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INSURER SUBROGATION IN WISCONSIN: THE GOOD HANDS (OR A NEIGHBOR) IN ANOTHER'S SHOES

JOHN J. KIRCHER*

I. INTRODUCTION

Early in the development of Wisconsin jurisprudence, it became established principle that when a fire insurer paid its insured for a loss covered by its policy it had a right of action against the person who wrongfully caused the loss, without the need for any formal assignment of the insured's claim against the wrongdoer.¹ The Wisconsin Supreme Court later explained the doctrinal foundation for this principle of insurer subrogation as follows:

The doctrine aforesaid is based on the theory that in a contract of fire insurance the company is a surety, and so upon the general equitable principles of subrogation when it, as indemnitor, pays a loss caused by the negligence of a third person its relation with such person is that of surety and principal obligor. It has all the rights against the latter which the principal creditor, so to speak, formerly had. The insured has one claim which he can enforce against either party, but he can have but one satisfaction, and the party primarily liable is relievable only by assuming the burden.²

There are those who claim that insurer subrogation is nothing more than a useless, wasteful exercise of trading dol-

* Professor of Law, Marquette University. The author wishes to acknowledge, with deep gratitude, the helpful comments of Professors James D. Ghiardi and Christine M. Wiseman on earlier drafts of this article, and the research assistance of Jane Davis Weida, Marquette University Law School, Class of 1989.

1. *Wunderlich v. Chicago & N.W. Ry.*, 93 Wis. 132, 66 N.W. 1144 (1896); *Hustisford Farmers' Mut. Ins. Co. v. Chicago, Milwaukee & St. Paul Ry.*, 66 Wis. 58, 28 N.W. 64 (1886); *Swarthout v. Chicago & N. W. Ry.*, 49 Wis. 625, 6 N.W. 314 (1880). These early cases, which involved fire losses resulting from the proclivity of locomotives of the time to emit burning embers from their smokestacks, would surprise no one familiar with nineteenth century railroading.

2. *Gatzweiler v. Milwaukee Elec. Ry. & Light Co.*, 136 Wis. 34, 36, 116 N.W. 633, 633 (1908). This is generally referred to as "legal" or "equitable" subrogation. COUCH ON INSURANCE 2D §§ 61:2, 61:3 (rev. ed. 1983).

lars among insurers who end up paying out as much to other insurers on these claims as they collect themselves.³ While the break-even assertion may well be true, subrogation does have one very important, beneficial function — loss reallocation. With subrogation, the loss falls upon the one who caused it to occur and not upon the insurance record of the one who sustained that loss. Without loss reallocation through subrogation, poor insurance risks would not disappear; they would merely be rendered anonymous in many cases.⁴

This article will trace the evolution of insurer subrogation law in Wisconsin over the past century and explore doctrinal problems in the current status of that law. At times the doctrinal developments have been somewhat bizarre and have caused considerable confusion for those who have sought to understand and apply the law.⁵ Yet of late, some clarity appears to have developed which may lead to easier understanding and application in the future.

II. THE LEGAL/CONVENTIONAL SUBROGATION DICHOTOMY

In the now-famous case of *Gatzweiler v. Milwaukee Electric Railway & Light Co.*,⁶ the supreme court made it clear that subrogation rights would not arise by operation of law each time any insurer paid its insured for a loss caused by another. *Gatzweiler* brought an action to recover for personal injuries which he claimed had been caused by the negligence of the defendant. The defendant answered in abatement that the plaintiff, when injured, possessed a policy of accident insurance to indemnify him against the type of injury he sus-

3. KEETON & O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 70 (1965). See also O'CONNELL, ENDING INSULT TO INJURY - NO FAULT INSURANCE FOR PRODUCTS AND SERVICES 77 (1975); FERREIRA, QUANTITATIVE MODELS FOR AUTOMOBILE ACCIDENTS AND INSURANCE 6 (1970); Denenberg, *Subrogation Recovery: Who Is Made Whole?*, 29 FED'N INS. COUNS. Q. 185 (1979); Ghiardi, *The Collateral Source Rule: Multiple Recovery in Personal Injury Actions*, 535 INS. L. J. 457, 463 (1967).

4. Meyers, *Subrogation Rights and Recoveries Arising Out of First Party Contracts*, 9 FORUM 83, 84 (1973).

5. It also has not been a stroll in the park for those of us who have tried to teach the subject.

6. 136 Wis. 34, 116 N.W. 633 (1908).

tained and that the insurer had paid the plaintiff \$2,500 because of that injury. The defendant asserted, therefore, that the plaintiff's insurer was subrogated to the plaintiff's right of action against the defendant to the extent of the amount it had paid, and that the action could not properly proceed without the presence of that insurer.

The court, without articulating the details of the policy provisions, characterized the policy as being in the nature of an "investment contract," such as life insurance, where "[t]he amount stipulated to be paid is a fixed sum as to each particular injury specified or is computable without any such definite data as in [the] case of the loss of property."⁷ The court concluded that subrogation would arise as a matter of law with respect to indemnity contracts of insurance, only upon payment to the insured, and that with investment policies, no subrogation rights would arise unless the parties to the contract "give it that character by a stipulation"⁸

The state of the law following *Gatzweiler* was such that fire insurance was considered an indemnity contract as to which legal (a/k/a equitable) subrogation would arise, as a matter of law, after the insurer made payment to the insured. Payment under accident insurance would create no subrogation rights for the insurer unless the parties to that insurance contract made it an indemnity contract by stipulation. Subsequently, the court ruled that automobile collision insurance is similar in principle to fire insurance and, as an indemnity contract, subrogation rights would flow from insurer payment as a matter of law.⁹ Liability insurance also was afforded the same treatment as an indemnity contract.¹⁰

Following *Gatzweiler*, the Wisconsin Supreme Court was predisposed to knee-jerk each time it encountered a subrogation issue in a case involving a policy which it characterized as "accident" insurance. It did so even with policies which provided reimbursement to the insured for actual medical and hospital expenses. The equation which the court adopted in

7. *Id.* at 37, 116 N.W. at 634.

8. *Id.* at 38, 116 N.W. at 634.

9. *Patitucci v. Gerhardt*, 206 Wis. 358, 361, 240 N.W. 385, 386 (1932).

10. *Frankfort Gen. Ins. Co. v. Milwaukee Elec. Ry. & Light Co.*, 169 Wis. 533, 173 N.W. 307 (1919) (as to the insured's contribution claim against another tortfeasor, and even though the policy contractually provided for subrogation).

these cases appeared to be: "accident" insurance equals "investment contract" equals no legal subrogation. Much has changed in the insurance business in the almost eighty years since *Gatzweiler*. So-called "accident" policies now referred to as "accident and health" policies contain provisions to indemnify the insured for actual losses sustained. Personal lines policies such as auto and homeowner's insurance contain medical payment provisions to do the same. Modern surgical/hospital coverages, the majority of which are underwritten on a group basis, were unheard of during the *Gatzweiler* era. Health Maintenance Organizations (HMO's), Preferred Provider Options (PPO's) and their kind have dramatically altered basic concepts of insuring health care delivery. Each indemnifies the insured for actual expenses incurred. The court, until very recently, has been oblivious to these changes.

As late as 1967, almost sixty years after *Gatzweiler*, the court appeared unaware of the indemnity feature of some modern insurance coverages. In the case of *Associated Hospital Service, Inc. v. Milwaukee Automobile Mutual Insurance Co.*,¹¹ the court was concerned with a subrogation claim by the insurer of an automobile accident victim. The insurer (Blue Cross) paid \$479.75 for the medical and hospital expenses of the injured victim. The policy contained a contractual subrogation provision, and the case was concerned with the validity of that conventional subrogation agreement.¹² Nevertheless, one would have expected the court to find that this was an indemnity contract, unlike the investment-type accident policy in *Gatzweiler*, and to rule that the absence or presence of a subrogation provision in the policy was irrelevant to the rights of the insurer.

The court again employed this form-over-substance approach in 1978 in the case of *Rixmann v. Somerset Public Schools*.¹³ In that action, a son and his father sought damages resulting from injuries which the son sustained in a school ac-

11. 33 Wis. 2d 170, 147 N.W.2d 225 (1967).

12. The court found no Wisconsin cases "squarely on point," but relied on language from *Gatzweiler* concerning parties to the insurance contract who agreed to make the investment contract one of indemnity. *Id.* at 174. 147 N.W.2d at 227. See *Gatzweiler*, 136 Wis. at 38, 116 N.W. at 634 and text accompanying note 8. This is referred to as "contractual" or "conventional" subrogation. See *supra* note 2.

13. 83 Wis. 2d 571, 266 N.W.2d 326 (1978).

cident. The trial court refused to allow the father to recover the medical and hospital expenses that he incurred for his son, which expenses the father's health insurer paid. On appeal, the school district argued that the trial court was correct since the health insurer was subrogated to the father's claim to the extent of the amount it paid. As if reciting an ancient formula by rote, the Wisconsin Supreme Court reversed, invoking the old rule that "[a]n accident insurance policy, in the absence of an express provision in the policy to the contrary, is held to be an investment contract . . . [under which] the insurance company is not subrogated to the rights of the insured [upon payment]." ¹⁴

The court apparently believed that some of the confusion concerning subrogation resulted from an overly broad statement it had made in *Heifetz v. Johnson*:¹⁵ "Acceptance of payment from an insurer operates as an assignment of the claim to that extent whether or not the policy contains a subrogation agreement."¹⁶ In *Rixmann*, the court ruled that this language should not be viewed to suggest that subrogation always occurs when the injured party accepts an insurance payment.¹⁷ Lost from sight is the fact that *Gatzweiler* labeled the policy before it an investment contract, not because it was an "accident" policy, but because the benefit to be paid was fixed in advance of the insured's loss rather than computed after the loss and based upon the extent of that loss.

The *Rixmann* case presented a ray of hope, however, for those of us who ardently prayed for court enlightenment. The supreme court noted that in Wisconsin, the one seeking to prove subrogation has the burden of introducing evidence to that effect.¹⁸ In that regard it noted that the *Rixmann* insurance contract was never made part of the record. These statements obviously refer to the presence or absence of an express subrogation provision in the *Rixmann* policy. However, the

14. *Id.* at 582, 266 N.W.2d at 331-32 (citing *Patitucci*, 206 Wis. at 358, 240 N.W. at 386).

15. 61 Wis. 2d 111, 124, 211 N.W.2d 834, 841 (1973).

16. *Id.*

17. *Rixmann*, 83 Wis. 2d at 579, 266 N.W.2d at 330 (1978).

