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## THE ANTI-SUBROGATION RULE IN ALL 50 STATES

The Anti-Subrogation Rule (“ASR”) is a common law defense to subrogation. It states that a subrogated insurance company standing in the shoes of its insured cannot bring a subrogation action against or sue its own insured. Sometimes known as the “suing your own insured” defense, the ASR was originally developed based on the logical premise that because the carrier stands in the shoes of its insured, it would essentially be suing itself. Therefore, no right of subrogation can arise in favor of an insurance company against its own insured. *Wager v. Providence Ins. Co.*, 150 U.S. 99 (1893); *The John Russell*, 68 F.2d 901 (2<sup>nd</sup> Cir. 1934); *Sherwood Trucking, Inc. v. Carolina Cas. Ins. Co.*, 552 F.2d 568 (4<sup>th</sup> Cir. 1977); *Peavey Co. v. M/V ANPA*, 971 F.2d 1168 (5<sup>th</sup> Cir. 1992) (insured or additional insured); *Prestige Cas. Co. v. Michigan Mut. Ins. Co.*, 99 F.3d 1340 (6<sup>th</sup> Cir. 1996). This seemingly simple concept has many tentacles and each state has developed their own bodies of law with regard to how and when the ASR will be applied, setting forth numerous exceptions and rules regarding its application. This chart will provide an overview of the ASR generally, as well as the nuances of its application in each state. The ASR can be set forth in case law or by state statute.

The application of the ASR can depend heavily on the facts of the case, the status and legal identity of each of the parties involved, and the terms, conditions, or exclusions of the insurance policy involved and any other written or oral agreements which may be involved. The identity of the insured as a co-insured, an additional insured, an indemnitor, an implied co-insured, or as a person or entity having some kind of a relationship with or duty to the insured, may play a role in determining whether the ASR is to be applied in a particular case. The ASR may involve prohibiting subrogation against an entity that is considered to be an “additional insured” or “co-insured”, either by terms of the insurance policy, case law, or by statute. It may involve a situation where a separate agreement requires the insured to carry insurance for the benefit of a third party.

Paramount in the understanding of any ASR situation is the legal status of the tortfeasor. A parent corporation, subsidiary, affiliate, or partner of an insured might be considered a close enough relationship to prohibit subrogation by application of the ASR defense. It will depend on the state. The ASR prohibits actions by an insurer against its insured for recovery of a claim payment under the policy but will sometimes not prohibit an insurance company’s claim for reimbursement from the insured after the insured recovers from a third party who happens to also be insured by the same insurer. In states which do not prohibit subrogation under these circumstances, public policy does not prohibit reimbursement where the tortfeasor is insured under a separate policy.

### *Economic Waste Doctrine*

In some jurisdictions, it is considered “to protect against the same risk of loss.” An example is Connecticut, where the Connecticut Supreme Court in a case where the landlord’s insurer tried to subrogate against a tenant has held that where a lease did “not remotely inform the defendant that they would be liable to their landlord’s insurer” for fire damages to the landlord’s building, nor did it inform the defendant of the need to obtain fire insurance “to cover the value of the entire multi-unit

*apartment building*”, the tenant would be considered to be an “implied co-insured” and could not be subrogated against due to the ASR. One of the reasons for establishing this “default” rule was to avoid the economic waste of forcing *each* individual tenant in a multi-unit apartment to insure the whole building.

### ***Implied Co-Insured Doctrine***

The ability of a landlord’s property insurer to subrogate against a tenant for property damage caused by the negligence of the tenant depends on which state the loss occurs in and the nature and language of the lease involved. There are generally three different approaches:

- (1) A minority of courts hold that, absent a clear contractual expression to the contrary, the insurance carrier will be permitted to sue a tenant in subrogation.
- (2) Seeking to avoid a *per se* rule, in some states the ability to subrogate must be assessed on a case-by-case basis and governed by the intent and reasonable expectations of the parties under the terms of the lease and the facts of case.
- (3) Known as the “*Sutton Rule*”, some states hold that, absent a clearly expressed agreement to the contrary, the tenant is presumed to be a co-insured on the landlord’s insurance policy and, therefore, the landlord’s insurance carrier has no right of subrogation against the negligent tenant. The rule of subrogation known as the “*Sutton Rule*” states that a tenant and landlord are automatically considered “co-insureds” under a fire insurance policy as a matter of law and, therefore, the insurer of the landlord who pays for the fire damage caused by the negligence of a tenant may not sue the tenant in subrogation because it would be tantamount to suing its own insured.

The subject of when and under what circumstances a landlord’s property insurer can subrogate against a tenant is not covered in this chart, but is covered thoroughly in another chart that can be found [HERE](#).

### ***Origins of the Anti-Subrogation Rule***

The origins of common law subrogation lie in equity – the body of law which was developed in the English Court of Chancery that traditionally supplemented the common law where the application of the common law would have operated too harshly. This was done to achieve what is sometimes referred to as natural justice, or more simply speaking, fairness. Subrogation seeks to impose the ultimate responsibility for a wrong or loss on the party who, in equity and good conscience, ought to bear it. The equitable considerations that are the underpinnings of subrogation are (1) that the insured should not recover twice for a single injury, and (2) that the insurer should be reimbursed for payments it made that, in fairness, should be borne by the wrongdoer. *Powell v. Blue Cross & Blue Shield of Alabama*, 581 So.2d 772, 774 (Ala. 1990), *overruled on other grounds by Ex parte State Farm Fire & Cas. Co.*, 764 So.2d 543 (Ala. 2000); see also *Aetna & Cas. Sur. Co. v. Turner*, 662 So.2d 237 (Ala. 1995); *Star Freight, Inc. v. Sheffield*, 587 So.2d 946 (Ala. 1991). The same equitable principles which gave birth to subrogation were eventually developed into a rule which prohibits an insurer from asserting a right of subrogation against its own insured if the defendant is the insured, a co-insured, or an additional insured under the subrogating insurer’s policy. Allowing subrogation in these cases would compromise the special relationship between the insured and the insurer.

### ***Purpose and Application of the Anti-Subrogation Rule***

There are five (5) fundamental reasons for the ASR:

1. An insurer who seeks subrogation stands in the shoes of the insured and can take nothing by subrogation but the rights of the insured. Because a person cannot sue himself for damages, that person’s insurer, who stands in the person’s shoes for subrogation purposes, cannot sue the person either.
2. Public policy. An insurer that has accepted premiums to cover certain risks should not be allowed to pass the same risks back to its insured in a subrogation action. Otherwise, the insurer would be allowed to avoid the coverage that the insured has purchased.

3. The relationship between an insurer and its insured are fraught with conflicting interests.
4. There is a possibility that, if insurers were permitted to sue their insureds for subrogation, the insurers would be able to obtain information from their insureds under the guise of policy provisions for later use in a subrogation action.
5. An insurer's right to sue its insured could be interpreted by the insurer as a judicial sanction to breach the insurance policy. *Stafford Metal Works, Inc. v. Cook Paint and Varnish Co.*, 418 F. Supp. 56 (N.D. Tex. 1976).

