



1970

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Recommended Citation

Walter A. Rodgers, *Insurance Subrogation in Auto Medical Payments Coverage*, 19 Clev. St. L. Rev. 393 (1970)
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Insurance Subrogation in Auto Medical Payments Coverage

Walter A. Rodgers*

THE ISSUE OF AN INSURANCE COMPANY suing in its own name to recover payments for medical bills already paid for its insured has been the subject of much confusion. An automobile insurance policy designed to resolve this confusion was introduced by the National Bureau of Casualty Underwriters and National Automobile Underwriters Association in a number of states in September, 1959. The Mutual Insurance Rating Bureau helped revise the 1959 introductory policy in 1963; and created the "Special Package Automobile Form" (hereinafter referred to as Special Policy). The policy was designed for private passenger and utility automobiles; it has a maximum effective term of six months, and is a highly competitive policy in the insurance market.¹ This new form differed markedly from the "Family Automobile Policy," which was the traditional policy designed for the same class of automobiles and is still in wide use today.

The Special Policy was distinct primarily in that it attempted to eliminate duplication of coverage and unjust enrichment to an injured party. It provided:

- (1) a set-off provision against liability coverage (or the requirement of a covenant not to sue for medical expense),
- (2) an exclusion of benefits where there is other insurance against such loss and
- (3) a subrogation clause.²

It is unnecessary to elaborate on the other major differences between the two policies as this study will be confined to a discussion of the provisions of the Medical Payments Coverage with an analysis of the treatment these provisions have received by various courts, and more particularly, to resolving the question of whether the subrogation of medical expenses by automobile insurers is an assignment of a bodily injury claim.

Policy Language

The usual policy language of the Medical Payments Coverage provides as follows:

"To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, x-ray and dental

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¹ See Fire, Casualty, Surety Bulletins (C & S sections), AS-1, Fifth Printing, 1963.

² Katz, Automobile Medical Payments Coverage—A Changing Concept?, 28 Ins. Counsel J. 277 (1961).

services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services. . . ."³

As already mentioned, one of the new features of the Special Policy is the insertion of a subrogation clause, an example of which reads:

"In the event of any payment under the Medical Expense Coverage of this policy, insurer shall be subrogated to all the rights of recovery thereof which the injured person or anyone receiving such payment may have against any person or organization and such person shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. Such person shall do nothing after loss to prejudice such rights."⁴

There are two problems insurers face when issuing such policies. One problem, that might develop in those states which do not have Guest Passenger Statutes, is the double recovery dilemma. This arises when a passenger has his medical expenses paid under the Medical Payments Coverage and then seeks to recover the medical expenses again in a personal injury action against the insured driver. The second, and most crucial problem, occurs when the insurer, after having paid the medical expenses of the injured person, seeks to be subrogated to the rights of that injured person against the tortfeasor.

The subrogation provision clearly makes specific reference to Medical Payments. Indeed, in a memorandum explaining this Special Policy, the National Bureau stated:

Underwriters have been greatly concerned for some time that standard forms of automobile liability insurance and medical payments coverage have been affording benefits which by reason of their duplication within the policy and with other forms of insurance result in unintended, and in some cases actually unjust enrichment to the insureds and claimants involved in automobile accidents in that they have been recovering more than once for the same medical expenses. This form is newly conceived on the principle that the named insurer is neither legally nor morally bound to provide certain of these unjust benefits and that this policy should be designed so that such benefits are not recoverable.⁵

Thus, the intent of the provisions is clear and unambiguous, the most important of which is the stipulation for subrogation. In effect, this stipulation is an extension of an insurer's right of subrogation where it would seemingly not otherwise be available. This will be dealt with in a later discussion.

³ Reliance Insurance Company, Family Automobile Combination Policy, p. 2 (Nov., 1966).

⁴ Planet Insurance Company, V.I.P. Thrift Automobile Policy, p. 8 (April, 1965).

⁵ Katz, *supra* n. 2 at 277.

