LEGAL AND PRACTICAL SUBROGATION ISSUES IN THE U.S.A.

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INTRODUCTION

This paper deals with subrogation in the United States and its legal and practical implications. While the paper does not exhaust all potential issues, it does focus on the more recurrent scenarios and problems.

Subrogation in the United States is a doctrine of equitable origin which allows an insurer who has indemnified its insured to stand in his shoes and acquire rights against a third party. While standing in the shoes of the insured, the insurer acquires all of the rights and entitlements, as well as all of the limitations and obligations. Therefore, the relationship between the insured and the third party tortfeasor is of paramount concern since that relationship will determine the rights and responsibilities of the subrogated insurer.

DOCTRINES LIMITING THE RIGHT OF SUBROGATED INSURERS

1. Economic Loss Limitation

One of the more misunderstood and misapplied doctrines in the United States is the Economic Loss Rule. The Economic Loss Rule precludes recovery in tort when a product defect causes only economic losses and does not result in personal injury or damage to property other than the product itself. The type of economic losses that cannot be recovered in tort are the diminution in the value of the product and loss of

use. As such, economic loss embrace damages for inadequate value, costs to repair and consequential damages, including loss of profits.

In a traditional subrogation claim, the insurer normally pays for property damage to the product itself if one is involved and the business interruption resulting from that damage. If the jurisdiction in which the event occurs has adopted the Economic Loss Rule, the insurer's ability to recover these damages may be severely curtailed.

East River Steamship Corp. v. Transamerica Delaval[1] is one of the leading cases discussing the Economic Loss Rule and while it only applies in federal courts, a number of state courts follow it. In *East River*, the defendant designed and manufactured four turbines which were installed on separate super tankers. While the tankers were under charter to the plaintiff, the turbines failed damaging themselves and producing a substantial loss of income. The plaintiff brought an action against the manufacturer seeking to recover the cost of the damage to the turbines as well as the lost income. The United States Supreme Court framed the issue as follows: *Is there a cause of action when a defective product purchased in a commercial transaction malfunctions injuring only the product itself and causing purely economic loss?*

In analyzing the issue, the court considered the minority view[2] which would allow the plaintiff to recover all of its damages and the majority view[3] which would preclude

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[1] 476 U.S. 858 (1986).

[2] *Santor v. A&M Karagheusian Inc.*, 44 N.J. 52, 207 A.2d 305 (1965).

[3] *Seely v. White Motor Co.*, 63 Cal.2d 9, 403 P.2d 145 (1965).

tort liability when a defective product causes purely monetary damage. In adopting the majority view, the court observed:

> "The tort concern with safety is reduced when an injury is only to the product itself. When a person is injured, the cost of an injury on the loss of time or health may be an overwhelming misfortune, and one the person is not prepared to meet. In contract, when a product injures itself, the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs or, as in this case, experiences increased costs in performing a service. Losses like these can be insured. Society need not presume the customer needs special protection. The increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified."

Thus, the court concluded that a manufacturer in a commercial relationship had no duty under a negligence or products liability theory to prevent a product from injuring itself and thus none of the damages were recoverable. Since *East* River, the Economic Loss Rule has been followed in some jurisdictions, ignored in others, and codified in at least two. Today it is safe to say that most jurisdictions adhere to the *East River* rationale in some fashion. As a consequence, an insurer's subrogation recoveries have been dramatically affected.

Some jurisdictions have tried to ameliorate the harshness of the rule by creating exceptions. For example, in some states if the product damages other property, then the doctrine may not apply.[4] These courts feel that the purchaser did not bargain for this type of risk. Other jurisdictions examine the nature of the incident causing the damage

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[4] *Moorman Mfg. Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443 (1982).

and if it can be characterized as catastrophic, the rule will not apply.[5] For example, if the product explodes or fails in a violent or sudden fashion, some courts will not apply the rule because the product has created a situation which is *potentially* dangerous to persons or other property.

While the Economic Loss Rule should only concern products and consumer expectations, a number of courts have applied it in situations where it does not belong. For example, in one case the court used the rule to bar the claims of tenants who were forced from their high rise offices when a contractor negligently flooded the basements of buildings they occupied.[6] Another court applied the rule when telephone service was negligently interrupted to customers in a major metropolitan area.[7] Neither case dealt with the sale of a product or with consumer expectations, but in both cases the courts said plaintiffs could not recover damages because they were economic losses.

