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Note

Extension of the No Subrogation Against Insured Rule


I. INTRODUCTION

Subrogation is an important concept in insurance law. There are several reasons why an insurer which has paid for a loss should be allowed to recover from those legally responsible. First, the insured is prevented from recovering twice for the same loss, preserving the principle of indemnity. Second, the insurer is reimbursed for the payment it has made. Third, the tort-feasor, who is legally responsible, is prevented from receiving a windfall by being absolved of liability. "Stated simply, subrogation is a creature of equity having for its purpose the working out of an equitable adjustment between the parties by securing the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it."  

In *Stetina v. State Farm Mutual Automobile Insurance Co.*, the Nebraska Supreme Court restricted the insurer's right to subrogation on payment of a loss to its insured.

II. THE FACTS

In October, 1973, Diane Stetina was a passenger in an automobile struck by a vehicle driven by Vera Lusins. Diane was severely injured in the accident and her father, the plaintiff, incurred about $17,800 of medical expenses.

At the time of the accident, the plaintiff had first party coverage under two insurance policies issued by the defendant, State Farm

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3. 196 Neb. 441, 243 N.W.2d 341 (1976).
4. Id. at 442, 243 N.W.2d at 342. This sum was incurred as of the date Mr. Stetina filed his amended petition.
Mutual Automobile Insurance Company. Each policy contained an insuring agreement designated as "Coverage M—Major Medical Payments," under which the defendant was to pay 100 per cent of the first $1,000 of medical expenses incurred by the plaintiff due to his daughter's injuries and 80 per cent of the expenses over that amount up to a limit of $5,000. At the time of the accident, State Farm also provided liability coverage to Vera Lusins, the driver of the other vehicle, and to her husband. This protection was limited to $50,000 for bodily injury to one person.

After the accident, the plaintiff's attorneys and an employee of State Farm negotiated a settlement of $50,000 in satisfaction of all claims of Diane and her parents against the Lusinses. As part of the settlement agreement, the plaintiff, either individually as the parent of Diane or on her behalf as guardian, agreed not to sue the Lusinses.

After the settlement, the plaintiff presented Diane's medical bills to State Farm and demanded $10,000 under the medical payments coverage of his policies. State Farm denied the claim and the plaintiff brought suit in the District Court of Lancaster County. The district court found that the plaintiff had violated the provisions of the insurance policies by entering into the covenant not to sue the Lusinses and therefore had no right to recover medical payments. It gave summary judgment for the defendant, State Farm, and overruled the plaintiff's motion for a new trial. The plaintiff appealed to the Nebraska Supreme Court which reversed the judgment of the district court.

III. THE SUPREME COURT DECISION

The Nebraska Supreme Court quoted the "relevant terms" of the plaintiff's policies with State Farm. The first of these was an assistance and cooperation clause. The second was a subrogation provision.

5. See Record, vol. 1, at 15-29, Stetina v. State Farm Mut. Auto. Ins. Co., 196 Neb. 441, 243 N.W.2d 341 (1976) (plaintiff's insurance policies). The plaintiff's policies each contained two medical payments insuring agreements, Coverage C and Coverage M. Under Coverage C, the plaintiff would have been able to obtain medical payments coverage in an amount greater than $5,000 but no protection under that coverage was purchased. State Farm's limit of liability under Coverage M was fixed at $5,000 for each policy. The court's opinion does not mention the letter designation of the plaintiff's medical payments coverage although it is important when interpreting the subrogation provision. See § IV of text infra.

6. 196 Neb. 442, 243 N.W.2d 342.

7. Id.

8. Assistance and Cooperation of the Insured. The insured shall
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provision.9

With no discussion of either provision, the supreme court framed the issue to be decided: Did the plaintiff, Frank Stetina, by exe-
cuting the covenant not to sue the Lusinses, destroy State Farm’s right of subrogation against the tort-feasor in violation of the terms of the policies, or did State Farm have no right of subrogation against the tort-feasor, Mrs. Lusins, because she also was insured by State Farm? In the latter case, the execution of the covenant not to sue would not have prejudiced any subrogation rights or have violated any provision that would preclude recovery under the policies.10

The plaintiff conceded that where the tort-feasor is insured by a different insurance company, or not at all, and the insured executed a covenant not to sue the tort-feasor, the insurer’s right of subrogation is prejudiced and it is released from liability.11 But the court held, that under the circumstances of this case, the agreement not to sue did not prejudice any subrogation rights of State Farm, and therefore there was no violation of the policies which would preclude the plaintiff from recovering under them. In so holding, the supreme court accepted the contention of the plaintiff that the defendant, State Farm, possessed no right of subrogation against the tort-feasor, Mrs. Lusins, because she also was insured by State Farm.12 The court examined various authorities which all referred to the basic hornbook law that an insurer cannot recover by right of subrogation from its own insured. It was in light of these authorities and “considerations of public policy”13 that the court reached its decision.

cooperate with the company, and upon its request, attend hearings and trials, assist in effecting settlement, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance. The insured shall not, except at his own cost, voluntarily make any payment assume any obligation or incur any expense other than for such first aid to others as shall be imperative at the time of accident.

