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Insurance

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commitment pursuant to the Law was neither civil commitment nor punishment for an offense.¹⁵¹ Instead, commitment under chapter 975 is an alternative to sentencing¹⁵² and is an independent proceeding different from penal sentencing.¹⁵³ The court recognized that although section 946.42(4) requires that later sentences be consecutive to those which have been previously imposed, commitment under chapter 975 is not a sentence. Therefore, consecutive sentencing in this type of case, while permissible, is not required by the statute. The court admitted that the legislature might have intended the consecutive sentencing rule to apply to persons who escape from custody while committed. However, it should be noted that the statute lacks language which would express this possible intent, and the court is bound to decide this issue in a manner consistent with previous holdings. In addition, the court held that since the defendant had already served the year's sentence before the modification occurred, whether the modification was in error or not involved moot issues.¹⁵⁴

Problems inherent in the consecutive sentencing statutes must be resolved for the benefit of defendants, their counsel, prosecutors and the courts. Legislative intent is best provided by clear statutory language, not by judicial construction. Hopefully, the legislature will soon accept the court's frequent requests for assistance in this area, and resolve the problems of consecutive sentencing law.

THOMAS E. DUGAN
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INSURANCE

During the recent term, the Wisconsin Supreme Court was again called upon to decide a wide variety of insurance cases.

court. If the defendant is not placed on probation, the court shall order the defendant conveyed by the proper county authorities, at county expense, to the sex crimes law facility designated by the department.

151. 76 Wis. 2d at 176, 251 N.W.2d at 11, *citing*, *State ex rel. Farrell v. Stovall*, 59 Wis. 2d 148, 167, 207 N.W.2d 809 (1973).

152. 76 Wis. 2d at 177, 251 N.W.2d at 11, *citing*, *State v. Neutz*, 69 Wis. 2d 292, 295, 230 N.W.2d 806 (1975).

153. 76 Wis. 2d at 176, 251 N.W.2d at 11, *citing*, *Huebner v. State*, 33 Wis. 2d 505, 526, 147 N.W.2d 646 (1967).

154. 76 Wis. 2d at 178, 251 N.W.2d at 12.

In a case decided under Iowa law, the court indicated a willingness to adopt the liberal principle of honoring the reasonable expectations of applicants and intended beneficiaries of insurance contracts, even though a painstaking study of the policy provisions would have negated their expectations.¹ The court also established that oral contracts of insurance will be liberally construed for purposes of providing coverage, and strictly construed against insurers seeking to deny coverage.² However, the court did not maintain this liberal stance when it declined to adopt broad third party beneficiary principles urged upon it in a case where a third party sought to hold a mortgagee liable for failure to procure homeowners insurance for the mortgagor's property.³ In other matters of contract interpretation, the court considered the insured's policy obligations of furnishing notice of loss⁴ and demanding uninsured motorist arbitration,⁵ and extensively discussed the meaning of the term "regular use" within the context of the nonowned automobile liability coverage clause.⁶ However, the most significant cases decided this term dealt with principles of subrogation. These cases and their impact on Wisconsin practice will be discussed in the remainder of this article.

Few segments of insurance law have produced more problems for trial practitioners in recent years than the law of subrogation.⁷ The area is rife with confusion and uncertainty, much of which is attributable to the supreme court's decision in the now infamous case of *Heifetz v. Johnson*.⁸ With its decisions this term in *Karl v. Employers Insurance of Wausau*⁹ and

1. *Handal v. American Farmers Mut. Cas. Co.*, 79 Wis. 2d 67, 255 N.W.2d 903 (1977). For a discussion of this principle, see KEETON, *INSURANCE LAW*, § 6.3(a) (1971).

2. *Roeske v. Diefenbach*, 75 Wis. 2d 253, 249 N.W.2d 555 (1977).

3. *Schell v. Knickelbein*, 77 Wis. 2d 344, 252 N.W.2d 921 (1977).

4. *RTE Corp. v. Maryland Cas. Co.*, 74 Wis. 2d 614, 247 N.W.2d 171 (1976).

5. *Worthington v. Farmers Ins. Exchange*, 77 Wis. 2d 508, 253 N.W.2d 76 (1977).

6. *Jones v. Perkins*, 75 Wis. 2d 18, 248 N.W.2d 463 (1977); *Hochgurtel v. San Felippo*, 78 Wis. 2d 70, 253 N.W.2d 526 (1977).

