



1957

Civil Procedure--Insurance Companies as Real Parties in Interest

Joseph B. Helm
University of Kentucky

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Civil Procedure Commons](#), and the [Insurance Law Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Helm, Joseph B. (1957) "Civil Procedure--Insurance Companies as Real Parties in Interest," *Kentucky Law Journal*: Vol. 46 : Iss. 2 , Article 3.

Available at: <https://uknowledge.uky.edu/klj/vol46/iss2/3>

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Notes

CIVIL PROCEDURE—INSURANCE COMPANIES AS REAL PARTIES IN INTEREST

The purposes of this note are twofold. One purpose is to analyze critically three legal relationships, one or another of which arises between an insurance company and its insured every time an action is brought against a third party primarily liable for the loss sustained. These relationships to be examined from the procedural standpoint of the insurance company as a party to the action arise as follows:

1. In case of full assignment by the insured.
2. In case of partial assignment by the insured.
3. Under a loan arrangement between insurer and insured. The second purpose is to evaluate these three legal relationships in light of the policy against the interjection of the existence of insurance into a jury trial.

Full Assignment by the Insured

The first situation governing the insurer's status in the litigation is determined by an affirmative answer to the following question. Was the insured fully reimbursed for all the damages sought in the action, resulting in either an actual assignment or, as a matter of law, a subrogation of his whole claim to the insurer?¹ If so, the insurer and only the insurer can bring the action as he is the sole real party in interest. This is the rule in most states having a real party in interest statute² and became the rule in Kentucky in 1950 when such was clearly set forth in the case of *Works v. Winkle*.³ This case arose out of an automobile collision and involved a plaintiff who carried a one hundred dollar deductible collision insurance policy. The insurer and the plaintiff, its insured, fixed the latter's damages at \$900.00 whereupon the insurer paid to the insured \$800.00 and received in return an assignment of the right of recovery from the tortfeasor to the extent of the \$800.00.⁴ Action against the tortfeasor was then brought in the

¹ For the purpose of this note the words assignment and subrogation will be used interchangeably as they have the same legal effect upon the real party in interest question as far as the writer can determine from the Kentucky cases. For further discussion of this point and of the subject of this note see Clark and Hutchins, "The Real Party In Interest," 34 Yale L.J. 259 (1925).

² *Id.* at 266.

³ 234 S.W. 2d 312 (Ky. 1950).

⁴ Though the title of this section is "Full Assignment by the Insured" and the case under discussion involves a partial assignment, the case is cited for its dictum.

name of the insured requesting damages of \$1135.00, \$135.00 of which was for loss of use of the automobile during the period of repair. Verdict was rendered and judgment was entered for the plaintiff. But, upon introduction of evidence of the assignment, the lower court set aside the judgment on the grounds of fraud in that the insurer, not the insured, was the real party in interest.

The Kentucky Court of Appeals on reinstating the original judgment discussed the past Kentucky cases involving the failure of subrogated insurance companies to join in actions by their policyholders. The Court relied upon the earliest Kentucky case on the subject, *Illinois Cent. Ry. v. Hicklin*,⁵ as authority for its holding that a partial assignor may sue to recover the whole claim. However, by way of dictum the *Works* opinion modified dictum in the *Hicklin* case. According to *Hicklin* case, where there is an assignment of the insured's cause of action the defendant has no right to insist on being faced by the insurer "if the defendant will be protected in a payment to or a recovery by him [the insured]." The *Hicklin* decision made no distinction between partial and full assignments of the claim but contained the following unqualified language:

The fact, however, that a third party might be entitled to the damages as between him and plaintiffs, is not sufficient to bar the right of action by the plaintiffs. The legal title to the property destroyed was in the plaintiffs. As between the plaintiffs and defendant the former were the real parties in interest.⁶

The *Works* decision, after quoting the above excerpt from the *Hicklin* case, went on to withdraw from the effect of the statement the full assignment situations. Relying on an intervening case, *Monson v. Payne*,⁷ the *Works* decision set up the present rule that where the whole cause of action has been assigned prior to the institution of the action it must be brought in the name of the assignee. But the writer takes issue with the Court's reliance on *Monson v. Payne* for authority, as that case is distinguishable on its facts. The Court in that decision had no intention of bringing about so severe a modification of the unambiguous words, quoted above, from the *Hicklin* opinion. In the *Monson* case the plaintiffs' partially insured property had been set afire by sparks from defendant's locomotive. Having obtained partial reimbursement for their damages from their insurers, plaintiffs received compensation for the remainder of their damages in a settlement with the defendant-railroad in which settlement plaintiffs re-

⁵ 131 Ky. 624, 115 S.W. 752 (1909).