While the courts said that they were applying the Economic Loss Rule to these situations, the cases really concern the doctrines of proximate cause, foreseeability, and duty. In *Madison Avenue Gourmet Foods v. Finlandia Center*,[8] the court recognized the distinction and while barring recovery to a plaintiff who sustained no property damage, did not use the rubric of economic loss. In this case, access to the plaintiff's delicatessen was blocked when a construction project collapsed on Madison Avenue in New York City. The plaintiff had no property damage and his only loss was for income. In denying

5 *Bailey Farms Inc. v. Nor-Am. Chemical Company,* 27 F.3d 188 (6th Cir. 1994).
6 *In Re Chicago Flood*, 176 Ill.2d 179, 680 N.E.2d 265 (1997).
7 *In Re Illinois Bell Switching Station*, 161 Ill.2d 233, 641 N.E.2d 440 (1994).
8 96 N.Y.2d 280, 750 N.E.2d 1097 (2001).

recovery, the court said that the economic loss rule had no application because that rule dealt with end purchasers of products who were making claims against manufacturers. The court said that the problem needed to be analyzed in the context of defendant's duty to plaintiff. In this situation, the court said that a landowner owes a duty to adjoining property owners, but he owes no duty to protect an entire urban neighborhood from economic losses.

The Economic Loss Rule is a major limitation on a subrogating insurer's rights. Since the insurer normally pays for damage to the property as well as for damage from the loss of use of that property, it will be unable to recover these economic losses if the jurisdiction is applying the majority rule. On the other hand, if the jurisdiction recognizes that damage to other property is an exception or looks to the nature of the event, then the insurer may recover. Unfortunately, a subrogated insurer in one state may find itself barred while a subrogated insurer in a state across the border might recover on the same facts. Such, however, are the vagaries of the judicial system in the United States.

2. ***Home Insurance Company v. Pinski* Limitation**

Home Insurance Company v. Pinski[9] dealt with a seemingly straightforward proposition of law - an insurer cannot subrogate against its own insured. However, the common understanding of this rule is that it is applied only to an insured named in the policy. *Pinski*, on the other hand, deals with a very different situation. In *Pinski*, the Home Indemnity Company paid a property damage loss caused by an explosion at the

9 160 Mont. 219, 500 P.2d 945 (1972).

insured's building. Home Indemnity then brought a subrogation action against several defendants, including an architectural firm who had a liability insurance policy with the Home Insurance Company. The court assumed that the Home Insurance Company and the Home Indemnity Company were one and the same.

The issue was whether the Home Indemnity Company could maintain a subrogation action against a third party who it also insured under a separate and unrelated liability policy. The Montana Supreme Court refused to allow the action to proceed and dismissed the Complaint. In reaching its decision, the court said:

> "To permit the insurer to sue its own insured for a liability covered by the insurance policy would violate these basic equity principles, as well as violate sound public policy. Such action, if permitted, would (1) allow the insurer to expend premiums collected from its insured to secure a judgment against the same insured on a risk insured against; (2) give judicial sanction to the breach of the insurance policy by the insurer; (3) permit the insurer to secure information from its insured under the guise of policy provisions available for later use in the insurer's subrogation action against its own insured; (4) allow the insurer to take advantage of its conduct and conflict of interest with its insured; and (5) constitute judicial approval of a breach of the insurer's relationship with its own insured.
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> . . . To allow subrogation under such circumstances would permit an insurer, in effect, to pass the incidents of the loss, either partially or totally, from itself to its own insured and thus avoid the coverage which its insured purchased."

The *Pinski* principle has been followed in several jurisdictions in the United States, but has also been rejected in at least four others.[10] Furthermore, some courts will not follow the doctrine if the subrogated insurer and the liability insurer are merely related as affiliated or "sister" companies. *Fashion Tanning Co., Inc. v. Fulton Cty. Electrical Contrs., Inc.*[11]

Application of the *Pinski* doctrine to a complex subrogation case can have substantial ramifications. For example, in a shared or layered insurance program, all subrogated insurers who also insure a potential defendant must drop claims against that defendant. While the action can proceed some subrogated insurers may conclude that it is not worth pursuing the claim if the remaining defendants are marginally at fault or impecunious.