18. *Id.* at 582, 266 N.W.2d at 332 (citing *Karl v. Employers Ins.*, 78 Wis. 2d 284, 254 N.W.2d 255 (1977)); *Rennick v. Fruehauf Corp.*, 82 Wis. 2d 793, 264 N.W.2d 264 (1978).

concept of examining the policy when subrogation is at issue provided a key for developments in the law to follow.

The first development came in 1985, in the case of *Cunningham v. Metropolitan Life Insurance Co.*¹⁹ In *Cunningham*, the court gave further emphasis to the importance of examining the policy provisions to determine an insurer's subrogation rights. Cunningham's daughter was seriously injured in an automobile accident. She was hospitalized for her injuries and died four months following the accident. Cunningham, along with his dependents, was covered under a group insurance policy with Metropolitan issued through his employer. The group policy contained two riders: (1) "Group Hospitalization and Physicians' Service Benefits Insurance Rider" and (2) "Group Medical Expenses Insurance-Extended Coverage." Metropolitan paid Cunningham over \$80,000 in benefits, representing medical expenses which he incurred as a result of the injuries to his daughter.

Cunningham made and settled claims for the wrongful death of his daughter against third-party tortfeasors, including the liability insurer of the automobile in which his daughter was riding at the time of the accident. The parties agreed that \$20,000 of the settlement proceeds from the liability insurer would be held in a trust account pending a judicial determination of Metropolitan's subrogation rights. The parties stipulated that the policy contained no conventional subrogation provision. The policy, in its entirety, was appended to the agreed statement of facts submitted to the trial court. The trial court found that the group policy was one of indemnity and the insurer was entitled to subrogation. The parties subsequently stipulated to a supplementary statement of facts based upon that determination. They agreed that Cunningham had been made whole by Metropolitan's payments, the settlement proceeds of the wrongful death claim, and further settlement proceeds from another contributing tortfeasor.²⁰ An additional sum in excess of \$5,000, representing a portion of another settlement from a contributing tortfeasor, was placed in the trust account. The trial court then ordered judgment for Metropolitan as the subrogated insurer. The court of

19. 121 Wis. 2d 437, 360 N.W.2d 33 (1985).

20. See *infra* discussion in Section V.

appeals affirmed, relying on *Rixmann*, and determined that the applicable provisions of the group policy provided coverage "for the actual medical expenses incurred" rather than for a "fixed sum upon the occurrence of a specified event."²¹

The supreme court was thus confronted with the issue of whether the insurer, absent an express subrogation provision in the policy, was subrogated to the extent of its payment under the two policy riders. The court began its analysis of the issue by providing a summary of its previous holdings on insurer subrogation, including the indemnity/investment distinction as to legal subrogation. The court then noted: "The investment-indemnity contract distinction has historically turned upon more than merely the measurement of liability, whether it be measured by fixed sum or by the extent of the insured's loss. The availability of subrogation has generally depended on the type of coverage involved"²² Without citing to Wisconsin authority, the court explained its statement by referring to decisions from other jurisdictions and views of text writers, and by stating that courts have implied subrogation rights with policies of property insurance, but have not done so with personal insurance contracts such as life, medical, hospital and accident benefits. The court noted that the unwillingness of courts in general to imply subrogation into personal insurance contracts may be due to their recognition that "the insured's receipt of both tort damages and insurance benefits may not produce a duplicative result given that the insured is likely to have suffered intangible losses that are not indemnified by either the insurer or the third-party tortfeasor."²³

The court observed that while its past decisions had not explicitly embraced the property versus personal insurance distinctions, they had "nonetheless proven to be entirely consistent with the general trends in each of these areas."²⁴ How

21. *Cunningham*, 121 Wis. 2d at 443, 360 N.W.2d at 36 (quoting *Cunningham v. Metro. Life Ins. Co.*, 116 Wis. 2d 331, 336, 342 N.W.2d 60, 63 (Ct. App. 1983)).

22. *Cunningham*, 121 Wis. 2d at 447, 360 N.W.2d at 38.

23. *Id.* at 448, 360 N.W.2d at 38. Considering the broad spectrum of tort damages now recoverable, this possibility should be examined on a case-by-case basis.

24. *Id.* (citing *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374 (1927) and *Thoreson v. Milwaukee & S. Transp. Corp.*, 56 Wis. 2d 231, 201 N.W.2d 745 (1972)). Both *Campbell* and *Thoreson* are really collateral source rule cases, see *infra* Section IV, and

Wisconsin has been consistent with the trends in these areas is difficult to discern.

Nevertheless, the court then turned its attention to the issue before it — whether the insurer was subrogated absent an express policy provision. In conducting its analysis of this issue, the court found that its decision in *Rixmann* was the key:

While Metropolitan argues that subrogation rights should be implied upon payments of benefits for medical and hospital expenses given the true indemnity nature of these types of contracts, this court has declined to do so in *Rixmann*, and we decline to do so now. The *Rixmann* court, like every court which has considered this question, was unwilling to find, in the absence of an express subrogation clause, and without the benefit of the policy in the record, that the insurer was subrogated to the extent of its payments made to the insured's rights to recover medical expenses from the third party tortfeasor.

We read *Rixmann* to hold that when a policy is included in the record, the court must first look at the policy in question to determine into which category it falls. We reject Cunningham's argument, however, that the policy which includes life insurance, accident and health insurance, and medical coverage must be construed as a whole. We examine only those portions of the policy under which the insurer paid the insured for all of the medical expenses, including hospitalization, and for which Metropolitan is presently seeking subrogation. We therefore limit our inquiry into the "Group Hospitalization and Physicians' Services Benefits Rider" issued in 1971 and the "Group Medical Expense Insurance-Extended Coverage" rider issued in 1973.²⁵

The court then found a provision in each rider which allowed it to determine the investment/indemnity issue. It noted that the Group Medical rider, as to insurer reimbursement, provided:

If benefits have been paid hereunder on account of services received by the Employee or by a Dependent and thereafter it is established that the charges for such services were not paid by the Employee or the Dependent, or said Em-

have no bearing on investment/indemnity or property/personal insurance subrogation issues.

25. *Cunningham*, 121 Wis. 2d at 449-50, 360 N.W.2d at 39 (citation omitted).

ployee or Dependent was otherwise reimbursed therefor, the Insurance Company shall be entitled to a refund of the amount of the benefits paid which is in excess of the benefits that would have been payable based on the actual charges incurred and paid by the Employee or the Dependent.²⁶

However, the Group Hospitalization rider provided:

The hospitalization benefits otherwise provided for any hospital confinement of the *Employee* shall be reduced by any benefits paid or payable on account of hospital confinement for the same period or any part thereof from any fund, other insurance, or other arrangement, *provided or established in conformity with any state or other governmental disability or cash sickness or hospital benefits law.*²⁷

Based upon these two provisions the court determined that the Group Medical rider was an indemnity contract as to which subrogation would arise even without an express subrogation provision. Furthermore, the Group Hospitalization rider was an investment contract with no subrogation rights for the insurer, unless the contract expressly so provided. The distinction was based upon the court's finding that, under the Medical rider, Metropolitan was entitled to reimbursement if the benefits it paid were duplicated from any other source, whereas under the Hospitalization rider, this would occur only if duplication resulted from some form of governmental benefit law. In addition, the reimbursement provision of the Hospitalization rider only applied to employee hospitalization and not to that of a dependent. The case was remanded for a determination of what sums Metropolitan paid under each of the riders and how much of the funds held in trust were intended to compensate Cunningham for medical expenses which Metropolitan previously paid under the rider so as to entitle it to subrogation.

The current status of the indemnity/investment distinction following *Cunningham* appears to indicate that if evidence of the content of the insurance contract is not presented to a court, prior, gross groupings of insurance will be employed. Thus, fire insurance, collision insurance, liability insurance, and possibly any other form of property insurance will, with

26. *Id.* at 450-51, 360 N.W.2d at 39.

27. *Id.* at 452, 360 N.W.2d at 40 (emphasis added).

payment by the insurer, produce legal (a/k/a equitable) subrogation. With all other forms of insurance (an "accident" or other type of "personal" policy) subrogation will not arise from payment as a matter of law and can only occur if the policy expressly provides for conventional (a/k/a contractual) subrogation. However, with non-property forms of insurance, if the policy is produced so that it may be examined by the court, the court will find it to be an indemnity contract if it provides for insurer reimbursement when the insured receives duplicate payments from any other source.²⁸

At present, whether an insurance contract of the "personal" policy type is an indemnity contract for purposes of subrogation is not dependent upon whether the policy seeks to provide benefits to the insured for actual, out-of-pocket expenses incurred. This appears to be a form of judicial coordination of benefits. One is tempted to agree with Justice Abrahamson, in her partial dissent to *Cunningham*, that the best solution to the tenuous indemnity/investment distinction, which courts appear inept to apply, would be for the court to rule that in the absence of an express subrogation provision, an insurer has no subrogation rights.²⁹ Absent the supreme

28. In *Lambert v. Wrensch*, 135 Wis. 2d 105, 399 N.W.2d 369 (1987) the court found a policy reimbursement provision similar to that held in *Cunningham* to make the contract one of indemnity and thus held subrogation exists as a matter of law. The language considered by the court in *Lambert* was:

If you or your dependent incur expenses on account of bodily injury or sickness, caused by the negligence or wrong of a third-party with respect to which benefits are payable in accordance with the provisions of the policy, you may take such benefits under this plan; provided that, if there is a recovery by you or your dependents (or a personal representative) from the third-party or his personal representative, whether by judgment, settlement or otherwise, on account of such bodily injury or sickness, you shall reimburse The Equitable to the extent of the total amount of such benefits paid under this plan, but not in an amount in excess of the proceeds of any such recovery after the deduction of reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery.

Id. at 116, 399 N.W.2d at 374. However, this reimbursement provision appears more limited than that of the Group Medical rider in *Cunningham*.

29. *Cunningham*, 121 Wis. 2d at 456-57, 360 N.W.2d at 42. However, the temptation is not too great. Of course, most insurers prepare their policy forms for use in many jurisdictions and some jurisdictions prohibit subrogation, even contractual, if its use would amount to splitting a cause of action for personal injuries. See, e.g., *Brockman v. Metropolitan Life Ins. Co.*, 125 Ariz. 246, 609 P.2d 61 (1980); *Klimvakis v. Caruso*, 54 A.D.2d 972, 388 N.Y.S.2d 671 (1976); *Schuldt v. State Farm Mut. Auto. Ins. Co.*, 89 S.D. 687, 238 N.W.2d 270 (1975).

court's adoption of her suggestion, or employment by the insurance industry of express subrogation provisions in most policies, doubt will continue as to the ability of the supreme court to ever understand the nature of indemnity insurance.