Id. at 443, 243 N.W.2d at 342.

9. Id. at 443, 243 N.W.2d at 342–43. The subrogation provision which the court quoted appears in full at the beginning of § IV of the text. When the court quoted the provision however, it deleted the phrase “except under coverages C, M, S and T.” This deletion caused the provision to be misleading as quoted by the court, because it was only the sec-
ond paragraph of the provision, not the first, which related to the plaintiff’s claim.

10. Id. at 443–44, 243 N.W.2d at 343.

11. Id. at 444, 243 N.W.2d at 343.

12. Id. at 452, 243 N.W.2d at 347.

13. Id.
IV. ANALYSIS OF THE DECISION

A. The Subrogation Provision

The full text of the "subrogation" provision as it appeared in the plaintiff's policies was as follows:

4. Subrogation. Upon payment under this policy except under coverages C, M, S and T, the company shall be subrogated to all the insured's rights of recovery therefor and the insured shall do whatever is necessary to secure such rights and do nothing to prejudice them.

Upon payment under coverages C and M of this policy the company shall be subrogated 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 which the injured person or anyone receiving such payment may have against any person or organization and such person shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. Such person shall do nothing after loss to prejudice such rights.15

Under the first paragraph of this provision, payment by State Farm under the medical payment coverages was specifically excepted from those payments that gave it the right to be subrogated to the insured's rights of recovery. The second paragraph, which dealt with the company's rights after payment under the medical payments coverages of the policy, only gave State Farm a right to the proceeds of any settlement or judgment the insured should receive to the extent of the payment made.

There was a purpose for the distinction made by State Farm in drafting its "subrogation" provision. As a general rule, a cause of action to recover for personal injuries cannot be assigned absent a statute so allowing.17 Clauses giving the insurer the right to be subrogated to the insured's rights of recovery on payment under the medical payments coverage of an automobile insurance policy have been interpreted by some courts as constituting assignments to the insurer of the insureds' causes of action for personal injury.18
Consequently, medical payments subrogation clauses are held void by these courts.\textsuperscript{19}

Some courts have distinguished an assignment of a cause of action for personal injury from an assignment of the right to proceeds of a settlement or judgment resulting from a personal injury claim. These courts, although recognizing that a cause of action for personal injury cannot be assigned, have upheld the assignment of the proceeds of a recovery on such claim.\textsuperscript{20} State Farm apparently recognized that the courts were distinguishing assignments of causes of action for personal injury from assignments of proceeds of any recovery obtained. It drafted its policies to imply that its "subrogation" rights after payment under the medical payments coverages were not rights against the tort-feasor but rather were rights to be reimbursed from the proceeds of any settlement or judgment the insured might obtain.\textsuperscript{21}

State Farm's efforts resulted in at least partial success. In California, medical payments subrogation clauses, allowing the insurer to bring an action against the tort-feasor to recover payments, were held invalid as assignments of causes of action for personal injury.\textsuperscript{22} However, the State Farm clause was approved and State Farm was allowed reimbursement from proceeds of an insured's recovery from the tort-feasor.\textsuperscript{23} Of particular significance to those courts holding the State Farm "subrogation" clause to be valid was the fact that the clause gave the insurer rights only to the proceeds of a settlement or judgment that might be obtained, rather than rights against the tort-feasor.\textsuperscript{24} However, other courts have refused or

\begin{itemize}
\item \textsuperscript{19} Id. The interpretation of a medical payments subrogation clause as constituting an assignment of a cause of action for personal injury is highly questionable. Several other courts have upheld medical payments subrogation clauses relying on differences between the concepts of subrogation and assignment. See Annot., 19 A.L.R.3d 1054, 1063 (1968).
\item \textsuperscript{20} See Annot., 40 A.L.R.2d 500, 512 (1955).
\end{itemize}
failed to recognize the distinction and have held the clause invalid as an assignment of a cause of action for personal injury.25