⁶ Id. at 630, 115 S.W. at 753.

⁷ 199 Ky. 105, 250 S.W. 799 (1923).

leased all claims against the railroad growing out of the fire. Subsequently, the insurer in the insured's name brought action against the railroad for the damages sustained by the insurers. The high Court held that because the plaintiffs had received full payment for their losses and *had executed a release to the defendant*, the action should be maintained in the name of the subrogated insurers. In the body of the *Monson* case the Court distinguished that case from the *Hicklin* case not on the grounds that the plaintiffs had been made whole, but on the basis of the fact that they had given complete "acquittance" to the defendant of any further liability.⁸

Nevertheless, in the *Works* opinion the full assignment rule was unequivocally stated as a guide to future litigation. The following words were used:

Where an assignment of the whole cause of action has been made previous to the institution of the action, the action must be commenced in the name of the assignee. . . .⁹

Partial Assignment by the Insured

A second situation, one touched upon above, in which an insurance company may be named as a party to the action, whether or not it so desires, occurs when its status is that of a partial assignee. This status can come about where the injured insured holds a deductible policy in which case upon reimbursement by the insurer and assignment to him of the right of recovery to the extent of the payment, the insured retains the right to recovery to the amount deducted. Another way in which the partial assignee status may appear is where the insurance protection is less than the damage done to the insured property or where some of the property damaged was not insured at all.

At any rate, whenever the insured's claim is for more than the policy covers, the insurer as a partial assignee can recover for the part assigned in the same or separate action as that brought by the assignor should the latter sue only for the part unassigned.¹⁰ Or the Court will allow the insured-assignor to sue for the whole claim if recovery by him will be a bar to the insurer's right of action for the part assigned.¹¹ Such was clearly set forth in the *Works* decision as a guide to future litigation and is well supported by prior Kentucky cases cited in that opinion.

However, a further modification of this partial assignment rule

⁸ Id. at 110, 250 S.W. at 802.

⁹ *Works v. Winkle*, 234 S.W. 2d 312, 316 (Ky. 1950).

¹⁰ *Travelers Indemnity Co. v. Moore*, 304 Ky. 456, 201 S.W. 2d 7 (1947); accord, *Works v. Winkle*, 234 S.W. 2d 312, 316 (Ky. 1950).

¹¹ *Works v. Winkle*, supra note 10 at 316.

came in the 1954 case of *Louisville & Nashville Ry. v. Mack Mfg. Corp.*¹² The case involved a collision between a train and a truck, and the action was brought by the truck owner against the railroad after he had been compensated for all his damages less one hundred dollars under a one hundred dollar deductible collision policy. The railroad in its pleadings questioned the truckowner's status as the real party in interest asserting that he had been reimbursed and had executed an assignment of the entire cause of action to his insurer. The Court of Appeals found the assignment was only a partial one but went on to alter the seemingly unqualified right of the partial assignor to seek full recovery in his own name. The opinion read:

Where the [partial] assignor has brought suit for the entire claim (thus not splitting the cause of action) the defendant would have the right to insist upon application of the real party in interest rule by moving that the assignee be made a party and assert his claim.¹³

The Court treated the railroad's pleading as a motion to join the insurance company, reversed the \$4,500 judgment for the truck-owner, and made what appears to be new law in Kentucky, new law based on Rule 17.01 of the Kentucky Rules of Civil Procedure specifying that all actions must be prosecuted in the name of the real party in interest. This rule has been in existence in Kentucky for years,¹⁴ but it was not until the *Mack* decision that it was invoked to require joinder of partially subrogated insurance companies upon motion of the defendant.