7. For an excellent discussion of the problems in this area, see Barron, "Heifetz" and the Collateral Source Rule, 48 Wis. B. BULL. 27 (1975) [hereinafter cited as Barron]. See also, Capwell & Greenwald, *Legal and Practical Problems Arising From Subrogation Clauses in Health and Accident Policies*, 54 MARQ. L. REV. 255 (1971) [hereinafter cited as Capwell & Greenwald]; Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478 (1966) [hereinafter cited as Fleming]; Kimball & Davis, *The Extension of Insurance Subrogation*, 60 MICH. L. REV. 841 (1962) [hereinafter cited as Kimball].

8. 61 Wis. 2d 111, 211 N.W.2d 834 (1973); See Barron, *supra* note 7, at 27.

9. 78 Wis. 2d 284, 254 N.W.2d 255 (1977).

Garrity v. Rural Mutual Insurance Co.,¹⁰ the court has apparently answered several recurring questions faced by insurance litigators and clarified at least one aspect of the *Heifetz* doctrine.

In *Heifetz*, the court stated that “[a]cceptance of payment from an insurer operates as an assignment of the claim to that extent whether or not the policy contains a subrogation agreement. The plaintiff loses his right to sue for any amount received from his insurer.”¹¹ A literal reading of this broad statement would indicate that a claimant cannot recover the amount of any “collateral source”¹² payments received from an insurer regardless of whether the contract provided for subrogation.¹³ However, this interpretation is unwarranted as it ignores the “historical attitude” toward insurance subrogation¹⁴ and totally disregards the collateral source doctrine which has long been followed in Wisconsin¹⁵ and throughout the country.¹⁶ *Karl v. Employers Insurance of Wausau* confirmed the opinion of at least one commentator that the quoted passage from *Heifetz* is dicta and does not apply to all types of collateral source benefits.¹⁷

In *Karl*, a plaintiff had been awarded \$2300 for past medical expenses by the jury. The defendants claimed that the plaintiff's judgment should have been reduced by the amount of the plaintiff's expenses which were paid by his health insurer. As

10. 77 Wis. 2d 537, 253 N.W.2d 512 (1977).

11. 61 Wis. 2d at 124, 211 N.W.2d at 841.

12. “The collateral source rule provides that the damages to be awarded to an injured person are not to be affected by the fact that the claimant received compensation from other sources, such as sick leave, compensation, or insurance.” *Payne v. Bilco Co.*, 54 Wis. 2d 424, 433, 195 N.W.2d 641, 647 (1972). See also *Thoreson v. Milwaukee & Suburban Trans. Corp.*, 56 Wis. 2d 231, 201 N.W.2d 745 (1972); *Ashley v. American Auto. Ins. Co.*, 19 Wis. 2d 17, 119 N.W.2d 359 (1963).

13. *Piper, Problems in Third-Party Action Procedure Under the Wisconsin Workers' Compensation Act*, 60 MARQ. L. REV. 91, 97 (1976); *Barron, supra* note 7, at 27.

14. *Kimball, supra* note 7, at 844-51.

15. *Thoreson v. Milwaukee & Suburban Trans. Corp.*, 56 Wis. 2d 231, 201 N.W.2d 745 (1972); *Payne v. Bilco Co.*, 54 Wis. 2d 424, 195 N.W.2d 641 (1972); *Ashley v. American Auto. Ins. Co.*, 19 Wis. 2d 17, 119 N.W.2d 359 (1963); *Prunty v. Vandenberg*, 257 Wis. 469, 44 N.W.2d 246 (1950); *Cunnien v. Superior Iron Works*, 175 Wis. 172, 184 N.W. 767 (1921); *Marshall-Jackson Co. v. Jeffery*, 167 Wis. 63, 166 N.W. 647 (1918); *Gatzweiler v. Milwaukee E.R. & L. Co.*, 136 Wis. 34, 116 N.W. 633 (1908).

16. *Fleming, supra* note 7, at 1482; *Maxwell, Collateral Source Rule in the American Law of Damages*, 46 MINN. L. REV. 669 (1962); *Schwartz, The Collateral-Source Rule*, 41 B.U. L. REV. 348 (1961).

