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Notes

Understanding the Difference Between the Right to Subrogation and Assignment of an Insurance Claim

*Keisker v. Farmer*¹

I. INTRODUCTION

When an individual purchases an insurance policy, it is unlikely that the insured possesses a solid understanding of the difference between the insurance provider's right to subrogation, and an assignment of any claims to the provider. In comparison, when a provider creates a policy it is probably aware of the difference between these options, and the effects of this difference on future claims. However, based on a recent Missouri Supreme Court case, *Keisker v. Farmer*,² it is apparent that not all insurance companies carefully consider the difference between assignment and subrogation when establishing the terms of their policies.³

Trinity Universal Insurance Company ("Trinity") wrote a policy that did not expressly create an assignment of its policyholder's future claims and, as a result, recovered only a fraction of the amount it paid to the policyholder.⁴ Had Trinity carefully drafted its policy to create an assignment of the insured's claims, it might have recovered the entire amount from those responsible for the damages. For this reason, insurance companies need to understand the difference between assignment and subrogation. Furthermore, insured individuals need to understand this distinction so that they are aware of their own rights and obligations.

II. FACTS AND HOLDING

Keisker v. Farmer demonstrated the importance of distinguishing between subrogation and assignment. Super Sandwich Shop, Inc. ("Shop") operated a restaurant in a building leased from Ellen Keisker ("Keisker").⁵ The lease provided that Shop would insure Keisker and Shop against bodily injury and

1. 90 S.W.3d 71 (Mo. 2002).

2. *Id.*

3. *See id.*

4. *Id.* at 75.

5. *Keisker v. Farmer*, No. ED78681, 2002 Mo. App. LEXIS 7, at *2 (Mo. Ct. App. Jan. 2, 2002).

property damage.⁶ Shop purchased \$190,000 of insurance coverage through Trinity, including \$175,000 on the building and its contents, and \$15,000 for business interruption.⁷

On December 11, 1997, two cars driven by Harold Beck and Beatrice Farmer hit the building, causing extensive damage.⁸ The following day, Shop reported these damages to Trinity, and Trinity subsequently paid Shop \$141,609.⁹ Trinity's payment covered damage to both the building and the business's personal property, and \$15,000 for income lost due to the interruption of business.¹⁰

One month after the accident, Shop sued the drivers of both cars.¹¹ Shop also sued the Sheriff's Department of the City of St. Louis ("Sheriff's Department") and the City of St. Louis ("City") because the Sheriff's Department employed Beck.¹² Shop sought damages against all parties for loss of income and profits due to the restaurant's closure after the car accident.¹³

In the following year, Trinity's attorney sent several letters regarding its subrogation rights.¹⁴ Trinity sent a letter to City's attorney, requesting protection of its "subrogation lien in the event the third party claim/suit settles."¹⁵ Trinity

6. *Id.*

7. *Id.* The portion of the policy relevant to this case provided as follows:
TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US
If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

1. Prior to a loss to your Covered Property or Covered Income.
2. After a loss to your Covered Property or Covered Income only if, at time of loss, that party is one of the following:
 - a. Someone insured by this insurance;
 - b. A business firm:
 - (1) Owned or controlled by you; or
 - (2) That owns or controls you; or
 - c. Your tenant.

Keisker, 90 S.W.3d at 73.

8. *Keisker*, 2002 Mo. App. LEXIS 7, at *3.

9. *Id.*

10. *Id.* In addition, Shop paid a \$500 deductible. *Id.*

11. *Keisker*, 90 S.W.3d at 73.

12. *Keisker*, 2002 Mo. App. LEXIS 7, at *3-4.

13. *Id.*

14. *Id.* at *4.

15. *Id.*

also sent two letters to Shop's attorney.¹⁶ The first letter informed Shop that Trinity had retained the attorney "with respect to its subrogation claim"; the second stated that Trinity had a "valid right of subrogation" through the terms of the insurance policy.¹⁷ Trinity's use of the term "subrogation" later became the basis of Shop's defense against Trinity's claim that the policy created an assignment.¹⁸

