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# Subrogation in Florida

Michael J. Cappucio

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# SUBROGATION IN FLORIDA

MICHAEL J. CAPPUCIO\*

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## I. INTRODUCTION<sup>1</sup>

Subrogation has been broadly defined as "the substitution of one person in the place of another with reference to a lawful claim or right."<sup>2</sup> Traditionally the doctrine has been subdivided into "subrogation by operation of law" and "conventional subrogation." Preliminary definitions of these terms are required.

The right to subrogation by operation of law generally arises when one person places himself in a position of obligation to pay a debt for which another is primarily liable. The right is enforced by equity when such debt is paid by the person secondarily liable under such circumstances which render him entitled equitably to the obligations and securi-

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1. The purpose of this article is to survey the use made of the doctrine of subrogation by the Florida courts. No attempt, therefore, has been made to discuss areas to which a right of subrogation has been extended by other jurisdictions.

2. *Boley v. Daniel*, 72 Fla. 121, 123, 72 So. 644, 645 (1916).

ties held by the creditor so paid.<sup>3</sup> This legal subrogation may also arise where one having no duty to pay the debt of another, nonetheless has some recognizable right in premises which have been advanced as security for a loan.<sup>4</sup> Conventional subrogation, on the other hand, is grounded upon an agreement or understanding, hence it may be said to depend upon a lawful contract. It arises when one having no interest in the debt of another pays such debt pursuant to an agreement whereby he then becomes entitled to the rights and securities of the former creditor.<sup>5</sup>

## II. LIMITATIONS UPON THE USE OF SUBROGATION

Subrogation is not an absolute right, rather it depends upon the equities and attending circumstances of each particular case.<sup>6</sup> It is difficult, therefore, if not impossible, to verbalize a general rule which would be applicable to all cases in which subrogation might be sought. There are, however, two conditions which must be present in most subrogation actions before the party seeking subrogation will be accorded relief: first, there must exist a debt or obligation for which persons other than the complainant are primarily liable; second, the debt or obligation must be paid in full.<sup>7</sup>

### A. *Payment of One's Own Debts*

Subrogation is not available to one who pays a debt for which he is otherwise solely or primarily liable. Thus, an insurer, which was liable to an assignee of a term life insurance policy because of its failure to give the assignee an opportunity to convert such policy into ordinary life insurance, was found to have no right to subrogation against its insured's estate.<sup>8</sup>

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3. *Bruce v. McClure*, 220 F.2d 330 (5th Cir. 1955); *North v. Albee*, 155 Fla. 515, 20 So.2d 682 (1945); *Lovingood v. Butler Constr. Co.*, 100 Fla. 1252, 131 So. 126 (1930); *Boley v. Daniel*, *supra* note 2; *Ulery v. Asphalt Paving, Inc.*, 119 So.2d 432 (Fla. 1st Dist. 1960).

4. *Boley v. Daniel*, *supra* note 2.

5. *Dantzer Lumber & Export Co. v. Columbia Cas. Co.*, 115 Fla. 541, 156 So. 116 (1934); *Brogan v. Ferguson*, 101 Fla. 1306, 131 So. 171 (1930); *Marianna Nat'l Farm Loan Ass'n v. Braswell*, 95 Fla. 510, 116 So. 639 (1928); *Forman v. First Nat'l Bank*, 76 Fla. 48, 79 So. 742 (1918); *Washington Sec. Co. v. Tracy's Plumbing & Pumps, Inc.*, 166 So.2d 680 (Fla. 2d Dist. 1964).

6. *Meyer v. Levy*, 169 So.2d 340 (Fla. 3d Dist. 1964).

7. It has been stated that subrogation is not available to a mere volunteer. In practice, the "volunteer" concept is not a separate and distinct limitation upon the granting of relief through subrogation. It may more accurately be characterized as a shorthand method of stating that a complainant is not entitled to subrogation by operation of law merely because he paid the debt of another when he was under no obligation to do so and when he had no "right" in security premises which equity will recognize.

Generally speaking, a party making payment of another's debt is a volunteer if, in so doing, he has no right or interest of his own to protect, and acts without obligation, moral or legal, and without being requested by anyone liable on the obligation. *Trueman Fertilizer Co. v. Allison*, 81 So.2d 734, 736 (Fla. 1955).

8. *Traveler's Ins. Co. v. Tallahassee Bank & Trust Co.*, 133 So.2d 463 (Fla. 1st Dist. 1961).

### B. *Payment of the Entire Debt*

As a general rule, no decree of subrogation to the rights of a creditor will be granted until the creditor's claim against the principal debtor has been paid in full.<sup>9</sup> Until full payment, there can be no interference with the creditor's rights or securities which might prejudice him in the collection of the debt.<sup>10</sup> An exception to this general rule is that a claim of subrogation may be adjudicated when an action is brought upon another claim and the right to subrogation comes into existence by virtue of the principal decree. For example, in *Ulery v. Asphalt Paving, Inc.*,<sup>11</sup> the assignee of a life insurance policy which was assigned as collateral security for the debt of another, and the widow of the assignor, brought suit to determine their respective rights to the proceeds of the policy. The First District Court of Appeal held that if the insurer were required to pay the proceeds to the assignee, the trial court could then declare the widow of the assignor subrogated to the assignee's rights as against the party primarily liable on the debt.