In addition to the "subrogation" clause discussed above, State Farm buttressed its policies with a "Trust Agreement" provision. The "Trust Agreement" provided that if State Farm paid any person under the medical payments coverages of the policy, it would be entitled to reimbursement from the proceeds of any settlement or judgment that such person might collect from the tort-feasor; that all rights of recovery of such person against the tort-feasor would be held in trust for the company; that such person would act to secure any rights of recovery and not prejudice them; that if requested by the company, such person would bring any necessary action, to recover from the tort-feasor with the company being reimbursed first out of any recovery for its expenses; and that such person would execute and deliver to the company any papers needed to secure the rights and obligations of the person and the company established under the "Trust Agreement." Frank Stetina's policies contained this provision although it was not mentioned in the supreme court opinion.26


The full text of the "Trust Agreement" provision contained in the policies is as follows:

5. Trust Agreement—Coverages C, M and U. In the event of payment to any person under coverage C, M or U:
   (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 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 the coverages;
   (c) 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;
   (e) Such person shall execute and deliver to the company such instruments and papers as may be appropriate to se-
The effect of such a trust agreement provision in an insurance policy is to give the insurer essentially the same rights as under a subrogation clause.\textsuperscript{27} If there is any reason for distinguishing a clause which states that the insurer will be subrogated to all of the insured's rights of recovery, from one that merely allows the insurer reimbursement from the proceeds of any recovery, such a distinction should not be made where a clause of the latter type is accompanied by a trust agreement provision such as that in Frank Stetina's policies. In Missouri, where medical payments subrogation clauses have been held void as assignments of causes of action for personal injury,\textsuperscript{28} similar trust agreement provisions have also been held invalid.\textsuperscript{29} However, in California, one court upheld the State Farm medical payments "subrogation" clause giving the insurer the right to reimbursement from the proceeds of any recovery, even though it was accompanied by a trust agreement provision identical to that in the Stetina policies.\textsuperscript{30} Two justices of that court did question the validity of the clauses noting that "[t]he cumulative effect of the policy provisions is to create the economic reality of subrogation to the personal injury claim without its language."\textsuperscript{31}

The Nebraska Supreme Court's opinion in \textit{Stetina} did not discuss the medical payments "subrogation" provision in the plaintiff's policies. Holding that the plaintiff had not prejudiced State Farm's rights by agreeing not to sue the Lusineses because the "no subro-
gation against insured" rule prevented State Farm from having any rights against Mrs. Lusins, the court apparently interpreted the policies to give State Farm subrogation rights against the tort-feasor rather than merely a right of reimbursement from the proceeds of any recovery. Because the policies contained the "Trust Agreement" provision, this was probably the proper interpretation.

From the Stetina decision, it appears that the Nebraska Supreme Court will refuse to hold invalid a medical payments subrogation provision as an assignment of a cause of action for personal injury even if the provision is worded to provide that the insurer will be subrogated to the insured's rights of recovery against the tort-feasor rather than in terms of reimbursement from the proceeds of any recovery. Therefore, the court's interpretation of the policy provisions as giving the insurer subrogation rights against the tort-feasor is of no significance to the issue of whether such clauses will be valid in Nebraska. Were Nebraska one of those states where medical payments subrogation is considered to be an assignment of a cause of action for personal injury, such an interpretation would be crucial to the validity of such provisions.

The court's interpretation of the policy provisions as providing for subrogation against the tort-feasor is important to the outcome of Stetina. Had the Nebraska court interpreted the provisions of the plaintiff's policies as merely providing State Farm with a right of reimbursement from the proceeds of any recovery the plaintiff might obtain, there would have been no need to determine whether the "no subrogation against insured" rule applied to prevent State Farm from being subrogated against Mrs. Lusins. Under such an interpretation, State Farm would not have any subrogation rights against Vera Lusins whether she was insured by State Farm or not.

32. By failing to mention the letter designation of the plaintiff's medical payments coverage under his policies and to quote fully the "subrogation" provision, see note 9 supra, the supreme court conveniently avoided having to deal directly with the issue of whether the State Farm policy gives the insurer subrogation rights against the tort-feasor or merely a right to reimbursement from the proceeds of any recovery. Notwithstanding this, the ultimate interpretation of the policy provision by the court is quite clear.

33. For a collection of cases in which medical payments subrogation provisions were held valid, see Annot., 19 A.L.R.3d 1054, 1063 (1968).