After Trinity filed a negligence action against City, City counterclaimed for interpleader,¹⁹ and paid \$100,000 to the court.²⁰ Thus, City's counterclaim joined both Shop's and Trinity's claims in the same action. Trinity argued that it was entitled to the damages City paid, up to the amount Trinity had paid Shop, because Shop's policy had assigned all claims to Trinity.²¹ Shop argued that there was no assignment or, if there was an assignment, it was a partial assignment giving Trinity a "cause of action only to the extent Trinity paid Shop for a loss for which Shop could recover from City, Sheriff's Department, or Beck."²² Shop also argued that Trinity's previous statements that it had a right to subrogation barred assignment, under the theories of collateral estoppel and laches.²³ The trial court rejected Shop's arguments, and found an assignment of Shop's claims to Trinity based on the language of the insurance policy.²⁴ The court awarded \$100,000 to Trinity.²⁵

On appeal to the Missouri Court of Appeals for the Eastern District, Shop argued that the trial court erred in finding that the policy "unambiguously assigned Shop's cause of action to Trinity," and erred in finding that Trinity was not estopped from asserting the assignment argument.²⁶ Shop based both arguments on Trinity's earlier assertion of its right to subrogation, which is inconsistent with an asserted right to an assignment.²⁷ Shop also argued that there was not an assignment because the policy's language did not use

16. *Id.*

17. *Id.*

18. *Id.* at *8.

19. Interpleader allows a party who is subject to competing claims, which could result in double liability, to join all claimants in the same action. *See Green Valley Seed, Inc. v. Plenge*, 72 S.W.3d 601, 603-04 (Mo. Ct. App. 2002).

20. *Keisker v. Farmer*, 90 S.W.3d 71, 73 (Mo. 2002). City paid \$100,000 to the court because it was the statutory limit of City's liability. *Id.*

21. *Id.* at 73-74.

22. *Keisker*, 2002 Mo. App. LEXIS 7, at *5.

23. *Id.* at *6.

24. *Id.* at *7.

25. *Id.*

26. *Id.* at *8.

27. *Id.*

“assignment language.”²⁸ The court rejected these arguments, and affirmed the trial court’s decision.²⁹

However, the Missouri Supreme Court subsequently granted transfer and reversed the court of appeals’ decision.³⁰ After reviewing the terms of the insurance policy, the court held that it was ambiguous and lacked “clear intent to create an assignment,” thereby giving Trinity a right to subrogation instead of an assignment.³¹

III. LEGAL BACKGROUND

Under insurance law principles, if an insured individual makes an insurance claim for a loss caused by a third party, and a provider pays that claim, the provider may have a right to recover the amount paid.³² The insurer’s right to recovery is based either on the right to subrogation or an assignment of the insured’s claim. Whether there is a right to subrogation or an assignment determines how and from whom the insurer collects.³³ If the insurer has a right to subrogation, the insured retains the right to bring an action against a third party.³⁴ In contrast, an assignment transfers the right to bring an action to the insurer.³⁵

When determining whether an insurance policy creates an assignment or a right to subrogation, the rules governing the interpretation of insurance policies are important. If a policy is not ambiguous, it is enforced as written.³⁶ However, if it is ambiguous, the policy is generally construed against the insurer.³⁷ A

28. *Id.*

29. *Id.* at *19, *22-23.

30. *Keisker v. Farmer*, 90 S.W.3d 71, 73 (Mo. 2002).

31. *Id.* at 74-75.

32. *See Kroeker v. State Farm Mut. Auto. Ins. Co.*, 466 S.W.2d 105, 110-11 (Mo. Ct. App. 1971).

33. *Holt v. Myers*, 494 S.W.2d 430, 437 (Mo. Ct. App. 1973); *see also Steele v. Goosen*, 329 S.W.2d 703, 711-12 (Mo. 1959). In at least one case the Missouri Court of Appeals for the Eastern District has failed to distinguish between a right to subrogation and an assignment of a claim. *See Ewing v. Pugh*, 420 S.W.2d 14, 18 (Mo. Ct. App. 1967). However, the court later realized its error. *See Holt*, 494 S.W.2d at 438. Both the Western and Southern Districts later recognized the distinction drawn in *Holt*. *See State Farm Mut. Auto. Ins. Co. v. Jessee*, 523 S.W.2d 832, 834 (Mo. Ct. App. 1975); *Alsop v. Green*, 517 S.W.2d 151, 153 (Mo. Ct. App. 1974) (adopting *Holt* in the Southern District); *State ex rel. Bartlett & Co., Grain v. Kelso*, 499 S.W.2d 579, 582 (Mo. Ct. App. 1973) (adopting *Holt* in the Western District).