A second exception was established by the Supreme Court of Florida in *Miami Mtg. & Guar. Co. v. Drawdy*.<sup>12</sup> When the endorser of a series of notes which are secured by a mortgage pays one of the notes, he becomes subrogated to the right of the holder of any of the remaining notes to foreclose, and may enforce such right without having to first pay off any remaining notes. No prejudice is deemed to result to the holder of later maturing notes since the foreclosure and sale of mortgaged premises for part of a mortgage debt does not exhaust the mortgage lien in Florida; the holder may foreclose as the remaining notes fall due. However, when a holder of later maturing notes intervenes in an endorser's foreclosure, such holder will be paid prior to the endorser if the proceeds of the mortgage sale are insufficient to pay both of their liens.<sup>13</sup>

A third exception may be said to exist in that a surety who makes partial payment may be reimbursed in a suit for exoneration, without paying his entire indebtedness. When a principal debtor has failed to discharge his obligation, his surety may bring suit for exoneration in equity seeking to compel the principal debtor to pay the creditor.<sup>14</sup> In such a case the surety may be given the benefit of any liens held by the creditor to the extent of any partial payment made by him to the creditor.<sup>15</sup>

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9. *Fowler v. Lee*, 106 Fla. 712, 143 So. 613 (1932); *Quinn Plumbing Co. v. New Miami Shores Corp.*, 100 Fla. 413, 129 So. 690 (1930); *Furlong v. Leybourne*, 138 So.2d 352 (Fla. 3d Dist. 1962).

10. *Marianna Nat'l Farm Loan Ass'n v. Braswell*, 95 Fla. 510, 116 So. 639 (1928).

11. 119 So.2d 432 (Fla. 1st Dist. 1960).

12. 99 Fla. 1092, 127 So. 323 (1930).

13. *Maryland Cas. Co. v. Orr*, 109 Fla. 184, 147 So. 271 (1933).

14. *Glades County v. Detroit Fid. & Sur. Co.*, 57 F.2d 449 (5th Cir. 1932).

15. *Ferguson v. Brogan*, 101 Fla. 1311, 133 So. 317 (1933).

### III. APPLICATIONS OF THE DOCTRINE

#### A. *Subrogation by Operation of Law*

While it has been stated that there is no limit to the circumstances in which courts may deem the doctrine of legal subrogation applicable,<sup>16</sup> the Florida courts have applied it most frequently in favor of sureties. A right to subrogation has also been declared in favor of co-obligors, indorsers of notes, purchasers at void judicial sales, and persons paying taxes and mortgages.

##### 1. SURETIES

A surety is subrogated, by operation of law, to the rights and securities of his creditor.<sup>17</sup> A surety who has satisfied his principal's debt is entitled to all securities which may have been given a creditor by the principal debtor.<sup>18</sup> Therefore, a surety on a contractor's performance bond is entitled to any funds retained in the hands of a property owner upon completing work abandoned by a contractor.<sup>19</sup> The surety's lien is superior to the claims of a money lender who takes an assignment of retained funds as security for a loan after the execution of the contractor's bond,<sup>20</sup> since the surety's lien comes into existence by operation of law when he agrees to be bound and is, therefore, first in time.<sup>21</sup> Accordingly, the requirement that the surety complete work abandoned by the contractor before he is entitled to a subrogation decree, does not mean that subrogation arises only upon completion of the work.<sup>22</sup>

A surety is subrogated to any right of action which the creditor may have. Thus it has been held that a surety on a fidelity bond of an employee is subrogated to the employer's right of action against public accountants for their negligence in failing to discover such employee's embezzlement.<sup>23</sup>

16. *Federal Land Bank v. Godwin*, 107 Fla. 537, 145 So. 883 (1933).

17. *Cuesta, Rey & Co. v. Newsom*, 102 Fla. 853, 136 So. 551 (1931). The equitable remedy of subrogation has found greater application in America than in England. In England, prior to modern legislation, if a surety paid on a contract which he had executed jointly with his principal debtor, or paid a judgment recovered against him and his principal jointly, the contract or judgment was thereby discharged and could not be enforced by him. He could become an equitable assignee only of collateral securities. 4 POMEROY, EQUITY JURISPRUDENCE 1072-1074 (5th ed. 1941).

18. *North v. Albee*, 155 Fla. 515, 20 So.2d 682 (1945).

19. *Broward County v. Continental Cas. Co.*, 243 F. Supp. 118 (S.D. Fla. 1965).

20. *Union Indem. Co. v. City of New Smyrna*, 100 Fla. 980, 130 So. 453 (1930).

21. *Standard Acc. Ins. Co. v. Bear*, 134 Fla. 523, 184 So. 97 (1938).

22. The court in *In re Bruce Constr. Corp.*, 217 F. Supp. 926 (S.D. Fla. 1963), stated that a surety's right to subrogation comes into existence only upon the completion of his work, but "somehow" relates back to the time of making of the surety agreement so as to be superior to the lien of an assignee from the principal debtor. Such a statement appears to be inaccurate and is obviously of no aid in determining why the surety's lien is superior.

23. *Dantzler Lumber & Export Co. v. Columbia Cas. Co.*, 115 Fla. 541, 156 So. 116 (1934).

