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Civil Procedure - Subrogation - Subrogated Insurer's Joinder in Action against Third-Party Tortfeasor May Not Be Disclosed to Jury: Safeco Insurance Company of America v. United States Fidelity & (and) Guaranty Co.

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CIVIL PROCEDURE—SUBROGATION—Subrogated Insurer's Joinder in Action Against Third-Party Tortfeasor May Not Be Disclosed to Jury: *Safeco Insurance Company of America v. United States Fidelity & Guaranty Co.*

I. INTRODUCTION

In *Safeco Insurance Company of America v. United States Fidelity & Guaranty Company,*[1] the New Mexico Supreme Court held that when a subrogated insurer[2] is required to join an action as a party and a jury tries the case, the insurer's joinder may not be disclosed to the jury.[3] This new

1. 101 N.M. 148, 679 P.2d 816 (1984).

2. Subrogation is the insurer's right to take the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss paid by the insurer. 16 G. COUCH, CYCLOPEDIA OF INSURANCE LAW 2D § 61:1 (rev. ed. 1983) (citing Liberty Mut. Fire Ins. Co. v. Auto Spring Supply Co., 59 Cal. App. 3d 860, 131 Cal. Rptr. 211 (Cal. App. 1976)). "Subrogation may exist by virtue of statute, judicial device, or agreement between the insured and the insurer and is designed to compel discharge of the obligation by the one who in equity should bear the loss." *Id.* (quoting Aetna Ins. Co. v. Gilchrist Bros., Inc., 85 N.J. 550, 428 A.2d 1254 (1981)). *See also* 44 Am. Jur. 2d, *Insurance* § 1794 (1982). *Safeco* involved legal subrogation arising by operation of law. 101 N.M. at 149, 679 P.2d at 817. *See also* 16 G. Couch, *supra* § 61:2. For a discussion of conventional subrogation, or that which arises by contract of the parties, *see infra* notes 47–50 and accompanying text. *See also* State Farm Mut. Auto. Ins. Co. v. Foundation R. Ins. Co., 78 N.M. 359, 363, 431 P.2d 737, 741 (1967).

3. *Safeco,* 101 N.M. at 150, 679 P.2d at 818. N.M. R. CIV. P. 17(a) provides, in pertinent part, that "[e]very action shall be prosecuted in the name of the real party in interest. . . ." Status as a "real party in interest" is determined by whether one is the owner of the right being enforced and is in a position to discharge the defendant from the liability asserted in the suit. State Farm Mut. Auto. Ins. Co. v. Foundation R. Ins. Co., 78 N.M. 359, 364, 431 P.2d 737, 472 (1967).

N.M.R. CIV. P. 17(a) must be read together with rule 19(a). Prager v. Prager, 80 N.M. 773, 461 P.2d 906 (1969). N.M.R. CIV. P. 19(a) reads, in pertinent part:

> Persons to be joined if feasible. A person . . . shall be joined . . . if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest, or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest.

See also N.M.R. CIV. P. 19(b), which reads, in pertinent part:

> Determination by court whenever joinder not feasible. If a person as described in subdivision (a)(1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. . . .

The New Mexico judiciary has consistently held that a necessary party is also indispensable and, therefore, must be joined or the case must be dismissed. *See* Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957). Where an insurer has paid its insured for loss, in whole or in part, it is a necessary and indispensable party to an action to recover amounts paid from the third party allegedly responsible therefor. United States Fidelity & Guar. Co. v. Raton Natural Gas Co., 86 N.M. 741, 743, 410 P.2d 959, 961 (1966).

procedure is intended to prevent jury prejudice[4] against insured parties while protecting the subrogated insurer's interests.[5] Even though the insurer is joined, the insured party must assert his claim solely against the alleged tortfeasor for all damages, including any subrogated interest claimed by the insurer.[6] The insurer is permitted to prove its claim to the court only after the insured has recovered.[7] The court will then apportion damages according to the respective interests of the insurer and insured.[8]

This Note will demonstrate that the court did not achieve its goal of adequately protecting subrogated rights. In addition, it questions the wisdom of a rule intended to apply in all situations involving subrogated insurers.