34. *Keisker*, 90 S.W.3d at 74.

35. *Id.*

36. *Krombach v. Mayflower Ins. Co.*, 827 S.W.2d 208, 210 (Mo. 1992).

37. *Id.*

policy may be ambiguous if there is “duplicity, indistinctness, or uncertainty in the meaning of the words used.”³⁸

A. Subrogation

The right to subrogation originated at common law,³⁹ and was “founded on principles of justice and equity.”⁴⁰ As an equitable principle, subrogation is supposed to ensure that the person who actually caused damages will eventually pay for those damages.⁴¹

Subrogation is classified as either conventional subrogation, which is based on an “act or agreement of the parties,”⁴² or legal subrogation, which arises “out of a condition or relationship by operation of law.”⁴³ More specifically, a provider’s right to subrogation arises by operation of law when it pays either a portion or the entire amount of property damages an insured individual claims under a policy.⁴⁴ As a result, a right to subrogation may exist even without a statute or agreement that provides for it.⁴⁵

Subrogation is generally defined as “[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.”⁴⁶ However, this definition does not clearly describe the actual application of subrogation. In Missouri, the general rule is that if a person pays for another individual’s injury or loss resulting from the actions of a third party, and the payment is made “pursuant to a legal obligation to do so,” that person is subrogated to the injured party’s rights against the third party.⁴⁷

38. *Id.*

39. *Cole v. Morris*, 409 S.W.2d 668, 671 (Mo. 1966); *see also* *Kroeker v. State Farm Mut. Auto. Ins. Co.*, 466 S.W.2d 105, 110 (Mo. Ct. App. 1971).

40. *Cole*, 409 S.W.2d at 671.

41. *Id.*

42. *Kroeker*, 466 S.W.2d at 110 (citing *Cole*, 409 S.W.2d at 668).

43. *Id.*; *see also* Robert M. Smith, Note, *What Happened to the Equity in Equitable Subrogation?*, 64 MO. L. REV. 503, 505 (1999) (summarizing the different types of subrogation).

44. *Farmers Ins. Co. v. Effertz*, 795 S.W.2d 424, 426 (Mo. Ct. App. 1990); *see also* *Hagar v. Wright Tire & Appliance, Inc.*, 33 S.W.3d 605, 610 (Mo. Ct. App. 2001).

45. *Cole*, 409 S.W.2d at 670.

46. BLACK’S LAW DICTIONARY 1440 (7th ed. 1999).

47. *Cole*, 409 S.W.2d at 670.

As a general rule, any person who, pursuant to a legal obligation to do so, has paid even indirectly, for a loss or injury resulting from the wrong or default of another will be subrogated to the rights of the creditor or injured person against the wrongdoer or defaulter, persons who stand in the shoes of the wrongdoer, or others who, as the payor, are primarily responsible for the

When an insurance provider has a right of subrogation to an insured's claims, it has an equitable right to the claim.⁴⁸ However, the insured retains the legal right to the claim, whether the insurer pays for all or only a portion of the insured's damages.⁴⁹ "Recovery for damages from a third party does not, in and of itself, destroy legal ownership and the right to maintain an action."⁵⁰ As a result of the insured's legal title to the claim, the insurer cannot bring any claims against the third party in its own name.⁵¹ Instead, the insurer must "assert its subrogation interest against any recovery the insured makes against the tortfeasor."⁵² Another possible option for the insurer is to bring an action in the name of the insured.⁵³ If an insured has already brought a claim against a third party, Missouri law does not require joinder of the insurer, even if the third party brings a motion to do so.⁵⁴

B. Assignment

An assignment varies from subrogation in both the method of creation and the results produced. In general terms, an assignment is "a transfer or making over to another of the whole of any property, real or personal, in possession or in action."⁵⁵

For parties to create a valid assignment of a claim, Missouri law requires that they assign the entire claim from one party to another, and must "necessarily contemplat[e] the continued existence of the . . . [assigned] claim."⁵⁶ Furthermore, an assignment of the entire claim occurs even if the insured was required to pay a deductible, and therefore did not receive the entire cost of the damages incurred.⁵⁷

wrong or default.

Kroeker, 466 S.W.2d at 110.

48. *Holt v. Myers*, 494 S.W.2d 430, 437 (Mo. Ct. App. 1973).