34. In such a case the court would have to decide how much State Farm is obligated to pay under the medical payments coverages of the plaintiff's policies. This obligation to pay would depend on the extent State Farm would be entitled to reimbursement for payments made from the proceeds of the recovery obtained by the plaintiff. That is, if the court were to determine that State Farm would be entitled to full
B. The No Subrogation Against Insured Rule

The rule that an insurer cannot recover by right of subrogation from its own insured generally has been accepted by those courts that have considered it. Applying the rule literally, one may reach the same conclusion as did the Nebraska Supreme Court—that the defendant, State Farm, would not be entitled to be subrogated to any claims of Frank Stetina against Vera Lusins or her husband, because the Lusinses were insured under an automobile liability insurance policy issued by State Farm. But an examination of the rule, in light of the policy behind it, makes clear that the rule should not apply to prevent State Farm from being subrogated to such claims against the Lusinses under the circumstances of this case.

Professor Keeton states the rule and the policy behind it, as follows:

"Allowing an insurer to be subrogated to rights against an "insured" on account of a payment of benefits under the coverage with respect to which the person is an "insured" would have the effect of withdrawing insurance benefits. Accordingly, it is generally stated that an insurer cannot have subrogation against its own "insured.""

Of course, it would not be fair to allow an insurer, after it has provided coverage to an insured for a loss, to collect from the insured any moneys paid by it under the coverage on the occurrence of that loss. This policy behind the rule is evidenced by several court opinions.

Application of the rule would be proper where the insured from whom the insurer attempts to recover is a named insured under the same policy on which the insurer has paid, or is an additional insured, or is anyone for whose benefit the policy has been written. If State Farm had attempted to recover from Vera

reimbursement from the settlement obtained by the plaintiff, it would not owe the plaintiff any amount under his policy because any payment made would have to be given back.

35. R. KEETON, supra note 1, § 4.2(b), at 187 (emphasis added).
Lusins as tort-feasor the $50,000 it had paid to Frank Stetina under the Lusinses' policy, the "no subrogation against insured" rule properly would have prevented such action. In such instances, allowing subrogation by the insurer against the insured clearly would have the effect of withdrawing the insurance benefits purchased. But these situations are markedly different from that in Stetina.

In Stetina, Vera Lusins, at the time of the accident, was an insured under an automobile liability insurance policy issued by State Farm, distinct and separate from the plaintiff's policies. Her policy provided her with liability coverage and protection in the amount of $50,000 for bodily injury to one person and State Farm was not liable on that policy for any amount above $50,000 that Vera Lusins might have become legally obligated to pay because of injury to one person. Vera Lusins was not an insured under the plaintiff's policies with State Farm and the coverage afforded under those policies was not for her benefit. To allow State Farm to be subrogated to the rights of the plaintiff against Vera Lusins to recover payments made under the plaintiff's policies would not have the effect of withdrawing Mrs. Lusins's insurance benefits.

An example will illustrate how an insurer can be subrogated to rights against a person who has an insurance policy with it and still fulfill its contractual obligations under the policy by providing the insured with all the protection purchased. Suppose that Person A has a liability insurance policy with Company X which provides coverage up to $50,000. A negligently starts a fire which destroys Person B's home worth $100,000. B also has an insurance policy with Company X which covers loss to B's dwelling caused by fire up to $100,000. B's policy provides that X, upon payment under the policy, will be subrogated to B's right of recovery against any party responsible for the loss. Upon payment to B, Company X should be allowed to be subrogated to B's rights against A for $100,000. Any judgment obtained by X against A would be reduced by $50,000, the amount of liability coverage and protection promised by X to A. A would receive all the liability protection he purchased and X would be giving all the protection it contracted for—$50,000 to A and $100,000 to B with the right to recover what it can from the tort-feasor.

Consider the result when the "no subrogation against insured" rule, as interpreted by the supreme court in Stetina, is applied to the above example. On payment to B of the $100,000 of insurance

39. See 15 G. Couch, supra note 2, § 56.41, at 708.
40. A typical "Homeowners" insurance policy provides protection for both personal liability and fire loss.
benefits, X would not be allowed to be subrogated to B's rights against A to recover the amount paid. X contracted for that right and had A been insured by another insurer, or not at all, X would have been subrogated to B's rights and might have been able to recover from A some of the money paid to B.41