There has been at least one significant exception to *Pinski* where a court allowed an insurer to subrogate against a defendant that it also insured under a separate liability policy. In *Transport Trailer Service, Inc. v. Upjohn Co.*[12], the insured had a fire loss and

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10 *Norris v. Allstate Ins. Co.* (La. App. 1974), 293 So.2d 918; *Cozzi v. Government Emp. Ins. Co.* (N.J. App. 1977), 154 N.J. Super. 519; *Transport Trailer Serv., Inc. v. The Upjohn Co.* (E.D. Pa. 1981), 506 F. Supp. 442; *Fashion Tanning Co., Inc. v. Fulton Cty. Electrical Contrs., Inc.* (1989), 142 A.D.2d 465, 536 N.Y.S.2d 866.

11 142 A.D.2d 645, 536 N.Y.S.2d 866 (1989). For a contrary result, see *Royal Exchange Assurance of America v. SS President Adams*, 581 (W.D. Wash. 1981) where the court said that two separate insurance companies that shared the same telephone, mailing address, administrative offices and directors were one and the same. In *Keystone Paper Converters v. Philadelphia Electric Co.*, 562 F. Supp. 1046 (E.D. Penn. 1983), the court refused to allow subrogation saying "I have grave doubts that the federal courts should be used by an insurer to clean up its books, and if need be, transfer funds from its liability pool to its indemnity pool."

12 506 F. Supp. 442 (E.D. Pa. 1981).

received $191,000 from its property insurer. The insured then brought an action on behalf of itself and its insurer claiming that defendant's polyurethane foam was responsible for spreading the fire. The defendant was also insured by the plaintiff's insurer under a separate liability policy; however, that policy had a $5,000,000 self-insured retention. The defendant moved to dismiss the action arguing that the *Pinski* doctrine precluded the insurer from suing its own insured.

The court disagreed and said that in this situation *Pinski* would not apply. In reaching its conclusion, the court said:

> "Upjohn has paid Aetna a premium for a products liability policy calculated on a deductible in the amount of $5,000,000, and its incurred losses for the relevant policy year do not yet total that sum. To preclude any subrogation claim by Aetna on behalf of any other company also insured by Aetna which may have a valid claim against Upjohn when this deductible amount has not yet been exhausted might allow Upjohn an un-bargained for, unpaid for, windfall; a risk not otherwise insured against would in effect be covered by Upjohn's insurance policy with Aetna because of a fortuitous fact, i.e. that liability was asserted against Upjohn by a party, Transport, which also happens to be insured by Aetna. An insurance company might hesitate to pay promptly claims of one insured if it could never assert a subrogation claim against any other insured. As a general rule, this seems an undesirable reallocation of risk."

Thus, in those instances when a defendant has a substantial self-insured retention in its liability policy, subrogation may not be barred.

In deciding whether to apply the *Pinski* rule, the courts will not condone tactics or practices which demonstrate an element of bad faith to avoid the effect of *Pinski*. For

example, in *Keystone Paper Converters v. Neemar, Inc.,*[13] the subrogated insurer brought an action against a defendant that it also insured under a separate liability policy. Rather than move to dismiss the action, the defendant joined two third-party defendants seeking indemnification from them. It appeared that counsel for the plaintiff and counsel for the defendant had "scripted" this scenario to pass the liability through to the third party defendants. The third party defendants sought dismissal of the third-party claims on the basis that the primary subrogation claim was barred under the *Pinski* principle. The court agreed and held that the defendant insured's interests were in jeopardy even if it was possible to pass the losses on to the third-party defendants. In the court's view, the defendant could end up with a judgment against it which might increase its insurance premiums, make it a less insurable entity, or affect its credit rating. The lesson of *Keystone Paper* is that courts will not condone collusive efforts to avoid the effects of *Pinski.*

When an insurer finds itself on both sides of a subrogation action, subrogation may be barred. One might ask why a subrogated insurer would pursue subrogation against an entity it was obligated to indemnify since it would seem to be taking money from one pocket and putting it in the other. However, consider the situation where the subrogated insurer has a substantial claim against an entity it also insures, but that entity has a low limit of primary liability and substantial excess coverage with a different insurer. In that situation, it would seem to be in the subrogated insurer's interest to

