ins. Fund*, 213 A.D.2d 164, 623 N.Y.S.2d 558 (1st Dep't 1995); *Avalanche Wrecking Corp. v. New York State Ins. Fund*, 211 A.D.2d 551, 621 N.Y.S.2d 74 (1st Dep't 1995); *Washington v. New York City Indus. Development Agency*, 215 A.D.2d 297, 627 N.Y.S.2d 343 (1st Dep't 1995); *Aetna Cas. & Sur. Co. v. Greater New York Mut. Ins. Co.*, 205 A.D.2d 433, 613 N.Y.S.2d 904 (1st Dep't 1994).

Partial exception for claims actually or potentially in excess of policy limits

Where a judgment in the main action might exceed the limits of the defendant/third-party plaintiff's insurance under the third-party defendant's CGL policy, such a potential excess verdict would give rise to claims of common law indemnity, contractual indemnity, and contribution in favor of the third-party plaintiff and against the third-party defendant, ***apart from*** or ***in excess of*** any claim as to which that CGL carrier could be deemed the real party in interest. In other words, until the plaintiffs' damages have been quantified by settlement or judgment, there is still a chance that a defendant/third-party plaintiff could wind up asserting its own interests (as opposed to the common CGL carrier's interests) against the third-party defendant. If the third-party action were dismissed completely before trial under the antisubrogation rule, then the third-party plaintiff would be unfairly deprived of its right to pursue such claims in its own interest.

To avoid that kind of unfair prejudice to third-party plaintiffs, most courts only partially dismiss the third-party actions before trial, notwithstanding the antisubrogation rule, and allow the third-party actions to go forward, but only insofar as those third-party actions seek damages in excess of or unrelated to the subrogating insurer's applicable policy limits. *Washington v. New York City Indus. Development Agency*, 215 A.D.2d 297, 627 N.Y.S.2d 343 (1st Dep't 1995); *Walters v. City of New York*, 159 A.D.2d 423, 553 N.Y.S.2d 115 (1st Dep't 1990); *Leyden v. Square Arch Realty Corp.*, 164 Misc.2d 769, 626 N.Y.S.2d 352 (Sup. Ct. 1995); *Pierce v. City of New York*, 160 Misc.2d 600, 610 N.Y.S.2d 731 (Sup. Ct. 1994); *cf.*, *Viola v. Great Neck Water Pollution Control Dist.*, 202 A.D.2d 363, 610 N.Y.S.2d 189 (1st Dep't 1994); *Kurtin v. National R.R. Passenger Corp. (Amtrak)*, 1996 WL 194296, *4 (S.D.N.Y.); *cf.*, *White v. Hotel D'Artistes, Inc.*, 230 A.D.2d 657, 646 N.Y.S.2d 793 (1st Dep't 1996) [dismissal under antisubrogation rule

was premature, because it had not yet been decided to what extent third-party plaintiff's own separate insurance might fund ultimate judgment or settlement with plaintiff]; *Layaw v. Maguire Ford-Lincoln-Mercury Inc.*, 219 A.D.2d 73, 639 N.Y.S.2d 544 (3rd Dep't 1996) [antissubrogation rule inapplicable because third-party claim for contractual indemnity was limited to indemnity for sums in excess of applicable coverage]; *contra*, *Hailey v. New York State Elec. & Gas Corp.*, 214 A.D.2d 986, 626 N.Y.S.2d 912 (4th Dep't 1995).

Partial exception where third-party plaintiff has other insurance

Just as it is premature to dismiss completely a third-party claim on antissubrogation grounds where the third-party defendant has a potential claim in its own right in excess of the common insurer's policy limit, so is it also premature to dismiss completely a third-party claim on antissubrogation grounds where the third-party plaintiff has its own independent insurance coverage for the plaintiff's claim. *Fitch v. Turner Const. Co.*, 241 A.D.2d 166, 671 N.Y.S.2d 446 (1st Dep't 1998); *White v. Hotel D'Artistes, Inc.*, 230 A.D.2d 657, 646 N.Y.S.2d 793 (1st Dep't 1996). That is because such a dismissal would unfairly wipe out that **other** insurer's chance to be subrogated to the rights of its insured and to pursue those rights against the third-party defendant.

Exception where common insurer has nothing to do with defense of third-party plaintiff

One reported decision, *National Union Fire Ins. Co. of Pittsburgh, Pa. v. State Ins. Fund*, 222 A.D.2d 369, 636 N.Y.S.2d 31 (1st Dep't 1995), suggests there may be an exception to the antissubrogation rule where the common insurer has nothing to do with the defense of the defendant or the prosecution of its third-party claims.