17. *Barron, supra* note 7, at 33.

an offer of proof, the defendants introduced an interrogatory answer made by the plaintiff's wife, stating that she was informed that Blue Cross had paid \$1683 toward her hospital bill. The trial court's refusal to reduce the plaintiff's recovery was upheld by the supreme court:

The defendants failed to produce the alleged contract of insurance between the Karls and their hospital insurer even though they had from the third day of December, 1970 until the time of trial to pursue this matter. *Neither the trial court nor this court has been apprised of the nature of the particular insurance contract, whether it had a subrogation clause, or whether subrogation was waived.* Because of the state of the record we find no error in the refusal of the trial court to reduce the judgment by the amount of the alleged insurance recovery.¹⁸

The italicized portion of the quotation indicates that, contrary to *Heifetz*, acceptance of payment from a health insurer does not deprive the claimant of "his right to sue for any amount received from his insurer."¹⁹ The passage implies that a plaintiff is allowed to recover, as collateral source benefits, amounts received from a health insurer where the contract does not contain an express subrogation provision, where the existence of such a provision is not established, or where the insurer waives its right to subrogation. This position is consistent with the general rule that a health insurer or plan operator is not entitled to subrogation by reason of payments made under a contract, absent an express provision to that effect in the agreement.²⁰

To reconcile the *Karl* and *Heifetz* positions, it is necessary to consider several fundamental principles of the law of subrogation. Essentially there are two types of subrogation: "legal" or "equitable" subrogation which arises by operation of law (or, more accurately, of equity)²¹ and conventional subrogation

18. 78 Wis. 2d 284, at 302, 254 N.W.2d 255, at 263 (emphasis added).

19. *Heifetz v. Johnson*, 61 Wis. 2d at 124, 211 N.W.2d at 841.

20. *Mich. Hosp. Service v. Sharpe*, 339 Mich. 357, 63 N.W.2d 638 (1954); *Publix Cab Co. v. Colorado Nat'l Bank of Denver*, 139 Colo. 205, 338 P.2d 702 (1959); *Annot.*, 43 A.L.R.2d 1177 (1955); *Fleming*, *supra* note 7, at 1501-02; *Note, Subrogation in Medical Service Plans and Medical Insurance Policies*, 28 MD. L. REV. 292, 294 (1968); *cf.*, *Barron*, *supra* note 7, at 33.

21. *Garrity v. Rural Mut. Ins. Co.*, 77 Wis. 2d 537, 543, 253 N.W.2d 512, 515 (1977), *citing American Ins. Co. v. Milwaukee*, 51 Wis. 2d 346, 351-53, 187 N.W.2d 142, 145-47 (1971); *Kimball*, *supra* note 7, at 841; 11 APPELMAN, INSURANCE LAW & PRACTICE, §§

which is the product of an agreement between the parties.²² The distinction is of critical importance in determining whether an insurer is subrogated to the rights of the payee. Once it is established that the party is entitled to be subrogated, it does not matter whether the right is a legal one or a conventional one, as Wisconsin law does not distinguish between the two classes; recovery in each instance is dependent upon the same equitable principles. Problems in determining an insurer's right to subrogation arise only when the contract contains no subrogation clause.²³ In such instances, the insurer will be subrogated to the insured's rights only where subrogation is made automatic by statute or arises by operation of law due to the type of insurance involved.²⁴

In *Gatzweiler v. Milwaukee Electric Railway & Light Co.*,²⁵ the Wisconsin court drew a distinction between indemnity and investment insurance contracts. Legal subrogation was said to be an incident of the former but not the latter.²⁶ This approach was subsequently followed by the court in *Campbell v. Sutliff*.²⁷ However, the difference between investment and indemnity insurance policies is unclear; consequently, this standard has been criticized as inaccurate and uncertain.²⁸

6501, 6502 [hereinafter cited as APPELMAN]; 16 COUCH, INSURANCE 2d § 61:3 (1966); SHELDON, SUBROGATION § 1 (2d ed. 1893).

22. Kimball, *supra* note 7, at 841; 11 APPELMAN, *supra* note 21, §6501; 16 COUCH, INSURANCE 2d § 61:3.

23. This is true in Wisconsin where assignment of virtually all tort claims is permitted. *Associates Hosp. Serv. Inc. v. Milwaukee Auto. Mut. Ins. Co.*, 33 Wis. 2d 170, 147 N.W.2d 225 (1967); *D'Angelo v. Connell Paperboard Products Co.*, 19 Wis. 2d 390, 120 N.W.2d 70 (1963). *See also*, WIS. STAT. § 895.01 (1975); *Bernardine v. Home & Auto. Ins. Co.*, 64 Ill. App. 2d 465, 212 N.E.2d 499 (1965); *Davenport v. State Farm Mut. Auto. Ins. Co.*, 81 Nev. 361, 404 P.2d 10 (1965); *Miller v. Liberty Mut. Fire Ins. Co.*, 48 Misc. 2d 102, 264 N.Y.S.2d 319 (1965); *Travelers Ins. Co. v. Lutz*, 32 Ohio Op. 2d 469, 210 N.W.2d 755 (1964).