49. *Farmers Ins. Co. v. Effertz*, 795 S.W.2d 424, 426 (Mo. Ct. App. 1990); *Holt*, 494 S.W.2d at 437. In some other states, "legal title to a property damage claim passes to the injured party's insurer once the insurer pays the insured party's claim." *Hagar v. Wright Tire & Appliance, Inc.*, 33 S.W.3d 605, 610 (Mo. Ct. App. 2000).

50. *Klein v. Gen. Elec. Co.*, 714 S.W.2d 896, 902 (Mo. Ct. App. 1986).

51. *Hagar*, 33 S.W.3d at 610.

52. *Id.*

53. *Klein*, 714 S.W.2d at 902-03 ("If the interest of the insurer is derived by subrogation, the action must be brought by or at least in the name of the insured.").

54. *Rust v. Hammons*, 929 S.W.2d 834, 840 (Mo. Ct. App. 1996).

55. *Kroeker v. State Farm Mut. Auto. Ins. Co.*, 466 S.W.2d 105, 109 (Mo. Ct. App. 1971).

56. *Id.* at 110.

57. See e.g., *Steele v. Goosen*, 329 S.W.2d 703, 711 (Mo. 1959); *State Farm Mut. Auto. Ins. Co. v. Jessee*, 523 S.W.2d 832, 834 (Mo. Ct. App. 1975).

It is also important to note that an assignment of an entire cause of action may occur even if the language of the assignment limits the insurer's rights.⁵⁸ For example, in *Steele v. Goosen* an agreement limited the insurer's rights to the amount that it had paid the insured.⁵⁹ The *Steele* court stated that it was "immaterial" that the agreement imposed such a limitation because these terms were not enough to support the contention that the policy did not assign the entire cause of action.⁶⁰ Although specific words are not required to create an assignment, one party must have actual intent to receive an assignment, and the other party must have actual intent to make an assignment.⁶¹ This intent must be apparent from surrounding circumstances.⁶²

Missouri courts have also addressed whether an assignment is allowed despite the general rule against splitting a cause of action. In *General Exchange Insurance Corp. v. Young*,⁶³ the court recognized the rule that an "assignment of a part of a single cause of action does not entitle the assignee to bring a suit at law unless the defendant consents thereto."⁶⁴ The court also stated that a single plaintiff may not bring "separate suits for personal injuries and damages to property caused by the same wrongful act."⁶⁵ At issue was whether or not there was an exception to these rules when the assignment was made from an insured individual to the insurance provider.⁶⁶ The court stated that the rule requiring personal and property damage claims resulting from a single occurrence to be brought in the same action does not apply unless the same person has the right of action for both claims.⁶⁷ Therefore, an insured individual may assign rights to property damage claims before the damage occurs and may retain rights to personal injury claims without violating the rule against splitting claims.⁶⁸ The court stated that in such situations "it is more accurate to say there has been no split of the cause of action, but the creation of two separate causes of action."⁶⁹

58. *Steele*, 329 S.W.2d at 711-12.

59. *Id.* at 711.

60. *Id.*

61. *Farmers Ins. Co. v. Effertz*, 795 S.W.2d 424, 425 (Mo. Ct. App. 1990).

62. *Id.*

63. 212 S.W.2d 396 (Mo. 1948). In *Young*, the insured assigned her "entire claim for damages to the car" to the insurance provider. *Id.* at 399. The insurer sued for damages, and recovered the amount it had paid to the insured. *Id.* After the insured settled with the insurance provider, she then brought a suit for personal injuries against the individual whose negligence allegedly caused her automobile accident. *Id.* at 397.

64. *Id.* at 398-99. The court stated that this general rule had been announced in numerous cases relied on by appellant. *Id.* For a list of those cases, see *id.* at 398.

65. *Id.* at 399.

66. *Id.*

67. *Id.* at 400.