The equitable doctrine of subrogation without agreement is applicable where one advancing money assumes the posture of a contractual surety.<sup>24</sup> Thus, the endorser of a note secured by a mortgage is subrogated to the right of the holder of the note to foreclose upon the mortgage debt upon payment of the note.<sup>25</sup> Moreover, a wife who joined her husband in executing a note and mortgage on homestead property as an accommodation so that the husband could pay a debt owed by him individually, has been held to be entitled to be subrogated to the rights of the creditor to foreclose the mortgage, provided that she paid the entire debt owed to the creditor.<sup>26</sup> And, a taxpayer who paid income taxes by certified check and was compelled to pay the taxes a second time because the certifying bank became insolvent before the check was presented for payment was held to be subrogated to the preference which the federal government is given as against general creditors, and thus entitled to priority in the distribution of the bank's resources.<sup>27</sup>

## 2. CO-OBLIGORS

An obligor who pays in full a debt upon which he is jointly and severally liable with other obligors is entitled to be subrogated to the rights of the creditor for the purpose of recovering the proportionate share of the debt owed by the other obligors. Thus, when a co-tenant of realty discharges a joint mortgage, which is the responsibility of both himself and another co-tenant, he is entitled to a lien upon his co-tenant's interest in the realty by way of subrogation in equity.<sup>28</sup> And a debtor who pays in full a judgment which is rendered by a court against himself and other jointly and severally liable debtors may maintain an action against his co-debtors seeking subrogation.<sup>29</sup>

A co-obligor's right to subrogation is especially valuable when a creditor has reduced his debt to a judgment. If the co-obligor has paid the entire debt, he may recover in *equity* even after the statute of limitations applicable to bringing a law action for contribution has expired, provided that the time set for the original creditor to enforce his judgment has not expired.<sup>30</sup>

Since each co-obligor is a principal as between himself and his creditor, it might appear that he should be denied subrogation under the rule that such remedy is not available to one who merely pays a debt for

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24. Griffin v. Orman, 9 Fla. 22 (1860).

25. Miami Mtg. & Guar. Co. v. Drawdy, 99 Fla. 1092, 127 So. 323 (1930).

26. Furlong v. Leybourne, 138 So.2d 352 (Fla. 3d Dist. 1962).

27. Cuesta, Rey & Co. v. Newsom, *supra* note 17.

28. Mechler v. Weiss, 80 So.2d 608 (Fla. 1955). However, the payor's right to recovery is limited to contribution; he is not entitled to fees for services of his attorney in a suit against his co-obligor.

29. North v. Albee, *supra* note 18.

30. *Ibid.*

which he primarily is liable.<sup>31</sup> However, relief is nonetheless granted because co-obligors are considered to be sureties as between themselves. Consequently, each joint debtor is regarded as a principal debtor for that portion of the debt which he should pay, and is considered secondarily liable for the shares of the other joint debtors.<sup>32</sup>

### 3. SELF-INTEREST

Subrogation by operation of law has not been limited to cases in which one has been *legally* required to pay another's debt. It has also been extended to persons who pay an encumbrance to protect an interest in mortgaged property. Thus, a junior mortgagee who paid taxes on mortgaged property to protect his lien was subrogated to the paramount government lien for the amount of the taxes paid—the lien acquired by subrogation is superior to that of a first mortgagee in the same premises.<sup>33</sup> And, a general creditor who redeemed tax certificates against lands that were assets of a dissolved corporation in which his debtor had been the principal stockholder was held to be entitled to the taxing authority's lien against the debtor's interest in such land.<sup>34</sup>

One who, in good faith and under a reasonable belief that such payment is necessary to protect an interest in mortgaged property pays a debt owed by another, may be subrogated to the rights of the mortgagee when it is later discovered that he had no interest to protect. The Supreme Court of Florida in *Hollywood, Inc. v. Clark*<sup>35</sup> indicated that such a person is entitled to subrogation provided that he has some relation to the property other than that brought about by a mere mistake as to its identity. For example, one who has paid taxes on land belonging to an adjoining owner in the belief that the land belonged to him should not be entitled to subrogation. On the other hand, one who has purchased land, but has failed to record the purchase, thereby rendering his title void as against subsequent recorded deeds, should be subrogated to the lien of the government for taxes paid in the good faith belief that he had good title.<sup>36</sup>

### 4. IMPERFECT JUDICIAL SALES

In Florida, absent a finding that payment was prompted by some obligation, legal subrogation has only been applied when property has been purchased at an imperfect judicial sale. The purchaser of mortgaged property at a foreclosure sale is subrogated to the rights of the mortgagee for whose benefit the sale is conducted when the proceedings are ir-

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31. See text accompanying notes 5 & 6 *supra*.

32. *North v. Albee*, *supra* note 18.

33. *Prudential Ins. Co. v. Baylarian*, 124 Fla. 259, 168 So. 7 (1936).

34. *Trueman Fertilizer Co. v. Allison*, 81 So.2d 734 (Fla. 1955).

35. 153 Fla. 501, 15 So.2d 175 (1943).

36. *Ibid.*

regular. He is entitled to bring suit de novo for foreclosure against all junior encumbrancers,<sup>37</sup> and owners<sup>38</sup> who were omitted as parties to the original foreclosure proceeding,<sup>39</sup> and the grantee or assignee of such purchaser is also entitled to subrogation.<sup>40</sup>

## 5. SUBROGATION OF CREDITORS

A creditor is entitled to the benefit of security received by a surety from his principal debtor. The Supreme Court of Florida applied this concept in the case of *Ferguson v. Brogan*,<sup>41</sup> where suit was brought by a vendor of realty against his vendee, who had executed a note and mortgage on the premises sold, and against a subsequent vendee, who had assumed to save the original vendee harmless from liability on the note. The court held that the trial court could decree that the original vendor was entitled to foreclose his mortgage upon the premises held by the second vendee if it should first decree that the original vendee was liable.