Historical Development of Assignments of Claims Ex Delicto

The most consistent, and perhaps the most narrow, argument which some courts adhere to today in failing to allow the right of subrogation of medical expenses is that the insured's (subrogor's) transfer of his rights to medical expenses to the insurer (subrogee) is an assignment of a claim *ex delicto* and is, therefore, void. Historically, claims *ex delicto* were not capable of assignment. This common law principle was universally accepted.⁶ A frequently cited case in point is *Rice v. Stone*,⁷ wherein the court answered the question of whether a personal injury claim was assignable. In adhering to the common law rule, the court listed two reasons for holding the assignment invalid: (1) to avoid maintenance; and (2) prior to judgment the assignor has nothing that can be assigned.

Thus, the common law test for the assignability of a claim depended on its survival. There being no survival statutes at common law, a claim for personal injury ceased to exist when the injured party died. The desire to avoid maintenance was conceived to forbid unprincipled people from purchasing personal injury claims and thereby preventing them from prosecuting these claims for pain and suffering. The early courts' reasoning led to what might have been a wise conclusion at the time, but it is doubtful whether there is any force left to this argument today.

With the introduction of survival statutes in most of the states, it should syllogistically follow that claims *ex delicto* are capable of assignment. The survival statutes, of course, permit a personal injury claim to survive the death of the injured person. Some survival statutes are not as broadly stated as others;⁸ i.e., some states maintain that personal injury claims are not capable of assignment until reduced to judgment. There would appear to be little justification for consistently holding the assignment of a personal injury claim invalid if the statutes were as broad as they could be. This is true inasmuch as the common law test of survivability has been met.

Assignment and Subrogation in General

It is not difficult to recognize that the concept of subrogation is distinct from that of assignment. In distinguishing subrogation from assignment, it has been said that:

Subrogation is the substitution of another person in the place of the creditor, so that the person substituted will succeed to the rights

⁶ Restatement, Contracts sec. 547 (1932); see also Annot. 40 A.L.R. 2d 500 and 40-48 A.L.R. 2d Later Case Service 45; Prosser, Torts 920 (3d edition, 1964); Kimball and Davis, The Extension of Insurance Subrogation, 60 Mich. L. Rev. 841 (1962).

⁷ 83 Mass. 566 (1913).

⁸ Prosser, Torts, note 44 at 924 (3d edition, 1964).

of the creditor in relation to the debt or claim, and is an act of the law—growing out of the relations of the parties to the original contract of insurance, and the natural justice or equities arising from the fact that the insurer has paid the insured, rather than a right depending upon the contract. On the other hand, an assignment of a right or claim is the act of the parties to the assignment, dependent upon actual intention, and necessarily contemplating the continued existence of the debt or claim, the whole of which is assigned.⁹

The operational effect and purpose of subrogation is that it seeks contribution and indemnity, while an assignment is the transfer of the whole claim.¹⁰

Subrogation can be of two kinds, either legal or conventional. One court construes legal subrogation as:

a creature of equity not depending upon contract, but upon the equities of the parties. In its more usual aspect, it arises by operation of law where one having a liability or right or a fiduciary relation in the premises pays a debt owing by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he paid.¹¹

Conventional subrogation, on the other hand, is simply the agreement of parties to a contract, wherein one party pays the other, then that party will seek indemnification by being subrogated to the rights of the party for whom the payment was made.¹² It would seem then that conventional subrogation should be capable of extending the right of subrogation to those situations where it would otherwise not be available.

Insurer's Right of Subrogation

As was mentioned, a clear distinction exists between subrogation and assignment. From this there emerges the question of whether an insurer has the right of subrogation; specifically, does the insurer have a right of subrogation of medical expenses resulting from automobile accidents?

Absent contractual stipulation (conventional subrogation) an insurer would not be subrogated to its insured's rights of recovery for medical expenses from the tortfeasor. Generally Medical Payments

⁹ 16 Couch, Insurance 2d 61:92 (Curr. ed.).

¹⁰ 6 C.J.S. Assignments 26 at 1074.

¹¹ General Creditors of Estate of Harris v. Cornett, 416 P. 2d 398, 400 (Okl. Sup. Ct., 1966; see also 50 Am. Jur. 681; 83 C.J.S. Subrogation 3 at 583.