II. STATEMENT OF THE CASE

Safeco involved an automobile accident among three parties, two insured and one uninsured.[9] After paying the bulk of its insured's damages, United States Fidelity & Guaranty Company (USF&G) brought suit under a subrogation theory against both the uninsured and insured tortfeasors, naming the insured tortfeasor's insurance company, Safeco, as a co-defendant.[10] USF&G also named its insured as an involuntary plaintiff to the extent of her $100 deductable.[11] Safeco moved to dismiss the claim against it, alleging that, as a matter of law, USF&G and USF&G's insured had no direct cause of action against Safeco.[12] The district court dismissed the claim against Safeco.[13] USF&G appealed.[14]

The New Mexico Court of Appeals reversed on the ground that due process required Safeco's joinder as a party defendant.[15] Relying on prior

4. The disclosure of insurance coverage is considered prejudicial. *See infra* note 27 and accompanying text. *See also* Falkner v. Martin, 74 N.M. 159, 162, 391 P.2d 660, 662 (1964). In *Safeco*, Justice Walters discussed the potential for juror awareness of a party's insurance coverage through the application of N.M.R. EVID. 101, 105, 401, 402, 411, and 1101. 101 N.M. at 150–52, 679 P.2d at 818–20. A complete discussion of these rules is beyond the scope of this Note.

5. *Safeco*, 101 N.M. at 150, 679 P.2d at 818.

6. *Id.* at 149–51, 679 P.2d at 817–19.

7. *Id.* at 150, 679 P.2d at 818.

8. *Id.*

9. *Id.* at 149, 679 P.2d at 817. The three parties involved were Kim Taylor, insured by USF&G; Nicholas Calomino, insured by Safeco; and Richard Vigil, the driver of a car owned by Eugene Vigil, both uninsured.

10. *Id.*

11. *Id. See* N.M.R. CIV. P. 19(a) which provides, in pertinent part: "If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff."

12. United States Fidelity and Guaranty Co. v. Safeco Insurance Co. of America, 22 N.M. St. B. Bull. 62, 63 (Ct. App. 1982).

13. *Id.*

14. *Id.*

15. *Id.* The court reasoned that the rights of the parties were balanced, as required by principles of due process, only when both insurers were named as parties to the action.

New Mexico Supreme Court decisions, the court held that (1) USF&G and its insured were indispensible parties required to join the action and (2) since the plaintiff's insurance company was required to join as a plaintiff, the element of fairness embodied in due process required that the defendant's insurance company, Safeco, be joined as a party defendant.[16]

The New Mexico Supreme Court granted certiorari to clarify the existing law regarding joinder of insurance companies as parties.[17] The supreme court reversed the court of appeals, holding that the joinder of a subrogated insurer may not be disclosed to the jury.[18] To the extent that any prior case law conflicted with this decision, the court also reversed it.[19]

III. DISCUSSION AND ANALYSIS

A. The New Mexico Supreme Court's Reasoning

In New Mexico, an insurer who pays its insured's claim pursuant to policy terms is subrogated, by operation of law, to its insured's claim against the third-party tortfeasor.[20] Both insured and insurer, therefore, are entitled to pursue recovery from the third-party tortfeasor.[21]

One guiding purpose behind the *Safeco* court's decision was to protect both individual and collective interests by promulgating rules intended to apply in all insurance related situations.[22] The *Safeco* court recognized that New Mexico law had evolved as an attempt to ensure fairness to

16. *Id.* at 64. The court relied on Sellman v. Haddock, 62 N.M. 391, 310 P.2d 1045 (1957), which held that a subrogated insurer was both a necessary and indispensable party to any action for recovery on account of damage suffered by its insured. In *Sellman,* the plaintiff's insurer paid for most of the damages the plaintiff suffered in an automobile accident. *Id.* at 403, 310 P.2d at 1053. The trial court awarded the plaintiff the amount of his deductible only. *Id.* The plaintiff appealed. *Id.* On appeal the defendant argued that plaintiff's subrogated insurance carrier was an indispensable party to the suit. The court determined that there was only one cause of action based upon the claim of defendant's negligence. *Id.* Accordingly, the court agreed that both insured and insurer must join in the one action for recovery. *Id.* The *Safeco* court then relied on Maurer v. Thorpe, 95 N.M. 286, 621 P.2d 503 (1980), which held that since the plaintiff's subrogated insurer was required to join the suit according to the rule in *Sellman,* the plaintiff was denied due process of law if the defendant failed to join his insurer. *Maurer* involved an automobile accident where both plaintiff and defendant were insured. *Id.* at 287, 621 P.2d at 604. At trial the plaintiff unsuccessfully attempted to join the defendant's insurer as a party-defendant. *Id.* at 288, 621 P.2d at 505. On appeal, the New Mexico Supreme Court concluded that there was a "real probability that prejudice [would] result from excluding defendant['s] insurer" in a case where the plaintiff was required to join its insurer. *Id.* In the interests of fairness, the court determined that "the rights of the parties [were] balanced and protected only when both insurance companies [were] named as parties to the action." *Id.*

17. *Safeco,* 101 N.M. at 149, 679 P.2d at 817.