To permit the insurer to sue its own insured for a liability covered by the insurance policy would violate basic equity principles, as well as violate sound public policy. Such action, if permitted, would (1) allow the insurer to expend premiums collected from its insured to secure a judgment against the same insured on a risk insured against; (2) give judicial sanction to the breach of the insurance policy by the insurer; (3) permit the insurer to secure information from its insured under the guise of policy provisions available for later use in the insurer's subrogation action against its own insured; (4) allow the insurer to take advantage of its conduct and conflict of interest with its insured; and (5) constitute judicial approval of a breach of the insurer's relationship with its own insured. *Home Ins. Co. v. Pinski Brothers*, 500 P.2d 945, 949 (Mont. 1972). The ASR, therefore, serves two purposes: (1) it prevents the insurer from passing the loss back to its insured, an act that would avoid the coverage that the insured had purchased; and (2) it guards against conflicts of interest that might affect the insurer's incentive to provide a vigorous defense for its insured. *N. Star Reinsurance Corp. v. Cont'l Ins. Co.*, 624 N.E.2d 647, 653-54 (N.Y. 1993).

### ***Exceptions to the Anti-Subrogation Rule***

The application of the ASR usually prevents inequitable results in cases involving a *single insurance policy*. An insurer who has paid a loss to its insured under a policy should not be allowed to sue that insured or a co-insured under the *same* policy to recover that same loss.

Every state is different, and some states have, over time, developed various exceptions to the application of the ASR. For example, if an insurer pays on behalf of one insured for damage caused by a second insured, under a policy that does not cover the second insured for the loss, the insurer might be allowed to subrogate against the second insured, an exception referred to as the "no-coverage exception." *Chubb Ins. Co. v. DeChambre*, 808 N.E.2d 37 (Ill. App. 2004); *Rosato v. Karl Koch Erecting Co.*, 865 F. Supp. 104 (E.D. N.Y. 1994). An insurer might also be able to subrogate for damage caused by a subcontractor's negligence where the insured general contractor's policy covered the subcontractor for property damage, but not liability. *Employers' Fire Ins. Co. v. Behunin*, 275 F. Supp. 399 (D. Colo. 1967). Another exception is where an insured has impaired the subrogation rights of the insurer. The insurer may be able to proceed against the insured or payee under the policy without the ASR being an impediment. *Maynard v. State Farm Mut. Auto. Ins. Co.*, 902 P.2d 1328 (Alaska 1995).

### ***Summary***

The ASR may be applicable in any case in which the tortfeasor has liability insurance with an insurer who is related to or the same as the subrogated carrier. The public policy underlying the ASR and the stated purposes for its application should be understood thoroughly in order to avoid its application in cases in which it can be avoided. Chinese walls can be erected to avoid the inadvertent sharing of information by an insurer at the expense of its insured. If an insurer is not the same, but have some sort of corporate relationship, the ASR should be carefully scrutinized. If there is a large deductible, an excess insurer, or a large SIR involved, then some part of the subrogated claim may be barred by the ASR while other parts are not. Knowing which can make the difference between a large subrogation recovery and no recovery at all. With the help of research by Jacob Coz, a Marquette law student and summer legal intern at Matthiesen, Wickert & Lehrer, S.C., let's take a closer look at the specific laws of all 50 states.

## SUMMARY OF ANTI-SUBROGATION RULE IN ALL 50 STATES

### ALABAMA

An insurer has no right of subrogation against its own insured. *Moring v. State Farm Mut. Auto. Ins. Co.*, 426 So.2d 810 (Ala. 1982). There is no right of subrogation against a tortfeasor when the tortfeasor and victim are insured by the same insurer. *Id.* The purchaser of a home has an insurable interest in the property but does not inherently become an “additional insured” on the contractor’s builder’s risk policy by purchasing the home. *McGuire v. Wilson*, 372 So.2d 1297 (Ala. 1979). In *McGuire*, McGuire, the homebuilder, got a builder’s risk policy from American Liberty, which insured McGuire from loss during construction of a home. McGuire contracted to sell the home to Wilson, contingent on Wilson getting an FHA loan. Wilson moved into the home prior to getting the FHA loan and negligently started a fire that damaged the home. American Liberty paid McGuire \$22,000 for the damage assuming the damage was covered under the builder’s risk policy and the home subsequently was officially sold to Wilson. American Liberty filed a subrogation action against Wilson. The court held that a purchaser with a beneficial interest does not become an additional insured under the builders’ risk policy so as to trigger the ASR and, therefore, subrogation was permissible.

### ALASKA

An insurer cannot recover by means of subrogation against its own insured. *Graham v. Rockman*, 504 P.2d 1351 (Alaska 1972). An insurer may not recover its losses from a negligent third party if the negligent third party is an additional insured under the applicable policy. *Id.* An insurer can seek reimbursement for medical expenses paid to its insured under his policy when it also insures the tortfeasor and the insured brings an action against the tortfeasor seeking damages for the same medical expenses. *Maynard v. State Farm Mut. Auto. Ins. Co.*, 902 P.2d 1328 (Alaska 1995). A subcontractor’s immunity for liability to the insurer is not limited to the amount of damages to the subcontractor’s own property, rather a builders’ risk policy includes losses caused by negligence of any insured, and the insurer cannot shift those losses to an insured. *Baugh-Belarde Const. Co. v. College Utilities Corp.*, 561 P.2d 1211 (Alaska 1977). If an insurer insures both the tortfeasor and victim in an auto accident, after the insurer pays the victim for their medical expenses, the injured party can be barred from suing the tortfeasor for those same medical expenses if the insurer asks the injured party not to sue for those expenses. *Ruggles ex rel. Estate of Mayer v. Grow*, 984 P.2d 509 (Alaska 1999). In *Ruggles ex rel. Estate of Mayer*, the insurer covered both the plaintiff and tortfeasor under separate policies. The court permitted the insurer to avoid a double recovery by a Med Pay insured by requiring her not to include the medical expense benefits paid to her under the Med Pay coverage in the tort action. Better reasoning holds that an insurer contemplating subrogation against its own insured “must state such intent in clear and unequivocal language in the policy.” This is in contrast with some other states that require the policy to state such an intention in clear and unequivocal language (*e.g.*, *AGIP Petroleum Co., Inc. v. Gulf Island Fabrication, Inc.*, 920 F. Supp. 1318 (S.D. Tex. 1996)). In *Maynard*, Maynard was involved in auto accident with Madison and both were separately insured under policies issued by State Farm. After recovering his medical expenses under his own policy, Maynard brought an action to recover the same damages under Madison’s liability policy. The question that came up before the Alaska Supreme Court was whether State Farm would be entitled to reimbursement if Maynard recovered the same medical expenses under Madison’s liability coverage. One section of the medical expense provisions of Maynard’s policy provided generally that State Farm need not pay any medical expenses for which Madison had already been compensated elsewhere and a second section provided that State Farm would be entitled to reimbursement from any third-party recovery of medical expenses paid to Madison under his own policy. The court permitted subrogation, noting that there was an absence of any policy language suggesting that these two provisions did not apply when the carrier insured both parties under separate policies.