Nevertheless, the majority in *Cunningham* has created a new definition of "indemnity" which is clearly contrary to the long-standing concept of that term as understood by those who have even a passing knowledge of insurance. What the court may be saying, at least for now, is that to be considered an "indemnity" contract, the non-property policy should provide for insurer reimbursement by the insured if the latter also gains a recovery from the tortfeasor for the same loss. The net effect of such a provision, akin to a trust agreement, is subrogation in indirection.

III. SUBROGATED INSURER AS AN INDISPENSABLE PARTY

When an insurer becomes subrogated to a portion of the claim of its insured against some third party tortfeasor, consideration must be given to the potential lawsuit which the insured might later bring against the tortfeasor and the insurer's involvement in that lawsuit. One of the earliest Wisconsin cases to consider this issue was *Patitucci v. Gerhardt*.³⁰ The action was commenced to recover for damage caused to the plaintiff's automobile as the result of its collision with a vehicle driven by the defendant. At trial, cross-examination of the plaintiff revealed that he carried collision insurance on his car; that the policy provided for the payment of collision damage less a deductible; and, that the insurer had paid the plaintiff for the damage to his vehicle, less the deductible amount. Judgment was entered against the defendant for the full amount of damage to the plaintiff's automobile. On appeal the defendant contended that, based upon the information which was elicited at trial through cross-examination, the plaintiff's recoverable damages should have been limited to the amount of the deductible. In the alternative, the defend-

30. 206 Wis. 358, 240 N.W. 385 (1932). See also *Sims v. Mutual Fire Ins. Co.*, 101 Wis. 586, 77 N.W. 908 (1899); *Allen v. Chicago & Northwestern Ry.*, 94 Wis. 93, 68 N.W. 873 (1896); *Wunderlich v. Chicago & Northwestern Ry.*, 93 Wis. 132, 66 N.W. 1144 (1896); *Pratt v. Radford*, 52 Wis. 114, 8 N.W. 606 (1881).

ant argued that the plaintiff's insurer was a necessary party to the complete determination of the controversy and that no judgment for any amount could be properly entered against the defendant without the presence of the insurer as a party to the action.

The supreme court framed the issue presented by *Patitucci* in terms of whether failure to join a subrogated insurer is a mere defect in parties, such as is waived by the failure to object by answer or demurrer, or whether the situation is one in which the presence of the insurer is indispensable to a complete determination of the controversy. It found the latter to be the case:

The claim against the defendant by reason of his tortious act has been said to be indivisible and to be based upon a single liability. By operation of law the ownership of a part of this claim has become vested in the insurance company by reason of its payment of the loss. If this presents to the court a single controversy, it must be apparent that a complete determination of it cannot be had without the presence of all of the parties who together own the cause of action. When it is further considered that sub. (4) of sec. 260.19 requires that a liberal construction be given to the section, to the end that closely related contentions may be disposed of in one action, even though in a strict sense there be two controversies, and when it is further considered that the obligation on the part of the trial court to bring in indispensable parties is one that exists independently of any motion by either party, it must be apparent that sec. 260.19 has a larger objective than merely the protection of the parties to the action. It is the apparent intention of the legislature that single controversies shall be determined in one action, for the purpose of promoting expedition and economy in the administration of justice.³¹

31. *Patitucci*, 206 Wis. at 362, 240 N.W. at 386. Subsection (4) of WIS. STAT. § 260.19 (1929), the joinder statute applicable at the time, provided:

(4) This section shall be liberally construed in order that, so far as practicable, all closely related contentions may be disposed of in one action, even though in the strict sense there be two controversies, provided the contentions relate to the same general subject and separate actions would subject either of the parties to the danger of double liability or serious hardship.

The court held that if sec. 260.19 was to be given application to actions at law,³² there could be no more appropriate situation in which to do so than where a single cause of action exists, but ownership of the cause of action is vested in several persons by reason of partial assignments. It found this especially true in those cases where the assignment occurs by operation of the principles of subrogation.

The court in *Patitucci* ruled that when in the course of the trial it comes to the attention of the court that an insurer has an interest in the cause of action, "we think it [is] the duty of the court, upon its own motion, to stay proceedings and to order the insurance company made a party."³³ The court made it clear, however, that alternatives exist if the matter of insurer subrogation is not brought to the attention of the trial court:

In such a situation the defendant, either because he paid the judgment without knowledge of the fact that an insurer had paid for part of the loss, or because of the fact that the payment was involuntary, would doubtless be protected by the judgment, upon the ground, in the first case, that the insurer, not having notified the tortfeasor of its claim, could not complain, and in the second case, that the compulsion of the judgment would prevent the payment of the full sum to the insured from operating as a fraud upon the insurer. In such a case the insured would recover the entire amount and hold such portion as properly belongs to the insurance company as trustee.³⁴

The court also noted that the problem of a new trial could be avoided in *Patitucci* if the insurer filed either a release of its claim or an assignment of its rights to its insured, the plaintiff.³⁵

32. *Patitucci*, 206 Wis. at 362, 240 N.W.2d at 386. The court found that § 260.19 was borrowed from the old rules governing equity actions and with the law/equity merger it was a fair conclusion that it was applicable to all actions. *Id.*

33. *Id.* at 363, 240 N.W. at 387.

34. *Id.* at 363, 240 N.W. at 386-87.

35. This was given as a practical method of avoiding a new trial after judgment in this action. It may not have worked, however, if a plea in abatement had been entered to the action before trial. *Truesdill v. Roach*, 11 Wis. 2d 492, 498-99, 105 N.W.2d 871, 874-75, (1960). Absent a plea in abatement the problem of non-joinder of a subrogated insurer may be obviated if, before verdict, the insurer disclaims the right of subrogation or assigns that right to the insured. *Leonard v. Bottomley*, 210 Wis. 411, 245 N.W. 849 (1933).

All of the above, of course, must be considered in light of the determination in *Frederick v. Great Northern Railway*,³⁶ made that same day. In *Frederick*, the court described the insurer as being subrogated "*pro tanto*" to the rights of the insured and made it clear that by stepping into the insured's shoes the insurer cannot recover as assignee by operation of law when the insured could not recover.³⁷ This is a very important principle which must be understood for a proper analysis of subrogation issues. Subrogation results in nothing more or less than the substitution of the insurer for its insured. Thus the subrogated insurer's rights are no better or worse than were those of its insured before the subrogation occurred. All defenses previously available against the insured are therefore available against the subrogated insurer. The subrogated insurer becomes, as it were, the *alter ego* of its insured.

The impact of the failure of the insured to join a subrogated insurer in the action against an alleged tortfeasor was again before the Wisconsin Supreme Court in *Heifetz v. Johnson*.³⁸ In this action, however, the absence of the subrogated insurer was not called to the attention of the trial court until more than three years after the harm was sustained by the insured.³⁹ Although the insured's action had been timely commenced,⁴⁰ the trial court ruled that the failure to join the subrogated insurer could not be corrected, as to that insurer, since the statute of limitations had run on its claim. The supreme court agreed, noting that the running of a statute of limitations extinguishes not only the right of action but also the cause of action.⁴¹ However, the supreme court considered

36. 207 Wis. 234, 240 N.W. 387 (1932) (reported later due to a motion for rehearing).

37. *Id.* at 245, 240 N.W.2d at 391.

38. 61 Wis. 2d 111, 211 N.W.2d 834 (1973).

39. Since with subrogation the insurer steps into the shoes of the insured, the statute of limitations applicable to the subrogation claim is the same as is applicable to the claim of its insured. See *Frederick*, 207 Wis. 234, 240 N.W. 387.

40. *Heifetz*, 61 Wis. 2d at 113, 211 N.W.2d at 835. The insured was injured in an auto accident on October 21, 1968, and commenced the action on October 12, 1971, within the three years provided by Wis. STAT. § 893.205(1) (1971). Also see further discussion of the statute of limitations in subrogation cases commencing at p. 70 *infra*.

41. *Heifetz*, 61 Wis. 2d at 115, 211 N.W.2d at 836 (relying on *Borde v. Hake*, 44 Wis. 2d 22, 32, 170 N.W.2d 768, 772 (1969)). It appears that this conclusion and the reliance on *Borde* were erroneous since the real-party-in-interest rule, purely proce-

the real issue to be whether the cause of action of the insured also had been extinguished by the failure to join the subrogated insurer before the statute had run as to its claim. If the commencement of a lawsuit without joining an indispensable party is so defective as to deprive the court of jurisdiction, then the statute of limitations would not have been tolled by the insured's service of process and the insured would be barred from suing the defendant.

The court noted that there was a split in the authorities as to whether an objection to the lack of an indispensable party is jurisdictional in nature. The court aligned itself with those authorities holding that absence of an indispensable party is not jurisdictional and withdrew any of its prior statements to the contrary. It did, however, note one exception to the general rule. That exception occurs when one of several joint owners of a claim brings an action and, after the statute of limitations has run, attempts to bring in the other joint owners. The court noted, however, that the situation of a subrogated insurer and its insured is not really analogous:

However, it can be seen that they are not really joint owners in the same sense as the joint payees of a note. Each actually owns separately a part of the liability of the tort-feasor. The insurer has a claim only for the money he paid to his insured and the insured by accepting payment has lost his right to demand payment of that sum from the tort-feasor. The insured can claim all other damages over and above that amount and the insurer has no claim to those damages. Thus it is better to think of the insurer as an assignee of part of the claim than to speak of the insured and the insurer as joint owners of the claim. The *Patitucci* case also uses the description of the insurer's rights as an "assignment." The definition of subrogation given in *American Jurisprudence* is the "doctrine of substitution," and it later states that subrogation contemplates full substitution and places the party subrogated in the shoes of the creditor. "Substitution" implies the displacement of the original party and reinforces the conclusion that the insured and the subrogated insurer

duel, is invoked to impose the substantive bar of limitations of actions, and commencement by one of the interested parties should have been effective to toll the statute as to the entire claim. See Clausen & Lowe, *The New Wisconsin Rules of Civil Procedure: Chapters 801-803*, 59 MARQ. L. REV. 1, 74-77 (1976) [hereinafter *The New Wisconsin Rules*].

are not joint owners of any part of the claim against the tortfeasor, although an adjudication of the tort-feasor's total liability requires the presence of both of the co-owners of the claim as plaintiffs.⁴²

The court also agreed with the insured that the purpose of the mandatory joinder statutes is to protect the defendant against a multiplicity of suits. It observed that such purpose is served when, by operation of the statute of limitations, the insurer is barred forever from asserting any claim against the defendant: "There is, in effect, no longer any lack of an indispensable party for the insurer no longer has any interest in the action."⁴³ As a result of such finding, the court allowed the insured to proceed, in his action against the defendant, to seek to recover all of the damages sustained less those to which the insurer was subrogated.⁴⁴

Any procedural problems resulting from the decisions in *Patitucci* and *Heifetz*, real or imagined, appear to have been eliminated by the adoption of new civil procedure rules in Wisconsin. For example, sec. 803.01(1) currently states:

[C]ommencement of the action by any of the persons holding a part of the claim will toll the statute of limitations as to all, provided that within a reasonable time after objection is made, the other persons holding part of the claim ratify the plaintiff's commencement of the action or are themselves joined or substituted in the action.⁴⁵

42. *Heifetz*, 61 Wis. 2d at 120-21, 211 N.W.2d at 839.