In some states, assignment of personal injury claims is not permitted and contractual subrogation provisions in health insurance policies are generally held invalid in such jurisdictions. *Capwell & Greenwald*, *supra* note 7, at 259-64; *Frosthave v. Hardware Dealers Mut. Fire Ins. Co.*, 416 S.W.2d 208 (Mo. 1967); *Harleysville Mut. Ins. Co. v. Lea*, 2 Ariz. App. 538, 410 P.2d 495 (1966); *Wrightsmen v. Hardware Dealers Mut. Fire Ins. Co.*, 113 Ga. App. 306, 147 S.E.2d 860 (1966).

24. Baron, *supra* note 7, at 32; Kimball, *supra* note 7, at 844-60. *See, e.g.*, WIS. STAT. §§ 102.29, 49.65 (1975).

25. 136 Wis. 34, 116 N.W. 633 (1908).

26. *Id.* at 37, 116 N.W. at 634. This is the position taken in COUCH, INSURANCE 2d § 61:4 (1966).

27. 193 Wis. 370, 374, 214 N.W. 374, 376 (1927).

28. Kimball, *supra* note 7, at 850-51.

A leading commentary has suggested that an insurer should be entitled to legal subrogation in cases where there is insurance against a loss measurable in economic terms,²⁹ as with fire or collision insurance which are uniformly held to give rise to legal subrogation.³⁰ The authors would deny subrogation only where the insured has not been adequately indemnified.³¹

Another view distinguishes between contracts of personal insurance and property insurance. Absent a specific policy provision, an insurer paying under a personal insurance contract is not subrogated to the rights of the insured or beneficiary.³² The rationale underlying this distinction is that damages to the person are less susceptible to precise determination. With damages for personal injuries, there is also a lesser likelihood of double recovery by the insured and, for policy reasons, legal subrogation is not allowed.³³

This standard appears to reflect more accurately judicial treatment of the question as it allows legal subrogation under fire and collision policies, but not under life or accident policies.³⁴ However, this approach has been criticized because of the ambiguity inherent in the term "personal insurance."³⁵ There is also a problem involved in applying the standard to medical payments insurance which falls into the gray area between personal and property insurance.³⁶ This problem is illustrated by the Wisconsin court's statement in *Heifetz* to the effect that the insurer was legally subrogated to the plaintiff's claim by virtue of its payments to him under the medical payments provision of his automobile liability policy.³⁷ The court

29. *Id.* at 859.

30. *Id.* See also *Gatzweiler v. Milwaukee Elec. Ry. & Light Co.*, 136 Wis. 34, 116 N.W. 633 (1908); COUCH, INSURANCE 2d § 61:233-61:235 (1966).

31. Kimball, *supra* note 7, at 859-60.

32. 3 APPELMAN, *supra* note 21, at § 1674; Note, *Subrogation in Medical Service Plans and Medical Insurance Policies*, 28 Md. L. REV. 292, 293 (1968); Fleming, *supra* note 7, at 1499.

33. *Id.*, *Cf.*, *Gatzweiler v. Milwaukee Elec. Ry. & Light Co.*, 136 Wis. 34, 116 N.W. 633 (1908); *Aetna Life Ins. Co. v. J. B. Parker & Co.*, 30 Tex. Civ. App. 521, 72 S.W. 621 (1902).

34. *Cf.*, Barron, *supra* note 7, at 33.