¹² See 50 Am. Jur. 681 for a discussion on the distinction between legal and conventional subrogation. See also Kimball and Davis, *supra* note 6 at 844, where the authors outline those types of insurance policies to which legal subrogation is said to be available and even suggest that conventional subrogation could extend the right of subrogation of life insurance policies.

Coverage is a form of accident insurance and is, therefore, not capable of indemnification; Medical Payments Coverage is in the form of an investment contract and therefore, also not capable of indemnification; and also a claim for medical payments cannot be severed from the bodily injury claim.

There are no cases deciding the issue of whether legal subrogation is available in automobile medical payments claims.¹³ Nevertheless, a frequently cited case which deals with the question of why legal subrogation is not available is *Gatzweiler v. Milwaukee Elec. Ry. & Light Co.*¹⁴ Here the problem involved accident insurance. The plaintiff's insurance company sought to be joined as a party to Gatzweiler's claim for personal injuries against the defendant, inasmuch as the insurance company had paid the plaintiff twenty-five hundred dollars for his injuries. There was no provision for subrogation in the policy. Despite this, it was argued that the policy of accident insurance was a policy to indemnify the plaintiff policyholder and that the insurer, thereby, became subrogated to plaintiff's right of recovery for the amount of money the insurer had to pay out. This novel approach was not supported by authority, however, even though the argument was based on equitable assignment (legal subrogation), i.e. that where a tortfeasor has caused one person to obligingly pay another, the loss should fall on the tortfeasor, regardless of the lack of privity between the two. The court, however, accepted the established view. It stated that: (1) a life insurance policy is not an indemnity contract but a valued policy (although stating that an accident policy is not a life insurance policy, nor an indemnity policy); (2) being similar to a life insurance policy, the accident policy agrees to pay for injuries contingent upon the happening of an accident; (3) the amount of money paid out here had no relation to the damages suffered by the plaintiff; and (4) the policy is in the nature of an investment, the insured investing premiums with the company to have the company pay him in the event of a contingency. The court concluded by stating that there was no indemnity feature present in the policy but left the contractual approach open by remarking that:

if such a company desires protection against loss caused by the wrongs of third persons who would ordinarily be liable they must do so by contracts they make; that in the absence of a feature expressly making the policy of insurance an indemnity contract, it should not be regarded as such but held to be an investment contract in which only the parties concerned are the insurer and the assured or the beneficiary.¹⁵

¹³ Kimball and Davis, *supra* n. 6 at 846.

¹⁴ 136 Wis. 34, 116 N.W. 633 (1908).

¹⁵ *Id.* 116 N.W. at 634.

The test for allowing insurers the right of subrogation in these situations turns on the question of whether the policy is one of investment or indemnity. If it is construed as an investment contract, as life insurance policies invariably are, then no right of legal subrogation is available. If the policy is construed as an indemnity contract, legal subrogation should be available. One writer sums up the problems by saying that: "the doctrine of subrogation and indemnity are indissolubly connected."¹⁶

It remains unclear why automobile insurers failed to take the suggestion, mentioned by the court in the *Gatzweiler* case in 1908, and make constructive use of it until 1959 with the Special Policy. Indeed, it remains a mystery why all automobile policies are not written with the stipulation for subrogation of medical expenses. Perhaps the answer is that the Special Policy, and other policies with similar stipulations today, are written on the basis of competition.

Analysis of Cases Unfavorable to Subrogation

With the development of the idea that, absent stipulation, the subrogation of medical expenses by automobile insurance companies would be denied, in addition to the suggestion by the *Gatzweiler* case as to what interpretation would be given to policies containing a stipulation, is there any justification for a court's refusal to give effect to the legitimate subrogation rights of insurers, who have derived their rights by stipulation?

In several recent cases, the courts deny medical expense subrogation and see no technical distinction between subrogation and assignment, or feel that severing a claim for medical expenses from a chose on action results in the splitting of that cause.

A leading case in Missouri¹⁷ presented, for the first time, the question of whether or not the subrogation of medical expenses, as a condition of the policy, was proper. The court failed to distinguish between subrogation and assignment, labelling the insurer an assignee of part of its insured's claim for personal injury. The insurer added to the confusion by actually stating in an amended petition that its subrogation rights were "held as the assignee of Forest Oakley Chumbley. . . ."¹⁸ From there the court passed quickly over the argument that it was splitting a cause of action and emphasized that Missouri consistently followed the common law rule prohibiting the assignment of a bodily injury claim. The court should have had little difficulty in distinguishing between assignment and subrogation. It seems, however, that the dif-

¹⁶ Katz, *supra* n. 2 at 279, citing Vance, Insurance, at 797.