### ARIZONA

In Arizona, the ASR is often the name given to and confused with the common law rule long followed in Arizona, known also as the “Anti-Assignability Rule”, which states that, absent a statute, an assignment of a cause of action for personal injuries against a third-party tortfeasor is void and unenforceable. *Harleysville Mutual Ins. Co. v. Lea*, 410 P.2d 495 (Ariz. App. 1966). Arizona also follows the more traditional ASR – an insurer cannot subrogate against its own insured to assert the claim of its named insured, even though it doesn’t often refer to it by that name. *Transp. Indem. Co. v. Carolina Cas. Ins. Co.*, 652 P.2d 134 (Ariz. 1982). An entity that is an insured under

the liability portion of an auto policy and, therefore, protected by the ASR for claims under the liability policy, can still be subrogated against under the collision portion of the policy. *KnightBrook Ins. Co. v. Payless Car Rental Sys., Inc.*, 2015 WL 1754685 (D. Ariz. 2015). An individual hired to transport a vehicle is not an “insured” under the vehicle owner’s auto policy collision coverage, meaning that subrogation against the hired individual is permitted. *Amica Mut. Ins. Co. v. Auto Driveaway Co.*, 831 P.2d 882 (Ariz. App. 1992). Where a policy expressly limits coverage to the named dealership, an individual who borrows the vehicle from a dealership is not an insured under the dealership’s collision policy, even if the policy extends coverage to the borrowed vehicle. *Highlands Ins. Co. v. Fischer*, 595 P.2d 186 (Ariz. App. 1979). In *Auto Driveaway Co.*, a shipper’s insurer sued a common carrier, seeking reimbursement of money the insurer paid to the shipper for damage to her auto which occurred while it was being transported by a driver hired by the common carrier. The trial court entered summary judgment for the insurer and the carrier appealed. The Court of Appeals held that the driver of vehicle was not an “insured” under the auto collision policy, therefore, the shipper’s insurer could subrogate against the common carrier. In *Fischer*, the defendants contracted with a dealership to pay the market value of a substitute vehicle if it were destroyed, and subsequently received a substitute vehicle while their vehicle was repaired. The substitute vehicle was subsequently destroyed in an accident and the Court ruled that the dealership’s collision insurer could subrogate against the defendants because the dealership’s policy expressly limited coverage to the named insured on the policy and the defendants were not the named insureds despite the coverage being extended to substitute vehicles.

## ARKANSAS

An insurance company may not subrogate against its own insured or a co-insured. However, when a party claiming to be a co-insured is merely a loss payee to which no liability coverage is afforded, subrogation is permissible. *Dalrymple v. Royal-Globe Ins. Co.*, 659 S.W.2d 938 (Ark. 1983). A permissive vehicle user, who is a co-insured under the liability section of a policy, can still be subrogated against under the collision portion of a policy, depending on the exact terms of the policy. *Gardner v. Baker*, 1986 WL 1632 (Ark. App. 1986) (*unpublished*). Where an insured is required by contract or lease to carry insurance for the benefit of another, the other party may attain the status of co-insured such that no subrogation may be taken against that party. *Page v. Scott*, 567 S.W.2d 101 (1978). In *Dalrymple*, Dalrymple sold some apartments to Ross with the condition that Ross must obtain hazard insurance for the property and that Dalrymple must be listed as a loss payee on the insurance. Ross bought a hazard insurance policy from Royal-Globe Insurance. Faulty wiring caused a fire in one of the insured apartments and Royal-Globe paid Ross and Dalrymple for their loss. Royal-Globe initiated a subrogation action against Dalrymple on behalf of the tenants of the damaged apartment and Dalrymple argued that he was a co-insured under Ross’ hazard insurance policy and, therefore, he was protected by the ASR. The court ruled that the policy in no way afforded a loss-payee any liability protection and, therefore, although Dalrymple could collect for the loss, he could also be subrogated against for that same loss. In *Gardner*, Baker dropped off her car at a gas station so that it could be washed. Gardner offered to drive the car back to Baker’s home after the wash was completed and Baker agreed. Gardner crashed the car on the way to Baker’s home. Shelter Insurance Company, Baker’s car insurance company, sought to subrogate against Gardner for the damage done to Baker’s car. Gardner argued that he was protected by the ASR because as a permissive user of the vehicle, he was entitled to co-insured status under Baker’s auto insurance policy. The court reasoned that the term “insured” has no fixed meaning in the policy. Under the liability portion of the policy, a permissive user was an “insured.” However, under the collision portion, which protects the “insured vehicle”, there was no definition of “insured” because the focus is upon autos rather than persons. “You” and “your,” however, are defined as the “insured named in the Declaration,” which in this case was the owner/insured and not the permissive user and subrogation was allowed.

## CALIFORNIA

An insurer has no right to subrogation against its own insured for losses or liability for which the insured is covered under the policy. *Truck Ins. Exch. v. County of Los Angeles*, 95 Cal. App.4<sup>th</sup> 13, 115 Cal. Rptr.2d 179 (Cal. Ct. App. 2002). If the subrogee is not insured for the loss that occurs, the insurer can still seek subrogation and the ASR does not apply. *Id.* If a claimant and a tortfeasor are insured by the same policy, the insurer cannot subrogate against the tortfeasor for the insurer’s payment for the loss, because doing so would mean in effect that the insured would be covering his own loss, despite the insurer’s having accepted premiums to do so. *Longoria v. Hengehold Motor Co.*, 191 Cal. Rptr. 439 (Cal. Ct. App 1983) (Subrogation barred where husband and wife who shared policy collided while driving separate vehicles). With regard to equitable subrogation against an insured, if the policy does not cover the insured for a particular loss or liability, it would neither undermine the insured’s

coverage nor be inequitable to impose the loss or liability on the insured if the insured caused or was otherwise responsible for the loss or liability. *McKinley v. XL Specialty Ins. Co.*, 33 Cal.Rptr.3d 98 (Cal. Ct. App. 2005). The anti-subrogation rule bars an insurer's subrogation claims against its own insured for a claim arising from the very risk for which the insured was covered. *Romero v. S. Schwab Company, Inc.*, 2018 WL 31261111 (S.D. Cal. 2018); *Pennsylvania General Ins. Co. v. Austin Powder Co.*, 502 N.E.2d 982 (N.Y. 1986).

If an insurer insures both the tortfeasor and victim under separate policies, the ASR is triggered when the insurer attempts to recover from the tortfeasor for losses paid to the victim from the same incident. *Nat'l Union Fire Ins. Co. of Pitt., Pa. v. Engineering-Science, Inc.*, 673 F. Supp. 380 (N.D. Cal. 1987) (Subrogation barred where insurer insured contractor under builder's risk policy and engineering firm under errors and omissions policy which provided coverage for the same loss). However, in *White v. Allstate Ins. Co.*, 1996 WL 601476 (9<sup>th</sup> Cir. 1996) (*unpublished*), the Ninth Circuit, applying California law, found that subrogation was permissible against a painter, whom Allstate covered under an auto insurance policy, when the painter negligently burned down a home that Allstate covered under a homeowner's policy.