35. Kimball, *supra* note 7, at 845.

36. Note, *Subrogation in Medical Service Plans and Medical Insurance Policies*, 28 Md. L. REV. 292, 293 (1968).

37. It was not clear whether the insurance policy in *Heifetz* contained a subrogation clause. The plaintiff executed a "subrogation receipt" on receiving payment from his insurer. However, the court stated that it would not matter whether or not he had signed the receipt. 61 Wis. 2d at 124, 211 N.W.2d at 841. The opinion also does not

took this position despite the fact that there was considerable authority which indicated that medical payments do not give rise to legal subrogation.³⁸

What then is the net effect of *Karl* and *Heifetz*? The *Heifetz* doctrine should be applied only to medical payments made under an automobile liability policy.³⁹ The *Karl* principle would certainly appear to apply to health insurance payments made under contracts without subrogation provisions and in cases where a health insurer waives its right to subrogation. The law in Wisconsin with regard to other types of insurance remains uncertain. While this remains the case, the safest approach in any case where it is necessary to determine whether the insurer will be subrogated is to determine the particular line of insurance involved, and then look to cases dealing with contracts of that type.⁴⁰

One must wonder whether the legal/conventional subrogation distinction is warranted at this time. Much could be gained by abolishing this dichotomy in favor of a uniform approach to the problem. This could be accomplished by recognizing automatic subrogation in all lines of insurance. However, in view of the widespread use and availability of subrogation clauses,⁴¹ a more sensible solution would be a total abolition of the principle of legal subrogation. This would serve to harmonize the law of subrogation with the collateral source rule and add the element of certainty to this confused area by allowing subrogation only in those cases where the parties to the insurance contract so provide. Until the time that remedial action is taken, the courts will continue to split hairs and draw artificial distinctions when faced with this problem.

indicate what effect, if any, § 204.30(6) of the Wisconsin Statutes had on the outcome in the case. This statute became effective after the cause of action arose but before the court decided the case and provided that an insurer was subrogated to the extent of any payments made under the medical payments provision of an automobile liability insurance policy. Wis. STAT. § 204.30(6) (1971); Wis. Laws 1971, ch. 132.

38. Fleming, *supra* note 7, at 1501-02; Purcell v. Goldberg, 34 Cal. App. 2d 344, 93 P.2d 578 (1939); Healy v. Rennert, 9 N.Y.2d 202, 173 N.E.2d 777 (1961); Annot. 13 A.L.R.2d 355 (1950). See Severson v. Milwaukee Auto. Ins. Co., 265 Wis. 488, 61 N.W.2d 872 (1953).

39. Any analysis of the *Heifetz* case should also consider the effect of the new real party in interest rule on the court's holding with respect to the effect of the failure to join the subrogated insurer as a party. See Wis. STAT. § 803.01 (1975).

40. Kimball, *supra* note 7, at 845. See also 2 RICHARDS, INSURANCE § 184 (5th ed. 1952); VANCE, INSURANCE § 134 (3d ed. 1951).

41. See, KEETON, INSURANCE LAW, § 3.10 (1971).

A different aspect of the subrogation tangle was before the court in *Garrity v. Rural Mutual Insurance Co.*⁴² The court was asked to determine the respective rights of an insured and subrogated fire insurer to damages recovered from a tortfeasor, where the loss caused by the tortfeasor exceeded the amount recoverable under the insured's fire policy.

The insureds in *Garrity* suffered a loss in the amount of \$110,000 as a result of a fire on their dairy farm allegedly caused by the negligent operation of another's feed truck on the property. Under their fire insurance policy which contained the standard form subrogation clause, the owners were paid slightly more than \$67,000, the maximum amount recoverable.⁴³ Upon receipt of the fire insurance proceeds, the insureds executed a "subrogation receipt" which purported to subrogate the insurer to all claims which they had against any third persons responsible for the loss.

Shortly thereafter, the insureds brought suit against the owners of the feed truck and their liability insurer.⁴⁴ When it was disclosed that there was only \$25,000 coverage on the truck, the fire insurer sought a determination of its rights to any amount recovered from the truck owners. The trial court ruled that the fire insurer, as subrogee, had priority in the recovery, up to the amount paid under the policy. The supreme court reversed, holding that the insureds "must first be made whole before the insurer is entitled to share in the amount recoverable from the tort-feasor. . . ."⁴⁵

In so holding, the court adopted the common law rule which prohibits recovery by the subrogee until the subrogor has been fully indemnified.⁴⁶ This full indemnity rule, which is followed in the majority of jurisdictions that have considered the ques-

42. 77 Wis. 2d 537, 253 N.W.2d 512 (1977).

43. Lines 162 through 165 of the standard fire insurance policy provide as follows: "Subrogation. This 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 this Company." 77 Wis. 2d at 540, 253 N.W.2d at 513. Cf., WIS. STAT. § 203.01 (1973).