18. *Id.* at 150, 679 P.2d at 818.

19. *Id.*

20. *Id.* at 149, 679 P.2d at 817. See also *supra* note 2.

21. 16 G. COUCH, *supra* note 2, at section 61:1.

22. 101 N.M. at 150, 679 P.2d at 818.

both individuals and insurance companies in particular fact situations.[23] Prior to *Safeco*, as the court of appeals correctly recognized, the New Mexico Supreme Court ruled that a subrogated insurer to an injured party was both a necessary and an indispensable party in an action brought by that injured party against the alleged tortfeasor in a jury trial.[24]

This required only the joinder of plaintiff's insurer.[25] Accordingly, it created the risk of suggesting to the jury that a plaintiff was protected by insurance while a defendant was not.[26] Thus, in order to avoid potential jury bias in favor of the apparently "financially unequal" defendant, the New Mexico Supreme Court subsequently ruled that the defendant's insurance company must also be joined.[27] A direct action against the defendant's insurer, however, was still prohibited.[28]

In *Safeco*, the New Mexico Supreme Court confronted a situation where the earlier decisions were not effective.[29] *Safeco* involved one insured plaintiff, one insured defendant, and one uninsured defendant.[30] Existing legal doctrine mandated that the insurance companies be revealed to the jury.[31] The insured parties argued that a jury would be biased in favor of

23. *Id.* at 149–50, 679 P.2d at 817–18.

24. *Sellman*, 62 N.M. at 403, 310 P.2d at 1053. N.M.R. Civ. P. 19 requires joinder of all parties to assure that the issues at bar are fully litigated and finally resolved. See *supra* note 3 and accompanying text.

25. *Safeco*, 101 N.M. at 149, 679 P.2d at 817.

26. *See id.* Courts have generally declared a mistrial when the awareness of insurance coverage was thought to influence the verdict of the jury. *Falkner*, 74 N.M. at 162, 391 P.2d at 662.

27. *Maurer*, 95 N.M. at 287, 621 P.2d at 504. The plaintiff in *Maurer* argued that such a practice violated concepts of due process of law viewing the probability of jury prejudice as fundamentally unfair. *Id.* at 288, 621 P.2d at 505. The court held that in order to avoid biased verdicts against a presumably "deep-pocket" plaintiff, the fairness principles of due process required that the defendant's insurer join the action for the purpose of making its presence known to the jury. *Id. See* U.S. Const. amend. XIV, and N.M. Const. art. IV. *See also* Campbell v. Benson, 97 N.M. 147, 637 P.2d 578 (Ct. App. 1981). In *Campbell*, the court explained that when defendant's insurer is joined as a party-defendant, its position is that of a nominal or pro forma party. *Id.* at 150, 637 P.2d at 581. "A nominal party . . . is one who, although joined as a party defendant, has no real interest in the subject matter . . . and is joined merely because the technical rules of pleading require its presence in the record." *Id.*

28. *See* Roberts v. Sparks, 99 N.M. 152, 154, 655 P.2d 539, 541. The liability of the defendant's insurer depends upon the coverage under the defendant's policy; there is no relationship to the plaintiff's cause of action. *Id. See also Maurer*, 95 N.M. at 287, 621 P.2d at 504. The decision in *Maurer* served a dual purpose. First, it continued to protect the defendant from multiple litigation by requiring joinder of plaintiff's insurer as a necessary and indispensible party. *Id.* Second, it created financial equality in the eyes of the jury, by linking both plaintiff and defendant to their respective insurer. *Id.* In *Campbell*, 97 N.M. at 150, 637 P.2d at 581, the court said "the failure of a plaintiff to initially join as an indispensable party its insurance carrier where plaintiff has been paid for losses covered under a policy of insurance and a signed subrogation agreement is jurisdictional." *Id.* To ensure fairness, the case must be dismissed if the insurer is not joined. *Id.*

29. *See* 101 N.M. at 149, 679 P.2d at 817.