## **COLORADO**

An insurer may not seek recovery against its insured on a claim arising from the risk for which the insured was covered. *1700 Lincoln, Ltd. v. Denver Marble & Tile Co.*, 741 P.2d 1270 (Colo. App. 1987). An insurer may sue to recover payments made for damages caused by a subcontractor's negligence where a general contractor's policy covered subcontractors for property damage, but not liability. *Employers' Fire Ins. Co. v. Behunin*, 275 F. Supp. 399 (D. Colo. 1967). The ASR did not bar the auto insurer from recovering from the settlement the insured received from the tortfeasor as allowing reimbursement did not make the insurer's medical payments coverage illusory. *DeHerrera v. American Family Mut. Ins. Co.*, 219 P.3d 346 (Colo. App. 2009). To qualify as an insured on a policy, and thereby trigger the protection of the ASR, a subcontractor must show that they are an insured under the "plain language" of the policy. *Fairfield Development, Inc. v. JDI Contractor & Supply, Inc.*, 703 F. Supp.2d 1211 (D. Colo. 2010) (applying Colorado law). In *Continental Divide Ins. Co.*, the insurer of a property owner sued the property manager for indemnity and breach of contract, arising from a property damage judgment a commercial tenant obtained against the property owner and manager in the underlying action. The court held that the insurer was barred by the ASR because the insurer clearly covered the property manager for the conduct that gave rise to its liability, and the fact that the coverage was excess to manager's primary insurance did not amount to an exclusion. The court discussed the "no-coverage" exception. If an insurer pays on behalf of one insured for damage caused by a second insured, under a policy that does not cover the second insured for the loss, the insurer may recover from the second insured by subrogation. This exception is sometimes called the "no-coverage exception."

In *Higby Crane Servs., LLC v. Nat'l Helium, LLC*, 2017 WL 3495478 (10<sup>th</sup> Cir. 2017), DCP Midstream, LP started a fire that damaged a crane belonging to Higby Crane Services, LLC. At the time of the fire, the crane was located on the grounds of a gas processing plant owned by DCP's wholly-owned subsidiary, National Helium, LLC. Higby's insurer, National Interstate Insurance Co., paid for the damage under the terms of a commercial inland marine policy. National and Higby then sued DCP, seeking to recover the cost to repair the crane. DCP argued that the Anti-Subrogation Rule barred recovery by National against DCP because DCP was National's insured under a commercial general liability policy that also covered the loss. Plaintiffs argued that the CGL Policy cannot cover DCP for the loss at issue because the Additional Insured Provision is void under Colorado's Anti-Indemnification Statute which bars a construction business from contracting out liability for its own negligence. The court held that the CGL Policy did not cover DCP under the circumstances of this case. Consequently, DCP is not National's insured for the loss at issue and the Anti-Subrogation Rule is inapplicable.

## **CONNECTICUT**

An individual who contributes to the payments on the premium of a property insurance policy, and who would reasonably not expect to be the target of subrogation, is exempt from subrogation. *Allstate Ins. Co. v. Palumbo*, 994 A.2d 174 (Conn. 2010). A home insurer can seek equitable subrogation against a houseguest who negligently burns down a home. *Wasko v. Manella*, 849 A.2d 777 (Conn. 2004). In *Palumbo*, a woman's fiancé lived with her in the home that she owned. The fiancé negligently installed a water heater, which resulted in a fire that damaged the home. The court ruled that equitable subrogation against the fiancé was impermissible because the

fiancé contributed to payments on the homeowner's insurance, had lived in the residence for an extended period, and likely would have believed that subrogation against him was impossible. In *Wasko*, a houseguest negligently burned down a vacation home. The insurer brought a subrogation action against the guest, who argued that he was protected by the ASR because he was an implied co-insured on the homeowners' policy. The court ruled that although statutory subrogation was barred, equitable subrogation against the houseguest was still permissible.

## DELAWARE

An insurer has no right of subrogation against an insured, co-insured, or a wrongdoer who is an insured under the same policy. *Lexington Ins. Co. v. Raboin*, 712 A.2d 1011 (Del. 1998). If a joint tortfeasor is protected from subrogation because of the ASR, and other joint tortfeasors who are not protected by the ASR are sued by the insurer, the unprotected joint tortfeasors can sue the protected joint tortfeasor for contribution. *Great American Assur. Co. v. Fisher Controls Intern., Inc.*, 2003 WL 21901094 (2003) (*unpublished*); *Firemen's Ins. Co. of Washington, D.C. v. Fire-Free Chimney Sweeps, Inc.*, 2010 WL 1268158 (2010) (*unpublished*). In *Fisher Controls Intern., Inc.*, Great American Assurance Company ("Great American") paid damages for a fire that broke out at a refinery during a renovation project. Great American sued several subcontractors alleging that they negligently started the fire. They drop the suit against one of the subcontractors, Conectiv, after determining that Conectiv was an insured under the Great American policy and, therefore, protected by the ASR. Several of the other subcontractors then sue Conectiv for indemnification or contribution. The court rules that although the ASR protects Conectiv from a direct action by Great American, precedent indicates that Conectiv can still be sued for contribution or indemnification by its joint tortfeasors.

## DISTRICT OF COLUMBIA

ASR yet to be determined.

## FLORIDA

An insurance carrier has no right of subrogation against its own insured. *Bulone v. United States Auto. Ass'n*, 660 So.2d 399 (Fla. Dist. Ct. App. 1995). If a contract imposes an affirmative duty on a building owner to buy insurance for the benefit of the owner and contractor, then the contractor becomes an insured under the policy, preventing the insurer from bringing suit against the contractor. *Ins. Co. of N. Am. v. E.L. Nezelek, Inc.*, 480 So.2d 1333 (Fla. Dist. Ct. App. 1985). Where a contract required a property owner to carry fire insurance that included a contractor as one of the insureds with the intent of shifting all risk of fire damage to an insurer regardless of any parties' negligence, failure of the owner to include the contractor in the insurance policy prevented the property owner from collecting from the contractor on behalf of the insurer. *Smith v. Ryan*, 142 So.2d 139 (Fla. Dist. Ct. App. 1962). An insurer may not be subrogated to the rights of one insured to defeat another insured due to its undertaking to insure both. *Ray v. Earl*, 277 So.2d 73 (Fla. Dist. Ct. App. 1973). Generally, a builders' risk insurer may not recover from a co-insured for damages caused to property covered under the policy. *Dyson & Co. v. Flood Engineers, Architects, Planners, Inc.*, 523 So.2d 756 (Fla. Dist. Ct. App. 1988). Where a contractor failed to include an engineering/design firm in their builders' risk policy, despite having contracted to do so, the contractor's insurer may not subrogate against the engineering/design firm because the engineering/design firm has "a substantial interest in being held free from any liability arising out of its participation in the project." *Id.* An insurer who makes payments to an insured for injuries the insured suffered from an uninsured motorist is entitled to subrogate against money the insured receives from a joint tortfeasor of the uninsured driver. *Schwab v. Town of Davie*, 492 So.2d 708 (Fla. Dist. Ct. App. 1986) (Allstate, who paid Schwab \$190,000 for injuries caused by an uninsured driver, was entitled to subrogate against the \$100,000 Schwab was paid by Town of Davie for having negligently designed the road Schwab was injured on). In *Dyson & Co.*, Flood Engineers designed a sewage system for the city of Pensacola, Florida, who subsequently hired the contractor Dyson to build the Sewage system. Dyson was required by contract to maintain a builders' risk policy that included Flood Engineers as an insured, but Dyson failed to do so and after a fire caused significant damage to the project, Dyson's insurer attempted to subrogate against Flood Engineers for the damage. Flood Engineers argued that Dyson's failure to include Flood Engineers as an insured on Dyson's policy barred Dyson's insurer from subrogating against Flood Engineers, while Dyson and its insurer argued that Flood Engineers

could not be an insured on the policy because Flood Engineers had no insurable interest in the project (*e.g.*, bricks, mortar, tools, etc.). The court ultimately held that Flood Engineers could not be subrogated against because Dyson had breached their duty to include Flood Engineers on their policy, and Flood Engineers had an insurable interest in the project because Flood Engineers had a “substantial interest in being held free from any liability arising out of its participation in the project.”