[13] 562 F. Supp. 1046 (E.D. Pa. 1983).

proceed with the action in an effort to reach the excess limits; however, even in that situation at least one court has said that subrogation is not permitted. *National Union Fire Insurance Company v. Engineering-Science, Inc.*[14]

RECOVERIES AGAINST CO-INSUREDS

In spite of *Pinski*, some courts have considered and allowed subrogation against coinsureds in the builders risk context. For example, in *Paul Tishman Company v. Carney & Dell Guidice, Inc.*,[15] the court said that a builder's risk policy is property insurance and not liability insurance and thus the policy covers only property in which a named insured has an insurable interest. Accordingly, a builder's risk policy does not insure a named insured subcontractor for its potential legal liability to a general contractor. Therefore, a subrogee can proceed against a subcontractor for any damage to property in which the subcontractor does not have an insurable interest.

A contrary view known as the Louisiana Rule[16] holds that an insurer cannot pay a general contractor for its losses and then seek to recover from a subcontractor who is named as an additional insured on the policy. In these cases, the courts interpret the policy language "as their interests may appear" to encompass liability, as well as property interests. Cases adopting the Louisiana rule say that there is a conflict of interest when an insurer is permitted to sue an insured who is under a duty to cooperate with the insurer. Other courts rely on public policy considerations to preclude subrogation. Those

[14] 673 F. Supp. 380 (N.D. Cal. 1987).
[15] 320 N.Y. Supp.2d 396.
[16] *Glens Falls Ins. Co. v. Globe Indemnity Co.*, 214 La. 467, 38 S.2d 139 (1948).

considerations include reduction of litigation and the financial burden which would be placed on subcontractors to protect themselves from potentially devastating litigation.

Beyond the builders risk context, there are other situations in which courts have concluded that subrogation against a co-insured will not be permitted. These cases usually involve a landlord's insurer subrogating against a tenant who caused damage to the leasehold. In many jurisdictions, the courts have concluded that absent an express agreement in the lease establishing liability, a tenant is an *implied* co-insured on the policy. As such, the landlord's insurer will not be allowed to pursue subrogation against a negligent tenant. Courts following this approach have said that a landlord who obtains insurance for the property in effect passes through the cost of the premiums to the tenant in the form of rent, thus making the tenant an implied coinsured.[17] While this is a legal fiction, it has substantially impacted an insurer's ability to subrogate against a negligent tenant.

In summary, tenants and subcontractors are immune from subrogation claims in many jurisdictions. Whether the courts use the language of the policy, the language of contractual provisions, or the applications of common law, the trend is to limit the right

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[17] *Sutton v. Jondahl*, 532 P.2d 478 (Okla. 1975); *Alaska Ins. Co. v. RCA Alaska Communications, Inc.*, 623 P.2d 1216 (Alaska 1981); *Liberty Mutual Fire Ins. Co. v. Auto Spring Supply Co.,* 59 Cal. App.3d 860, 131 Cal. Rptr. 211 (1976); *Safeco Ins. Co. v. Weisgerber,* 115 Idaho 428, 767 P.2d 271 (1989); *Reeder v. Reeder,* 217 Neb. 120, 348 N.W.2d 832 (1984); *Safeco Ins. Co. v. Capri,* 101 Nev. 429, 705 P.2d 659 (1985); *Fashion Place Invs. Ltd. v. Salt Lake County Mental Health,* 776 P.2d 941 (Utah App. 1989); *Monterey Corp. v. Hart*, 216 Va. 843, 224 S.E.2d 142 (1976); *Cascade Trailer Court v. Beeson,* 50 Wash. App. 678, 749 P.2d 761 (1988).

of subrogation. There are, of course, states which have protected the subrogated carriers' rights and if the loss occurs in one of those jurisdictions, subrogation can proceed.

PRORATION OF RECOVERIES - "FIRST DOLLAR OUT" DOCTRINE

The division of subrogation dollars between insured and insurer can be an extremely complex and divisive issue. For example, when an insured sustains a substantial uninsured loss and then joins with the insurer in subrogating against the wrongdoer, how is any recovery shared? Should the insurer be made whole for all of its indemnity payments before the insured makes any recovery? On the other hand, should the uninsured loss, including any deductible, be satisfied before the insurer makes any recovery?