30. *Id.*

31. *Id.* The court stated that applying the existing joinder doctrine to the facts of *Safeco*, requiring disclosure of defendant's and plaintiff's insurers, would create the impression that the parties were financially unequal, or that the insured parties had access to deep pockets. *Id.*

the uninsured defendant, thus rendering a verdict favoring that uninsured defendant.[32]

The New Mexico Supreme Court, recognizing the potentially unfair jury bias, held that the plaintiff's subrogated insurer, while a necessary and indispensable party, could not be revealed to the jury.[33] Since the invisibility of the plaintiff's insurance company negated the fairness rationale for requiring that the defendant's insurance company be named in the action, the court also overruled its earlier requirement that a defendant's insurance company be named in the action.[34] In so doing, the court precluded any knowledge on the part of the jury of any party's insurance situation.[35]

The court reasoned that if the plaintiff's insurer is not disclosed to the jury, then due process does not require joinder of defendant's insurer for purposes of symmetry.[36] By completely eliminating any jury awareness of any party's insurance status, the *Safeco* court sought to eliminate unfairness resulting from prejudice against insured parties.[37] Moreover, the *Safeco* decision protects the insurer's subrogation rights by permitting the insurer to prove its claim after a verdict is rendered.[38] Because the *Safeco* court sought to prevent jury bias, the *Safeco* nondisclosure rule is only applicable when a subrogated insurer is required to join a jury trial.[39]

B. Problems With the Nondisclosure of Joinder Rule

In *Safeco,* the court intended to "obviate any unfair effects,"[40] by requiring that the insurer's joinder not be disclosed.[41] The court, therefore, developed a rule overriding all prior practice involving subrogated insurers.[42]

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32. *Id.*

33. *Id.*

34. *Id.* at 150, 679 P.2d at 818.

35. *Id.*

36. *Id. See supra* note 27 and accompanying text.

37. *See Safeco,* 101 N.M. at 150, 679 P.2d at 818.

38. *See id.*

39. *Id.* If trial is not by jury there is obviously no need to protect the parties from potential jury prejudice. *Id.* The *Safeco* court also noted that this procedure "has, as a practical matter been the manner of proceeding that has been followed by agreement of the parties in many districts of New Mexico for decades." *Id.*

40. *Id.*

41. *Id.* "Trial courts are instructed to disregard *Sellman, Maurer,* and *Campbell* as authority for any joinder issues concerning insurers or insureds." *Id.*

42. *Id. Compare Sellman,* 62 N.M. at 403, 310 P.2d at 1053 (subrogated insurers are necessary, and thus indispensable parties pursuant to N.M.R. CIV. P. 19); *and Maurer,* 95 N.M. at 288, 621 P.2d at 505 (a plaintiff compelled by law to join its insurer is prejudiced in presenting his case unless allowed to name the defendant's insurer as a party-defendant), *with Safeco,* 101 N.M. at 150, 679 P.2d at 818 (the fact of any subrogated insurer's joinder cannot be disclosed to the jury, therefore, defendant need not join his insurer).

The *Safeco* rule will not protect the interests of all parties in every situation. First, the decision prevents the insurance company from participating at trial in any manner that would disclose its joinder and status as a party to the jury.[43] If the insured initiates the cause of action and the insured's lawyer fails to fully protect the joined insurer's rights, the insurer may not be adequately protected.[44] Second, when the plaintiff is satisfied with his recovery under the policy provided by his insurer, he may have no desire to bring action against the third-party tortfeasor.[45] It is unnecessary for the insurer to remain anonymous, while compelling its insured to participate, when only the insurer is interested in the jury's verdict.[46]

1. The Insurer's Inability to Control the Litigation

Whether the insurance company will be able to control the litigation depends on the terms of the insurance policy itself. Often policies specify the roles required of insured and insurer in any ensuing litigation.[47] For

43. *Compare Maurer*, 95 N.M. at 287–88, 621 P.2d at 504–05 (stating that "[t]he *Sellman* rule allows [the plaintiff's] insurance company to participate fully in the litigation, thereby protecting its own interest[s] in recovering from the defendant. . . .") *with Safeco*, 101 N.M. at 150, 679 P.2d at 818 (suggesting that an insurer will not be able to fully participate in litigation).