68. *Id.*

69. *Id.*

If insured individuals have claims that could be brought under their policies, and they assign their entire claim to the provider, the insured individuals no longer have any right to bring an action for damages that would have been covered under the policy.⁷⁰ The assignee insurance provider acquires all rights to the claim, including legal title.⁷¹ Therefore, the insurer may bring an action against the third party tortfeasor.⁷²

C. Real Party in Interest

Whether there is an assignment of a cause of action or a right to subrogation determines who is entitled to bring a lawsuit against a third party tortfeasor. As Missouri courts have stated,

The firmly established rule in Missouri, although apparently obtaining only in this jurisdiction, is that when an insurer pays a property loss, then its right to maintain suit against the tortfeasor depends upon whether it receives from the insured an assignment of the whole claim as compared with merely rights of subrogation.⁷³

The individual who possesses the right to bring the lawsuit is referred to as the “real party in interest.”⁷⁴

The “real party in interest” rule allows only individuals who are “directly interested in the subject matter of litigation and entitled to reap its fruits” to maintain an action.⁷⁵ The purpose of this rule is to protect individuals from “harassment and multiple suits by persons who would not be bound by the principles of res adjudicata if they were prevented from bringing subsequent actions by a real party in interest rule.”⁷⁶

The real party in interest rule prevents both the insurance provider and the insured from suing separately for property damages.⁷⁷ Under Missouri law,

70. *Hagar v. Wright Tire & Appliance, Inc.*, 33 S.W.3d 605, 610 (Mo. Ct. App. 2000); *Holt v. Myers*, 494 S.W.2d 430, 437 (Mo. Ct. App. 1973).

71. *Hagar*, 33 S.W.3d at 610.

72. *Id.*; *Kroeker v. State Farm Mut. Auto. Ins. Co.*, 466 S.W.2d 105, 110 (Mo. Ct. App. 1971) (citing *Hayes v. Jenkins*, 337 S.W.2d 259 (Mo. Ct. App. 1960)).

73. *State Farm Mut. Auto. Ins. Co. v. Jessee*, 523 S.W.2d 832, 834 (Mo. Ct. App. 1975).

74. *Welch v. Davis*, Nos. WD 6189, WD 61731, 2003 WL 21321178, at *5 (Mo. Ct. App. June 10, 2003) (citing *Janssen v. Guar. Land Title Co.*, 571 S.W.2d 702, 706 (Mo. Ct. App. 1978)).

75. *Holt v. Myers*, 494 S.W.2d 430, 435 (Mo. Ct. App. 1973) (citing *Smith v. Cowen*, 350 S.W.2d 96, 98 (Mo. Ct. App. 1961)).

76. *Id.*

77. *Jessee*, 523 S.W.2d at 835.

either the insurer or the insured has the right to the cause of action against the tortfeasor.⁷⁸ “Missouri courts have constantly denied splitting of [claims for] damages, so as to allow the insurance company to sue for only that portion of the loss paid by it, with the insured retaining the right to sue for the balance.”⁷⁹

In summary, if an insured makes an assignment of claims to the insurer, the insurer is the real party in interest.⁸⁰ The insurer is also the real party in interest if it has only paid the insured a portion of the damages but receives an assignment of the entire claim.⁸¹ On the other hand, if the insurer has a right to subrogation, the insured remains the real party in interest,⁸² and the provider may not bring an action in its own name.⁸³ This rule applies even if a provider has paid an individual’s entire claim.⁸⁴ However, this does not prevent the insurance provider from settling with the tortfeasor or the tortfeasor’s insurer.⁸⁵

D. Other Jurisdictions

Although many jurisdictions, like Missouri, deny a provider the right to bring an action against a third party when the insurer does not receive an assignment, state subrogation laws vary greatly.⁸⁶ Of particular interest are those jurisdictions that allow an insurer to bring an action in its own name after paying the insured for a portion of the damages resulting from a third party’s actions.

For example, the United States Supreme Court and other courts have indicated that both the insured and the provider may, as real parties in interest,

78. *Id.*

79. *Id.*

80. *Holt*, 494 S.W.2d at 438.

81. *Gen. Exch. Ins. Corp. v. Young*, 212 S.W.2d 396, 401 (Mo. 1948).

82. *Holt*, 494 S.W.2d at 437.

83. *Farmers Ins. Co. v. Effertz*, 795 S.W.2d 424, 426 (Mo. Ct. App. 1990).

84. *Hayes v. Jenkins*, 337 S.W.2d 259, 261 (1960) (rejecting defendant’s contention that if the insurance provider has paid the insured for all damages, the insurance provider becomes the real party in interest, whether or not there was a deductible amount that the insured was not paid).

85. *See Hagar v. Wright Tire & Appliance, Inc.*, 33 S.W.3d 605, 611 (Mo. Ct. App. 2001). In *Hagar*, the insurer did not have a right of subrogation until after the tortfeasor had been found liable. *Id.* Despite this, the tortfeasor’s insurer settled with the plaintiff’s insurer. *Id.* Subsequently, the injured party brought a claim against the tortfeasor, and was awarded over \$200,000. *Id.* at 609. The defendant ended up paying both the injured party and his insurer. *Id.* at 611.

