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Subrogation in Insurance Contracts

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INTRODUCTION

This article seeks to clarify the term "subrogation" and what this means to you as the insured, for the purpose of an insurance contract. The central topics of discussion in this article are, primarily, what subrogation is, the doctrine of subrogation under English law, the insurers right to subrogation and the requirements for subrogation.

In basic terms, an insurance contract entitles the insured to indemnity against a valid insured loss, subject to the terms outlined in the insurance contract.

In instances where a third party has either caused or contributed to the loss suffered by the insured and is legally liable to compensate the insured for that damage, once the insurer has indemnified the insured, the insurer will be entitled to step into the proverbial shoes of the insured in relation to the recovery to be pursued against the third party.

This will allow the insurer to claim damages in the name of the insured in order to recover the amount paid to the insured in terms of the insurance contract. This concept of transferring of rights to the insurer is known as subrogation and will be explained hereunder.

THE DOCTRINE OF SUBROGATION

The doctrine of subrogation, as established under English law, is founded on the avoidance of unjustified enrichment of the insured to the detriment of the insurer and on the principle of equality.

It can be simply described as the substitution of one party for another or the insurer "stepping into the shoes" of the insured and describes the legal right that provides for the reimbursement of an insurer that has previously indemnified an insured in accordance with the terms provided for in the insurance contract.

THE INSURER'S RIGHT TO SUBROGATION

Insurance contracts are automatically subject to the doctrine of subrogation and, furthermore, subrogation applies to all rights that an insured may have against a third party, as long as those rights serve to compensate the insured for the loss which he/she has already been indemnified against by the insurer.

The precedent for the indemnity principle in insurance law that founds the doctrine of subrogation can be seen in the case of Castellain v Preston (1883) 11 Q.B. 380, whereby an insured who had contracted to sell a property, instituted a claim under a fire insurance policy with his insurer when the property was damaged by fire prior to the sale. The purchaser nevertheless paid over the purchase price to the insured and the insured found himself unjustifiably enriched.

The insured argued that the money paid to him by the insurers was irrelevant to the fact that the purchaser honoured the contract and paid across the purchase price. He further argued that even if the money received due to the sale of the property was not irrelevant, that it did not impact his right to claim the insurance monies as a result of the fire.

The court held that the insured was not entitled to obtain both the indemnity and the sale proceeds and that the sale proceeds should be transferred to the insurer. In adopting this judgement, the court advised that the insurer was not only entitled to adopt the insured's rights against a third party, who is delictually or contractually liable for his/her loss but would also be entitled to the advantage of any other right, provided that same served as a total or partial substitution of the asset in question, namely, the purchase price of the property.

REQUIREMENTS FOR SUBROGATION

Pursuant to the above, an insurer may only subrogate the rights of an insured if all of the following requirements of subrogation are met:

- a valid and enforceable contract must exist between the insurer and the insured, fulfilling the requirements of consensus, legality, formalities, possibility, capacity and certainty, as under the law of contract.
- the insurer must have fully indemnified the insured by admitting liability in respect of the claim and by paying the insured the full quantum due to him/her as provided for in the insurance contract.
- the insured must be fully compensated by the insurer for his/her loss before any claim can be made by the insurer to any monies recovered by an insured.

CONCLUSION

The doctrine of subrogation is a valid and enforceable part of South African insurance law and is applicable to both the insured's rights against a third party, whether it be under the law of delict or contract, and to rights that have been wholly or partially substituted. As such, it is important that members of the public that enter into contracts of insurance understand this right and act in accordance with same in a manner that does not prejudice the insurer's rights.

Failing to properly appreciate and apply the doctrine of subrogation can prove prejudicial to an insured as, case dependant, this could result in the insurer either claiming the return of any payment made by themselves to the insured based on unjustified enrichment or alternatively could possibly result in the insurer rejecting the claim of the insured party.

Insurance law is complex and can be easily misunderstood. If you are in doubt as to whether your insurer has a valid right of subrogation, speak with your attorney for clarity.

Kindly contact the authors of this article on 011 568 8500 for more information.

Please note: this article is for general public information and use. It is not to be considered or construed as legal advice. Each matter must be dealt with on a case-by-case basis and you should consult an attorney before taking any action contemplated here.

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