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Subrogation and Liens

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The Author acknowledges the assistance of colleagues who send her opinions from across the state and nation. Especially prolific and insightful is Roger Baron, Professor of Law at the University of South Dakota, who can be followed at http://erisawithprofessorbaron.com/

SUBROGATION AND LIENS

I. OVERVIEW OF SUBROGATION, HISTORY, FEDERAL AND STATE BALANCING ACT, AND COMMON LAW EQUITABLE PRINCIPLES.

A. *History of state and federal regulation of insurance.*

Subrogation is an element of insurance law. In 1944, the United States Supreme Court determined that "insurance" is a form of interstate commerce subject to federal regulation; see *United States v. South-Eastern Underwriters Assoc.*, 322 U.S. 533 (1944). Shortly thereafter, Congress passed the McCarran-Ferguson Act, 15 U.S.C.S. § 1011 and following. The McCarran-Ferguson Act granted authority to the states to regulate the "business of insurance." Various federal laws continued to govern the "peripherals of the industry (labor, tax, securities)." State laws which regulated the core nature of the insurance business therefore overrode most federal laws to the contrary. This paper is designed to analyze the myriad of state and federal statutes and cases on the topic of subrogation, from the standpoint of the plaintiff's personal injury practitioner.

In an attempt to harmonize the proliferation of insurance policies and laws, Congress passed the Employee Retirement and Income Security Act, commonly known as ERISA, in 1974. ERISA did not vitiate the McCarran-Ferguson's grant of state regulation; it did spawn a spate of lawsuits trying to determine which state laws qualify as state regulation (not-preempted by ERISA) and which laws deal with peripheral issues (pre-empted by ERISA). ERISA also recognized that some health plans are self-funded, not funded by insurance premiums, and those plans are exempt from state regulation.

The shifting of risk through the payment of premiums is the most fundamental principle of insurance. Subrogation is a bastardization of that risk-shifting principle. Therefore, subrogation should come within the "core business" of insurance and be subject to state regulation for all premium funded insurance policies. A Florida court traced the history and analysis:

> [T]the court in *Pilot* looked to case law interpreting the phrase "business of insurance" under the McCarran-Ferguson Act. *Id.* This law, taken as a whole, provided three criteria for determining whether a practice would fall under the "business of insurance." *Id.* Namely:
> "*[F]irst,* whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 129, 102 S.Ct. 3002, 3009, 73 L.Ed.2d 647 (1982) (emphasis in original). *Id.* at 48-49.

However, more recently, in *Kentucky Ass'n of Health Plans, Inc. v. Miller,* 538 U.S. 329, 341-42 (2003), the Supreme Court receded from the McCarran-Ferguson factors, stating:

> Today we make a clean break from the McCarran-Ferguson factors and hold that for a state law to be deemed a "law ... which regulates insurance" under § 1144(b)(2)(A), it must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance. *See Pilot Life, supra,* at 50, 107 S.Ct. 1549, *UNUM, supra,* at 368, 119 S.Ct. 1380; *Rush Prudential,* supra, at 366, 122 S.Ct. 2151. Second ... the state law must substantially affect the risk pooling arrangement between the insurer and the insured. Kentucky's law satisfies each of these requirements.

The majority of cases addressing state subrogation and collateral source statutes have determined that they are laws regulating insurance. In *FMC Corp. v. Holliday,* 498 U.S. 52, 60-61 (1990), the Supreme Court considered whether a Pennsylvania anti-subrogation statute was a law "regulating insurance" and held:

> There is no dispute that the Pennsylvania law falls within ERISA's insurance saving clause.... Section 1720 directly controls the terms of insurance contracts by invalidating any subrogation provisions that they contain. *See Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S., at 740-741, 105 S.Ct., at 2389-2390. It does not merely have an impact on the insurance industry; it is aimed at it. *See Pilot Life*

[*Ins. Co. v. Dedeaux*, 481 U.S. 41, 50, 107 S.Ct. 1549, 1554, 95 L.Ed.2d 39 (1987)]. This returns the matter of subrogation to state law.