44. *See, e.g.*, Maldonado v. Haney, 94 N.M. 335, 610 P.2d 222 (Ct. App. 1980). In *Maldonado*, the plaintiff-insured sought to avoid sharing its verdict with its subrogated insurance company. *Id.* at 336, 610 P.2d at 223. The court, by stipulation prior to trial, assured the insurer, plaintiff-in-intervention, that its subrogation rights would be protected by court order. *Id.* Under *Safeco*, the subrogated insurer is entitled to prove its subrogation claim only after its insured recovers damages. 101 N.M. at 150, 679 P.2d at 818. There is a risk then that the insured will not recover an amount reflective of all damages incurred by both insured and insurer. Unlike *Maldonado*, the insurer is not protected by court stipulation which effectively puts the insured on notice of all interests that need protection. *See Maldonado*, 94 N.M. at 336–37, 610 P.2d at 223–24.

45. *See Safeco*, 101 N.M. at 149, 679 P.2d at 817. In such situations the insurer must join its insured as an involuntary plaintiff. *Id. See also supra* note 11, discussing the involuntary plaintiff rule.

46. *See Safeco*, 101 N.M. 148, 679 P.2d 816 (where insured's interest was only $100, presumably not sufficient incentive to facilitate the litigation).

47. *See* sample insurance forms *infra*. Many insurance policies include a clause providing for subrogation. Quite often, howwever, these clauses are stated in general and ambiguous terms. For example, a standard USF&G form contains the following provision:

> If we make a payment under this policy and the person from whom payment was made recovers damages from another, that person shall do: (1) whatever is necessary to enable us to exercise our rights; and (2) nothing after loss to prejudice them.

USF&G Form 00 01 (Ed. 6-80f).

A standard Safeco form likewise reads:

> Trust Agreement. In the event of payment to any person under this endorsement: (a) The company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury or property damage because of which such payment is made; (b) such person shall hold in trust for the benefit of the company all rights of recovery which he shall have against such other person or organization because of the damages which are the subject of claim made under this endorsement; (c)

example, an insured may have the duty either to sue the third-party tortfeasor or to waive any right to collect from the insurer.[48] The insurer might have the right to bring the cause of action in the insured's name and with the insured's participation but under the guidance and control of the insurer.[49] When a contract provides for such procedures, the contract clearly prevails.[50]

Under these circumstances, the extent of both the insurer's and the insured's rights are well defined. Yet, insurance policies are often stated in general terms.[51] Some policies require an insured to do "[w]hatever is necessary" or "[w]hatever is proper," without specifying the insured's duties, to protect its insurer's right of subrogation.[52] When the contract is ambiguous, the *Safeco* nondisclosure rule necessarily limits the insurer's ability to control the litigation strategy.[53]

Under *Safeco* if the insurer desires to bring suit against the third-party tortfeasor, it is the insured that must assert the claim before the jury for an amount which includes that to which his insurer is subrogated.[54] Moreover, while the insurer must join any action brought by an insured, it may not participate in the litigation in a manner that would disclose its joinder.[55] If, for example, the insured's attorney inadequately demonstrates damages, the insurer will be unable to intercede in a manner which discloses its interests as a party.[56] This inability to fully disclose will impair the insurer in protecting its subrogated interests.[57]

The *Safeco* court intended to "safeguard the interests of all insurers to the extent of their subrogated rights."[58] If an insured maintains its suit in an imcompetent fashion, the insurer should be allowed to reveal its party status and participate openly and actively in the prosecution of the

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> such person shall do whatever is proper to secure and shall do nothing after loss to prejudice such rights; (d) if requested in writing by the company, such person shall take, through any representative designated by the company, such action as may be necessary or appropriate to recover such payment as damages from such other person or organization, such action to be taken in the name of such person; in the event of a recovery, the company shall be reimbursed out of such recovery for expenses, costs and attorneys' fees incurred by it in connection therewith. . . .

Safeco Form SA-383 R3 4/80.

48. *See supra* note 47.

49. *Id.*

50. 16 G. COUCH, *supra* note 2, § 61:3.

51. *See supra* note 47.

52. *Id.*

53. *See Safeco*, 101 N.M. at 150, 679 P.2d at 818.

54. *Id.*

55. *Id.*

56. *See Maldonado*, 94 N.M. at 335, 610 P.2d at 222.

57. *But cf. Maldonado*, 94 N.M. at 335, 610 P.2d at 222, where the insurer by stipulation was fully protected. Absent this stipulation, the insurer protects itself by full participation. *See also Maurer*, 95 N.M. at 287, 621 P.2d at 504, where the court recognized insurance company support of the *Sellman* rule allowing participation.