Professor Robert Keaton, a recognized authority on insurance law, has categorized the various approaches to apportionment of subrogation recoveries as follows:

Rule 1 (Insurer: Whole Plus): Under this rule, the insurer is the sole beneficial owner of the claim and is entitled to full recovery even if it exceeds the amount paid by the insurer to the insured.

Rule 2 (Insurer: Whole): Under this rule, the insurer is to be reimbursed first out of any recovery and the insured then is entitled to the difference remaining.

Rule 3 (Proration): Under this rule, the recovery is prorated between the insurer and the insured according to the percentage of the original loss for which the insurer paid the insured.

Rule 4 (Insured: Whole): Under this rule, the insured is reimbursed first from any recovery and the insurer is entitled to

any balance remaining after the insured is fully reimbursed.

Rule 5 (Insured: Whole Plus): Under this rule, the insured owns the entire claim against the third party and is entitled to any amount recovered whether or not this exceeds the insured's loss.[18]

While all of the rules have their adherents, the majority of jurisdictions have adopted either Rule 2 or Rule 4. Rule 3 is typically only followed when the parties have contractually agreed to proration.

Those jurisdictions which adopt Rule 2 represent the minority view in the United States. By far, the greater weight of authority is that the insured must be fully compensated for any uninsured loss before the insurer can share in the proceeds. Approximately 27 states have adopted the rule in some form or another.

Garrity v. Rural Mutual Insurance Co.[19] is one of the most frequently cited cases supporting the rule. In *Garrity*, the subrogated insurer had made payments under its policy of fire insurance. The insured commenced its own action against the tortfeasors and eventually settled his claims for less than the actual amount of his damages. The insurer asked for a declaration that it was entitled to recover its payment before the insured received any of the proceeds. The court denied the insurer's request and concluded that the insured must be completely compensated for all elements of damages before the insurer's subrogation rights arise. Thus, the insured was entitled to keep the entire amount of the settlement to the exclusion of the insurer.

18 Robert E. Keeton, Basic Text on Insurance Law § 3.10(c)(2) (1971).

19 253 N.W.2d 512 (Wis. 1977).

The *Garrity* rule is based on several rationales. Some courts believe that subrogation does not arise until the insured is made whole. Other courts theorize that if the question is whether the insurer or the insured must go unpaid, the insurer should bear the loss for it has been paid to assume that risk. Whatever reason, the result is the same – the insured must be fully paid for all losses before the subrogated insurer acquires any right of subrogation.

One way to deal with this issue and create a level of certainty between insurer and insured is to agree either before or after a loss to apportion recoveries. For instance, certain policies of insurance may contain the following provision:

> "The company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefore is made by the company, but the company shall not acquire any rights of recovery which the insured has expressly waived prior to loss, nor such waiver affect the insured's rights under this policy.
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> Any recovery as a result of subrogation proceedings arising out of a loss occurrence, after expenses incurred in such subrogation proceeding are deducted, shall accrue to the insured in the proportion that the deductible amount and/or any provable uninsured loss amount bears to the entire provable loss amount."

Under this formula, both insurer and insured agree in advance to a proration mechanism. The only element which would require negotiation is to reach an agreement as to the amount of the insured's "provable uninsured loss."

If the policy is silent on the issue, the parties can enter into a post loss proration agreement. This can be a very useful method to resolve apportionment problems. Not

only can recoveries be apportioned, but fees, costs and expenses can also be apportioned. A proration agreement eliminates the uncertainty and guess work between the insurer and the insured and establishes with finality a method of allocating recoveries and expenses.

SUBROGATION WAIVER ISSUES

Many property insurance policies allow an insured to waive an insurer's right of subrogation in advance of a loss. Since express waivers are common in contracts, leases, and purchase agreements, granting permission to waive without penalty became a necessary feature in property policies. All courts will enforce agreements to waive subrogation and thus an insurer faced with an express waiver of subrogation would seem to have little chance of recovery.