¹⁷ Travelers Indemnity Company v. Chumbley, 394 S.W. 2d 418 (Mo. App., 1965).

¹⁸ *Id.* at 423.

ficuity in distinction lies in the effect of the transactions. Both result in transfer of rights. It is, however, hardly necessary to assume that the effect of a transaction is also the cause. Merely because two similar causes have the same general effect does not mean that they are interrelated. Had the court recognized the distinction, a more plausible conclusion could have been reached.

An earlier California case¹⁹ was cited by the court in the *Chumbley* case. Although the case did not involve the subrogation of automobile accident medical expenses, the same question was involved, i.e., the validity of subrogation of medical expenses. In a confusing and somewhat verbose opinion, the court held that California's survival statute prohibited the assignment of a cause of action for personal injury. The defense argued that both conventional and legal subrogation are equitable assignments and forbidden by statute. The court sketched the development of the rules relating to the assignability of a chose in action for personal injuries, but again the substance of the distinction between subrogation (conventional) and assignment was not recognized. The conclusion of the court is in direct opposition to the recognized fact that:

neither the common law prohibition against assignability of tort causes of action nor any statute prohibiting such assignment constitutes a bar to subrogation. The insurer seeking to enforce subrogation after payment of medical expenses can command all the equities that have persuaded the courts over the years to allow the splitting of causes of action for bodily injury and property damage arising from a single negligent act, or permit the insurer to claim its share of the proceeds of a single cause of action treating the claimant as the trustees thereof.²⁰

More recent cases²¹ still deny conventional subrogation for essentially the same reasons as the *Chumbley* and *Fifield Manor* cases.

Analysis of Cases Favorable to Subrogation

No case has been found which has allowed legal subrogation of automobile medical expenses. The insertion of a subrogation clause applicable to the Medical Payments Coverage, creating conventional subrogation, would however, seem to extend the right of subrogation to this

¹⁹ *Fifield Manor v. Finston*, 54 Cal. 2d 632, 7 Cal. Rptr. 377, 354 P. 2d 1073 (1960); see also 78 A.L.R. 2d 813.

²⁰ *Katz*, *supra* n. 2 at 281; see also *Kimball and Davis*, *supra* n. 6 at 863.

²¹ *Harleysville Mutual Ins. Co. v. Lea*, 2 Ariz. App. 538, 410 P. 2d 495 (1966); *Peller v. Liberty Mutual Fire Ins. Co.*, 220 Cal. App. 2d 610, 34 Cal. Rptr. 41 (1963); *Wrightman v. Hardware Dealers Mutual Fire Insurance Co.*, 116 Ga. App. 306, 147 S.E. 2d 860 (1966); *Forsthove v. Hardware Dealers Fire Ins. Co.*, 416 S.W. 2d 208 (Mo., St. Louis Ct. of App., 1967); *Lowder v. Oklahoma Farm Bureau Mutual Ins. Co.*, 436 P. 2d 654 (Okla. Sup. Ct., 1968). All of these cases have denied subrogation despite the fact that a stipulation for subrogation was a condition of the contract.

area.²² Some early cases in point were tried in Michigan courts.²³ Conventional subrogation was upheld in one case,²⁴ while legal subrogation was denied in another.²⁵ A New Jersey case²⁶ has been relied upon as authority for upholding the right of conventional subrogation. In that case the plaintiffs (insureds) questioned the validity of the subrogation clause applicable to automobile accident medical expenses. They sought the full extent of the Medical Payments Coverage and also sought a judgment:

- (a) reforming the policy so as to eliminate the subrogation clause;
- (b) declaring the subrogation clause to be illegal, void, against public policy and of no effect; (c) enjoining the defendant from using the clause in any policies until proper steps have been taken to protect the public interest; and (d) requiring the Motor Club to account for premiums paid for such coverage by policy holders upon the theory of unjust enrichment.²⁷