58. 101 N.M. at 150, 679 P.2d at 818.

cause. One solution to this problem is to allow disclosure and participation whenever subrogation rights would otherwise be impaired. The court, in its inherent power to manage the trial fairly, should have the power to permit full disclosure and active participation as fairness requires.[59]

Accordingly, if the court determines that the need for anonymity outweighs the insurer's need to control the trial, then the court should have the power to decide that the nondisclosure rule stands. Whatever the decision, courts should resolve the question of disclosure on a case-by-case basis. The trial procedure should start with a presumption of nondisclosure, but allow for disclosure when necessary.

2. Applicability of the Rule When the Insured Choses Not to Sue

Another problem arises when the insured does not initiate the cause of action, perhaps because the insured is satisfied with his recovery under the policy.[60] Pursuant to the New Mexico Rules of Civil Procedure, the insurer is allowed to bring suit in the name of its insured, naming the insured as an involuntary plaintiff.[61] Presumably, an involuntary plaintiff lacks motivation to prosecute the claim vigorously. In situations where only the insurer's interests are at risk, nondisclosure may defeat the purpose it is intended to serve. Moreover, the *Safeco* rule seeks to protect insured plaintiffs and defendants from jury prejudice.[62] If only the insurer is seeking recovery, the *Safeco*'s nondisclosure rule is unnecessary. The court is protecting a party with no interest in the outcome of the suit.[63]

As it now stands, *Safeco* forbids disclosure of insurance coverage irrespective of whether an insured needs such protection. A better rule would permit disclosure when: (1) the insured's interests would not be impaired, or (2) when protection of the insurer's interest requires such disclosure.

Considering the problems inherent in the *Safeco* rule, lawyers and insurance companies should carefully analyze whether the right to participate fully in the court is desirable in a specific case prior to initiating

59. *Compare* Cooper v. Albuquerque City Commission, 85 N.M. 786, 790, 518 P.2d 275, 279 (1974) (protecting parties from adverse affects is a valid reason for not following the general rule that an attempt to intervene after a final judgment should fail); Richins v. Mayfield, 85 N.M. 578, 580, 514 P.2d 854, 856 (1973) (trial judges may permit intervention after a final judgment, notwithstanding the general rule that it not be allowed, if the judge finds that a right or interest cannot otherwise be protected except by intervention).

60. *See Safeco*, 101 N.M. at 149, 679 P.2d at 817.

61. *Id. See* N.M.R. Civ. P. 19, quoted in pertinent part, *supra* note 3. *Safeco* did not change the application of this rule.

62. 101 N.M. at 150, 679 P.2d at 818.

63. *See id.* at 101 N.M. at 152–53, 679 P.2d at 820–21 (Justice Stowers stated, in his dissent in *Safeco* "[w]hile the majority properly concludes that an insurance company may be the real party in interest . . . this opinion still proceeds to maintain the fiction that the insured is the real party in interest in order to protect insurance companies from allegedly oversympathetic juries." *Id.*

a trial. If so, disclosure of insurance coverage is necessary. The insurance company has several options. The insurer could initiate suit and hope that none of the parties demands a jury.[64] If trial is by jury and the insurer has sufficient control of the litigation, the insurer could map out a strategy involving the use of evidentiary rules that allow for disclosure of insurance status.[65] Certainly, the insurer's attorney could argue for a more flexible rule which allows the trial court discretion to permit disclosure.[66]

IV. CONCLUSION

The New Mexico Supreme Court attempted in *Safeco* to resolve the problems created by previous case law. The court in *Safeco* sought to maintain the subrogated insurer's status as a necessary and indispensible party and eliminate possible jury prejudice as well as safeguarding subrogated rights. It is likely that the *Safeco* rule cannot fully achieve all of these goals in all possible situations. It would, therefore, be fairer and more efficient to permit trial courts to exercise their discretion in determining when disclosure is desirable.

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64. *Id.* at 150, 679 P.2d at 818 (the *Safeco* rule only applies to trial by jury).

65. *See generally Safeco*, 101 N.M. at 150–52, 679 P.2d at 818–20 (Justice Walters' discussion on the applicable rules of evidence).

66. Since this argument runs contra to *Safeco*, the attorney's ultimate success may only arise on appeal.