## GEORGIA

An insurer cannot subrogate against its own insured or against those deemed to be a conditional insured or co-insured under the policy of an insurance. *AEW No. 2 Corp. v. Fed. Ins. Co.*, 603 S.E.2d 22 (Ga. Ct. App. 2004). Insurers cannot sue a co-insured party indirectly by requiring one co-insured party to sue the other and remit any winnings to the insurer. *E. C. Long, Inc. v. Brennan’s of Atlanta, Inc.*, 252 S.E.2d 642 (Ga. Ct. App. 1979). An insured lessor, that paid its insurance claim for damages to a trailer while used by a lessee, could not maintain a subrogation suit on behalf of its insurer against the lessee, who was a co-insured. *Curles v. U.S. Fid. & Guar. Co.*, 403 S.E.2d 458 (Ga. Ct. App. 1991).

## HAWAII

ASR yet to be determined.

## IDAHO

An insurer cannot subrogate against an alleged wrongdoer who is an insured under the policy. *Pendlebury v. W. Cas. & Sur. Co.*, 406 P.2d 129 (Idaho 1965).

## ILLINOIS

An Insurer may not subrogate against its own insured or any person or entity that maintains a “co-insured” status. *Dix Mut. Ins. Co. v. LaFramboise*, 597 N.E.2d 622 (Ill. 1992). ASR does not preclude an insurer from asserting a subrogation claim against its own insured where the policy does not cover the risk at issue. *LaSalle Nat’l Bank v. Massachusetts Bay Ins. Co.*, 958 F. Supp. 384 (N.D. Ill. 1997). An insurer may subrogate against a party covered by a different policy issued by that same insurer, as long as the party’s policy limits are sufficient. *Benge v. State Farm Mut. Auto. Ins. Co.*, 697 N.E.2d 914 (Ill. App. Ct. 1998). If the party’s limits are inadequate, the subrogating carrier may have a conflict of interest. *Id.* If a party is an insured under the liability policy, they can still be subrogated against under the collision policy. *Universal Underwriters Group v. Pierson*, 787 N.E.2d 296 (Ill. App. Ct. 2003). If a contract or lease requires an insured to carry insurance for the benefit of another, the other party might attain the status of co-insured. *Reich v. Tharp*, 521 N.E.2d 530 (Ill. App. Ct. 1987). Where a general contractor purchases a policy in the name of the property owner for the mutual benefit and protection of both the general contractor and the property owner, the insurer is barred from seeking indemnification from the general contractor when they are defending the property owner. *Vandygriff v. Commonwealth Edison Co.*, 408 N.E.2d 1129 (Ill. App. Ct. 1980).

In *LaSalle Nat. Bank*, a man intentionally burns down the home that he and his wife live in, and as a result, the home’s insurers pay the wife for her losses and then seeks subrogation against the husband for payments made to the wife. The court rules that because the policy explicitly did not apply to intentional acts, the ASR did not bar the insurer from asserting subrogation claims against the husband. In *Benge*, the court considered whether an insurance carrier can exercise its subrogation rights under one policy against a party it insures under a different policy. The court held that the auto insurer could, without violating the ASR or public policy, assert a policy’s subrogation provision to avoid paying physical damage coverage benefits after it had already paid for the damage under the liability coverage of an unrelated policy it had coincidentally issued to the at-fault driver, where no conflict of interest existed insofar as the at-fault driver’s liability coverage exceeded the property damage coverage. In *Pierson*, Universal Underwriters Group (“UUG”) insured a car dealership that permitted Pierson to borrow a car. Pierson was subsequently involved in an accident and UUG paid for the damage to the car. UUG then brought a subrogation action against Pierson. The court permitted the subrogation action on the basis that because subrogation is allowed when there are two separate policies, UUG could defend Pierson under the third-party liability portion of the policy and subrogate for damage to the vehicle itself under the collision policy.



## INDIANA

An insurer may not subrogate against its own insured. *S. Tippecanoe School Bldg. Corp. v. Shambaugh & Son, Inc.*, 395 N.E.2d 320 (Ind. App. 1979). An insurer may be permitted to subrogate against a subcontractor if the subcontractor was not an intended insured under the policy. *Indiana Erectors, Inc. v Trustees of Indiana University*, 686 N.E.2d 878 (Ind. App. 1997). In *Indiana Erectors Inc.*, a builder's risk insurer brought a subrogation action in the insured landowner's name to recover from the subcontractor for damage caused by a fire. The court held that the builder's risk insurer could maintain a subrogation action against the subcontractor for the fire loss because the subcontractor was not an intended insured under the policy.

## IOWA

An insurer has no right to subrogation when the subrogor and target are covered by the same policy. *Connor v. Thompson Constr. & Development Co.*, 166 N.W.2d 109 (Iowa 1969). The ASR does not inherently protect a permissive driver because under Iowa Code § 321.493, a permissive driver is not required by law to be an insured under the owner's liability insurance unless the permissive driver, due to prior driving problems, is required by § 321A to provide proof of financial responsibility. *Universal Underwriters Ins. Co. v. American Family Ins. Group*, 587 N.W.2d 224 (Iowa 1998). A permissive driver can be an insured under another's policy where the vehicle the permissive driver was operating was a hired vehicle that the permissive driver did not own. *United Suppliers, Inc. v. Hanson*, 876 N.W.2d 765 (Iowa 2016). Subrogation is still permissible against a contractor when a home is damaged in a fire after the homeowner had moved in because a homeowner does not become the contractor's insurer upon agreeing to maintain builders' risk insurance during construction, the homeowner is not obligated to include the contractor as a named insured on their insurance, and any protections that the builders' risk insurance extended to the contractor terminated once the homeowner moves into the home. *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486 (Iowa 2000). In *Hanson*, United Suppliers (US) hired R. Hanson Trucking, Inc. (Hanson) to transport chemical shipments on behalf of US. DiRisio was hired by Hanson to drive the vehicle that would be handling the chemical shipments. DiRisio was subsequently involved in a one vehicle accident, which US's insurer, Nationwide, paid for, and then subsequently sought to subrogate against DiRisio and Hanson for the costs related to the accident. The court found that DiRisio was an insured under US's nationwide policy due to the policy's "Business Auto Coverage Form" that extended US's coverage to a hired or borrowed vehicle that was not driven by "[t]he owner or anyone else from whom [United Suppliers] hire[d] or borrow[ed] a covered 'auto'." This language was found to make DiRisio an insured under US's Nationwide policy, meaning that the ASR protected DiRisio from subrogation and also protected Hanson from derivative liability.