### B. *Conventional Subrogation*

According to the principles of conventional subrogation, a third person who pays off, or furnishes money to pay off, an encumbrance on property may acquire the right of subrogation by virtue of an agreement to that effect.<sup>42</sup> In Florida, conventional subrogation has been primarily employed to give one who at the request of a mortgagor pays off a first mortgage, the same priority against intervening liens as the paid mortgagee.

In *Boley v. Daniel*,<sup>43</sup> the Supreme Court of Florida held that subrogation will not be decreed in favor of a stranger who lends money to satisfy the lien of a first mortgagee unless an express agreement is made providing that the rights of the mortgagee should be kept alive for the benefit of the lender. The court has subsequently retreated from the proposition that a subrogation agreement cannot be implied.

The rule of civil law which required an absolute and express agreement for subrogation is modified by the generally accepted view that it is not necessary that there be an express agreement that the lien shall be kept alive for the benefit of one advancing

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37. *Quinn Plumbing Co. v. New Miami Shores Corp.*, 100 Fla. 413, 129 So. 690 (1930); *Meyer v. Florida Home Finders*, 90 Fla. 128, 105 So. 267 (1925).

38. *Key West Wharf & Coal Co. v. Porter*, 63 Fla. 448, 58 So. 599 (1912).

39. If the sale is set aside, the purchaser acquires only the rights of a mortgagee in possession, and therefore is held accountable, for the benefit of the mortgagor or owner of the equity, for rents and profits received by him while in possession. *Bridier v. Burns*, 148 Fla. 587, 4 So.2d 853 (1941).

40. *Trueman Fertilizer Co. v. Lester*, 155 Fla. 338, 20 So.2d 349 (1944); *Crystal River Lumber Co. v. Knight Turpentine Co.*, 69 Fla. 288, 67 So. 974 (1915).

41. 101 Fla. 1311, 133 So. 317 (1933).

42. See text accompanying note 5 *supra*.

43. 72 Fla. 121, 72 So. 644 (1916).



money to pay it, but, if from all the facts and circumstances surrounding the transaction it is clearly to be implied that it was the intention of the parties that the person making the advances was to have security of equal dignity and position with that discharged, then equity will decree a subrogation.<sup>44</sup>

Implied agreements that a lender is to have the same security as the discharged mortgagee have been found where the mortgagor and lender agree that the lender is to have a "first mortgage" or "first lien" on mortgaged property.<sup>45</sup> A subrogation agreement has also been implied where a lender took a satisfaction of an old mortgage and issued a new mortgage to secure his loan "all in one and the same transaction."<sup>46</sup> However, since subrogation is grounded in equitable principles, an agreement will not be implied if to do so would prejudice the rights of another.<sup>47</sup> The so-called "right" of subrogation is, therefore, not inherent in a subrogation contract, but rather arises in equity and is thereby granted or withheld as the equities of each case may demand. Thus, a lender who made no reasonable effort to determine the existence of outstanding liens, and who did not fall victim to false representations to the effect that there were no outstanding liens, was denied equitable relief.<sup>48</sup>

#### IV. SUBROGATION OF INSURERS

##### A. *In General*

An insurer which has agreed to indemnify a property owner against damages caused by the tortious acts of others becomes subrogated to its insured's rights against the wrongdoer upon satisfaction of its insured's claim.<sup>49</sup> Since an insurer is obligated to pay the damages caused by a tort-feasor, its right to recover rests upon the doctrine of subrogation by operation of law;<sup>50</sup> it is dependent neither upon a formal assignment to it of the insured's rights by a clause in the policy<sup>51</sup> nor upon the assignment by the insured of his rights upon receipt of payment for damages.<sup>52</sup>

44. *Lovingood v. Butler Constr. Co.*, 100 Fla. 1252, 1267, 131 So. 126, 131 (1930); *Forman v. First Nat'l Bank*, 76 Fla. 48, 79 So. 742 (1918).

45. *Federal Land Bank v. Deckle*, 108 Fla. 555, 148 So. 756 (1933); *Washington Sec. Co. v. Tracy's Plumbing & Pumps, Inc.*, 166 So.2d 680 (Fla. 2d Dist. 1964).

46. *Schilling v. Bank of Suphur Springs*, 109 Fla. 181, 147 So. 218 (1933).

47. *Boley v. Daniel*, *supra* note 43.

48. *Ibid*; *Boley v. Daniel*, 72 Fla. 121, 72 So. 644 (1916).

49. *Florida Pub. Util. Co. v. Wester*, 150 Fla. 378, 7 So.2d 788 (1942); *Dantzer Lumber & Export Co. v. Columbia Cas. Co.*, *supra* note 23.

As in other areas of subrogation, an insurer is not entitled to relief until he has fully paid the debt of another. *Federal Ins. Co. v. Tamiami Trial Tours, Inc.*, 117 F.2d 794 (5th Cir. 1941).

50. *Atlantic Coastline R.R. Co. v. Campbell*, 104 Fla. 274, 139 So. 886 (1932).

51. *Firestone Serv. Stores v. Wynn*, 131 Fla. 94, 179 So. 175 (1938).