If B were satisfied with the $100,000 payment from X and took no further action, it might be said that A in effect received $100,000 of liability protection for the price of $50,000. He at least received a windfall of being absolved of further liability. But assume that B brings suit against A for the damage caused. Denying the insurer subrogation rights against the tort-feasor insured would not prevent the claimant insured from proceeding against him. Under the collateral source rule, the amount paid by X to B under B's insurance policy could not be used to reduce the liability of A to B and B could obtain a judgment against A for $100,000.42 X, as liability insurer of A, would have to pay $50,000 of that judgment to B. If B could collect the remaining $50,000 from A, he would receive $200,000 for a $100,000 loss with $150,000 being paid by X. Under these circumstances, Company X would pay three times the total net amount that would have been paid out by insurance companies had A and B been insured by different companies and B would receive twice as much as he would have otherwise.43 Allowing X to be subrogated to B's rights against A in such a situation would not leave the tort-feasor insured, A, any worse off but would prevent double recovery by the claimant insured, B. Also, the net payout by the insurance industry would equal the amount that would have been paid had A and B been insured by different companies.

The facts of the Stetina case can illustrate how the application of the "no subrogation against insured" rule, as interpreted by the

41. At least one writer suggests that subrogation recoveries do enter the rate structure and that the insurer actually is being paid to take the risk of loss less net subrogation recoveries. See R. HORN, SUBROGATION IN INSURANCE THEORY AND PRACTICE 25 (1964). If this is true, the denial of subrogation rights would result in the insurer being required to take a greater risk than the premium charge would cover. But see E. PATTERSON, ESSENTIALS OF INSURANCE LAW 151 (2d ed. 1957).


43. Had A and B been insured by different companies, the insurer of B would be allowed to be subrogated to B's rights against A. The $100,000 recovery from A would reimburse B's insurer leaving a total net payout by it of zero. A's insurer would be obligated to pay $50,000 of the $100,000 judgment against A and it would not be able to recover any of that amount. B will have received $100,000 for a $100,000 loss with $50,000 being paid by A and $50,000 by A's insurer.
Nebraska Supreme Court, can lead to an inequitable result. Assume that the total loss to the plaintiff and his daughter that Vera Lusins was liable for was $50,000.\textsuperscript{44} Assume further that State Farm paid the plaintiff the $10,000 it owned him under the medical payments coverages of his policies. The plaintiff then could bring suit against Mrs. Lusins and recover $50,000 which would be paid by State Farm under the policy purchased by the Lusineses. Under the supreme court's interpretation of the rule, State Farm would have no subrogation rights and would not be entitled to any of the recovery obtained by the plaintiff. Thus, State Farm would be paying $60,000 to the plaintiff for a $50,000 loss.

A proper result would be reached by allowing State Farm to have subrogation rights against the Lusines even though they were insured under a policy it issued. State Farm, on paying the $10,000 medical payments benefits to Frank Stetina, would be subrogated to his rights against Mrs. Lusins to the extent of the payment made.\textsuperscript{45} Any recovery from Mrs. Lusins, up to $50,000, would be paid by State Farm, fulfilling its obligation under the insurance policy issued to the Lusineses. In allocating the proceeds of a $50,000 recovery, the plaintiff would receive $40,000 and State Farm would be entitled to the remaining $10,000.\textsuperscript{46} Thus, the Lusineses

\textsuperscript{44} The court in \textit{Stetina} did not indicate what the total loss resulting from the accident may have been. The court did state that the plaintiff had incurred about $17,800 in medical expenses as of the date of filing of the amended petition. From this, it may be surmised that the total loss to the plaintiff and his daughter well exceeded $50,000.

\textsuperscript{45} Such action might present conflict of interest problems. \textit{But see text accompanying notes 55-57 infra.}

\textsuperscript{46} Professor Keeton sets forth five rules, all of which have been urged at one time or another as the correct method of allocating the proceeds of a recovery from the tort-feasor between the insured and an insurer:

First Rule: The insurer is the sole beneficial owner of the claim against the third party and is entitled to the full amount recovered, whether or not it exceeds the amount paid by the insurer to the insured.

Second Rule: The insurer is to be reimbursed first out of the recovery from the third party, and the insured is entitled to any remaining balance.

Third Rule: The recovery from the third person is to be prorated between the insurer and the insured in accordance with the percentage of the original loss for which the insurer paid the insured under the policy.

Fourth Rule: Out of the recovery from the third party the insured is to be reimbursed first, for the loss not covered by insurance, and the insurer is entitled to any remaining balance, up to a sum sufficient to reimburse the insurer fully, the insured being entitled to anything beyond that. Thus, if there is any windfall, it goes to the insured.