## KANSAS

An insurer can have no right of subrogation against its own insured since its insured is not a third party but one to whom a duty to pay a loss is owed. *Transamerica Ins. Co. v. Gage Plumbing and Heating Co.*, 433 F.2d 1051 (10<sup>th</sup> Cir. 1970) (applying Kansas law). Under the ASR, an insurer may not seek recovery against its insured *on a claim arising from the risk for which the insured was covered*. *DeHerrera v. Am. Family Mut. Ins. Co.*, 219 P.3d 346 (Colo. App. 2009).

In addition, it is generally stated that no right of subrogation arises against a person who is not a named insured but holds the status of an *additional insured* under the policy since it must have been the intention of the parties to protect this additional insured from the consequences of his negligence by including him in the insurance coverage. *Id.* An auto dealership's insurance contract did not include the bailee as an insured, and thus the insurer could assert a subrogation claim against the bailee to recover damages arising from the collision caused by bailee's negligence. *Western Motor Co. v. Koehn*, 748 P.2d 851 (Kan. 1988). Colorado has an anti-indemnity statute (§ 13-21-111.5(6)) which prohibits one entity from contracting with another to obtain additional-insured coverage for liabilities arising from the former's own negligence. Any promise to provide such additional insured coverage is unenforceable and the CGL Policy will not cover the second entity if the second entity's negligence cause the loss. In such a case, the anti-subrogation rule is inapplicable. *Higby Crane Services, LLC v. DCP Midstream, L.P.*, 2017 WL 3495478 (10<sup>th</sup> Cir. 2017).

An insurance carrier that insures both a physician and his professional corporation for medical malpractice cannot sue the negligent physician for indemnification for sums paid on behalf of the corporation. *Obstetrics & Gynecology, Ltd. of Kansas City, Inc. v. Buckner*, 795 P.2d 386 (Kan. 1990).

## KENTUCKY

ASR yet to be determined.

## LOUISIANA

An insurer has “no cause of action against a co-insured as subrogor of the named insured.” *Olinkraft, Inc. v. Anco Insulation, Inc.*, 376 So.2d 1301 (La. Ct. App. 1979). An insurer has no right of action against a co-insured of the subrogor for a fire loss caused by the negligence of co-insured, absent design or fraud on part of co-insured. *State Farm Fire & Cas. Co. v. Sentry Indem. Co.*, 316 So.2d 185 (La. Ct. App. 1975). The Louisiana ASR is that an insurance company, which has paid a claim *and taken subrogation* action, cannot bring a subrogate suit - a suit asserting the rights of the insured whose claim it has paid - against a co-insured. *Louisiana Fire Ins. Co. v. Royal Indem. Co.*, 38 So.2d 807, 810 (La. App. 2<sup>nd</sup> Cir. 1949) (emphasis added); *see also Holden v. Connex-Metalna*, No. CIV.A.98-3326, 2000 WL 1818530, at \*8 (E.D. La. Dec. 12, 2000); *Lloyd’s Syndicate 457 v. Floatec, LLC d/b/a Floatec Solutinos, LLC*, 2017 WL 3180020 (S.D. Tex. 2017).

Unless stated otherwise in the policy, a customer who borrows an auto from the insured auto agency is not an “insured” and the insurer is entitled to recover for damage to the auto from the customer. *Cont’l Cas. Co. v. Oken*, 229 So.2d 393 (La. Ct. App. 1969). An insurer cannot seek recovery from an omnibus insured for amounts paid under its policy. *Shelter Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 993 So.2d 23 (La. Ct. App. 2008). Insurer did not lose its homeowner’s policy contractual right of subrogation by reason of the fact that it was also the comprehensive general liability insurer of the tortfeasor; after the insurer had made payment under the homeowner policy, its qualities as creditor and debtor of the liability obligation merged and, to the extent of the payment made, the obligation was extinguished by confusion. *Norris v. Allstate Ins. Co.*, 293 So.2d 918 (La. Ct. App. 1974).

In *Cont’l Cas. Co. v. Oken*, Oken borrowed a car from an auto agency that was insured by Continental Casualty Company (Continental) and soon after he crashed the car. Oken claimed that Continental could not subrogate against him because he was an insured under the policy Continental had issued to the auto agency. The court ruled that there was no indication from the policy language that the policy was meant to apply to Oken and, therefore, subrogation was permissible.

The Louisiana ASR does not bar any action by an insurer against a co-insured, it only bars subrogated claims. There is a distinction between a subrogated claim—prohibited under the ASR—and a freestanding claim that exists “outside the policy.” *Peavey Co. v. M/V ANPA*, 971 F.2d 1168 (5<sup>th</sup> Cir. 1992); *United States v. St. Bernard Par.*, 756 F.2d 1116, 1127 (5<sup>th</sup> Cir. 1985).

## MAINE

An insurance company cannot subrogate against its own insured. *Willis Realty Assoc. v. Cimino Constr. Co.*, 623 A.2d 1287 (Me. 1993). If a party is covered by the liability portion of a policy, but not the property damage portion, subrogation can proceed against the party for damages related to the property damage portion. *Philadelphia Indem. Ins. Co. v. Farrington*, 37 A.3d 305 (Me. 2012) (court ruled subrogation against renter of rental car could proceed after the court determined the renter was an insured under the liability portion of the policy, but not the property damage portion).

## MARYLAND

Maryland courts recognize, as a legal principle, that an insurer may not recover from its insured, or a co-insured, as subrogee. *Rausch v. Allstate Ins. Co.*, 882 A.2d 801 (Md. 2005).

## **MASSACHUSETTS**

An insurer cannot subrogate against its own insured. *Peterson v. Silva*, 704 N.E.2d 1163 (Mass. 1999). Being a co-insured under the liability portion of a policy does not inherently make a party a co-insured under the property damage portion of a policy. *Commerce Ins. Co. v. Empire Fire & Marine Ins. Co.*, 879 N.E.2d 1272 (Mass. App. 2008).

## **MICHIGAN**

An insurer cannot recover from its insured for a loss covered by the policy. *American Special Risk Ins. Co. v. City of Centerline*, 69 F.Supp.2d 944 (E.D. Mich. 1999) (applying Michigan Law). A “subrogee cannot sue the subrogor to enforce its subrogation rights.” *Attard v. Detroit Edison Co.*, 1998 WL 1988579 (Mich. App. 1998).