86. *See V. Woerner*, Annotation, *Proper Party Plaintiff, Under Real Party in Interest Statute, to Action Against Tortfeasor for Damage to Insured Property Where Insured Has Paid Part of Loss*, 13 A.L.R.3d 140 (1967); *see also* June F. Entman, *Compulsory Joinder of Compensating Insurers: Federal Rule of Civil Procedure 19 and the Role of Substantive Law*, 45 CASE W. RES. L. REV. 1, 6-7 (1994) (summarizing the various approaches to subrogation and the real party in interest concept).

bring claims against the third party.⁸⁷ This applies only if the insurance provider has paid for only a portion of the insured's loss.⁸⁸ As the Court in *United States v. Aetna Casualty & Surety Co.*⁸⁹ stated, "both insured and insurer 'own' portions of the substantive right [against the tortfeasor] and should appear in litigation in their own name."⁹⁰

New York allows both the insurance provider and the insured to bring an action against a third party who allegedly caused damage to the insured.⁹¹ Under New York law, if an insurer has paid the insured for a portion of their loss, the insurer may bring an action against the third party for that amount.⁹² Allowing the insurer to bring these claims does not affect the insured's right to bring an action against the third party for any damages that the insured has not paid for.⁹³ The insured's right is not affected because, upon the insurer's partial payment to the insured, the cause of action against the third party is split between the insured and the insurer.⁹⁴ Furthermore, at least one New York court has stated that the insurer is a necessary and proper party to an action brought by the insured against the third party.⁹⁵

Virginia takes a different approach under its rules of civil procedure, requiring that a provider notify an insured if it is going to bring a cause of action against a third party in the insured's name.⁹⁶ The notice ensures that the insurer's action does not prevent the insured from bringing an action for personal

87. See, e.g., *Bryan v. S. Pac. Co.*, 286 P.2d 761, 766 (Ariz. 1955) ("[I]f the insured does not seek to recover all the damages but only that portion for which he has not been compensated by his insurer, there being two substantive rights, a tort-feasor by such splitting of the cause of action might be compelled to defend two suits for one wrong. This result can be avoided by compelling the joinder of the insurer on timely application of the defendant."); *Harlem Cab Ass'n v. Diggs*, 82 A.2d 143 (D.C. 1951) (citing *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949)); *State ex rel. Nawd's T.V. & Appliance, Inc. v. Dist. Court of the Thirteenth Judicial Dist.*, 543 P.2d 1336, 1338 (Mont. 1975).

88. See, e.g., *Nawd's T.V.*, 543 P.2d at 1338 ("When an insurance carrier pays only part of its insured's loss because the loss exceeds the coverage of the insurance policy or the policy contains a deductible amount, both the insured and the carrier have a claim for relief against the wrongdoer and either may bring suit in his own name to the extent of his respective claim.").

89. 338 U.S. 366 (1949).

90. *Id.* at 381.

91. See *Fed. Ins. Co. v. Arthur Andersen & Co.*, 552 N.E.2d 870, 874 (N.Y. 1990).

92. *Id.*

93. *Id.*

94. See *Townsend v. Halbert*, 54 N.Y.S.2d 501, 503 (N.Y. Sup. Ct. 1944).

95. *Id.*

96. *Lopez v. Concord Gen. Mut. Ins. Group*, 583 A.2d 602, 606 (Vt. 1990) (citing *VT. R. CIV. P. 17(c)*).

injuries.⁹⁷ However, the insured is not required to notify its insurance provider if he is going to bring a suit, because the insurer “may sue for property damage in its own name as [a] real party in interest even after a judgment for the assured on the personal injury claim.”⁹⁸ Therefore, an insurer does not lose its cause of action even if the insured has already brought a lawsuit.⁹⁹

Other courts have declared that an insurance provider is a necessary party to an action brought by an insured individual against a third party to recover damages, if the insurer has paid the insured for a portion or all of the damages.¹⁰⁰ The insured may also be a necessary party in a case where both the insurer and the insured have a cause of action, and the insurer brings an action.¹⁰¹