Fifth Rule: The insured is the sole owner of the claim against the third party and is entitled to the full amount re-
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would have received the full liability protection they had purchased from State Farm, the Stetinas would have been fully compensated for their loss, and State Farm would have paid out the same total net amount that would have been paid out by insurers had the plaintiff and the Lusines been insured by different companies.\(^{47}\)

The supreme court also stated that it based its decision that State Farm had no right of subrogation against the tort-feasor, on "considerations of public policy."\(^{48}\) The court's discussion of public policy was limited to a quote from a Montana case, *Home Insurance Co. v. Pinski Brothers, Inc.*:\(^{49}\)

> To permit the insurer to sue its own insured for a liability covered by the insurance policy would violate these basic equity principles, as well as violate sound public policy. Such action, if permitted, would (1) allow the insurer to expend premiums collected from its insured to secure a judgment against the same insured on a risk insured against; (2) give judicial sanction to the breach of the insurance policy by the insurer; (3) permit the insurer to secure information from its insured under the guise of policy provisions available for later use in the insurer's subrogation against its own insured; (4) allow the insurer to take advantage of its conduct and conflict of interest with its insured; and (5) constitute judicial approval of a breach of the insurer's relationship with its own insured.\(^{50}\)

covered, whether or not the total thus received from the third party and the insurer exceeds his loss. This rule is a rejection of subrogation. It is in effect the rule applied to types of insurance under which subrogation is customarily disallowed—for example, life insurance.

R. KEETON, *supra* note 1, § 3.10 (c), at 160-62 (footnotes omitted).

The Nebraska Supreme Court never has specifically adopted any of these rules as the method to be used although it is clear that neither the first nor the fifth rule will be applied. See United Serv. Auto. Ass'n v. Hills, 172 Neb. 128, 109 N.W.2d 174 (1961); Krause v. State Farm Mut. Auto. Ins. Co., 184 Neb. 588, 169 N.W.2d 601 (1969). Where there is a recovery in full, application of rules two, three, and four as to the method of allocation produce the same result; that is, under the example in the text, $40,000 to the insured and $10,000 to the insurer.

Where there is a recovery which is less than full, which usually occurs where there is a settlement, the fourth rule, that of reimbursing the insured first, has the greatest amount of support in precedent. See R. KEETON, *supra* note 1, § 3.10 (c), at 164.

47. Had different insurers been involved, the plaintiff's insurer clearly would have had subrogation rights and would have been reimbursed fully for the $10,000 it paid the plaintiff under the medical payments coverages of his policies from the $50,000 obtained from the Lusines' insurer.

48. 196 Neb. at 452, 243 N.W.2d at 347.

49. 160 Mont. 219, 500 P.2d 945 (1972).

50. 196 Neb. at 451, 243 N.W.2d at 346 (quoting Home Ins. Co. v. Pinski
It is true that allowing an insurer to be subrogated against one who is insured under a policy issued by it may raise some problems. One concern of the Stetina court appeared to be that subrogation by the insurer against one insured by it would be a breach of the insurance policy by the insurer. But subrogation by the insurer against an insured does not necessarily involve a breach of the policy. The insurer can still fulfill its contractual undertaking to pay any amount up to the policy limits that the insured may become legally obligated to pay. Also, although under most liability insurance policies the insurer has an obligation to defend certain actions brought against the insured, this obligation can be fulfilled where it would otherwise cause conflict of interests problems by the insured hiring his own attorney and the insurer reimbursing him for the fees.

The supreme court also seemed to be concerned that allowing subrogation against Vera Lusins would permit State Farm to take advantage of its conflict of interest with her. The court did not indicate how State Farm would do this. Similar conflict of interests problems arise when one insurance company has insured two automobiles involved in a collision and the drivers bring suit against each other. The conflict that could arise by allowing the insurer to control both sides of the litigation is resolved by having at least one of the parties retain his own attorney.

As to the argument that allowing subrogation by an insurer against an insured would permit the insurer to obtain information from the insured for later use against him under the guise of policy provisions, it should be noted that it has been held that the insured need not comply with the provisions of a cooperation clause in the insurance policy if the insurer had conflicting interests. Similar

Bros., 160 Mont. 219, 225-26, 500 P.2d 945, 949 (1972) (emphasis supplied by Nebraska Supreme Court).

51. See § IV B of text supra.
52. R. KEETON, supra note 1, § 7.6(a), at 462.

The court also was concerned that allowing subrogation in such instances would be allowing the insurer to expend premiums collected from its insured to secure a judgment against the same insured on a risk assumed. Although it is impossible to determine where every premium goes, it would seem that if the insurer pays for the costs of the insured's defense and for his liability up to the policy limits, the insurer will have used every premium that the insured has paid and more.