The Loan Agreement

A third position of an insurance company in regard to the real party in interest rule involves the loan agreement, which is in substance the same as an assignment but legally is recognized and treated somewhat differently in Kentucky. The loan agreement is a transaction in which the insurer "lends" to the insured the amount of his damages protected by the policy in return for the insured's promise to institute action in his own name for the insurer's benefit against the third party responsible for the loss. No interest is charged and the insured is obligated to repay the loan only to the extent of his recovery

¹² 269 S.W. 2d 707 (Ky. 1954); accord, *Bratton v. Speaks*, 286 S.W. 2d 526 (Ky. 1956); and *C. D. Herme Inc. v. R. C. Tway Co.*, 294 S.W. 2d 534 (Ky. 1956).

¹³ *Louisville & Nashville Ry. v. Mack Mfg. Co.*, 269 S.W. 2d 707, 709 (Ky. 1954).

¹⁴ The rule that every action must be prosecuted in the name of the real party in interest can be found in sec. 30 of the original Kentucky Code of Civil Practice adopted by the Legislature in March 1851, later changed to sec. 18 of Carroll's Kentucky Code of Civil Practice, and now found in Rule 17.01 of Kentucky's Rules of Civil Procedure.

from the third party. This agreement was first acknowledged in Kentucky as a valid avoidance of the real party in interest rule in *State Farm Mut. Auto Ins. Co. v. Hall*, a 1942 case.¹⁵ The action was instituted to determine whether the owner's or the driver's automobile insurer was liable for a wrongful death judgment. The owner's insurer entered into a loan agreement with the driver whereby the latter was able to pay off the judgment rendered against him. As provided in the agreement, the driver then instituted action against his own insurer who alleged in his answer that the driver had been made whole "under the pretense of a loan" and "had no interest whatever in this action."¹⁶ The Court, noting that there were no domestic cases on the question, relied upon foreign authority for its holding that the loan did not amount to an absolute payment or an outright satisfaction of the insured's loss but must be treated as a loan since such was the intention of the parties which, according to the Court, is the determining factor. This rule was reaffirmed recently in *Aetna Freight Lines, Inc. v. R. C. Tway Co.*¹⁷ where a similar loan agreement was executed in anticipation of a recovery from a third party tortfeasor. The only relevant distinction ascertained by the Court between the two cases is that in the *State Farm* case the insurance policy involved contained an express provision that the insurer was liable only for the insured's actual damages and, therefore, would not be required to pay damages which the insured recovered from third parties. While the policy in the *Aetna* case contained no such provision, the Kentucky Court implied it and again enunciated the proposition that if the parties intended to execute a loan, which they undoubtedly did in order to avoid the real party in interest rule, then it will be recognized as such.

Without going into the question of the desirability of the result in the loan agreement cases, it is difficult to see why a loan agreement excuses an insurance company from the role of real party in interest when an assignment or subrogation casts the role upon the company whether it wants it or not. In all three situations the insurer is the beneficial owner of part or all of the recovery from the third party. On the other hand, if the Court does not consider payment on the policy absolute in the loan agreement cases, then payment cannot be considered absolute upon executing an assignment. In both instances a promise of refund is exacted which is conditioned upon the happening of the same event, a recovery elsewhere. But the Court treated the similar transactions differently, basing its distinctions on form rather

¹⁵ 292 Ky. 22, 165 S.W. 2d 838 (1942).

¹⁶ *Id.* at 25, 165 S.W. 2d at 840.

¹⁷ 298 S.W. 2d 293 (Ky. 1956).

than substance. This is undoubtedly within the judicial license, though this license should be used sparingly and limited to exceptional situations as perhaps it was here.

Regardless of the above inconsistency, the effect of the loan agreement decisions is obvious. It not only allows an insurer owning a part of a cause of action to avoid joinder, but the insurer owning the beneficial interest in the whole cause of action is permitted to escape the rule that he and only he can bring the action.

Real Party in Interest Rule Versus Jury Prejudice

It would be difficult to argue in any of the above three situations (full assignment, partial assignment, or loan agreement) that the insurance company is not a real party in interest since it is the party "who will be entitled to the benefits of the action upon successful termination thereof."¹⁸ Nevertheless, the effect of the full and partial assignment decisions has been to bring their rules in direct conflict with Kentucky's well established and rigidly adhered to policy against disclosing the fact of insurance to the jury.¹⁹ Despite many attempts by attorneys to interject such information into the trial, the Court of Appeals has held, with few exceptions, that the interjection is prejudicial and erroneous,²⁰ making no distinction as to which party it harmed.²¹ This judicial attitude is predicated on the theory that insurance is not relevant to the issue or issues in the case and the belief that juries will be unjustly influenced against the party insured.²² Nevertheless, in subrogation cases, the trial courts suddenly find themselves naming in an action a party whose presence has been a well-kept secret for years in the interest of justice.