## **MINNESOTA**

Minn. Stat. § 60A.41: “Subrogation Against Insureds Prohibited” deals directly with the ASR. Minn. Stat. § 60A.41(a) states that “[a]n insurance company ... may not proceed against its insured in a subrogation action where the loss was caused by the non-intentional acts of the insured.” Minn. Stat. § 60A.41(b) specifically prohibits an insurance company from subrogating “itself to the rights of its insured to proceed against another person ... insured for the same loss by the same company.” If a tortfeasor and injured party have separate policies from the same insurer, the insurer does not gain equitable subrogation rights to money the injured party receives from the tortfeasor by paying the injured party for their injuries. *Illinois Farmers Ins. Co. v. Schmuckler*, 603 N.W.2d 138 (Minn. Ct. App. 1999). In *Schmuckler*, Schmuckler received \$31,889.99 from her renter’s insurance policy and \$32,455 from a subsequent lawsuit against Creurer after Creurer backed her car into Schmuckler’s rented town home. Schmuckler had renter’s insurance with Illinois Farmers Insurance Co. (“Farmers”) and Creurer had auto insurance through Farmers. The court barred Farmer’s equitable subrogation attempt against the money Schmuckler had received from Creurer on the basis that Farmers had failed to acquire subrogation rights to the money because Minn. Stat. § 60A.41(b) bars insurers from subrogating “for the same loss by the same company.” In *Depositors Ins. Co. v. Dollansky*, 2017 WL 6273144 (Minn. App. 2017), Dollansky rented a motor home from caravan Trailers, and it started on fire. The agreement said Dollansky was responsible for all damage and agreed to indemnify Karavan. Karavan’s carrier, Depositors Insurance Company, submitted the claim to Dollansky’s carrier, American Family, who paid Karavan part of its deductible, but denied the balance. Depositors paid Karavan \$204,895 and sued Dollansky for breach of the rental agreement. The court dismissed the claim because the Depositor’s suit was prohibited by § 60A.41. Depositors appealed, claiming that § 60A.41 only prohibited subrogation suits against the carrier’s own named insured, not somebody who might be an “insured” due to language of the insurance contract (*i.e.*, additional insured, etc.). The court held that § 60A.41 prevented subrogation even if the defendant isn’t a “named insured.”

## **MISSISSIPPI**

An insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered. *Hutson v. State Farm Fire & Cas. Co.*, 2007 WL 1121364 (Miss. Ct. App. 2007). The Mississippi courts have recognized one exception where if two parties are insured under the same policy, and one intentionally commits a tort against the other, the tortfeasor is excluded from the policy and subrogation may proceed, while the victim maintains the status of an insured under the policy. *Id.* In *Hutson*, a homeowner property insurer paid a property claim of a co-insured wife for property damage caused by fire that her co-insured husband admitted to setting intentionally. The Court of Appeals found that the property insurer was entitled to subrogate against the husband in spite of the usual ASR in this context. The court found that the husband’s intentional act foreclosed any duty the insurer may have had to him, and as such, in the context of the relationship between the insurer and the innocent co-insured wife, the husband is treated as merely a third-party tortfeasor.

## MISSOURI

In Missouri, the ASR is referred to as the “No Subrogation Rule.” An insurer has no right of subrogation against its own insured or co-insured for a claim arising from the very risk for which the insured was covered. *Benton House, LLC v. Cook & Younts Ins., Inc.*, 249 S.W.3d 878 (Mo. Ct. App. 2008) (preempted by FEHBA on other grounds). The ASR prevents subrogation against an insured when the subrogor and target are covered by the same policy. *Factory Ins. Ass’n v. Donco Corp.*, 496 S.W.2d 331 (Mo. Ct. App. 1972). If a party is covered by the third-party liability portion of a policy, but not the property damage portion of the policy, an insurer can still subrogate for the damages portion of the policy. *Behlmann Pontiac GMC Truck, Inc. v. Harbin*, 6 S.W.3d 891 (Mo. 1999). In *Harbin*, the customer of an auto dealership test drove their insured vehicle which suffered property damage due to the customer/driver. After paying the dealership its claim, the dealer’s insurer commenced a subrogation action against the driver to recover for property damage claim. The driver defended on the grounds that he was an insured under the policy and, therefore, the ASR applied. The trial court granted the driver’s motion for summary judgment and dismissed the subrogation action. The Missouri Supreme Court reversed, finding that the driver was not an “insured” for property damage to the vehicle and, thus, the rule prohibiting subrogation against an insured did not apply. The court reasoned that the driver was an insured only for the purpose of providing coverage for property damage to the property of others and personal injury claims. Property damage to the insured’s dealer’s vehicle was outside of such coverage and, therefore, subrogation was allowed.

## MONTANA

An insurer has no right of subrogation against its own insured. *Home Ins. Co. v. Pinski Brothers, Inc.*, 500 P.2d 945 (Mont. 1972). This is true both as to the named insured and as to any party to whom coverage is extended under the policy terms; an additional insured is entitled to the same protection as the named insured. *Truck Ins. Exchange v. Transport Indem. Co.*, 591 P.2d 188 (Mont. 1979). A homeowner’s insurer cannot seek subrogation against a family member who is a guest of insured since it is, in effect, seeking to recover from the insured himself. *Continental Ins. Co. v. Bottomly*, 817 P.2d 1162 (Mont. 1991). In *Pinski Brothers, Inc.*, a building was heavily damaged after an explosion occurred during renovations. The building’s insurer was precluded from subrogating against the renovation’s architect because the same insurer covered the architect under a separate liability policy. In *Bottomly*, Gene Bottomly negligently burned down a cabin that was used by the extended Bottomly family as a vacation home. The only named individual on the cabin’s homeowner’s policy was Gene’s brother, Rich Bottomly, who received compensation from Continental Insurance (“Continental”) after the cabin was burned down. Continental’s subsequent subrogation action against Gene was blocked by the Court on the basis that allowing subrogation against Rich’s guest at the cabin would be akin to allowing subrogation against Rich himself.

## NEBRASKA

Generally, no right of subrogation can arise in favor of an insurer against its own insured. *Stetina v. State Farm Mut. Auto. Ins. Co.*, 243 N.W.2d 341 (Neb. 1976). However, an insurer can subrogate against a policyholder whose intentional conduct resulted in a loss. *Allstate Ins. Co. v. LaRondeau*, 622 N.W.2d 646 (Neb. 2001) (where a husband intentionally burned down the home he and his wife shared, the insurer could pay the wife for her damages and subsequently subrogate against the husband by treating him as a third party to the relationship between insurer and the wife). If an insured tells a guest that he will leave his policy on the home intact for when the guest is staying in the home, the insurance can be said to be for the benefit of the guest as much as the insured, therefore, the ASR is triggered, and the guest is protected. *Reeder v. Reeder*, 348 N.W.2d 832 (Neb. 1984) (where homeowner let brother stay in his home after the homeowner moved and brother was waiting for his home’s construction to be completed, the brother was a co-insured under the policy after the homeowner told the brother he would leave the policy active). If it is the intent of a building owner to take out insurance for the mutual benefit of the building owner and a contractor, and if the owner fails to have the contractor listed as a named insured, the owner becomes the contractor’s insurer, and because an insurer’s rights can be no greater than the rights of their insured, the owner’s insurer has no right to subrogation against the contractor due to the ASR. *Midwest Lumber Co. v. Dwight E. Nelson Constr. Co.*, 196 N.W.2d 377 (Neb. 1972). An insurer cannot seek to subrogate against its own insured, even if the insured was negligent in causing the loss; further, an insurer cannot recover from an implied co-insured for the very risk it contracted to assume. *Hans v. Lucas*, 703 N.W.2d 880 (Neb. 2005) (where a vendor of property contractually assumes the purchaser’s risk of loss, the purchaser is an implied co-insured for the

limited purpose of defeating the vendor's subrogation claim against the purchaser). An agreement where the CGL insurer of a contractor agreed to pay an employee of a subcontractor for their injuries in exchange for a portion of any settlement that the employee received from the subcontractor did not trigger the ASR despite the subcontractor being listed as an insured on the CGL policy. In *Control Specialists v. State Farm Mut. Auto. Ins. Co.*, 423 N.W.2d 775 (Neb. 1988), the court held that the ASR did not preclude an insurance company from subrogating its payment on behalf of one of its named insureds against another named insured under a different policy. Despite the fact that the insured, whom the insurer sought to subrogate against, was one to whom the insurer owed a duty, it was a duty under a different contract from the one under which it asserted its subrogation rights. In *Jacobs Engineering Group, Inc. v. ConAgra Foods, Inc.*, 917 N.W.2d 435 (Neb. 2018), the court held that under the anti-subrogation rule, no right of subrogation can arise in favor of an insurer against its own insured or coinsured for a risk covered by the policy, even if the insured is a negligent wrongdoer.