Even in jurisdictions where the insurer has not been deemed a necessary party, the insurer may be allowed to intervene in the action.¹⁰² The Fourth Circuit stated that “it is elementary” that if an insurer has paid an insured for a portion of the damages it incurred as a result of a third party’s action, the insurer is entitled to recover that amount and may join the insured in a lawsuit against the third party to do so, even where the insured holds a “single indivisible cause of action.”¹⁰³

IV. INSTANT DECISION

In *Keisker v. Farmer*,¹⁰⁴ Judge Benton delivered the opinion of a unanimous Missouri Supreme Court.¹⁰⁵ After reviewing the facts relevant to the case and summarizing the trial court’s decision, the court stated that the “threshold issue” was whether the policy gave Trinity an assignment or a right to subrogation.¹⁰⁶ Noting that the creation of an assignment requires a party’s intent to do so, the court rejected Trinity’s argument that the “transfer” language used in the policy

97. *Id.* (citing VT. R. CIV. P. 17(c) Reporter’s Notes).

98. *Id.* (citing VT. R. CIV. P. 17(c) Reporter’s Notes).

99. *Id.*

100. *See, e.g.,* *Waters v. Bigelow*, 310 P.2d 624, 624, 626-27 (Or. 1957) (holding that upon defendant’s motion, an insurer who has paid for a portion of an insured’s loss must be joined as a necessary party).

101. *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 381-82 (1949).

102. *See, e.g.,* *Va. Elec. & Power Co. v. Carolina Peanut Co.*, 186 F.2d 816, 820 (4th Cir. 1951).

103. *Id.*

104. 90 S.W.3d 71 (Mo. 2002).

105. *Id.* at 73, 75. Judge Teitelman did not participate in this decision. *Id.* at 75.

106. *Id.* at 74. The court reviewed the case *de novo* because it involved a question of law—the interpretation of an insurance policy. *Id.*

unambiguously created an assignment.¹⁰⁷ The court concluded that Shop did not have the necessary intent to assign the cause of action.¹⁰⁸

Next, the court summarily concluded that, in this case, the phrase “to the extent of our payments” limited Trinity’s rights based on the context.¹⁰⁹ The court also addressed the terms of the policy that allowed Shop to waive its rights against others in certain circumstances.¹¹⁰ It concluded that these terms also limited Trinity’s rights and noted that these limitations were inconsistent with an assignment.¹¹¹ Furthermore, the terms of the policy contradicted one another,¹¹² providing that Shop “must do nothing after loss to impair [Trinity’s rights],” but also allowing Shop to waive its rights “against another party . . . [a]fter a loss” if that party had a specified relationship with Shop at the time of the loss.¹¹³ The court found that these terms were ambiguous and must be construed against Trinity.¹¹⁴ This ambiguity, combined with no clear intent to create an assignment, gave Trinity a right of subrogation.¹¹⁵

Trinity also argued that it was entitled to the \$100,000 based on its right of subrogation.¹¹⁶ Recognizing that Shop’s suit against City was for lost income and profits, the court indicated that Trinity’s right to subrogation was limited to the \$15,000 it paid Shop for lost profits as long as Shop could prove lost profits of at least \$106,000.¹¹⁷ This number was calculated based on the amount of money Shop received from Trinity for lost profits and the amount of money Shop had or would receive from others involved in the accident: \$15,000 from Trinity for lost profits, \$6,000 from the second driver, and \$85,000 of the money City deposited with the court.¹¹⁸ Through subrogation, Trinity would receive the remaining \$15,000 that had been deposited with the court.¹¹⁹

107. *Id.* “No particular form of words is necessary to accomplish an assignment, so long as there appears from the circumstances an intention on the one side to assign . . . and on the other side to receive.” *Id.* (quoting *Farmers Ins. Co. v. Effertz*, 795 S.W.2d 424, 425 (Mo. Ct. App. 1990)).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 73-74.

114. *Id.* at 74.

115. *Id.* at 74-75.

116. *Id.* at 75 (citing *Tucker v. Holder*, 225 S.W.2d 123, 126 (1949)) (“Subrogation exists to prevent unjust enrichment.”).