52. *Morgan v. General Ins. Co.*, 181 So.2d 175 (Fla. 1st Dist. 1965); *Scott v. Rosenthal*, 118 So.2d 555 (Fla. 3d Dist. 1960).

It is immaterial to an insurer's right to recover that a cause of action in tort is not assignable by contract, because the insurer's right to subrogation is grounded in equitable, rather than express, assignment.<sup>53</sup>

### B. *Enforcement of an Insurer's Right of Subrogation*

#### 1. EXPRESS ASSIGNMENT OF AN INSURED'S RIGHTS

In Florida a property insurer which enters into an express subrogation agreement with its insured may proceed independently against a wrongdoer who has caused both personal injury and property damage to the insured. This is true, notwithstanding the fact that the insured has previously instituted an action against the wrongdoer for personal bodily injury.<sup>54</sup> The reason for the general rule against splitting causes of action is that only one cause of action results from a single tortious act which inflicts injury upon both a person and his property.<sup>55</sup> An insurer which is expressly assigned its insured's rights to property damages, is nonetheless deemed entitled to bring a subsequent suit on a theory that the insurer is a different party than its insured.<sup>56</sup>

#### 2. EQUITABLE ASSIGNMENT OF AN INSURED'S RIGHTS WITHOUT EXPRESS ASSIGNMENT

Still another question is whether a property insurer may sue a wrongdoer independently, when it does not receive an express subrogation agreement from its insured? In *Morgan v. General Ins. Co. of Am.*,<sup>57</sup> the court concluded that an insurer's right to proceed independently can only arise out of an express assignment by its insured; the insurer's equitable right to subrogation does not in itself enable it to proceed independently. If that be true, the only apparent recourse of a property insurer which does not procure an express assignment to protect its equitable right of subrogation is to intervene when its insured sues either for personal injuries or for property damage which are not covered by the insurance contract.

If an insurer intervenes and makes common cause with its insured, it is then entitled to precedence over any claim its insured may have. Thus, it has been held that when the insured and insurer jointly agree to compromise with a tort-feasor for less than the full value of their combined claims, the insurer is entitled to the full amount of its claim out of settlement monies, and the insured is entitled only to the excess.<sup>58</sup> Such a result appears to be unduly harsh upon an insured in view of the fact

53. Atlantic Coastline R.R. Co. v. Campbell, *supra* note 50.

54. Rosenthal v. Scott, 150 So.2d 433 (Fla. 1963) (*on rehearing*).

55. Gaynor v. Statum, 151 Fla. 793, 10 So.2d 432 (1942).

56. Rosenthal v. Scott, *supra* note 54.

57. 181 So.2d 174, 178 (Fla. 1st Dist. 1965) (dictum).

58. *Ibid.*

that when an insurer and insured jointly compromise their claims it can be implied that they intend to share any reduction in their claims pro rata.

### 3. LOAN RECEIPT AGREEMENTS

The rule against splitting a cause of action further prohibits an insured from bringing suit for the benefit of an insurer pursuant to the terms of a loan receipt agreement, once the insured has obtained judgment for personal injuries arising out of the same tort.<sup>59</sup> The reason for this rule is that a loan receipt agreement does not create a right in an insurer to bring suit in its own name, and, therefore, it is considered to be the same party as its insured.<sup>60</sup>

### 4. INSURER'S REFUSAL TO JOIN SUIT WITH ITS INSURED

In the absence of a subrogation agreement, the insurer may intervene as a party-plaintiff in any suit brought by its insured against a wrongdoer for damages not covered by the policy of insurance.<sup>61</sup> Conversely, the insured may join the insurer in such a suit. If the insurer refuses to make a common cause with its insured after a reasonable request to do so and the latter compromises his claim for less than his full loss, the insured is entitled to recoup the amount lost due to his compromise as well as his reasonable expenses of suit from the subrogation claim of the insurer.<sup>62</sup>

## C. Defenses Available to a Wrongdoer

### 1. INSURER UNDER NO DUTY TO PAY

The equities between an insurer and its insured are of no concern to a wrongdoer. Therefore, if an insurer chooses to pay the claim of its insured without litigation, the fact that it might have successfully contested the claim under the policy and relieved itself of liability is not a defense available to a tortfeasor.

The tort-feasor may, however, raise the issue that there was in fact no policy of insurance in an effort to prove that the insurer had no duty to pay and was therefore not entitled to subrogation by operation of law.<sup>63</sup> In such a case, the insurer need not introduce the policy into evidence—parol evidence is admissible to prove its existence.<sup>64</sup>

The distinction between the subject matter limitations of a policy on the one hand, and the conditions upon the insured's recovery on the

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59. *Mims v. Reid*, 98 So.2d 498 (Fla. 1957).

60. *Rosenthal v. Scott*, *supra* note 55.

61. *Florida Pub. Util. Co. v. Wester*, *supra* note 49.

62. *Forsyth v. Southern Bell Tel. & Tel. Co.*, 162 So.2d 916 (Fla. 1st Dist. 1964).

63. *Firestone Serv. Stores v. Wynn*, *supra* note 51.