Requiring that all actions must be prosecuted in the name of the real party in interest is doubtless a rule to protect the rights of the defendant, but when action by the plaintiff insured, brought at the insurer's request for all damages sustained will be a bar to any subsequent action by the insurer, it would seem the defendant is ade-

¹⁸ Taylor v. Hurst, Trustee, 186 Ky. 71, 74, 216 S.W. 95, 96 (1919). See also Clay, CR 17.01 at page 206 for a discussion of the real party in interest rule.

¹⁹ Gayheart v. Smith, 240 Ky. 596, 42 S.W. 2d 877 (1931); Bybee v. Shanks, 253 S.W. 2d 257 (Ky. 1952); Warren's Admr. v. Smith, 288 Ky. 833, 157 S.W. 2d 308 (1942).

²⁰ In addition to cases cited in note 19, supra, see recent cases of Thurmand v. Chumbler's Admx., 287 S.W. 2d 908 (Ky. 1956) and Wright v. Kinslow, 264 S.W. 2d 673 (Ky. 1954).

²¹ Wright v. Kinslow, supra note 20, was an action by an automobile driver and his passenger based on personal injury and property damage where the court held that the fact that the plaintiffs were partially insured against loss had no bearing on and was not relevant to any material issue in the case. Therefore, it was error for the jury to be informed of the existence of such insurance.

²² Ibid.

quately protected. To go further and insist upon open participation by the subrogated insurer adds nothing to the defendant's protection but enables him, the alleged wrongdoer, to have plaintiff's insurance interjected and thus prejudice the jury against the latter.

Consider the effect of these two rules pertaining to full and partial insurance assignments in the not unusual automobile accident litigation. The existence of plaintiff's collision insurance may be known to the jury, where due to subrogation he becomes a real party in interest, while the defendant's liability insurance, protecting him against liability, is excluded from disclosure by the above discussed policy against disclosing insurance to the jury. Although defendant's liability insurer is as much concerned over the outcome of the litigation as plaintiff's collision insurer, defendant's insurer, under the terms of the usual contract, neither pays out nor owes anything until the loss is placed upon the defendant by adverse judgment, and thus cannot be named in the action.²³ Consequently, requiring the subrogated insurance company to bring or join in the action as a real party in interest not only contravenes the insurance non-interjection policy but raises inequities where another insurance company is involved but not joinable.

Conclusion

The conflict between the evidence rule and the real party in interest rule is apparent and, as pointed out, can be avoided at the present only through use of the loan agreement. It is argued by some that when and if the two rules go before the Court at the same time and are evaluated that the evidence policy should yield because of its obsolescence. These proponents maintain that insurance is now a common commodity and is present in almost every personal injury and property damage situation, and that putting its existence over to the jury merely confirms an assumption already contained in the jurors' minds. But with this viewpoint exception is taken by the writer. Admitting that insurance coverage has greatly increased in recent years, it is not unreasonable to assume that there still remain a large number of actions in which at least one of the parties is not insured. Upon inquiry the Kentucky Department of Safety ventured a calculated guess that the percentage of insured motorists for both liability and collision insurance stands at about sixty per cent in Kentucky. With forty per cent of the motorists not insured, it appears erroneous to say that a jury assumes the parties to be protected by insurance when a

²³ Reynolds Metals Co. v. Liberty Nat'l Bank and Trust Co., 294 S.W. 2d 921 (Ky. 1956).

few members of the panel itself more than likely carry no insurance. The day has yet to come when everyone is protected by insurance against all kinds of injury or damage. Until that day does come there is little chance of a jury overlooking the joinder of insured and insurer as plaintiffs together with the absence of any mention of the defendant having similar protection against judgment.