43. *Id.* at 123, 211 N.W.2d at 841.

44. The impact of subrogation on the collateral source rule will be discussed in Section IV of this article.

45. *The New Wisconsin Rules*, *supra* note 41, at 77, 86-89. A procedure in conformity with the new rule was apparently at work in *Lambert v. Wrensch*, 135 Wis. 2d 105, 399 N.W.2d 369 (1987), *see supra* note 28. The plaintiff in that action was injured in an auto accident on May 19, 1978, and commenced the action against the tortfeasors on May 11, 1981, with only seven days remaining under the statute of limitations. Joined as a defendant was the insurer which provided nearly \$18,000 in medical expense benefits to the plaintiff following the accident. It was joined pursuant to WIS. STAT. § 803.03(2)(a) (1983-84). The insurer filed an answer on December 29, 1981, but did not assert the subrogation interest until January 8, 1982, submitting an amended complaint. The trial court, in a memorandum decision, dismissed the insurer's claim holding that although the insurer held a subrogation interest, its failure to respond in a timely fashion resulted in the running of the statute of limitations as to its claim. The trial court's memorandum decision does not amplify upon the reason for dismissal. It appears that although the plaintiff's commencement of the action tolled the running of the statute as to the insurer, because of WIS. STAT. § 803.01(1), it was only tolled for a reasonable time thereafter and, after the passage of a reasonable time, began to run again until it

Thus, even though this arguably was the intent of the procedure rules prior to *Heifetz*,⁴⁶ that intent is now clear.

Section 803.03(2) of the new rules also makes it clear that the party asserting the claim for affirmative relief in an action must join as parties those persons with subrogation claims.⁴⁷ However, it gives one so joined the options of either participating in the prosecution of the action, agreeing to have his or her interests represented by the party who caused the joinder, or moving for dismissal with or without prejudice.

The new rules of civil procedure may also provide an effective mechanism to resolve another problem related to insurer subrogation which has not as yet been discussed in this article. Insurance claims personnel recognize that, at times, it might be tactically advantageous not to make a claim payment to an insured, thus avoiding subrogation rights. It is not uncommon, for example, for an insurer to enter into a "loan receipt" agreement with the insured when actual claim payment would be prejudicial to the insurer under the terms of the insurance contract.

In the leading case of *Luckenbach v. McCahan Sugar Refining Co.*,⁴⁸ the United States Supreme Court upheld the validity of the loan receipt agreement. In that case the plaintiff

expired. The issue of the propriety of the trial court's dismissal of the insurer was not considered on appeal.

46. See *supra* note 41 and accompanying text.

47. WIS. STAT. § 803.03(2)(b) (1983-84):

(b) *Options after joinder.* Any party joined pursuant to par. (a) may 1. participate in the prosecution of the action, 2. agree to have his or her interest represented by the party who caused the joinder, or 3. move for dismissal with or without prejudice. If the party joined chooses to participate in the prosecution of the action, the party joined shall have an equal voice with other claimants in such prosecution. If the party joined chooses to have his or her interest represented by the party who caused the joinder, the party joined shall sign a written waiver of the right to participate which shall express consent to be bound by the judgment in the action. Such waiver shall become binding when filed with the court, but a party may withdraw the waiver upon timely motion to the judge to whom the case has been assigned with notice to the other parties. A party who represents the interest of another party and who obtains a judgment favorable to such other party may be awarded reasonable attorney's fees by the court. If the party joined moves for dismissal without prejudice as to his or her claim, the party shall demonstrate to the court that it would be unjust to require the party to prosecute the claim with the principal claim. In determining whether to grant the motion to dismiss, the court shall weigh the possible prejudice to the movant against the state's interest in economy of judicial effort.

48. 248 U.S. 139 (1918).

shipped a quantity of sugar on a ship owned by one of the defendants and chartered by the other. The sugar was severely damaged in transit and the plaintiff brought suit to recover for the damage. The carrier argued that it was entitled to credit for the amount paid to the plaintiff by its insurer. The cargo had been shipped under a bill of lading which provided that the carrier defendant would receive the benefit of any insurance the plaintiff had obtained on the goods. The insurance policy provided that the insurer would not be liable for any damages if a bill of lading attempted to secure the benefit of the insurance for a carrier. The plaintiff asserted that the amount received from the insurer was a loan and not a payment. Thus, the liability of the insurer under its policy was contingent. If the carrier was liable to the insured, the policy exclusion would be effective and the insured would have to repay the loan. If the carrier was not liable, the provision in the bill of lading would be meaningless, the liability of the insurer to its insured would be fixed, and the loan would not have to be repaid. Payment by the insurer under the policy without the "loan-receipt" agreement would have resulted in a waiver of the exclusion. In such a situation the insurer would have no subrogation rights against the carrier.⁴⁹

The Wisconsin Supreme Court has recognized that in cases like *Luckenbach*, where the insurer's liability to its insured under the policy is contingent and not fixed, "loan-receipts" have validity. However, in *Kopperud v. Chick*,⁵⁰ the court stated:

The loan receipt and agreement has a proper and legitimate place in the adjustment of losses under insurance policies but the device is unavailable and improper in this state to cover up a suit based on subrogation or to obtain the same results as the enforcement of subrogation rights. The court will not recognize the transaction as a loan if the insurer's right to demand repayment of the loan is in substance its right to subrogation parading in disguise. However, to expedite prompt settlement of claims against insurance compa-

49. In such a case the carrier would become an additional insured under the shipper's policy and an insurer is generally not entitled to subrogation against its own insured. See *Rural Mut. Ins. Co. v. Peterson*, 134 Wis. 2d 165, 170, 395 N.W.2d 776, 779 (1986).

50. 27 Wis. 2d 591, 135 N.W.2d 335 (1965).

nies the loan-agreement device has been recognized when payment would be prejudicial to the insurance company under the terms of its policy.⁵¹

In some cases the tactical advantage which the insurer may seek to gain from use of a "loan-receipt" is not the preservation of policy defenses and avoidance of waiver. It is simply an attempt to keep the identity of the real party in interest from the trier of fact to avoid potential jury prejudice against a plaintiff who is an insurance company. This is especially significant in Wisconsin. With the direct action and direct liability statutes in this state, the liability insurer of a negligent defendant may be joined in an action as a party-defendant.⁵² Absent the ability to look behind a "loan-receipt" to determine its validity (or conversely whether it is really a disguise for subrogation) the action could proceed so that it appears to a jury that a poor, hapless plaintiff (the insured) is pursuing a claim against a negligent defendant and a powerful, wealthy liability insurer. With new civil procedure rule 803.03, and guided by the analysis in *Kopperud*, a court should have the necessary tools to look behind a "loan-receipt" to ascertain the true purpose of the agreement and to join an insurer attempting to disguise its subrogation rights.

IV. SUBROGATION AND THE COLLATERAL SOURCE RULE

Various decisions of the Wisconsin Supreme Court have tended to confuse the relationship between the operation of subrogation principles and the collateral source rule. Simply stated, the collateral source rule will not allow a tortfeasor to reduce his damage liability resulting from harm caused to another by benefits the injured person received from sources other than the tortfeasor himself or one acting on the tortfeasor's behalf.⁵³ In essence, the collateral source rule is both a rule of damages and a rule of evidence. Its operation prevents a tort defendant from introducing evidence to prove that the plaintiff incurred no medical expenses because the

51. *Id.* at 595, 135 N.W.2d at 337.

52. WIS. STAT. §§ 632.24 (direct liability) and 803.04(2)(a) (1985-86) (direct action).

53. *Payne v. Bilco*, 54 Wis. 2d 424, 433, 195 N.W.2d 641, 647 (1972); RESTATEMENT (SECOND) OF TORTS § 920A (1979).

plaintiff's insurer paid them, or no wage loss because a kind employer continued wages during the disability.

The end result of the operation of the collateral source rule is that in some cases the tort plaintiff may recover twice or more for some elements of damages — once from the tortfeasor who caused the harm and again from any source of benefits collateral to the tortfeasor.⁵⁴ Such multiple recovery, however, is the byproduct of the rule and not a principle of the rule itself nor a policy at the foundation of the rule. The Wisconsin courts' analysis of the interaction of subrogation and the collateral source rule appears to confuse the result of the operation of the rule with the principles which underlie the rule itself.

A scant thirteen years after it had decided *Gatzweiler v. Milwaukee Electric Railway & Light Co.*,⁵⁵ the Wisconsin Supreme Court, in *Cunniën v. Superior Iron Works Co.*,⁵⁶ used *Gatzweiler* as authority for the proposition "that the amount received by an injured party under an accident policy for which he has paid the premiums cannot be considered by way of partial or total satisfaction of damages claimed by such injured person from a tortfeasor."⁵⁷ Six years later, again citing *Gatzweiler* as authority, the court held:

It is equally clear that the defendant is not entitled to have the damages reduced because the plaintiff had purchased and paid for the right to have indemnity in case he sustained accidental injuries. The sums paid for such insurance are in the nature of an investment, which, like other investments made by the plaintiff, ought not to inure to the benefit of the defendant. The only parties interested in such a contract of insurance are the plaintiff and the insurer.⁵⁸

54. This has caused some to criticize the collateral source rule, especially in light of the number of Americans who have these benefits available. See, e.g., Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478 (1966); *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964).

55. 136 Wis. 34, 116 N.W. 633 (1908).

56. 175 Wis. 172, 184 N.W. 767 (1921).

57. *Id.* at 187, 184 N.W. at 772.