There is one situation in which an insurer may avoid the consequences of an express waiver of subrogation. In a majority of states, the courts have said that a party cannot exculpate himself from the consequences of gross negligence or willful and wanton conduct. Courts adhering to this view, adopt the Restatement of the Law 2d, Contracts, § 195, which provides as follows:

> "Term exempting from liability for harm caused intentionally, recklessly or negligently:
>
> (1) A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.

Most jurisdictions considering this issue have adhered to the principle that public policy does not permit a party to exculpate himself from gross negligence.[20]

However, applying the exception is only half the battle for the insurer. Not only must the exception be recognized in the jurisdiction where the claim is pending, but the facts of the accident must amount to willful and wanton conduct or gross negligence. Gross negligence connotes an element of reckless indifference whereas willful and wanton conduct connotes deliberate or intentional actions. If the tortfeasor's conduct rises to either level, that conduct will trump the subrogation waiver and the issue will be resolved by the jury.

FOREIGN NATIONALS' ACCESS TO COURTS IN THE UNITED STATES

It is not uncommon for a foreign national to seek redress in the courts of the United States for torts occurring *in* the United States. In such a situation, U.S. courts have no difficulty in providing the foreign national with a forum to air his grievances. However, when foreign nationals seek redress in the United States for torts which took place *outside* the borders of this country, the courts take a more restrictive view. Courts faced with this type of situation often find that they are neither equipped to handle nor inclined to give access to a foreign national.

[20] *Travelers Indemnity Company v. The Losco Group, Inc.*, et al., 136 F. Supp.2d 253 (2001); *Thomas v. Atlantic Coast Line R. Co.*, 201 F.2d 167 (1953); *Donald Englehardt, et al. v. Triple X Chemical Laboratories, Inc.*, 53 Ill. App.3d 926, 369 N.E.2d 67 (1977); *Gold Connection Discount Jewelers, Inc. v. American District Telegraph Company, Inc.*, 212 A.D.2d 577, 622 N.Y.S.2d 740 (1995). For a contrary view, however, see *St. Paul Fire and Marine Ins. Co. v. Universal Builders Supply,* 409 F.3d 73 (2nd Cir. 2005) where the court said that all claims including claims for gross negligence are barred as a matter of law by a waiver of subrogation clause in a written lease.

What right do foreign nationals injured abroad have to use the courts of the United States to address their grievances? Why should someone who neither supports the government nor pays for its upkeep be permitted to use the courts of the United States to further his own self interest? Fortunately, for foreign nationals, these xenophobic pleas do not always find a receptive audience.

In *Ison v. E.I. Dupont de Nemours & Company,*[21] the plaintiffs were foreign families whose claims arose out of birth defects caused by a chemical manufactured by the defendant. The injuries occurred in England, Wales, Scotland and New Zealand as a result of exposure to the chemical when used agriculturally.

All of the plaintiffs were seeking relief against the defendant in a Delaware state court. The trial court had dismissed the case on the grounds of *forum non conveniens* saying that the plaintiffs had a remedy in their own country. On appeal, the Delaware Supreme Court reversed the trial court and said that the action by the foreign nationals could proceed in Delaware even though the occurrences took place outside of the United States. The court said that the defendant would have to prove it would be an overwhelming hardship if it had to defend the case in the United States. To satisfy this standard, the defendant would need to show that this "is one of the rare cases where the drastic relief of dismissal is warranted based on a strong showing that the burden of litigating in this forum is so severe as to result in manifest hardship to the defendant."

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[21] 729 A.2d 832 (Del. 1999).

The *Ison* rule is not, of course, uniformly followed throughout the United States. In California, for example, the court granted a manufacturer's motion to dismiss in a case brought by Swedish and Norwegian plaintiffs even though the products had been designed and packaged in California. The California Supreme Court said that since the plaintiffs were not residents of California, there was no basis to provide them with a forum for injuries which occurred outside the state.[22]

Texas for a time altogether abolished the *doctrine of forum non conveniens*. In *Dow Chemical Company v. Castro Alfaro*,[23] a group of Costa Rican agricultural workers sued Dow and Shell Oil for injuries caused by pesticides manufactured in the United States and shipped to Costa Rica. The Texas Supreme Court said that it was concerned that multi-national corporations should not be allowed to use procedural methods to force foreigners to litigate their claims in jurisdictions where it may be much more difficult to recover. However, in 1993, the Texas legislature overturned this result by passing a *forum non conveniens* statute applicable to all personal injury and wrongful death cases.