44. Rural Mutual had written both the fire insurance policy for the dairy farm and the liability policy which covered the feed truck. After suit was commenced against Rural Mutual as insurer for the truck, it issued a third party complaint against itself as subrogated insurer of the dairy farm and sought a determination of its rights in that capacity. 77 Wis. 2d at 539-40, 253 N.W.2d at 513.

45. *Id.* at 541, 253 N.W.2d at 514.

46. Kimball, *supra* note 7, at 865.

tion,⁴⁷ applies to both legal and conventional subrogation.⁴⁸ However, in such jurisdictions, parties to the insurance contract may contravene the common law rule by including an appropriate provision in the agreement which establishes their respective priorities in any amounts subsequently recovered.⁴⁹

The *Garrity* court found nothing which altered the application of the common law rule in the subrogation clause in the fire insurance policy.⁵⁰ Additionally, the subrogation receipt executed by the insureds had no effect on their priority in the recovery. Since an express assignment of a claim to a subrogated insurer is unnecessary,⁵¹ the mere execution of an assignment, without more, does not affect the insurer's right of recovery from a tortfeasor.⁵² The practical effect of such an assignment is purely procedural: it relieves the insurer of the burden of proving the existence of facts justifying subrogation since it can sue in its own right by virtue of the assignment.⁵³ Since neither the subrogation clause nor the subrogation receipt spec-

47. KEETON, INSURANCE LAW § 3:10(c)(2) (1971); *Hardware Dealers Mut. Fire Ins. Co. v. Ross*, 129 Ill. App. 2d 217, 262 N.E.2d 618 (1970); *Maryland Cas. Co. v. Cincinnati, C., C. & St. L. Ry. Co.*, 74 Ind. App. 272, 124 N.E. 774 (1919); *Oakland County v. Central West Cas. Co.*, 266 Mich. 438, 254 N.W. 158, *aff'd on reh.*, 268 Mich. 117, 255 N.W. 733 (1934); *Ward v. Concordia Fire Ins. Co.*, 218 Mo. App. 98, 262 S.W. 450 (1924); *Providence Washington Ins. Co. v. Hogges*, 67 N.J. Super. 475, 171 A.2d 120 (1961); *St. Paul Fire & Marine Ins. Co. v. W.P. Rose Supply Co.*, 19 N.C. 254, 200 S.E.2d 655 (1973); *Propeck v. Farmers' Mut. Ins. Ass'n.*, 65 S.W.2d 390 (Tex. Civ. App. 1933); *Lyon v. Hartford Accident & Indem. Co.*, 25 Utah 2d 311, 480 P.2d 739 (1971).

48. This is true in Wisconsin, as subrogation is recognized or denied upon equitable principles without differentiation as to its origin. 77 Wis. 2d at 543, 253 N.W.2d at 515; *American Ins. Co. v. Milwaukee*, 51 Wis. 2d 346, 351-53, 187 N.W.2d 142, 145 (1971). The same holds true in a number of other jurisdictions. *Hardware Dealers Mut. Fire Ins. Co. v. Ross*, 129 Ill. App. 2d 217, 262 N.E.2d 618 (1970); *Maryland Cas. Co. v. Cincinnati, C., C. & St. L. Ry. Co.*, 74 Ind. App. 272, 124 N.E. 774 (1919); *Providence Washington Ins. Co. v. Hogges*, 67 N.J. Super. 475, 171 A.2d 120 (1961); *Lyons v. Hartford Accident & Indem. Co.*, 25 Utah 2d 311, 480 P.2d 739 (1971). *Contra*, *Shifrin v. McGuire & Hester Constr. Co.*, 239 Cal. App. 2d 420, 48 Cal. Rptr. 799 (1966); *Blue Cross of Florida, Inc. v. O'Donnel*, 230 So. 2d 706 (Fla. App. 1970); *Cervin v. Garner*, 25 Ohio St. 2d 231, 267 N.E.2d 769 (1971).

49. COUCH, INSURANCE 2d § 61:63, *cf.*, *Kimball*, *supra* note 7, at 865.

50. 77 Wis. 2d at 544, 253 N.W.2d at 515.

51. *Northern Assurance Co. v. Milwaukee*, 227 Wis. 124, 277 N.W. 149 (1938); COUCH, INSURANCE 2d §§ 61:93, 61:104; APPELMAN, *supra* note 21, §§ 4053, 4054. *Cf.*, *Heifetz v. Johnson*, 61 Wis. 2d 111, 120, 211 N.W.2d 834, 839 (1973).