64. *Ibid.*

other, are crucial in determining whether an insurer is entitled to subrogation. If a risk is within the coverage of an insurance policy, the tort-feasor is clearly precluded from showing that a condition to recovery has not been met since the equities between the insurer and its insured are not a defense available to the tort-feasor. However, if a cause is excepted from coverage, or if the subject matter damaged is excluded from coverage, the insurer will not be allowed subrogation since a contract of insurance never existed as to such subject matter. For example, a tort-feasor can defeat an insurer's claim for recovery by proving that the insurance policy under which the insurer seeks a right of legal subrogation excludes intentional torts from coverage, and that the injury complained of was intentionally inflicted. The tort-feasor is allowed to demonstrate that the insurer is not entitled to legal subrogation because no insurance policy was issued as to the subject matter in question, then the insurer should be precluded from recovery despite any express assignment to it of the insured's right to recover, since an express assignment of a tort action is not recognized unless grounded in an equitable assignment.<sup>65</sup>

## 2. RELEASE BY THE INSURED

The insured's release of a wrongdoer from liability defeats the insurer's right to subrogation unless the wrongdoer has knowledge of the insurer's right of subrogation at the time of the release.<sup>66</sup> Mere notice to the tort-feasor that the insurer "looks to him" for reimbursement has been held insufficient to stop a tort-feasor from asserting the defense of release by the insured in a subrogation action brought by an insurer. The tort-feasor must have actual knowledge that the insurer's right to subrogation was perfected by the insurer's payment in full of its insured's claim.<sup>67</sup>

## 3. SUBROGATION WOULD DEFEAT THE RIGHTS OF AN INSURED

There is no room to subrogate an insurer to the rights of an insured when such subrogation would defeat the rights of another insured who is protected under the same policy. In *Federal Ins. Co. v. Tamiami Tours, Inc.*,<sup>68</sup> an insurance company undertook to insure both the purchaser and seller of a bus against damage to the bus. The Fifth Circuit Court of Appeal held that the insurer was not entitled to the purchaser's right to sue for rescission of the contract of purchase when the insured property was destroyed due to the negligence of the seller.

The rule that an insurer cannot maintain a subrogation suit against its own insured has, strangely enough, precluded an insurer from recover-

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65. See text accompanying note 53 *supra*.

66. *Dantzler Lumber & Export Co. v. Columbia Cas. Co.*, *supra* note 23.

67. *National Sur. Corp. v. Bimonte*, 143 So.2d 709 (Fla. 3d Dist. 1962).

68. 117 F.2d 794 (5th Cir. 1941).

ing against a tort-feasor when it did not undertake to insure the tort-feasor. In *Smith v. Ryan*,<sup>69</sup> a contract between a building contractor and a homeowner called for the owner to maintain fire insurance to protect the interests of both parties. The owner had insurance to protect her own interest but negligently failed to purchase insurance covering the contractor's interests. In an action by the insured owner for the benefit of its insurer against the contractor whose negligence allegedly caused a fire which damaged the premises, the Second District Court of Appeal held that the failure of the owner to fulfill her contractual duty to insure the tort-feasor's interest precluded recovery by the owner for the benefit of the insurer. The court reasoned that the owner's negligence caused her to become an insurer, in equity, of the contractor. Therefore, the insurer could not maintain a subrogation action against the contractor since this would amount to maintaining an action against its own insured. Clearly, the court considered the insurance company and the homeowner as the same party since the suit was brought by the insured for the benefit of its insurer.<sup>70</sup> The right of an insurer to subrogation against a third party tort-feasor does not rest upon any relation of contract or privity between the insurer and such tort-feasor, but arises out of the contract of insurance and is derived from the insured alone. Therefore, an insurer can take nothing by subrogation except the rights of its insured and is subject to any defenses which are available to the tort-feasor as against the insured.<sup>71</sup> An insurance company would be in a better position if it procures an express assignment of the insured's rights and sues in its own name, in which case, it would not be considered the same party as its insured. However, it would be subject to any defenses available against its insured.

## V. STATUTORY SUBROGATION

### A. *Persons Secondarily Liable on a Negotiable Instrument*

Florida Statutes, section 46.11, authorizes one seeking payment of a negotiable instrument to join in a single action the maker of the instrument and all other persons who have become secondarily liable for payment of the instrument at or before its execution and delivery. If the plaintiff-holder in such an action reduces his claim to judgment and the claim is paid by one who is secondarily liable, then the holder must assign his rights under the judgment to the payor at the payor's request. The payor may then enforce the judgment against the maker of the instrument in an action at law.<sup>72</sup> However, section 46.11 codifies only one

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69. 150 So.2d 433 (Fla. 1963).

70. See note 60 *supra* and accompanying text.

71. *Atlantic Coastline R.R. Co. v. Campbell*, 104 Fla. 274, 139 So. 886 (1932); *Dickerson v. Orange State Oil Co.*, 123 So.2d 562 (Fla. 2d Dist. 1960); *United States Cas. Co. v. Town of Palm Beach*, 119 So.2d 800 (Fla. 2d Dist. 1960).