117. *Id.*

118. *Id.*

119. *Id.* However, Trinity’s “share of the litigation expenses” limits its recovery. *Id.* “Where one litigates to create a fund for others, those sharing must contribute a proportional part of the expenses.” *Id.* (citing *Leggett v. Mo. State Life Ins. Co.*, 342

V. COMMENT

Understanding the intricacies of Missouri's insurance law is important for insured individuals, providers and any third parties who are liable for the insured's damages when an insurance claim is brought. Trinity's mistaken assumption that it had the right to bring a lawsuit against City following Shop's lawsuit demonstrates a possible misunderstanding of Missouri law in the insurance industry. Contrary to Trinity's assumption, it could not sue City in its own name to recover the amount it had paid to Shop for property damages.¹²⁰

After determining that Trinity had a right to subrogation, and not an assignment, the court stated that following Shop's suit, Trinity was not allowed to bring an action against City, despite the fact that Shop's claim for damages did not include any portion of the damages that Trinity had paid. In order for other insurers to increase the likelihood that they will eventually recover the amount of money that they have paid to insureds, several issues should be kept in mind. The ability to establish that one party had the intent to assign a cause of action, and that the other party had the intent to receive an assignment is the most important element of an insurer's argument that it has received an assignment. Closely related to the requirement of intent is the language that is used in the insurance policy. Keeping in mind that if an insurance policy is ambiguous it will be construed against the insurer, it is important that the language clearly set forth both the insured's and insurer's rights.¹²¹ Using layman's terms to explain the policy, as compared to technical and legal terms, will also increase the likelihood that the policy will be interpreted as intended.¹²²

Although the result in *Keisker* is consistent with previous cases decided under Missouri law, it is not consistent with the stated purpose of the right to subrogation. Missouri courts have repeatedly stated that the underlying purpose in granting an insurer the right to subrogation is ensuring equity and justice.¹²³ However, as applied, the law prevents an insurer from participating in a cause of action against third parties who are actually liable for the insured's damages.

S.W.2d 833, 936 (Mo. 1960); *Jourdan v. Gilmore*, 638 S.W.2d 763, 768-69 (Mo. Ct. App. 1982)). Therefore, the amount of Trinity's litigation expenses is the proportion of its recovery "to the total cash recovery by both Trinity and the Shop." *Id.*

120. *Id.*

121. See *supra* notes 36-38 and accompanying text.

122. See *Martin v. U.S. Fid. & Guar. Co.*, 996 S.W.2d 506, 508 (Mo. 1999) (quoting *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 508 (Mo. 1997)) ("When interpreting the language of an insurance policy, this Court gives a term its ordinary meaning, unless it plainly appears that a technical meaning was intended. The ordinary meaning of a term is the meaning that the average layperson would reasonably understand. 'To determine the ordinary meaning of a term, this Court consults standard English language dictionaries.'").

123. See *supra* notes 39-41 and accompanying text.

As *Keisker* demonstrates, the insured is not under any obligation to bring a lawsuit against the third party claiming damages that the insured has already paid for. Instead, the insured has discretion to determine which claims to bring. As a result, the provider may pay for damages that never become the basis of the insured's lawsuit against the individual who caused the damages. This result does not serve the purpose of subrogation because it does not ensure that the person who caused the damages is the person paying for them.

Adopting and applying the laws of different jurisdictions would better serve the underlying purposes of subrogation, considering that subrogation was "founded on principles of justice and equity."¹²⁴ For example, under *Aetna Casualty* or New York law Trinity would probably have had the right to bring an action against City in its own name to recover the amount that it had paid to Shop for property damages.¹²⁵ Under these laws, both Trinity and Shop would have been entitled to bring a claim against City. As a result, the person actually liable for the damages would also pay for them. This would also probably have been the outcome under Virginia law.¹²⁶ In comparison, Missouri law requires the insured to be particularly careful to create an assignment of a claim from the insured if it would like to retain the right to recover damages from the person actually liable for them.

VI. CONCLUSION

In *Keisker v. Farmer*,¹²⁷ the Missouri Supreme Court addressed the differences between assignment and subrogation, finding that Trinity, lacking intent to create an assignment, had a right to subrogation. As a result, Trinity did not have a cause of action against City.¹²⁸ Although this decision did not alter the course of Missouri insurance law, it did raise several important yet often misunderstood issues. The concepts of subrogation, assignment, and the real party in interest are central to understanding the inner workings of the insurance system.

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124. *Cole v. Morris*, 409 S.W.2d 668, 670 (Mo. 1966).

125. *See supra* notes 87-95 and accompanying text.

126. *See supra* notes 96-99 and accompanying text.

127. 90 S.W.3d 71 (Mo. 2002).

128. *Id.* at 74-75.