55. Id.
equitable relief may be granted to relieve the insured of compliance with other policy provisions if such compliance would result in the insurer obtaining information from the insured that may be later used against him. If the insurer did obtain information from the insured and attempted to use the information against him under inequitable circumstances, the court could refuse to allow the insurer to be subrogated against that insured by invoking one of the equitable doctrines stated in Home Insurance Co. v. Pinski Brothers, Inc., and quoted by the Stetina court: "One who seeks equity must do equity... One who seeks equity must come into court with clean hands,... 'No one can take advantage of his own wrong.'"

It should be noted that the public policy considerations stated by the Montana court as grounds for denying subrogation against an insured, and on which the Stetina court relied, were based on the assumption that the insurer will bring suit against the tort-feasor insured to enforce its subrogation rights. But it is not necessary for the insurer to participate in an action against the tort-feasor in order to realize on its subrogation rights. On payment to the insured, the subrogated insurer will be allowed reimbursement from the proceeds of the recovery obtained by the insured from the tort-feasor even though it failed to assist in the prosecution of the action. In situations such as Stetina, where the insurer's subrogation rights involve an amount of money substantially less than what it would have to pay were the tort-feasor insured found liable, the insurer would not wish to enforce its subrogation rights by bringing suit. The claimant insured could still bring suit and if he obtained a judgment and recovery, the insurer should be allowed to realize on its subrogation rights just as in cases where the tort-feasor was insured by a different company.

56. Although the State Farm policy included an express subrogation provision and therefore conventional subrogation was involved, it has been held that whether a right has its source in legal or in conventional subrogation, its enforcement is still subject to equitable principles. See State Farm Mut. Auto. Ins. Co. v. Foundation Reserve Ins. Co., Inc., 78 N.M. 359, 363, 431 P.2d 737, 741 (1967); Castleman Constr. v. Pennington, 222 Tenn. 82, 96-97, 432 S.W.2d 669, 676 (1968). The court in Stetina apparently agreed.

57. 196 Neb. at 450, 243 N.W.2d at 346 (quoting Home Ins. Co. v. Pinski Bros., 160 Mont. 219, 225, 500 P.2d 945, 949 (1972)).


59. It would seem that the insurer should be allowed to defend the tort-feasor insured as long as there were no conflict of interest problems. Some might argue that where the insurer works to prevent recovery it should not be allowed to share in the proceeds of that recovery.

As the quotation from Professor Keeton points out,61 the “no subrogation against insured” rule can only be applied absolutely in situations where the insurer attempts to recover from an insured money paid under a coverage that provides protection for that insured. Only in such situations would subrogation by the insurer against the insured have the effect of withdrawing insurance benefits purchased.62 In other situations, a court should proceed on a case-by-case basis, deciding whether or not to allow subrogation by determining whether the insured will still obtain the benefits contracted for and whether the insurer acted fairly and equitably. The application of the rule to all situations where the insurer is seeking to be subrogated against one who happens to be insured by it would deny an important right to the insurer where such a denial is not necessary.63 The “no subrogation against insured” rule was not applicable to the situation in Stetina, and it should not have been relied on by the court in reaching its decision that State Farm was not prejudiced by the plaintiff’s agreement not to sue the Lusinses.64

61. See text accompanying note 35 supra.
62. In Connor v. Thompson Constr. & Dev. Co., 166 N.W.2d 109 (Iowa 1969) (cited by the court in Stetina as authority for the general rule that an insurer cannot recover by right of subrogation from its own insured), the Iowa Supreme Court apparently recognized that the rule could not be applied absolutely to prevent subrogation by the insurer in all instances. In Connor, the owners of a house were deemed to be insurers of the contractors because they had breached an agreement which required them to obtain insurance covering loss to the structure by fire. The insurance policy was to name the contractor and all subcontractors as insureds. A fire, allegedly caused by the negligence of the contractors, destroyed the residence. Relying on the no subrogation against insured rule, the court held that the owners could not recover from the contractors for damage caused to the structure since they were the insurers of the contractors for that loss. But the court also held that nothing prevented the owners from recovering from the contractors for other losses caused by the fire.
63. An example of this is Home Ins. Co. v. Pinski Bros., 160 Mont. 219, 500 P.2d 945 (1972). In Pinski, a boiler explosion resulted in a $135,000 loss to a hospital. The hospital had insurance with the Home Insurance Co. which paid the loss and claimed subrogation rights against the architects who were allegedly responsible. The architects had liability insurance coverage to the extent of $25,000 also with the Home Insurance Co. They tendered defense of the action to the insurance company which refused the tender and subsequently hired their own attorneys. Relying on the no subrogation against insured rule, the Montana Supreme Court gave summary judgment in favor of the insurance company’s subrogation claim against them thereby denying the insurance company a possible $110,000 recovery of the insurance proceeds paid by them.
64. It is true that Home Ins. Co. v. Pinski Bros., 160 Mont. 219, 500 P.2d 945 (1972), and Dupre v. Vedrine, 261 So. 2d 288 (La. App. 1972), both support the holding of the court in Stetina that the “no subrogation
V. WAIVER OF SUBROGATION RIGHTS?