58. *Campbell v. Sutliff*, 193 Wis. 370, 374-75, 214 N.W. 374, 376 (1927). See also *Merz v. Old Republic Ins. Co.*, 53 Wis. 2d 47, 54, 191 N.W.2d 876, 879 (1971); *Dehnart v. Waukesha Brewing Co.*, 21 Wis. 2d 583, 595, 124 N.W.2d 664, 670 (1963).

Later, in the case of *Heifetz v. Johnson*, previously discussed,⁵⁹ the court made the following statement: "Acceptance of payment from an insurer operates as an assignment of the claim to that extent whether or not the policy contains a subrogation agreement. The plaintiff loses his right to sue for any amount received from his insurer."⁶⁰ Subsequently, in *Rixmann v. Somerset Public Schools*, also discussed previously,⁶¹ the court made the following observation concerning the statement in *Heifetz*:

It has been noted that this language could, under a narrow interpretation, be taken to mean that in any case in which the injured party has been compensated for his loss by his insurer, subrogation in favor of the insurer occurs. Thus, it might be argued that the collateral source rule, which provides that a personal injury claimant's recovery is not to be reduced by the amount of compensation received from other sources such as insurance, has been eliminated in this state.⁶²

It is difficult to understand how the statement from *Heifetz*, under *any* interpretation, narrow or broad, could be taken for anything more than what it actually was — a misstatement of the rule of *Gatzweiler* that subrogation would only arise by operation of law from an insurer's payment under an indemnity policy. *Rixmann* set the record straight in that regard, but it added to the confusion already existing between the interrelationship of subrogation and the collateral source rule. True, *Rixmann* states that *Heifetz* did not abolish the collateral source rule in Wisconsin; it points to authority both before and after *Heifetz* to support that assertion. However, the court then quotes language from one of its previous decisions,⁶³ dealing with the burden of proof in a contractual subrogation situation and makes the following statement:

This language is important in two respects. First, by pointing to the lack of evidence giving the insurer a *contractual* right to subrogation, the court applied the traditional, pre-*Heifetz*, *collateral source rule*: "An accident insurance policy, in the absence of any express provision in the policy to

59. See *supra* discussion in Section II.

60. *Heifetz v. Johnson*, 61 Wis. 2d 111, 124, 211 N.W.2d 834, 841 (1973).

61. See *supra* discussion in Section II.

62. *Rixmann v. Somerset Pub. Schools*, 83 Wis. 2d 571, 577, 266 N.W.2d 326, 329 (1978).

63. *Karl v. Employers Ins.* 78 Wis. 2d 284, 254 N.W.2d 255 (1977).

the contrary, is held to be an investment contract . . . [under which] the insurance company is not subrogated to the rights of the insured [upon payment].” Second, the court indicated that the one seeking to prove subrogation has the burden of introducing evidence to that effect.⁶⁴

What the *Rixmann* court quotes from *Patitucci* is not any form of the collateral source rule. It is nothing more than a restatement of the *Gatzweiler* rule on “accident” contracts and subrogation.

Subrogation, whether legal or conventional, has absolutely no impact on the collateral source rule. If there is an insurer subrogated to a portion of its insured’s claim against the tortfeasor, whether that subrogation was achieved by operation of law with an “indemnity” contract or contractually with an “investment” contract, the tortfeasor’s total damage liability is not reduced. If both the insured and insurer are successful in pursuing their separate claims, the tortfeasor will pay the same total amount of damages caused by the tortious conduct. Two separate payments will be made, however, instead of the one which would have been made had there been no subrogation. (This is usually because the injured person was self-insured or had an “investment” policy without an express subrogation provision.)

Subrogation may eliminate the situation in which an injured person will be compensated more than once for the same harm. However, as noted previously, multiple compensation of a person harmed by tortious conduct is not the principle behind the collateral source rule. The policy underlying the rule is to prevent the tortfeasor from benefiting, by reducing the ultimate damage liability from sources of compensation the tortfeasor did not provide.

Some might argue that the result in *Heifetz* impacted adversely on the principle behind the collateral source rule. The court in *Heifetz* held that since the plaintiff’s insurer was subrogated to a portion of the plaintiff’s claim, the plaintiff could not recover that amount from the tortfeasor. In addition, since the statute of limitations was held to have run on the insurer’s subrogation claim, the tortfeasor’s total damage lia-

64. *Rixmann*, 83 Wis. 2d at 582, 266 N.W.2d at 331-32 (emphasis added and citation omitted) (quoting *Karl v. Employers Ins.*, 78 Wis. 2d 284, 254 N.W.2d 255 (1977)).

bility was reduced by the amount of the insurer's barred claim. As the recent case of *Lambert v. Wrensch*⁶⁵ illustrates, the result in *Heifetz* may continue to occur even with the new procedure rules. However, when it does occur, it is not the result of any impact of subrogation on the collateral source rule. It was caused in *Heifetz* and *Lambert* simply because of the failure of the subrogated insurer to timely pursue its legal rights.

V. AND THEN CAME *GARRITY* AND *RIMES*

Although in the areas previously discussed subrogation law in Wisconsin does not have consistency and logic as its hallmarks, two decisions of the supreme court made all else seem insignificant by comparison.

In *Garrity v. Rural Mutual Insurance Co.*,⁶⁶ the supreme court was confronted with a rather unique situation in a case involving subrogation. One insurance company was both the liability insurer of the party alleged to have caused the loss and also the fire insurer for the party who sustained the loss. The Garritys suffered a fire loss to their dairy barn for which they were paid under their fire policy with the insurer. The payment constituted the limits payable under that policy. The total amount of the loss was in excess of the fire policy limits. The Garritys claimed that the fire loss was caused by the negligent operation of a truck owned by a co-partnership and operated at the time by one of its employees. The insurer had issued a liability insurance policy on the truck which provided coverage for the occurrence. In its answer to the Garritys' complaint, the insurer denied that the negligent operation of the truck caused the fire. The insurer also filed a third-party complaint against itself, as the fire insurer of the Garritys, asking for a determination of its rights as the fire insurer to any sum it might become liable to pay as the liability insurer.

65. 135 Wis. 2d 105, 399 N.W.2d 369 (1987). See *supra* note 45 and accompanying text for additional discussion on this case and of the impact of the new rules of procedure on the running of the statute of limitations as to a nonjoined, subrogated insurer. In *Lambert*, however, confusion as to subrogation and the collateral source rule still appears: "However, where subrogation is present, as here, the collateral source rule is inapplicable." *Id.* at 121, 399 N.W.2d at 376.

66. 77 Wis. 2d 537, 253 N.W.2d 512 (1977).

The issue presented to the court by the facts of *Garrity* was whether a subrogated insurer is entitled to recover from a tortfeasor what it has paid to the insured before its insured recovers tort compensation for the portion of the loss not covered by his insurance. Stated another way, the issue was whether a subrogated insurer or its insured has priority when both are in competition for reimbursement from the same limited source of funds. The trial court determined that the fire insurer had priority to the limits of the liability policy. Since the benefits paid by the insurer under the fire policy greatly exceeded the limits under the liability policy, that ruling effectively took the liability insurer out of the negligence action brought by the insureds.

The supreme court reversed. It held that before a subrogated insurer may recover anything from a tortfeasor, its insured must be made whole in terms of the insurance benefits received from that insurer and the tort damages recovered from the tortfeasor. In support of its ruling, the court relied upon its prior suretyship cases in which it held that subrogation does not arise for the surety until the principal debt has been paid in full:

Various reasons are given for the rule, the primary one being set out in *Hamill*, that a surety who is subrogated upon partial payment of the debt becomes a competitor with the creditor (here the insured). This would be less acceptable in a noninsurance case than here, because in a noninsurance case, "the liability of a surety for the remainder of the debt exists as well after as before partial payment, and until the entire debt is paid, the surety has no such equity as will entitle him to the active aid of a court of equity." In the instant case, however, the insurer's liability is limited and does not exist after payment according to the terms of the policy.⁶⁷

The court found that even though an insurer's liability is limited, as compared to a typical surety, most of the insurance subrogation cases from other jurisdictions follow the common law rule. Such cases hold that where either the insurer or insured must, to some extent, go unpaid, the loss should be borne by the insurer, since that is a risk the insured paid the insurer to assume. The supreme court therefore held that

67. *Id.* at 542, 253 N.W.2d at 514 (citing *Hamill v. Kuchler*, 203 Wis. 414, 426, 232 N.W. 877, 882 (1931) (citations omitted)).

since the parties stipulated that the Garritys had not been made whole for the loss they suffered, their insurer's right to recover from the tortfeasor's liability insurance coverage would be secondary to the right of the Garritys.

That determination did not totally resolve the matter, however. The court further noted that the common law rule as to priorities may be waived by provision in the contract of insurance.⁶⁸ Looking to the specific insurance contract, the court found that the rights of the parties were determined by the subrogation clause in the policy, derived from statutes,⁶⁹ and discovered nothing in the clause to change the common law rule. In addition to the policy subrogation provision, the Garritys also executed a "subrogation receipt" for the fire policy benefits received. However, the court held that no such receipt could change the rights of the parties as determined by the statutory provision respecting subrogation. The court also noted that whether the insurer is considered a "subrogee" or "assignee" of the insured's rights makes no difference regarding the priority of recovery from the tortfeasor.⁷⁰

Garrity, the writer recalls, did not cause much consternation to those concerned with insurance subrogation. Many believed that it had limited application, especially since it dealt with a property loss as to which damages are rather easily fixed and also because it involved a rather uncommon situation in which a subrogated insurer was competing with its own insured for the source of funds it already held as the adverse party's liability insurer.⁷¹ To many, it was inconceivable that *Garrity* could be applied to the typical personal injury

68. *Garrity*, 77 Wis. 2d at 543, 253 N.W.2d at 515 (citing COUCH ON INSURANCE 2D § 61.61 (1968)).

69. At the time the fire policy was entered into Wisconsin had a standard fire policy form prescribed by statute. WIS. STAT. § 203.01 (1969).

70. *Garrity*, 77 Wis. 2d at 546, 253 N.W.2d at 516. The court again was referring to its statement in *Heifetz v. Johnson*, 61 Wis. 2d 111, 120, 211 N.W.2d 834, 839 (1973), that "it is better to think of the [subrogated] insurer as an assignee of part of the claim than to speak of the insured and insurer as joint owners of the claim." *Garrity*, 77 Wis. 2d at 546, 253 N.W.2d at 516. The court viewed the difference between an assignment and an equitable right to a cause of action as that the express assignment "has the effect of benefiting the insurer by making it unnecessary for it to prove the existence of the facts justifying subrogation, for it can rely on the express assignment." *Id.* at 546, 253 N.W.2d at 516, (quoting COUCH ON INSURANCE 2D, § 61.105).