In *National Union Fire Ins. Co. of Pittsburgh, Pa. v. State Ins. Fund, id.*, a subcontractor's employee was injured on the job and sued the general contractor. The GC had its own insurance from Liberty Mutual, but was also an additional insured under the subcontractor's policy from National Union. Liberty Mutual defended the GC and commenced a third-party action in the GC's name against the subcontractor/employer. National Union defended the subcontractor/employer. No one ever asked National Union to assume any defense or indemnity obligation towards the GC and National Union never did so, even though the GC was an additional insured under the National Union policy. The subcontractor/employer also had WC coverage from The State Fund, but The State Fund denied any duty to defend or indemnify its

insured because, in its view, the third-party action should have been dismissed under the antisubrogation rule.

Eventually, the case settled. Liberty Mutual paid the entire amount of the GC's share of the settlement, with no contribution from National Union. National Union paid the entire amount of the subcontractor/employer's share of the settlement. The State Fund paid nothing.

National Union then sued The State Fund to recoup a share of the defense costs and indemnity payment it had paid for the subcontractor/employer. The State Fund's position was that it had no obligation to reimburse National Union for anything, because the GC's third-party action against the subcontractor/employer could and should have been dismissed under the antisubrogation rule. The trial court agreed with The State Fund, but the Appellate Division, First Department, reversed and held in favor of National Union.

The First Department held that the antisubrogation rule did *not* apply, despite the fact that National Union insured both the GC and the subcontractor/employer, because:

1. Liberty Mutual, not National Union, caused the third-party action to be commenced.
2. Liberty Mutual, in commencing the third-party action, did not seek to recover from its own insured (the GC), but rather from a stranger to its policy (the subcontractor/employer).
3. Neither the GC nor Liberty Mutual ever demanded that National Union contribute to the defense costs spent on behalf of the GC.
4. Neither the GC nor Liberty Mutual ever demanded that National Union contribute to the settlement monies spent on behalf of the GC.
5. National Union's duties to the GC were never invoked.
6. National Union could not control, have input into, or otherwise manipulate the theories of liability the GC asserted against the subcontractor/employer, so as to minimize its own liability or trigger the coverage of another insurance policy.

Under those circumstances, the court viewed the case as being akin to one in which the common insurer (National Union) did not cover the third-party defendant for any part of the third-party claim because of a policy exclusion, thereby "vitiating any double coverage or representation problem and rendering the antisubrogation rule inapplicable." *Id.*, 636 N.Y.S.2d at 32-33.

In addition to *National Union Fire Ins. Co. of Pittsburgh, Pa. v. State Ins. Fund, id.*, there is also a helpful unreported decision, *Commerce & Indus. Ins. Co. v. National Cas. Co.*, 1996 WL 450713 (Sup Ct. 1996). In *Commerce & Indus. Ins. Co. v. National Cas. Co.*, the court came to the same result as in *National Union Fire Ins. Co. of Pittsburgh, Pa. v. State Ins. Fund*, based on undisputed proof that (a) the common insurer played no role in controlling the defense of the third-party plaintiffs, (b) the common insurer did not actually defend or indemnify the third-party plaintiffs, and (c) the common insurer could not have controlled or manipulated the theories of liability asserted against the third-party defendant. Because the facts did not implicate any of the policy concerns raised in *North Star Reinsurance Corp. v. Continental Ins. Co.*, 82 N.Y.2d 281, 604 N.Y.S.2d 510 (1993), the court held the antisubrogation rule did not apply. Unfortunately, *Commerce & Indus. Ins. Co. v. National Cas. Co.* was a trial court decision and was not approved for publication by the reporter of decisions, so it is of relatively slight precedential value.

On the other hand, the same court that decided *National Union Fire Ins. Co. of Pittsburgh, Pa. v. State Ins. Fund* in 1995 came to an opposite result one year later in *National Cas. Co. v. State Ins. Fund*, 227 A.D.2d 665 (1st Dep't 1996). In *National Cas. Co. v. State Ins. Fund, id.*, the common insurer had not controlled the defense of the defendant/third-party plaintiff or the commencement of the third-party action. In fact, the common insurer *refused* to defend or indemnify the defendant/third-party plaintiff. Eventually, the claim was settled, with the common insurer agreeing to pay both the defendant/third-party plaintiff's *and* the third-party defendant's shares of the settlement with the plaintiff. The common insurer then sued The State Fund to recoup a share of its defense costs and indemnity payments. The court rejected the common insurer's demand for reimbursement, on two grounds: (a) it found that the third-party plaintiff had commenced its third-party action *because* of the common insurer's wrongful refusal to cover the third-party plaintiff in the first place and (b) it viewed the common insurer's initial refusal to defend or indemnify the third-party plaintiff as merely a ruse or gambit that "reeks of gamesmanship." *Id.*, 227 A.D.2d at 117, 641 N.Y.S.2d at 668. The court therefore held that the fact that the common insurer had not itself commenced the third-party action against its own insured was not enough to remove the case from the reach of the antisubrogation rule.