72. FLA. STAT. § 46.11 (1965).

facet of the principle of subrogation. Thus a person who is secondarily liable on a note may not bring an action at law under the statute against another who is also merely secondarily liable. In such a case he must resort to an action in equity for subrogation.<sup>73</sup>

### B. *Uninsured Motorist Statute*

Florida Statutes, section 627.0851(1) prohibits insurers from issuing policies covering liability arising out of the use of any motor vehicle which is registered or principally garaged in Florida unless such policy also offers to those persons insured thereunder certain additional minimum protection from bodily injury caused by uninsured motor vehicles.<sup>74</sup> An insurer who makes payment to one protected under uninsured motorist coverage is granted limited subrogation to its insured's rights against the uninsured motorist. It is "entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery [by an insured] against any person or organization legally responsible for the bodily injury for which such payment is made."<sup>75</sup>

### C. *Workmen's Compensation Law*

#### 1. SUIT BROUGHT BY AN EMPLOYEE AGAINST A THIRD PARTY TORTFEASOR

The Florida Workmen's Compensation Act permits an injured employee (or his dependents) to claim compensation benefits and, at the same time, to institute suit in his own name for his own benefit against third party tortfeasors who may be responsible for his injuries, or in his name for the use and benefit of his workmen's compensation insurance carrier<sup>76</sup> within one year from the time that his cause of action accrues.<sup>77</sup>

The Act grants a limited right of subrogation to an insurance carrier when an employee or his dependents accept or begin proceedings for compensation:

Upon suit being filed [by an employee or his dependents against a third party tortfeasor] the . . . insurance carrier . . . may file

73. *Freed v. Guiliani*, 164 So.2d 234 (Fla. 2d Dist. 1964).

74. The statute was enacted to afford members of the public the same protection that they would have if an uninsured vehicle whose driver is at fault in a collision with an insured vehicle had carried the minimum limit of public liability coverage. *Chandler v. Government Employees Ins. Co.*, 342 F.2d 420 (5th Cir. 1965).

75. FLA. STAT. § 627.0851(4) (1965).

76. FLA. STAT. §§ 440.39(1), (3)(a) (1965).

The words "workmen's compensation carrier" as used herein include employers who are self-insurers.

The injured party is not required to bring suit for the use and benefit of his insurance carrier. If he sues for his own benefit, he may exclusively control his lawsuit and his insurance carrier may not intervene as a party-plaintiff. *Fidelity & Cas. Co. v. Bedingfield*, 60 So.2d 489 (Fla. 1952).

77. FLA. STAT. § 440.39(4) (1965).

in the suit a notice of payment of compensation and medical benefits paid to the employee or his dependents which said notice shall be recorded and the same shall constitute a lien upon any judgment recovered to the extent that the court may determine to be [its] pro rata share for compensation benefits paid or to be paid . . . based upon such equitable distribution of the amount recovered as the court may determine, less [its] pro rata share of all court costs expended by the plaintiff in the prosecution of the suit including reasonable attorney's fees for the plaintiff's attorney.<sup>78</sup>

The Supreme Court of Florida has rejected the use of any precise formula for determining "pro rata share" in distributing a judgment.<sup>79</sup> Where an employee compromises his claim with a tortfeasor or where a jury returns a judgment, the ratio of the amount received by the employee to the amount which a court determines he should have received to make him whole, is not binding upon the court in its determination of the percent of total compensation payments which should be reimbursed to a compensation carrier. The distribution in each case depends upon its particular circumstances<sup>80</sup> and is discretionary with the trial court.<sup>81</sup> It may be proper for a court to order a carrier to be reimbursed in full,<sup>82</sup> or not at all.<sup>83</sup>

In determining the portion of a judgment or compromise which should be paid to carriers it is error for a trial court to ignore medical benefits paid and to be paid.<sup>84</sup> This is true despite the fact that section 440.39(3)(a) lists "medical benefits" and "compensation benefits" as separate items for the purpose of filing notice, and subsequently lists only "compensation benefits" for consideration in determining the pro rata share of the recovery for which the carrier may be reimbursed. However, an insurance carrier is not entitled to have funeral expenses included as an item to be considered in distributing monies recovered from a tort-feasor.<sup>85</sup>

A trial court was found to have abused its discretion when it failed to charge an insurance carrier with any part of the court costs incurred by an employee in bringing suit against a tort-feasor.<sup>86</sup> A carrier is not required to pay a pro rata share of the amount which an employee has contracted to pay his attorney if, in its sound discretion, the trial court

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78. FLA. STAT. § 440.39(3)(a) (1965).

79. *Arex Indem. Co. v. Radin*, 72 So.2d 393 (Fla. 1954).

80. *Luby Chevrolet, Inc. v. Foster*, 177 So.2d 510 (Fla. 3d Dist. 1965).

81. *Arex Indem. Co. v. Radin*, *supra* note 79; *Security Mut. Cas. Co. v. Grice*, 172 So.2d 834 (Fla. 2d Dist. 1965); *Hartford Acc. & Indem. Co. v. McNair*, 152 So.2d 805 (Fla. 1st Dist. 1963).

82. *Baughman v. Aetna Cas. & Sur. Co.*, 78 So.2d 694 (Fla. 1955).

83. *United States Fid. & Guar. Co. v. Harb*, 170 So.2d 54 (Fla. 3d Dist. 1964).

84. *Hartford Acc. & Indem. Co. v. McNair*, *supra* note 81.