52. 77 Wis. 2d at 546, 253 N.W.2d at 516; COUCH, INSURANCE 2d § 105.

53. 77 Wis. 2d at 546, 253 N.W.2d at 516, *citing* COUCH, INSURANCE 2d § 105. *But see* *Hartford Fire Ins. Co. v. Payne*, 28 Ga. App. 655, 112 S.E. 736 (1922) where an insurer, suing by virtue of an express assignment, was barred from recovering because it failed to show an equitable entitlement to subrogation.

ified the priorities of the parties in the recovery, the insurer was precluded from recovering by the common law rule.⁵⁴

The *Garrity* decision should have several effects on Wisconsin practice. Subrogated insurers and individual claimants generally have divided the proceeds of an inadequate recovery in one of two ways. In some instances, relying on an unfortunate dictum in *Patitucci v. Gerhardt*,⁵⁵ subrogees have received the entire amount of the proceeds, up to the amount of the subrogation claim, and the insureds have only recovered the excess over that amount.⁵⁶ The more prevalent practice, however, has been to distribute the funds received on a pro-rata basis: the subrogated insurer and its insured each receiving the same proportionate amount of their claim.⁵⁷ The same pro-rata distribution formula is generally followed in settlements of claims between insurers.⁵⁸

As a result of *Garrity*, individual plaintiffs will generally be indemnified before the subrogee recovers. This creates a potential adversity of interest between insurer and insured: the plaintiff wants to see his uncompensated damages maximized while the insurer wants these damages minimized so that its chances of recovery are increased. This adversity should limit the instances where an individual claimant's attorney also represents the subrogated insurer to cases where the tortfeasor has clearly adequate liability insurance or financial resources to fully satisfy both claims. Additionally, complications in settlement negotiations are foreseeable. For example, between subrogor and subrogee, who determines what amount will indemnify the subrogor? It is possible that a settling claimant will be able to protect himself from a subsequent claim from the subrogee by properly structuring the release to identify which elements of the plaintiff's damages are being compensated in the settlement. However, where the insurer's subrogated interest is substantial, it is unlikely that it will readily acquiesce in the allocation of settlement proceeds. It will be some time before

54. 77 Wis. 2d at 546-47, 253 N.W.2d at 516.

55. "If the amount of damages set by the jury is less than the insurance paid, the insurer is the sole owner; if the amount is greater, the insurer is only a partial owner." *Patitucci v. Gerhardt*, 206 Wis. 358, 363, 240 N.W. 385, 388 (1932).

56. Capwell & Greenwald, *supra* note 7, at 282.

57. *Id.*

58. KEETON, INSURANCE LAW § 3.10 (1971).

claim settlement practices fully reflect the impact of the *Garrity* decision.

Both *Garrity* and *Karl* have clarified selected areas of the law of subrogation. While these decisions have raised additional questions, on the whole they should provide a basis for greater harmony and consistency in future decisions of the court regarding subrogation. The lack of such consistency in previous decisions has been the major cause of problems in this area.

PATRICK R. GRIFFIN

MUNICIPAL LAW

In the 1976 term the Wisconsin Supreme Court addressed a broad spectrum of municipal law issues. This article focuses on five cases dealing with three of these issues: (1) the application of the Wisconsin Constitution's home rule amendment to both a state statute and a municipal ordinance, (2) interpretation of the Wisconsin Environmental Protection Act, and (3) the local governmental body's role in implementing the direct legislation statute. Each of the cases discussed below represents the court's first determination of the issue involved.

I. APPLICATION OF THE HOME RULE AMENDMENT

This term the court dealt with the distinction between matters of statewide concern and matters of local concern in two very different contexts. *City of Beloit v. Kallas*¹ involved a state statute aimed at pollution control, while *State ex rel. Michalek v. Le Grand*² involved a municipal ordinance aimed at improving housing conditions. In each case, the challengers unsuccessfully argued that statewide concerns were being subjugated to local interests in contravention of Article XI, section 3 of the Wisconsin Constitution. This section, known as the home rule amendment, provides in pertinent part:

Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of

1. 76 Wis. 2d 61, 250 N.W.2d 342 (1977).

2. 77 Wis. 2d 520, 253 N.W.2d 505 (1977).