71. Elliott, *Subrogation in Wisconsin or What "Times" With Confusion*, 56 WIS. BAR BULL. 12, 14 (Nov. 1983) [hereinafter Elliott].

action in which an insured's claim against the tortfeasor has many different damage components, some easily fixed and others not, and where total damages could be reduced under the Wisconsin comparative negligence rule.

Nevertheless, the view of those who believed that *Garrity* applied more broadly was confirmed on March 2, 1982, when the court decided *Rimes v. State Farm Mutual Automobile Insurance Co.*⁷² Rimes was involved in an auto accident with three other vehicles. He received \$9,649.90 from his own insurer, State Farm, whose policy contained a conventional subrogation agreement. Rimes and his wife commenced a personal injury action against the other three drivers and their insureds. State Farm was joined in the action because of its possible subrogation rights due to the medical payments. Prior to the commencement of the trial, one of the defendant drivers and his insurer were dismissed from the action with prejudice by stipulation of all the parties. On the same day the remaining parties entered into a stipulation providing that State Farm had "a subrogation interest in recovery of those medical bills and expenses as a result of the payments made" under the medical payments coverages.⁷³

On the second day of trial, Rimes and his wife settled all of their claims with the remaining defendants for the sum of \$125,000. One of the liability insurers, American Family, paid \$50,000, its policy limits, on behalf of its insured. The other liability insurer, Travelers, paid \$75,000 of its \$300,000 policy limits for its insured. A stipulation entered into among the parties provided that \$9,649.90 of the \$75,000 paid by Travelers was paid into court to be held in escrow until State Farm's subrogation claim was resolved. The balance of Travelers' payment went directly to Rimes, his wife, and their attorneys. The stipulation and order was signed by all parties, including State Farm. Under its terms, all claims were resolved except for the issue between Rimes and State Farm as to entitlement to the escrowed money. The defendants and their liability insurers were then given general releases by the Rimes.

72. 106 Wis. 2d 263, 316 N.W.2d 348 (1982). Prior to *Rimes*, no other reported decision further explained the principles of *Garrity*.

73. *Id.* at 267, 316 N.W.2d 351.

By agreement between Rimes and State Farm, a two day trial was then held to the court regarding entitlement to the escrowed funds. Evidence was taken not only as to the extent of the damages sustained by Rimes and his wife as a result of the accident, but also as to the issue of liability of all of the drivers.

The trial court determined that the total damages sustained by Rimes and his wife were \$300,433.54, and that Rimes was not negligent. Relying on *Garrity*, it concluded that only the damages it found would make the Rimes whole and that, because of the \$125,000 settlement, State Farm had no right of subrogation. It ordered the escrowed amount to be paid to the Rimes. The supreme court accepted certification of the case from the court of appeals.

The supreme court affirmed the trial court. It found that the subrogation agreement before it was not significantly dissimilar to the one it had examined in *Garrity*. Moreover, following the reasoning it had used in *Garrity*, it reaffirmed that equitable principles apply to subrogation whether it is legal or conventional. Thus, the insurer is not entitled to subrogation unless the insured has been made whole for his loss:

The purpose of subrogation is to prevent a double recovery by the insured. Under circumstances where an insured has received full damages from the tortfeasor and has also been paid for a portion of those damages by the insurer, he receives double payment — he has been made more than whole. Only under those circumstances is the insurer, under principles of equity, entitled to subrogation. Subrogation is to be allowed only when the insured is compensated in full by recovery from the tortfeasor. The insured is to be made whole, but no more than whole.⁷⁴

The court was not persuaded by the argument that *Garrity* should not be applied in this case because *Garrity* arose from a property insurance policy, where the wholeness of the insured is more easily determined.⁷⁵ The court was likewise unim-

74. *Id.* at 272, 316 N.W.2d at 353.

75. In rejecting this distinction the court stated:

The law of damages in personal-injury cases is premised upon the fact that the damages are reasonably ascertainable. The trial of a personal-injury action is based on that proposition, and we find the alleged difficulty of ascertainment of actual damages to be irrelevant to the merits of this case. Particularly, it is irrel-

pressed with the argument by State Farm that the Rimes' general release to the tortfeasors constituted an affirmation by them that they had been made whole as required by *Garrity*. It found that this argument overstated the characteristics of a release and settlement, particularly in a personal injury case. It said in fact that the release in this case asserted just the opposite of wholeness:

It is particularly apparent in this case that the release by the plaintiffs was not an affirmation that they were made whole, because the very escrow agreement arose out of the contention by the plaintiffs that they were entitled to the \$9,649.90 as a portion of the sum for which they would settle. By the escrow agreement contained in the stipulation it is apparent that the plaintiffs, even if we were to assume that they were acknowledging that the payment of \$125,000 would be sufficient to make them whole, believed that amount, less the \$9,649.90, would make them less than whole. Thus, by no ratiocination can it be concluded under these circumstances that the plaintiffs' release of the tortfeasors was an acknowledgment of wholeness.⁷⁶

Concluding its application of the principles of *Garrity* to the facts of this case, the court held:

Only if the insured's tort damages make him whole is he required to disgorge the amounts by which he has been indemnified, *i.e.*, the insured cannot collect once in indemnity from the indemnitor and again in damages from the tortfeasor without being compelled to respond in subrogation. It is clear, in accordance with the general principles of subrogation accepted by this court and stated in *Garrity*, that the settlement in this case did not make the plaintiffs whole and that only compensation in the sum of \$300,433.54 would have been sufficient. It was that sum, and nothing less, that would have sufficed to make the plaintiffs whole for the injuries.⁷⁷

This left one issue for determination — the propriety of the “mini-trial” employed by the trial court to determine the wholeness of the insured. The supreme court noted that, at

evant when, in fact, the procedures adopted by the trial court were designed to determine with exactitude the actual damages sustained by Rimes.

Id.

76. *Id.* at 273-74, 316 N.W.2d at 354.

77. *Id.* at 276, 316 N.W.2d at 355.

first blush, the procedure employed by the trial court appeared to be awkward and inappropriate. It termed "unfortunate" the fact that the parties could not settle all of their differences. It further found that the position of State Farm (which it apparently thought forced the mini-trial) was difficult to justify. Nevertheless, it concluded:

Be that as it may, the trial judge was confronted with a problem that required judicial resolution. As unnecessary as the procedure adopted should have been, we conclude that the methodology utilized was appropriate. The assumption on which the trial judge proceeded was that, under the circumstances, only a trial in which the various items of damages would be ascertained could determine what sum would have made the plaintiffs whole. Regrettable as we consider the necessity of having any trial at this tag end of a complicated lawsuit, we conclude the trial judge proceeded appropriately.⁷⁸

Unlike *Garrity*, *Rimes* was not a unanimous decision of the supreme court. Writing in dissent, Justice Coffey argued that there was a critical distinction between *Rimes* and *Garrity*. He noted that in *Garrity* the insurer and insured were competing for a limited amount of liability insurance dollars, the recovery of which would indemnify neither. Here, he asserted, it was the insureds' settlement for \$125,000 which made the remaining \$225,000 of liability insurance unavailable to either the insured or the insurer.⁷⁹ The \$350,000 in liability insurance, once available, would have been enough to pay in full both State Farm's claim and the *Rimes*' damages as found by the trial court. He said that although the court has consistently acknowledged that the purpose of subrogation is to avoid unjust enrichment, the result in this case fosters unjust enrichment of both the insured and the tortfeasor. He also asserted that allowing actions by the insured, such as the settlement here, to bar its insurer from its subrogation rights

78. *Id.* at 277, 316 N.W.2d at 356.

79. *Id.* at 280, 316 N.W.2d at 357. In fairness to the majority it should be noted that State Farm signed the stipulation and order which resulted in this situation. *Id.*

could be held to constitute a breach by the insured of his duty of good faith and fair dealing to the insurer.⁸⁰

Justice Coffey also criticized the majority's sanction of mini-trials, which he viewed as contrary to the interest of judicial economy and inimical to the benefit supposedly gained in the settlement of a claim. He asserted that mini-trials would be unnecessary if the court would have ruled that whenever an insured settles with a responsible tortfeasor, the subrogated insurer is entitled to recover to a proportionate amount equal to the insured's percentage of recovery of the actual loss sustained.⁸¹

Justice Coffey's final observations about the majority decision was that it places the insurer in the untenable position of having to disprove the claim of its own insured if it seeks to prove by the mini-trial that the insured was made whole through a settlement. This, he observed, pushes the insurer and its attorney to the point of ethical dilemma because of the confidential information which might be gathered in the investigation of the insured's loss.⁸²

Justice Steinmetz began his dissent by noting that the majority had erroneously based its decision on the findings and judgment of the trial court that the plaintiffs had not been made whole by the settlement with the tortfeasors. As to that factor, he stated:

[O]nce the plaintiffs' case was settled in full with the other tortfeasors, there were no longer any "findings and judgment" the court could render regarding the *damages* sustained by the plaintiff. All the court could do was render an advisory opinion which it did, and I find that inappropriate and beyond the trial court's jurisdiction.⁸³

Justice Steinmetz also expressed the belief that the majority, in relying on *Garrity*, had failed to give sufficient consideration to its holding that the common law rule as to insured/insurer priority may be modified by agreement of the parties. Unlike the majority, he found significant differences between both the

80. *Rimes*, 106 Wis. 2d at 282, 316 N.W.2d at 358 (citing *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978)), which spoke of a duty of good faith and fair dealing on the part of each party to the insurance contract.

81. *Id.* at 283, 316 N.W.2d at 358-59.

82. *Id.* at 283-84, 316 N.W.2d at 359.

83. *Id.* at 285, 316 N.W.2d at 359.

policy subrogation provisions and the subrogation agreements in the two cases.⁸⁴

Garrity, as amplified by *Rimes*, created many new questions for those interested in the status of Wisconsin subrogation law as it stood in their wake.⁸⁵ However, and surprisingly, the state Office of the Commissioner of Insurance (OCI) was apparently convinced that *Rimes* was the model of clarity and would allow insurers to spell out, through policy language, the respective rights of insurers and insureds in all subrogation situations. The following appeared in *The Bulletin*, a bi-annual publication of that Office:

The Wisconsin Supreme Court recently decided a case which will require insurers to revise the language currently being used to describe subrogation rights in insurance policies. The decision is *Rimes v. State Farm Mutual*. The court held that an insurer is barred from any subrogation rights unless the insured is made whole for all elements of damages as may be provided for by the settlement agreement. Insurers should revise the subrogation language in contracts which have already been approved to comply with this decision. Those changes should be submitted to the Rates and Forms Bureau of the Commissioner's office by June 1, 1983. All new forms being submitted should contain language describing subrogation rights accurately.⁸⁶

Despite OCI's oblivion to the obvious questions that *Garrity* and *Rimes* left unresolved, those questions remained. Some of them, however, have been answered by subsequent decisions of the Wisconsin courts.