A second way to meet the conflict, and one more palatable to the writer than dropping the non-interjection of insurance policy, is the procedure used in the United States District Court, Eastern District of Kentucky. In the federal courts under the authority of *United States v. Aetna Gas and Surety Co.*,²⁴ the insurer, partial subrogee, is a real party in interest and must join in the action upon motion of defendant. Accordingly, the United States District Court, Eastern District of Kentucky, requires such, but, going on a separate trial theory, does not permit disclosure of the insurance company's presence to the jury that tries the issues in which insurance is not relevant except when the insurer is the only real party in interest or when the insured and insurer assert their claims separately and are joined. Where the two join together to seek one recovery, which is the usual situation, the insurer is not prejudiced at the trial as his interest is communicated only in the pleading and in the final judgment.²⁵

Finally, a third and more direct method of resolving the conflict would be to amend the real party in interest rule, Rule 17.01 of the Kentucky Rules of Civil Procedure, to allow actions to be brought solely by the insured. This was done by the State of New York which experienced similar difficulty and perhaps even more confusion than Kentucky over its real party in interest rule.²⁶ Consequently, the New York Legislature in 1950 amended its rule to include within its exceptions the following words:

[A]n insured person, . . . which has executed to his insurer either a loan or subrogation receipt, trust agreement or other similar instrument, . . . may sue without joining with him the persons for whose benefit the action is prosecuted.²⁷

As it now stands, insurance companies are protected in Kentucky from the jury prejudice of which they live in constant fear so long as the loan agreement is utilized. Since this subterfuge solves the problem it may be best to leave the matter as it stands. But to permit the situa-

²⁴ 338 U.S. 366, 12 A.L.R. 2d 444 (1949).

²⁵ Per interview with the Honorable H. Church Ford, presiding Judge, United States District Court, Eastern District of Kentucky.

²⁶ For a discussion of New York's experience, see *Rosenfeld v. Continental Bldg. Co.*, 135 F. Supp. 465 (1955).

²⁷ N.Y. Civil Practice Act. sec. 210, amendment effective Sept. 1, 1950.

tion to rest upon a fictitious base and fail to call a spade a spade or an assignment an assignment seems legally immature compared to New York's more realistic and direct solution.

Joseph B. Helm

CRIMINAL PROCEDURE—WHAT AGENCY SHOULD FIX SENTENCE?

Today the determination of the criminal sentence is not the result of an automatic application of fixed schedules of fines and prison terms. It is the result of the exercise of discretion within limits prescribed by law. This note is primarily concerned with formulating an answer to the following question: After a finding of guilty or a plea of guilty to a criminal offense, for which the maximum sentence is not life imprisonment or death,¹ what agency should determine the punishment for a *sane* and *mature* defendant?

Lord Asquith said in the House of Lords on December 16, 1953, in debate upon a recommendation by the Royal Commission on Capital Punishment: "The wisdom of centuries has committed to juries the task, and the only task, of ascertaining innocence or guilt. The determination of the punishment has always been lodged in other hands."² And the "other hands" have traditionally been the hands of the trial judge. In the nineteenth century, however, there was manifested in the United States a movement toward technical procedure for the protection of the accused, and a momentary tendency to transfer the assessment of the punishment from the judge to the jury. This may have been the result of a seething reaction against the old English criminal law as promulgated by the early colonial judges—fanned by "the Jacksonian dislike for authority," and a "confidence in the ordinary citizen's adequacy to do any job."³ But whatever the cause, the judges shrewdly bowed to the spirit of the times, acquiescing in the protective technicalities with which the accused was surrounded, but regaining

¹ In most of those states which have retained the "life or death" sentence, the jury has been entrusted with the determination of such sentence. For an accounting of the various state laws on this subject, see *Andres v. United States*, 333 U.S. 740, 757-766 (1948).

² See Devlin, "Criminal Responsibility and Punishment: Functions of Judge and Jury," *Crim. L. Rev.* 661 (Sept. 1954). At common law, the jury either returned a special verdict, setting forth the circumstances and praying for judgment of the court thereon, or a general verdict of guilty or not guilty. Punishment was fixed by the court and governed by the laws in force. *People ex rel. Bradley v. Superintendent of Illinois State Reformatory*, 148 Ill. 413, 36 N.E. 76, 79 (1894).

³ Puttkammer, *Administration of Criminal Law* 216 (1953).