The issue of whether the subrogation clause was valid was answered affirmatively but weakly. The court held that the legislature had vested the Commissioner of Banking and Insurance with the authority to examine insurance policy provisions and to reject those he felt were against public policy—public policy being a matter of declaration by the legislature not the courts. Since the Commissioner had not declared the subrogation clause invalid, it was not against public policy. The court reached the proper conclusion, but the weakness of the decision lies in the failure of defense counsel to raise relevant matters which are inseparable from the issue. The issue cannot be resolved solely by the public policy argument. Inherent in the issue is the distinction between contracts of indemnity and contracts of investment and the integral relation between subrogation and indemnity.

Other courts have more adequately resolved this issue. In one Illinois case,²⁸ the plaintiff was a passenger in an automobile insured by the defendant when it was involved in an accident caused by the negligence of the driver of another vehicle. The plaintiff had settled his claim with the tortfeasor and had executed a general release. In

²² For a discussion of conventional subrogation and its creation of a new right, see Kimball and Davis, *supra* n. 6 at 860; Katz, *supra* n. 2 at 280.

²³ Michigan Hosp. Service v. Sharpe, 339 Mich. 357, 63 N.W. 2d 638 (1954); and Michigan Medical Service v. Sharpe, 339 Mich. 574, 64 N.W. 2d 713 (1954); see also Annot. 43 A.L.R. 2d 1167.

²⁴ Michigan Medical Service v. Sharpe, *supra* n. 23.

²⁵ Michigan Hosp. Service v. Sharpe, *supra* n. 23.

²⁶ Smith v. Motor Club of America Ins. Co., 54 N.J. Super. 37, 148 A. 2d 37; aff'd. 56 N.J. Super. 203, 152 A. 2d 369 (1959); certification denied 30 N.J. 563, 154 A. 2d 451 (1959). For a criticism of this case, see Travelers Indemnity Co. v. Chumbley, *supra* n. 17 at 425.

²⁷ Smith v. Motor Club of America Ins. Co., *supra* n. 26, 148 A. 2d at 39.

²⁸ Damhesel v. Hardware Dealers Mutual Fire Ins. Co., 60 Ill. App. 2d 279, 209 N.E. 2d 876, 34 Automobile Cases 2d 420 (1965).

this action the plaintiff sought to recover his medical expenses from the insurer of the vehicle in which he was riding.

The plaintiff contended that the subrogation clause was void as against public policy for two reasons: (1) that the subrogation of medical expenses was an assignment of a claim *ex delicto*, which was forbidden in Illinois; and (2) that subrogation is not permitted in a non-indemnity insurance policy. In a brief, succinct opinion the court held that subrogation is not assignment and that the contract was one of indemnity, inasmuch as its purpose was to indemnify persons for medical expenses incurred as a result of an accident, not to pay a stipulated amount for a broken arm, or a leg. The opinion, despite its brevity, is very satisfying in that it faced the issue head-on, recognized the distinction between subrogation and assignment, realized the indemnity feature of the coverage, and permitted the subrogation as a means of fixing the ultimate liability of the parties. It is a matter of interpretation as to whether the court considered the subrogation stipulation when it referred to Medical Payments Coverage as indemnity coverage. If the court was saying that Medical Payments Coverage, with or without stipulation for subrogation, is indemnity coverage, the decision is certainly against the weight of authority.

In a later Illinois case²⁹ the same result was reached in a similar fact situation. The lower court had held that subrogation of medical expenses is an assignment of a personal injury claim, thus void as against public policy. The case was reversed by the Appellate Court, and it was held that subrogation and assignment are distinct; subrogation operating only as a lien against an insured to the extent of the insurer's payment. There is no deprivation of a pain and suffering recovery, and the subrogation is not void because the Director of Insurance did not view it as against public policy.

In a somewhat analogous situation, a Tennessee court³⁰ upheld an insurer's right of conventional subrogation, although in its conclusion, it incorrectly referred to subrogation as assignment. In another Tennessee case,³¹ decided the same day by the same court, the court applied the reasoning of an Ohio case,³² saying that

it is common knowledge that a plaintiff holding an automobile liability policy providing for medical benefits is entitled to those payments when injured in an automobile accident and under the

²⁹ Bernardini v. Home and Automobile Insurance Co., 64 Ill. App. 2d 465, 212 N.E. 2d 499 (1965).