In *Vogt v. Schroeder*,⁸⁷ the court was confronted with the issue of whether an underinsured motorist carrier, after payment to its insured, would have any subrogation rights against

84. *Id.* at 287, 316 N.W.2d at 360.

There is a distinction in the two clauses; in *Garrity* the right of recovery of the insured governs, and in the present case the proceeds of any settlement are pledged for payment. The plaintiffs are presumed to know the language of their contract and should be bound by it, and, at least equitable determinations should not ignore the language of the contract. . . . In this case the receipt clearly made the interest of the company paramount in any money paid, pursuant to the coverage, to the insured.

Id. at 288, 316 N.W.2d at 361 (Steinmetz, J., dissenting).

85. See Elliott, *supra* note 71.

86. THE BULLETIN 2 (Mar.-Apr. 1983) (citation omitted).

87. 129 Wis. 2d 3, 383 N.W.2d 876 (1986).

an underinsured motorist. Progressive Casualty, which issued Schroeder's liability coverages, argued that no underinsured motorist carrier can ever have any subrogation rights since *Garrity* and *Rimes* stand for the proposition that the sole purpose of insurer subrogation is to prevent double recovery by the insured. As to this the court stated:

The teaching of *Garrity* and *Rimes* is not the simplistic rule that is urged by Progressive Casualty to be of universal application in all subrogation cases. Rather, it is that subrogation depends upon the application of equitable principles to the facts of the case. *Garrity* and *Rimes*, although involving different types of insurance, were basically the same case — who was to have priority, the insured or the insurer, where the total payments, including possible subrogation recovery, still would not make the insured whole.

The question here is a different one: Whether an automobile insurer, which by the terms of its contract pays its own insured under the underinsured motorist coverage, has a right of subrogation against the tortfeasor (the underinsured motorist) once a payment has been made to its own insured.⁸⁸

The court concluded that the underinsurer has the right of subrogation to the extent that it has paid benefits to its own insured prior to the release of the tortfeasor and the tortfeasor's liability insurer. Referring to the subrogation provision of the underinsured policy,⁸⁹ the court stated:

As this policy provision makes clear, a subrogation claim may not be pursued until payment has been made by the underinsured carrier; nor can subrogation be asserted after the tortfeasor has been released. Thus, in order to accomplish a just result, to put the burden of final payment upon the tortfeasor for the amount in excess of his coverage and to

88. *Id.* at 15-16, 383 N.W.2d at 881.

89. *Id.* at 9, 383 N.W.2d at 878. The pertinent portion of the policy provided:

In the event of any payment under this policy, we are entitled to all the rights of recovery of the person to whom payment was made against another. That person must sign and deliver to us any legal papers relating to that recovery, do whatever else is necessary to help us exercise those rights and do nothing after loss to prejudice our rights.

When a person has been paid damages by us under this policy and also recovers from another, the amount recovered from the other shall be held by that person in trust for us and reimbursed to us to the extent of our payment.

Id.

give the insured the proceeds of the settlement offered by the underinsured's insurer without the necessity of a costly lawsuit, it is necessary for the underinsurer to make payment to its own insured without releasing the tortfeasor.⁹⁰

Although concurring in the result, Justice Steinmetz wrote separately in an attempt to resolve misperceptions which he thought might arise from the opinion of the majority. One of these concerned limitations upon the underinsurer's options in a factual setting such as that presented by this case. He expressed the fear that the majority opinion could be construed to require an underinsurer to always substitute its funds for the offered settlement of a tortfeasor. He expressed the belief that if the underinsurer paid its benefits and gave notice thereof to the tortfeasor, a subsequent release obtained by the tortfeasor from the insured (of the underinsurer) would not defeat the subrogation rights of the underinsurer.⁹¹

Another question resulting from *Garrity* and *Rimes* was whether their principle of making an insured whole before an insurer was entitled to subrogation had any application to subrogation in an action by an injured worker against a third party under section 102.29 of the Wisconsin Statutes.⁹² The court of appeals addressed that issue in *Martinez v. Ashland Oil, Inc.*⁹³ In that case, a wrongful death action based on third-party liability under section 102.29 was commenced against Ashland Oil by the surviving spouse and child of a deceased worker. The parties entered into a settlement whereby Ashland agreed to pay \$100,000 to the plaintiffs. The workers' compensation insurer moved for distribution of the proceeds of the settlement pursuant to section 102.29(1). The plaintiffs objected, claiming that only after they were made whole would the compensation carrier be entitled to subrogation. Both the trial court and the court of appeals disagreed. The court of appeals noted that *Garrity* and *Rimes* do not address the Worker's Compensation Act and the disbursement of funds under section 102.29(1). It found that the

90. *Id.* at 19-20, 383 N.W.2d at 882-83.

91. *Id.* at 27-28, 383 N.W.2d at 886 (Steinmetz, J., concurring). So held Schmidt v. Clothier, 338 N.W.2d 256 (Minn. 1983) relied upon by the *Vogt* majority to support its decision.

92. Elliott, *supra* note 71 at 67.

93. 132 Wis. 2d 11, 390 N.W.2d 72 (Ct. App. 1986).

Worker's Compensation Act was a legislatively created substitute for the common law rather than a supplement thereto. Moreover, it found that workers' compensation was wholly statutory and that questions regarding public policy should be determined therefore by the legislature and not by the courts. It held that given the nature of the workers' compensation law and the limitations on *Garrity* and *Rimes*, as explained by the supreme court in *Vogt*, the common law principle of "being made whole" had no application to a third-party action under section 102.29 and the statutory distribution schedule set forth therein.⁹⁴

In *Valley Forge Insurance Co. v. Home Mutual Insurance Co.*,⁹⁵ the court of appeals considered an additional problem, apparently unresolved by *Garrity* and *Rimes*. In that case, a person injured in an automobile accident received compensation from his collision insurer for damage to his automobile. The collision insurer notified the tortfeasor's insurer of its payment and asserted subrogation rights. Thereafter, the tortfeasor's insurer paid the accident victim \$25,000 under its bodily injury liability coverage, exhausting the per person limit of that coverage. It also paid the accident victim an additional \$6,000 payment made under the property damage liability coverage. The collision insurer claimed entitlement since it had already made its insured, the accident victim, whole for the loss to his vehicle. It argued that allowing the insured to keep the \$6,000 from the liability insurer would violate the principle of *Garrity* and *Rimes* that subrogation is intended to avoid double recovery by an insured. The court of appeals also disagreed. The court noted that even with the monies received from both the collision insurer and the liability insurer, the accident victim had not recovered for all of the damages he sustained in the accident. The test of *Rimes*, according to the court, is thus, whether the insured has been completely compensated for all of the elements of his damages, not merely those damages for which the insurer indemnified its insured.⁹⁶

94. *Id.* at 13-16, 390 N.W.2d at 73-74.

95. 133 Wis. 2d 364, 396 N.W.2d 348 (Ct. App. 1986).

96. *Id.* at 366-69, 396 N.W.2d at 349-50.

Two decisions by the Wisconsin Supreme Court in the spring of 1987 have further narrowed and refined the application of *Garrity* and *Rimes*. In *Blue Cross & Blue Shield United v. Fireman's Fund Insurance Co.*⁹⁷ a medical/hospital insurer, Blue Cross, paid over \$10,000 in hospital charges on behalf of Kyle Adams under a contract issued to his father, Robert Adams. The charges resulted from injuries the younger Adams sustained in an accident while he was a passenger on a vehicle owned by Wisconsin Coach Lines, Inc. The vehicle was insured by Fireman's Fund. Following its payment, Blue Cross notified Fireman's Fund of its subrogation rights. Thereafter, Blue Cross learned that the Adamses had settled their personal injury claims with Fireman's Fund for \$40,000 less than that insurer's liability limits in its policy with Wisconsin Coach Lines. Blue Cross thus initiated an action against Fireman's Fund and the driver of the bus to recover the amount it paid on behalf of the Adamses. The trial court dismissed the complaint for failure to state a claim upon which relief could be granted because Blue Cross failed to allege that the Adamses had been made whole by the settlement with Fireman's Fund. The court of appeals reversed.⁹⁸

The supreme court on appeal began its analysis by noting that in the past it had established that a subrogated insurer has the right to enforce its subrogation rights despite a settlement between its insured and the tortfeasor's insurer. It noted that, in such a situation, it had characterized the interests of the insurer and insured such that each owned separately a part of the claim against the tortfeasor.⁹⁹ Thus, the court concluded, a settlement or recovery by the insured operates only to satisfy the part of the claim owned by the insured. In this case, therefore, since there was nothing to indicate that Blue Cross agreed to the settlement entered into by the Adamses and Fireman's Fund, the court concluded that Blue Cross had

97. 140 Wis. 2d 544, 411 N.W.2d 133 (1987).

98. *Blue Cross & Blue Shield United v. Fireman's Fund Ins. Co.*, 132 Wis. 2d 62, 390 N.W.2d 79 (Ct. App. 1986) (holding that in light of *Vogt*, and its interpretation of *Garrity* and *Rimes*, an allegation that the insured has been made whole is not essential to the subrogation claim).