85. *Ibid.*

86. *Baughman v. Aetna Cas. & Sur. Co.*, *supra* note 82.

determines reasonable attorney's fees to be less than the contracted amount.<sup>87</sup> The statute does not appear to contemplate a situation in which an employee allows his insurance carrier to aid in his suit against a tort-feasor. Where a cause is jointly handled by separate attorneys for the employee and carrier, equitable considerations require that each counsel look to his own client for any fees to which he is entitled.<sup>88</sup> The subrogated interest of a workman's carrier extends to all compensation paid and to be paid for the benefit of a widow and minor children. Thus it is not error to require a widow to reimburse the carrier for sums paid for the benefit of minor children out of funds received by her for her individual losses in a judgment against a third party tort-feasor.<sup>89</sup>

## 2. THE COMPENSATION CARRIER'S RIGHT TO BRING SUIT

If an injured employee or his dependents fail to bring suit against a third party tort-feasor within one year after the cause of action has accrued, the insurance carrier may institute such a suit. From any judgment recovered or settlement made, the carrier is subrogated to:

All amounts paid as compensation and medical benefits . . . and the present value of all future compensation benefits payable, . . . to be retained as a trust fund from which future payments of compensation are to be made, together with all court costs, including attorney's fees expended in the prosecution of . . . suit, to be pro rated as provided by subsection (3) of this section.<sup>90</sup>

It is error for a trial court to award an insurer anything less than the full amount which he has paid in compensation and medical benefits plus the present value of future compensation benefits payable.<sup>91</sup>

An insurer which brings an action under section 440.39(4) is placed in the shoes of its insured and is, therefore, subject to the four year statute of limitation applicable to recovery of damages for negligent causation of injuries, rather than the three year statute of limitation which is applicable to liabilities created by statute.<sup>92</sup>

## 3. DEFEATING THE RIGHTS OF A COMPENSATION CARRIER

An insurance carrier which brings suit against a third party tort-feasor, upon the failure of an injured employee to do so, is granted *only* those rights possessed by the injured employee and any defenses which would be available to the tort-feasor as against the employee are also available as against the insurer. Paradoxically, statutory limitations pre-

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87. *Ibid.*

88. *General Guar. Ins. Co. v. Moore*, 143 So.2d 541 (Fla. 2d Dist. 1962).

89. *Pursell v. Sumter Elec. Co-op., Inc.*, 169 So.2d 515 (Fla. 2d Dist. 1964).

90. FLA. STAT. § 440.39(4)(a) 1965.

91. *General Guar. Ins. Co. v. Moore*, *supra* note 88.

92. *Dickerson v. Orange State Oil Co.*, 123 So.2d 562 (Fla. 2d Dist. 1960).



clude a compensation insurer from ever bringing suit against a city for any negligent or wrongful injury to a workman. Florida Statutes, section 95.24, limits the bringing of suit to within twelve months from the time of the injury; antithetically, the Workmen's Compensation Act does not allow an insurer to bring suit until more than one year after the time of injury.

Once an employee or his dependents file suit against a tort-feasor, and the compensation carrier files notice of its expenditures in a definite amount, if the employee or his dependents then settle in reliance upon the insurer's notice of expenditures, the insurer is thereafter estopped to amend its notice to assert payment of a greater amount.<sup>93</sup>

An employee's release of a tort-feasor's liability after a carrier has paid compensation does not bar the subrogation rights of the carrier if the tort-feasor has actual knowledge of the subrogation rights which the carrier may have against him at the time of execution of such release.<sup>94</sup> A tort-feasor is charged with constructive notice of a carrier's statutory subrogation rights if he has knowledge that the injured workman was acting within the scope and course of his employment at the time of injury and is, therefore, subject to the subrogation rights of the carrier despite the execution of a release,<sup>95</sup> at least where such release is given after the carrier has paid some workmen's compensation benefits.<sup>96</sup> It is unclear, however, whether an injured employee's release of a tort-feasor prior to the time that such employee begins proceedings for or receives workmen's compensation benefits bars the subrogation rights of a carrier. In *Russell v. Shelby Mut. Ins. Co.*,<sup>97</sup> the Third District Court of Appeal, held that if the workman has no remedy at the time that the carrier makes its first payment or at the time that the workman institutes proceedings for compensation benefits due to his release of the tort-feasor from liability, then his carrier also has no remedy. A release under such circumstances bars the carrier from recovery on the ground that the insurer is substituted for a workman with reference to the workman's rights only upon payment of compensation<sup>98</sup> or upon an employee's institution of proceedings for compensation benefits.

Section 440.39(2) has since been amended to provide that an insurer shall be subrogated to the extent of the amount of compensation benefits *paid or payable*, and a section has been added which provides that a suit for pro rata distribution may be brought if an insurer has given written notice of his rights of subrogation to a tort-feasor before settlement of an

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93. Hartford Acc. & Indem. Co. v. McNair, *supra* note 81.

94. Dade County v. Michigan Mut. Liab. Co., 130 So.2d 111 (Fla. 3d Dist. 1961).

95. Dickerson v. Orange State Oil Co., *supra* note 92.

96. Shelby Mut. Ins. Co. v. Russell, 137 So.2d 219 (Fla. 1962).

97. 128 So.2d 161 (Fla. 3d Dist. 1961).

98. FLA. STAT. § 440.39(2) (1965) provides that an insurer shall be subrogated to the extent of the amount of compensation benefits *paid or payable*.

employee's claim is made.<sup>99</sup> The Supreme Court of Florida has indicated that *Russell* might still be good law despite the fact that the changes in section 440.39 "indicate strongly that the failure to provide for subrogation [where an employee settles with a tort-feasor before taking steps to recover workmen's compensation benefits] was an oversight."<sup>100</sup>

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99. FLA. STAT. § 440.39(3)(b) (1965).

100. *Shelby Mut. Ins. Co. v. Russell*, *supra* note 96, at 222.