Foreign nationals should never assume that courts of the United States are closed to them if the cause of action arises outside of the United States. As *Ison* demonstrates, not all jurisdictions have a closed door policy. As long as the defendant's due process rights are protected, a foreign national may be permitted access to the courts of the United States to redress wrongs committed outside this country.

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22 *Stanguik v. Shiley, Inc.*, 54 Cal.3d 744, 819 P.2d 14 (1991).

23 786 S.W.2d 764 (Tex. 1990).

THE IMPACT OF TORT REFORM ON SUBROGATION CLAIMS

Since the early 1990's, there has been a ground swell of support for legislation to regulate and control the tort system in the United States. The efforts are primarily focused in individual states, but there has also been significant federal legislation which has had an impact on the tort system on a national level.

The purpose of this paper is neither to endorse nor criticize the efforts to reform the tort system in the United States, but rather to note the impact these reforms have had on subrogation. Whether the social and economic effects of tort reform are beneficial or harmful is a debate for another day, but there is no question that tort reform has effected insurers' attempts to recover subrogation dollars.

One of the more significant tort reform measures has been the modification of the doctrine of joint and several liability. Under that doctrine, one tortfeasor was responsible for all tort damages regardless of that tortfeasor's degree of fault. Reformers felt that this was an unfair imposition of liability on a party whose fault was marginal. To remedy the inequity, many states have abandoned the doctrine of joint and several liability and have enacted statutes that say that tortfeasors are only severally liable for the consequences of their negligence. As a result, a defendant who is only assessed with a modest degree of fault will only be assessed with a modest degree of damages.

The result of this change has been to require subrogating insurers to accept far less in settlement from a "deep pocket" defendant with adequate resources and insurance because that defendant's fault is slight. The risk of not settling is that the judgment

against a defendant with a large degree of fault may go unsatisfied because that defendant is impecunious. Whether this result is fair is not the point. When confronted with several liability, subrogating insurers must realize that they will need to adopt a litigation strategy different from the strategy used when the joint and several rule applies.

Another tort reform which has affected a subrogating insurer's rights concerns statutes of repose or limitations. These reforms shorten the time for filing suit and may result in a complete bar to claims. For example, Florida and Ohio have established 10 year statutes of repose for products liability actions. Texas has created a 15 year statute of repose for such actions. Utah has passed a statute that establishes a 10 year statute of repose for actions against architects, engineers and builders for design error or faulty construction. Thus, in these jurisdictions, the actions cannot proceed if the accident occurs more than a specified period of time after a product was manufactured or a project was completed. The statutes of repose provide a defendant with an absolute defense to a claim based on a defective product or faulty design or construction. Such limitations have impacted the subrogation rights of an insurer by eliminating the potential for recovery against a number of defendants.

Another area in which tort reform has impacted the rights of a subrogating insurer concerns the admissibility of certain types of evidence. The State of Maine, for example, has adopted a statutory provision which provides that subsequent remedial measures taken after an accident are not admissible as evidence of negligence. The State of Florida has a provision which provides a rebutable presumption that a product is not defective if

the product met federal or state standards. Georgia has strengthened expert witness rules and adopted the *Daubert* standard in civil cases which has placed restrictions on the ability of an expert witness to render opinions at trial. Tort reform legislation with respect to evidentiary issues is intended to limit the ability of a plaintiff to establish a claim. None of the legislation has expanded or liberalized the rules of evidence, and thus subrogating insurers can expect that this type of tort reform will negatively impact their subrogation rights.

The purpose of tort reform in the United States is primarily devoted to the regulation, control and restriction of personal injury actions. However, statutes of repose, imposition of several liability, and evidentiary limitations do not distinguish a personal injury plaintiff from a subrogating insurer. The measure of damages sought by the subrogating insurer may not be the subject of damage caps or limitations, but the ability to pursue those damages is affected directly by tort reform. As noted at the outset, it is not the intent of this paper to criticize or extol tort reform in the United States, but there is no question that tort reform has limited and in some instances eliminated the rights of a subrogating insurer.