Coleman v. BCBS of Alabama, Inc., No. 1D10-1366, (D. Ct of Appeal Florida, 1st Dist. - Dec. 8, 2010)

This paper reviews U.S. and Texas subrogation interests and liens in favor of Veterans Administration, Medicare, Medicaid, workers' compensation, Hospital Liens, or child support liens. It covers conventional/contractual subrogation interests, including ERISA Employee Welfare Benefit Plans and Non-ERISA Plans, Self-funded Pools, Private Health Insurance, Government Employer or Church Sponsored Plans, Medical Payments Coverage, Uninsured/Underinsured Motorist Coverage, Vehicle Property Damage, and HMO's. It also covers equitable subrogation imposed by law. It will also analyze the devastating effect of the Texas Supreme Court's decision in *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 (Tex. 2007), NO. 05-0791, on the made whole doctrine, and the legislative reform of *Fortis* by the passage of HB 1869, signed into law as Ch. 140A Civ. Prac. and Rem. Code, effective with causes of action accruing on or after 01/01/2014. See Section I.E.1.B, Ch. 140A/HB 1869 of this paper for a discussion of the *Liberty Mutual Ins. Co. v. Transit Mix Concrete & Materials Co*., No. 06-12-00117-CV, (___ S.W.3d ___ June 28, 2013, pet. den.) case and the statute's effective date for both third party and first party UM-UIM claims pending as of the effective date.

B. ***Definitions.***

"Subrogation" has been defined as the "substitution of one person in the place of another with reference to a lawful claim, demand or right." Black's Law Dictionary.

Subrogation is the substitution of one person in the place of another, whether as creditor or as the possessor of some lawful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim. . . . By subrogation, a court of equity, for the purpose of doing exact justice between parties in a given transaction, places one of them, to whom a legal right does not belong, in the position of a party to whom the right does belong. 53 Tex.Jur.2d Subrogation § 1, at 429 (1964).

Subrogation has been characterized by Texas courts as a 'pure equity,' as a 'wholesome rule of equity,' and as 'a doctrine belonging to an age of enlightened policy and refined, although natural justice.' *Chambers & Co. v. Little*, 21 S.W.2d 17, 22 (Tex. App.--Eastland 1929, writ ref'd); *O'Brien v. Perkins*, 276 S.W. 308, 315 (Tex. App.--Amarillo 1925), aff'd sub nom., *Shelton v. O'Brien*, 285 S.W. 260 (Tex.1926). But recent judicial struggles with the notion of "equity" rely little on notions of fairness.

Texas courts have always been particularly hospitable to the right of subrogation and have been in the forefront of upholding it. As Judge Brown declared in *Faires v. Cockerell*, 88 Tex. 428, 437, 31 S.W. 190, 194, 28 L.R.A. 528 (1895) (quoted in a 1974 opinion):

> Perhaps the courts of no state have gone further in applying the doctrine of subrogation than has the court of this state…
>
> The doctrine of subrogation is always given a liberal interpretation and is broad enough to include every instance in which one person, not acting voluntarily has paid a debt for which another was primarily liable and which in equity and good conscience should have been discharged by the latter. *Galbraith-Foxworth Lumber Co. v. Long*, 5 S.W.2d 162, 167 (Tex. App.--Dallas 1928, writ ref'd); *Constitution Indemnity Co. v. Armbrust*, 25 S.W.2d 176, 180 (Tex. App.--San Antonio 1930, writ ref'd); *Independence Indemnity Co. v. Republic Nat'l Bank & Trust Co.*, 114 S.W.2d 1223 (Tex. App.--Dallas 1938, writ dism'd w.o.j.). …
>
> Where the court can give a policy a construction which, while preserving the protection given the insured under its terms, would also relieve the insurer from the increased hazard against which it undertook to provide, then such construction must be adopted, 'for such was the evident intent of the parties.' *Royal Ins. Co. v. Texas & G. Ry.*, 53 Tex. App. 154, 159, 115 S.W. 117, 120 (1909, writ ref'd).