³⁰ Tennessee Farmers' Mutual Insurance Co. v. Rader, 219 Tenn. 384, 410 S.W. 2d 171 (1966).

³¹ Wilson v. Tennessee Farmers' Mutual Insurance Co., 219 Tenn. 560, 411 S.W. 2d 699 (1966).

³² Travelers Ins. Co. v. Lutz, 3 Ohio Misc. 144, 210 N.E. 2d 755 (Muni. Ct. of Akron, 1964).

law of this state is also entitled . . . to recover for those same medical payments from the tortfeasor. If such plaintiff and his insurance company wish to enter into an agreement whereby the insurance company is subrogated to such medical payments, we fail to see the unfirmness of such contract. In this state subrogation agreements are permitted for property damage payments and we know of no reason why subrogation should not be allowed for medical payments. Generally, parties may contract as they wish and we cannot see that it is against public policy for the parties to contract for subrogation of medical payments. To hold otherwise would permit an injured plaintiff to recover twice for the same medical expenses. This should not be permitted.³³

No suggestion was made that legal subrogation was available under the coverage, and this is in accord with precedent. Once again it was decided that a stipulation for subrogation can create a right where it otherwise would not exist, and again, the public policy argument that subrogation of medical expenses is an assignment of a chose in action for personal injuries was easily disposed of. Other cases,³⁴ some earlier and some later, have followed the same lines in upholding subrogation clauses.

At least one court has upheld the medical subrogation clause on different grounds.³⁵ That court did not concern itself with discussing the distinction between assignment and subrogation. It simply held that a cause of action for personal injuries is assignable in that state, just as is a cause of action for damage of property.

Ohio's Position

What is apparently the first reported case in Ohio³⁶ originated in the Municipal Court of Akron. The defendant, Lutz, had caused an accident with an insured of Travelers Insurance Company. Travelers paid its insured's medical bills incurred as a result of the accident and proceeded to file suit against the defendant for recovery of these expenses. Nationwide Mutual Insurance Co., who insured the defendant, refused to honor the plaintiff's claim for subrogation of the medical expenses. In demurring to the action, the defendant alleged that plaintiff's subrogation right was an assignment of a cause of action for per-

³³ *Wilson v. Tennessee Farmers' Mutual Ins. Co.*, *supra* n. 31, 411 S.W. 2d at 701.

³⁴ *Higgins v. Allied American Mutual Fire Ins. Co.*, 237 A. 2d 471 (D.C. App., 1968); *Decespedes v. Prudence Mut. Cas. Co. of Chicago*, 193 So. 2d 224 (Fla. App., 1966), *aff'd*, 202 So. 2d 561 (Fla. Sup. Ct., 1967); *Appeal of Mack*, 30 Misc. 2d 610, 222 N.Y.S. 2d 845 (1961); *Dummary v. National Union Fire Ins. Co.*, 210 Pa. Super. 193, 232 A. 2d 21 (1967); and *Hospital Service Corp. of R.I. v. Penn. Ins. Co.*, 101 R.I. 708, 227 A. 2d 105 (1967).

³⁵ *Davenport v. State Farm Mutual Automobile Ins. Co.*, 81 Nev. 361, 404 P. 2d 10 (1965).

³⁶ *Travelers Ins. Co. v. Lutz*, *supra* n. 32.

sonal injury which is void in Ohio. Ohio's survival statute³⁷ does not expressly prohibit the assignment of personal injury claims. The court stated that:

subrogated insurance companies are entitled to sue in their own names for the part of a claim for damages arising out of an accident which have been assigned to them under a subrogation agreement.³⁸

From there the court proceeded to find no public policy against the subrogation of automobile accident medical expenses, adding that the Superintendent of Insurance of the State of Ohio had failed to reject this specific policy. In touching upon the problem of double recovery, the court said:

if the insured and the insurance company wish to enter an agreement whereby the insurance company is subrogated to such medical payments, it is impossible to see why this is an unfair or improper result. If this can be done with reference to property damage payments which the courts of Ohio construe as splitting a cause of action, it certainly can be done for medical payments which likewise are splitting a cause of action.³⁹

It is evident that this court incorrectly referred to subrogation and assignment interchangeably.