99. *Blue Cross*, 140 Wis. 2d at 549, 411 N.W.2d at 134. See *supra* notes 37 and 69 and accompanying text. The court apparently continues to have difficulty in determining whether "owner" or "assignee" is the better term.

a cause of action to recover from the tortfeasor and its liability insurer.¹⁰⁰

The supreme court further disagreed with the contention of Fireman's Fund that under *Garrity* and *Rimes* the subrogated insurer may not recover until it demonstrates that its insured has been made whole. The court recalled its prior decision in *Vogt* where it stated that *Garrity* and *Rimes* did not establish an absolute rule, and then commented:

We agree with the court of appeals that the compelling equitable factor which defeated the subrogation right asserted in both *Garrity* and *Rimes* (the prospect of an insurer competing with its own insured for funds which are insufficient to make the insured whole) is not present in this case. There are two factors which combine to distinguish the present case from *Garrity* and *Rimes*. First, Blue Cross in this action is not seeking to recover any funds from the Adamses. The complaint filed by Blue Cross seeks recovery from the tortfeasor and his insurer; it does not look to the funds of its insured as a source of recovery. Thus, the insurer is not directly competing with its insured for a limited set of funds. Second, the Adamses had already settled their part of their claim with the tortfeasor before Blue Cross initiated its suit against the tortfeasor.¹⁰¹

The court also made it clear that if the insured has not settled with the tortfeasor prior to his insurer's initiation of a subrogation action, the insured will be protected by the *Garrity/Rimes* doctrine because the insured must be joined in that action.¹⁰² The court labeled as "spurious" the argument of Fireman's Fund that the mere existence of a subrogated insurer's cause of action will reduce settlement offers to the insured and thus reduce the funds which would otherwise go to the insured in derogation of *Garrity* and *Rimes*. The court observed that the choice to settle or pursue a tort action, despite its ruling in this case, remains entirely in the hands of the insured. Thus, the court observed, "regardless of the exist-

100. *Id.* at 549, 411 N.W.2d at 134-35.

101. *Id.* at 550, 411 N.W.2d at 135. *See also supra* note 40.

102. *Id.* at 552 n.4, 411 N.W.2d at 136 n.4. The statutory basis for this holding is WIS. STAT. § 803.03(2)(a) (1985-86).

ence of an independent claim in the subrogated insurer, the injured party retains the ability to be made whole."¹⁰³

The final issue which the court addressed in *Blue Cross* concerned the assertion by Fireman's Fund that its agreement with the Adamses would require them to indemnify Fireman's Fund for any claim by Blue Cross against the Fund, in contravention of the *Garrity/Rimes* doctrine. The court disagreed, restating the fact that a separate claim by Blue Cross would not result in competition between it and its insured for the same funds. The court then stated: "Were we to recognize that the existence of an indemnity agreement would bar any claim by a subrogated insurer, all subrogation claims could be barred through the use of indemnity agreements, and our recognition of an independent claim in the insurer would be meaningless."¹⁰⁴ In a footnote, the court observed that it was not passing on the validity of such an indemnity agreement between the tortfeasor and the injured party, but noted that one court has found such an agreement void as against public policy.¹⁰⁵

The companion case of *Blue Cross* is *Mutual Service Casualty Co. v. American Family Insurance Group*.¹⁰⁶ Justice Callow again wrote the decision for a unanimous court. The facts of the case are very similar to *Blue Cross*, but contain one novel twist which makes one wonder why some Wisconsin insurers, so troubled by *Garrity* and *Rimes*, appear so prone to want to continue shooting themselves in the foot by attempting to further complicate the law. Here one insurer attempted to recreate a *Rimes* factual setting to gain an advantage over another insurer.

Mutual paid its insured \$2,000 under the medical payments coverage of her automobile insurance policy after her car was struck from the rear by the insured of American. Mutual thereafter notified American of its subrogation interest. Mutual's insured, through her attorney, filed a claim against American for the injuries resulting from the accident. Some-

103. *Blue Cross*, 140 Wis. 2d at 553, 411 N.W.2d at 136.

104. *Id.* at 554, 411 N.W.2d at 136.

105. *Id.* n.6, 411 N.W.2d 136 n.6 (citing *Allum v. MedCenter Health Care, Inc.*, 371 N.W.2d 557, 570 (Minn. Ct. App. 1985)).

106. 140 Wis. 2d 555, 410 N.W.2d 582 (1987).

time later, Mutual's insured negotiated a settlement with American. As a result of the settlement, American issued two checks — one payable to Mutual's insured and her attorney in the sum of \$7,900 and another in the sum of \$2,000 payable to the insured, her attorney, and to Mutual. Mutual requested that the \$2,000 check be endorsed over to it, but its insured refused.

Thereafter, Mutual filed suit against American to recover the \$2,000 it had paid to its insured under her medical payments coverage. American answered that it had discharged its responsibility to Mutual by issuing the \$2,000 check made payable to Mutual, its insured, and her attorney. The trial court subsequently dismissed American from the action finding that it discharged its obligation to Mutual by including it on the \$2,000 check.¹⁰⁷

The supreme court held that American should not have been dismissed. Using the same doctrinal foundation as in *Blue Cross*, the court concluded that the settlement between Mutual's insured and American neither involved Mutual as a party to the settlement nor provided for the payment of Mutual's subrogated interest. It found that absent some indication that Mutual's insured had authority to settle that part of the claim owned by Mutual, her agreement with American could not and did not impair Mutual's right to enforce its part of the claim. For American to satisfy its obligation to Mutual, the court observed, it must either obtain a separate release from Mutual (of Mutual's claim) or issue a separate check payable to Mutual alone.¹⁰⁸

Although the decisions which followed *Garrity* and *Rimes* appear to have resolved many of the major issues created and left unresolved by those two cases, one has yet to be addressed directly by the Wisconsin courts. That issue concerns the applicability of a statute of limitations to the subrogated insurer's claim against the tortfeasor.¹⁰⁹

107. *Id.* at 560, 410 N.W.2d at 583.

108. *Id.* at 563, 410 N.W.2d at 585.

109. Elliott, *supra* note 71 at 15, suggests three possible dates when the statute commences to run: (1) the date of the injury to the insured; (2) the date of the insurer's payment to the insured; or (3) the date the insured concedes, or it is determined that he or she has been made whole. *Id.*

As the subsequent analysis discloses, however, if there is any doubt as to the statute of limitations which is applicable to the subrogated insurers's claim, it should be very easily resolved. As discussed previously, subrogation results in the substitution of the insurer for the insured as to a portion of the insured's claim against the tortfeasor.¹¹⁰ The insurer thus steps into the shoes of the insured and, as the insured's *alter ego*, the applicable statute of limitations is that which would govern the insured's claim if there had been no subrogation.¹¹¹

Another issue, only facially more difficult, is whether the insurer's subrogation claim will accrue, and the statute begin to run, on a date different than that of the insured's claim. As a result of *Garrity, Rimes* and their progeny, it is relatively clear that an insurer's right to recover on its subrogation claim remains inchoate until such time as the insured is made whole, or at least until the insured is not in the position of competing with the insurer for the same source of funds. Added to this is the fact that it was not until after *Rimes* that Wisconsin adopted a discovery rule to be applied with the statute of limitations and to govern all tort actions other than those already governed by a legislatively created discovery rule.¹¹² Under the discovery rule, as later amplified,¹¹³ an action accrues and the statute begins to run when the plaintiff discovers, or with reasonable diligence should discover, that he or she has sustained harm and that the defendant is associated with the cause of that harm. In Wisconsin it has traditionally been held that a claim is deemed to accrue when there is a "claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it."¹¹⁴

Does all of the foregoing mean that although a subrogated insurer has three years to pursue its subrogation claim, just as its insured has to pursue his or her personal injury claim,¹¹⁵

110. See *supra* note 37 and accompanying text.

111. *Shelby Mut. Ins. Co. v. Home Mut. Ins. Co.*, 25 Wis. 2d 25, 130 N.W.2d 296 (1964).

112. *Hansen v. A.H. Robins Co., Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983).

113. *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397, 388 N.W.2d 140 (1986).

114. *Crawford v. Shepherd*, 86 Wis. 2d 362, 365-66, 272 N.W.2d 401, 402 (1978).

115. Under Wis. STAT. § 893.54 (1985-86); and, six years for injury to property under Wis. STAT. § 893.52 (1985-86).

the clock as to each begins to run on a different date? Is the date for the insurer that on which it and its insured, for whatever reason, are in a position when they can no longer compete for the same funds?

An affirmative answer to these questions would confuse the ability to enforce a claim with the ability to actually collect damages on the claim that is enforced. It must be remembered that in both *Garrity* and *Rimes* the insurer and its insured were in competition for a limited source of funds. Neither case involved the issue of whether the subrogated insurer could pursue its claim against a tortfeasor to judgment. The cases involved only the issue of the priority of payment of the competing claims of a subrogated insurer and its insured. It could hardly be argued that a statute of limitations would not begin to run on a claim against an impoverished tortfeasor until he or she had a source of funds to pay the potential judgment.

In addition to the foregoing it must be remembered that under section 803.03(2) of the statutes, if the insured commences an action against a tortfeasor, the subrogated insurer must be joined. The same section provides that if the subrogated insurer is the first to commence an action, the insured must be joined. When those provisions are considered together with section 803.01, which tolls the statute if only one party holding part of a claim commences the action,¹¹⁶ it is abundantly clear that not only does the subrogated insurer come under the same statute of limitations as its insured, but also that the clock starts running for each at precisely the same time.

VI. CONCLUSION

Much water has passed over, under, around and through the judicial dam since the supreme court articulated the first principle affecting insurer subrogation in Wisconsin. Clarity has not always been the product of the courts' decisions. The indemnity/investment dichotomy still remains a troublesome issue and probably more so now than in the past due to the new gloss *Cunningham v. Metropolitan Life Insurance Co.*¹¹⁷

116. See *supra* note 45 and accompanying text.

117. 121 Wis. 2d 437, 360 N.W.2d 33 (1985).

has added. What most once thought would qualify as an indemnity contract may now fail to qualify because of *Cunningham*. Such failure may occur not because the policy fails to reimburse the insured for actual losses incurred, but because the language of the policy fails to limit the insured to one indemnity for loss and no more. The court, even within the last year, has demonstrated difficulty in sorting out the collateral source rule from principles of subrogation. Still, the last year has seen new clarity develop as to the issue of priority between insured and subrogated insurer in competition for a limited source of funds from a tortfeasor. Since *Garrity v. Rural Mutual Insurance Co.*¹¹⁸ and *Rimes v. State Farm Mutual Automobile Insurance Co.*¹¹⁹ have now been fairly well sorted out and refined,¹²⁰ the remaining unsettled issues involving insurer subrogation in Wisconsin are, in candor, probably insignificant. Considering the track record of the Wisconsin courts on subrogation issues over the past century, it is difficult to predict the future development of the law. On matters such as that it is much better to be a jockey than a bookie.

118. 77 Wis. 2d 537, 253 N.W.2d 512 (1977).

119. 106 Wis. 2d 263, 316 N.W.2d 348 (1982).

120. There will probably be very few situations in which a subrogated insurer will allow itself to be in the position of competing with its insured thus forcing a true *Rimes* situation. However, this can still occur. See, e.g., *Wilmot v. Racine County*, 136 Wis. 2d 57, 400 N.W.2d 917 (1987).

