

# OREGON LAW UPDATE

## The Insurer vs. the Insured: Subrogation and the “Real Party in Interest” Rule

**From the desk of Jeff Eberhard: Is an insurer that makes an outright payment to its insured, and is subrogated to the insured’s claims arising from the loss for which payment was made, the “real party in interest” on a claim in any subsequent litigation to recover the amount paid to the insured?**

**Claims Pointer: Yes. If the complaint alleges that the insurer made an outright payment to its insured and became subrogated to its insured’s claim against the negligent defendant for property damage, then, as a matter of law, the insurer is the real party in interest as to that claim.**

case in point...

Nationwide Ins. Co. of America v. Tri-County Metropolitan Transp. Dist., 264 Or App 714, -- P3d -- (2014).

Nationwide Insurance Company of America (“Nationwide”) paid \$2,753.73 to repair damages to its insured’s Cadillac caused by defendant Tri-County Metropolitan Transportation District’s (“TriMet”) negligent operation of a bus. Nationwide then sued TriMet to recover the amount it paid to its insured, alleging that it was subrogated to all rights of its insured against TriMet. TriMet moved to dismiss the complaint on two grounds: that Nationwide was not the real party in interest on the claim, i.e., that Nationwide could not bring the claim against TriMet; and that the complaint did not state a claim for negligence because it did not allege that Nationwide itself, rather than its insured, had been injured by TriMet’s negligence.

The trial court granted both motions and dismissed the case for failure to state a claim. On appeal, the court first addressed the trial court’s dismissal on the ground that Nationwide was not the real party in interest. The Oregon Rules of Civil Procedure require that every action be prosecuted in the name of the real party in interest. *Metropolitan Property & Cas. v. Harper*, 168 Or App 358, 374 (2000); ORCP 26 A. The rule assures a defending party that it will be required to defend against a claim only once. *Id.* In this case, the court advised that under Oregon law, an insurer who makes an outright payment to its insured is subrogated to the insured’s claims arising from the loss for which payment was made. A subrogated insurer becomes the owner of the claim and is the real party in interest in any action to enforce the claim. Here, the complaint alleged that TriMet caused \$2,753.73 in physical damage to Nationwide’s insured’s car, that Nationwide made an outright payment of the amount to its insured, and that Nationwide became fully subrogated to its insured’s claims arising out of the property

damage caused by TriMet. These allegations, the court concluded, were sufficient to establish that Nationwide was the real party in interest.

Nevertheless, TriMet argued that the insured remains the real party in interest and to conclude otherwise would put TriMet at risk of having to defend a separate suit brought by the insured. The court acknowledged TriMet’s concern on this point, however, it rejected TriMet’s argument for two reasons. First, at this stage in the case, the court’s review is confined to the complaint. The court concluded that allegations in the complaint, if true, establish that Nationwide is the only real party in interest on the claim alleged because Nationwide became subrogated to all rights of its insured against TriMet. Second, the court advised that the proper method to address TriMet’s concern that the insured is also a real party in interest is to move to dismiss the complaint for failure to join an indispensable party. The court could not consider this defense on appeal because TriMet originally did not move to dismiss the complaint on these grounds. On remand, however, the court advised that if the evidence shows that the insured also is a real party in interest on the claim, then TriMet can move at that time to dismiss for failure to join an indispensable party, i.e., failure to join the insured to the litigation.

The court also rejected TriMet’s second argument that Nationwide’s complaint failed to allege that Nationwide itself had been injured by TriMet’s negligence, and concluded that because Nationwide became subrogated to all rights of its insured against TriMet, Nationwide’s complaint sufficiently stated a claim for negligence against TriMet.



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