This case was appealed to the Court of Appeals of the Ninth Judicial District, Summit County.⁴⁰ In delivering the opinion, the court stated:

It has been many times stated that an assignment of a chose in action was not allowed at common law. The reasons given for the rule were, in chief, that to permit such an assignment there would be created a tendency to encourage maintenance and, secondly, that in order for an assignment to be valid, the assignor must possess the thing which he attempts to assign, and that chose in action does not follow in this category. Over the years the courts have made various exceptions to the common law rule and there finally emerged the so-called doctrine of "survivability."

Under this doctrine in general choses in action may be assigned which would survive to the personal representative of the assignor. This rule seems now to be one of general application.⁴¹

The same question was later presented in the case of *Travelers Indemnity Co. v. Godfrey*.⁴² The insurer brought this action for subroga-

³⁷ Ohio Rev. Code, sec. 2305.21.

³⁸ *Travelers Ins. Co. v. Lutz*, *supra* n. 32, at 146.

³⁹ *Id.*, at 150.

⁴⁰ This information was given to the author by Louis Euphray, Claims Attorney for Nationwide Mutual Insurance Co. in a letter dated May 15, 1968.

⁴¹ *Travelers Ins. Co. v. Lutz*, *supra* n. 32. The appellate decision, never reported, was handed down December 22, 1965 (Ohio, Summit Co. Ct. of App., case number 5636).

⁴² 12 Ohio Misc. 143, 230 N.E. 2d 560 (Tuscarawas Co. Common Pleas Ct., 1967).

tion of medical expenses and property damage which it had paid as a result of an automobile accident caused by the defendant's negligence. There were three causes of action: (1) for recovery of property damage to the insured's vehicle; (2) for recovery of medical expenses paid to its insured in behalf of insured's minor son; and (3) for recovery of hospital and medical expenses paid to the parents of a minor passenger in the insured's vehicle. In a brief accompanying the defendant's demurrer, it was alleged that the plaintiff was attempting to split a cause of action by assignment.⁴³ Seeing no need to distinguish between assignment and subrogation; nor to rehash the arguments presented in other jurisdictions, the court stated:

the present doctrine in Ohio and other jurisdictions seems to be that a subrogated insurance company is entitled to sue in its own name for the part of a claim for damages arising out of an accident which has been assigned to it under a subrogation agreement and this is true whether it is a subrogated right for property damage or for hospital and medical expense.⁴⁴

Although the Ohio courts, in both cases, incorrectly use the terms assignment and subrogation interchangeably, it does not appear to create much of a problem. This is true inasmuch as Ohio courts "will honor an assignment to a subrogated insurance company of a part of a cause of action arising from the tortious injury."⁴⁵ Thus Ohio seems to have resolved the issue favorably but using incorrect terminology, on the same basis as did Nevada.⁴⁶

Conclusion

The question of whether conventional subrogation is assignment, or vice-versa, is certainly one which should not be raised. The reasoning of some courts in failing to distinguish between the two terms is, at best, strained. It is no doubt predicated on motivation. Perhaps the failure to recognize a technicality is a means of arriving at what some jurisdictions view as a desirable end. One writer suggests that the entire theory of subrogation in accident and medical benefit insurance "remains . . . hopelessly locked in a split of authority . . ."⁴⁷ Others

⁴³ Briefs filed with the Common Pleas Court relative to the demurrer in *Travelers Indemnity Co. v. Godfrey*, *Ibid.* were given to the author by Attorney William A. Kyler of the law offices of Smith, Renner, Hanhart & Miller who argued the case for the plaintiff. In the Brief in Opposition to Defendant's Demurrer, the case of *Travelers Ins. Co. v. Lutz*, *supra* n. 32 was cited.

⁴⁴ *Travelers Indemnity Co. v. Godfrey*, *supra* n. 42 at 145.

⁴⁵ *Travelers Ins. Co. v. Lutz*, *supra* n. 32 at 149.