Under the particular facts of *Stetina*, arguably, the plaintiff should have been allowed to recover under the medical payments coverages of his policies even though he released the Lusinses from further liability. When Frank Stetina executed the covenant not to sue, a State Farm agent was present and apparently negotiated the covenant.65 State Farm, through its agent, could have protected itself from further action by the plaintiff by obtaining an agreement from Stetina that he would not hold State Farm liable under the medical payments coverages of his policies.66 State Farm's failure to get such an agreement, along with its participation and acquiescence in the settlement between the Lusinses and Stetina, could constitute a waiver of its subrogation rights.67 Thus, State Farm still would be obligated to pay the plaintiff the benefits afforded under the medical payments coverages of his policies.68

If similar situations occur in the future, insurers may remember *Stetina* and try to obtain an agreement from the claimant insured that he will not recover under the provisions of his policy. Such a situation could present a conflict of interests between the insurer

against insured" rule prevented State Farm from having any subrogation rights against Vera Lusins. For the same reasons it has been argued that the holding of the court in *Stetina* was not proper. It may also be argued that the holdings of the courts in *Pinski* and *Dupre* were not proper. It is interesting to note that the Louisiana Court of Appeal in a later case, Norris v. Allstate Ins. Co., 293 So. 2d 918 (La. App. 1974), allowed the insurer to realize on its subrogation rights even though the tort-feasor was also insured by the insurer. The court distinguished the *Dupre* case on the fact that in *Norris* Allstate had a subrogation clause in its policy and therefore conventional subrogation was involved, whereas the insurer in *Dupre* was relying on legal subrogation. The court in *Stetina* cites *Norris* as "clarifying" *Dupre*. 196 Neb. at 449, 243 N.W.2d at 345.

65. 196 Neb. at 442, 243 N.W.2d at 342.
66. There is no indication in the *Stetina* opinion as to why State Farm did not obtain such an agreement. One may speculate that it believed the provisions of the plaintiff's policies adequately would protect it from having to pay under them and therefore felt it to be unnecessary to obtain a release from the plaintiff.
68. Such a result would be equitable if Diane Stetina's injuries amounted to $60,000 or more. In such a situation, had State Farm first paid the plaintiff the $10,000 owed under the medical payments coverages and then obtained a $50,000 settlement from the Lusinses, under the majority rule of allocation, see note 46 *supra*, the plaintiff would be entitled to the full amount recovered from the tort-feasor.
and the insured it represents. If the claimant insured is to be precluded from recovering under his own policies, he may insist on an increase in the settlement amount. If such an increase would raise the settlement to a figure above the policy limits of the tort-feasor insured, the insurer will be inclined to consent to it because the company would reduce its total liability. Of course, the tort-feasor insured will be worse off because he would have to make up at least part of the increase in the settlement amount. In such a situation, the courts should protect the insureds' interests by holding the insurer to a standard of good faith and ordinary care in negotiating the settlement. An insured should be allowed to obtain his own attorney to represent his interests whenever the claim against him exceeds his policy limits.

VI. CONCLUSION

In holding that State Farm could not have any subrogation rights against Vera Lusins because she also happened to be insured by it, the Nebraska Supreme Court unnecessarily restricted the subrogation rights of insurers. Where subrogation is denied, those objectives that subrogation serves are not attained. Consequently, if the “no subrogation against insured” rule is interpreted to prevent an insurer from ever having subrogation rights against one insured by it, situations may occur where the claimant insured is allowed double recovery or where the tort-feasor insured receives the windfall of being absolved of liability, both at the expense of the insurer.

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69. See R. Keeton, supra note 1, § 7.8(b), at 510-11 (1971).
70. See id. § 7.6(d) at 493 (1971).