⁴⁶ *Davenport v. State Farm Mutual Automobile Ins. Co.*, *supra* n. 35.

⁴⁷ Fleming, *The Collateral Source Rule and Loss Allocation In Tort Law*, 54 *Calif. L. Rev.* 1478 (1966).

contend that extending the right of subrogation to this type of insurance coverage involves a constant shifting of the loss burden and ultimately results in a multiplicity of law suits. This would result in greater cost to the insurer, which destroys the argument that subrogation would result in lower insurance rates.⁴⁸

Equally vociferous are the arguments in favor of subrogation of medical expenses. In addition to the case law cited, one writer, in introducing the "collateral source" rule, makes the comment that when an accident victim recovers from the tortfeasor and also from the collateral sources, he will "thus turn his blight into a bonanza."⁴⁹ The very purpose of the stipulation of subrogation of medical expenses, as mentioned earlier, was to eliminate a windfall to insureds and claimants, i.e., double recovery.

The fact that most major insurance companies are now issuing at least one policy providing for the subrogation of medical expenses is indicative of their intent. So, too, is the increasing stress placed on subrogation recoveries by fire, casualty and surety carriers.⁵⁰ By the same token, the courts undoubtedly recognize that most claims *ex delicto* concerning subrogation involve insurance coverage, and the process is only a means of fixing the ultimate liability of the parties. The trend very definitely seems to be moving towards the goal of creating stipulated subrogation of medical expenses in all automobile policies.

When courts are faced with the problem of whether or not to uphold an insurer's right of conventional subrogation under the Automobile Medical Payments Coverage, certain factors should be weighed and balanced.⁵¹ They are: (1) that Medical Payments Coverage, when subrogation is stipulated, is a form of indemnity insurance; (2) that subrogation and indemnity are members of the same family; (3) that subrogation recoveries result in better loss ratios to the insurer, and consequently, lower rates; (4) that as is the case with property damage, an accident victim should be entitled to recover only once for his loss or injuries; (5) that the windfall of unjust enrichment is morally objectionable; and (6) that the concept of conventional subrogation is clearly distinct from assignment.

The argument against the enforcement of conventional subrogation, mentioned earlier, is that it will clog the machinery of our courts by creating a multiplicity of subrogation suits. This argument fails to consider that nearly all medical expense subrogation disputes are either

⁴⁸ See Fleming, *supra* n. 47 at 1547; Kimball and Davis, *supra* n. 6 at 870; see also 2 Harper & James, Torts 25:23 (1956).

⁴⁹ Fleming, *supra* n. 47 at 1478.

⁵⁰ This was suggested to the author by several Cleveland insurance executives.

⁵¹ Some of these factors are suggested by Katz, *supra* n. 2 at 281. See also Kircher, Set-Off and Subrogation In Automobile Medical Payments Coverage, 7 For the Defense, No. 10, Dec. 1966.

between different insurance carriers or between an insurer and its insured. No problem should arise between an insurer and its insured once the policyholder is fully aware of the policy language. There should also be no problem between different insurance companies. An insurer's medical expense subrogation right should be honored by all insurance carriers. Failure to honor subrogation of medical expenses should arise only when there is a legitimate question of liability. Nevertheless, when this situation develops, judicial machinery does not have to be invoked for settlement. This is a matter which should fall solely within the provinces of the Nationwide Inter-Company Arbitration Agreement, which is administered by a division of the American Arbitration Association. This committee is today arbitrating thousands of disputes between various member insurance companies. The subject matter of arbitration by this committee is nearly always subrogation of property damage to automobiles. There is no reason why the recovery of medical expenses should not be included in a dispute over liability. When a dispute is arbitrated, the insurance company against whom the decision was rendered should reimburse the other carrier for whatever amount it had to pay for damages to property and for medical expenses. If, after the dispute is arbitrated, the insured brings suit against the tortfeasor, the courts should allow the insured to recover only for pain and suffering.

With the availability of this machinery and a working agreement among insurance companies to honor medical pay subrogation claims, the issue raised in this article should present no further difficulty in those states where subrogation of medical payments has been upheld. On the other hand, in those states where, for different reasons, subrogation of medical payments has not been upheld, the issue remains.