## **NEVADA**

An insurer cannot subrogate against its own insured. *Harvey's Wagon Wheel, Inc. v. MacSween*, 606 P.2d 1095 (Nev. 1980). An insurer may not subrogate against a co-insured of its insured. While case law indicates that an insurer also may not subrogate against a "coinsured" of its insured, this is only the case when the very loss which is the subject of the subrogated policy is covered by a policy which names the "coinsured" as such. *Lumbermen's Underwriting All. v. RCR Plumbing, Inc.*, 969 P.2d 301 (Nev. 1998).

## **NEW HAMPSHIRE**

Under the *Sutton* rule, a tenant was considered a co-insured of the landlords with respect to fire damage to the leased residential premises and, thus, the insurer had no right of subrogation against tenant whose negligence caused the fire damage. *Cambridge Mut. Fire Ins. Co. v. Crete*, 846 A.2d 521 (N.H. 2004).

## **NEW JERSEY**

New Jersey courts have generally followed the ASR with one limited exception in cases involving an insured's criminal wrongdoing. See *Ambassador Ins. Co. v. Montes*, 388 A.2d 603 (N.J. 1978) (holding that in the case of an insurer, who pays an innocent party monetary damages due to liability of the insured ascribable to a criminal event, it is usually equitable that the insurer be indemnified by the insured). An insurer cannot subrogate against a co-insured. *Guideone Mut. Ins. Co. v. Comito*, 2007 WL 3170127 (N.J. Super. Ct. App. Div. 2007). Under N.J.S.A. § 39:6B-1, an auto dealer has no obligation to provide collision insurance for permissive test drivers therefore, unless the policy states otherwise, the permissive test driver is not an insured for damages to the vehicle and subrogation is permissible for physical damage to the test-driven vehicle. *Universal Underwriters Group v. Heibel*, 901 A.2d 398 (N.J. Super. Ct. App. Div. 2006). However, if an accident results in injury to an innocent third party, under N.J.S.A. § 39:6B-1, the vehicle owner's liability insurance covers the test driver for injuries to that third party, preventing subrogation for those injuries. See *Id.* In *Heibel*, Heibel lost control of a motorcycle while test driving it and crashed. Universal Underwriters Group ("Universal") paid the dealership for damages to the motorcycle and then sought to subrogate against Heibel for the damages to the motorcycle. The court held that Universal's policy itself did not make Heibel an insured for damages to the vehicle, and that N.J.S.A. § 39:6B-1 did not mandate that permitted test drivers be insured under a dealership's policy for physical damage to the vehicle. Therefore, subrogation for physical damage to the vehicle was permissible. In *Hanover Ins. Co. v. Mi-Jack Products, Inc.*, 2018 WL 4761579 (D. N.J. 2018), Norfolk Southern filed an insurance claim with Hanover Insurance for damage to its lift truck. Hanover paid \$408,100 to Norfolk Southern, which then assigned Hanover all of its "claims, rights and demands against third-persons" related to the damage to the lift truck. Hanover filed a subrogation suit against Mi-Jack and Mi-Jack then filed a Third-Party Complaint against H&M and others asserting claims for contribution and indemnification. Mi-Jack's claims against H&M assert that if H&M's negligence caused damage to the lift truck, H&M would be contributorily liable for the monetary payments Mi-Jack would have to pay out if it is found liable. H&M argued that New Jersey's "anti-subrogation rule" barred Hanover from asserting a "right of subrogation against its own insured under the subrogating insurer's policy." The court held that it could not say that H&M, by virtue of its contractual obligation to pay for the insurance policy, is an "insured," "co-insured," or "additional insured" under that policy.

## NEW MEXICO

An insurer may not subrogate against its own insured. *State ex rel. Regents of New Mexico State University v. Siplast, Inc.*, 877 P.2d 38 (N.M. 1994). An insurer may not be subrogated against a contractor who is insured against damage to his own property under a builder's risk policy, even though the subcontractor's negligence may have resulted in a loss to another co-insured. *Id.* Where a builder's risk insurance policy was issued to a general contractor to protect against losses to a structure under construction, and the insurer, pursuant to such policy, compensated the general contractor for a loss allegedly caused by the negligence of a subcontractor, the insurer could bring a subrogation action against the subcontractor if the subcontractor is not an insured on the policy. *Great American Ins. Co. of New York v. Western States Fire Protection Co.*, 730 F.Supp.2d 1308 (D. N.M. 2009). Subcontractor was not co-insured under commercial insurance policy issued to general contractor on a project at a public university, and thus insurer was not barred, as subrogee of general contractor, from seeking subrogation from subcontractor for damages the insurer paid and which allegedly flowed from subcontractor's negligence; the policy at issue contained no provision for coverage of subcontractors and listed only the general contractor as an insured. *Id.*

## NEW YORK

New York's ASR is found in common law and is not statutorily-based. An insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered even where the insured has expressly agreed to indemnify the party from whom the insurer's rights are derived. *North Star Reinsurance Corp. v. Cont'l Ins. Co.*, 624 N.E.2d 647 (N.Y. 1993). Insurers are barred under the ASR from seeking subrogation against a named insured or additional insureds. Conversely, subrogation is typically permissible where the third party is not a named or additional insured. *Millennium Holdings, LLC v. Glidden Co.*, 53 N.E.3d 723 (N.Y. App. 2016). In other words, an insurer may subrogate against a third-party tortfeasor if it also qualifies as an insured under the same policy for damages arising from the *same risk* covered by the policy. The ASR does not apply when the loss for which indemnification is sought is subject to a specific exclusion in the pertinent policy. *State v. Schenectady Hardware and Elec. Co., Inc.*, 223 A.D.2d 783 (N.Y. App. Div. 1996). In *Millennium Holdings*, the Court of Appeals clarified that, except for rare public policy-driven exceptions, in order for the ASR to apply, the party seeking the protection of the rule must be insured under the insurance policy. In so ruling, the Court of Appeals reversed the rulings of the lower courts which, according to the Court of Appeals, would have improperly expanded application of the rule to the non-insured parties. The ASR does not apply to claims by liability insurers for lead paint manufacturer's successor to recover on indemnify obligation by related successor that was never an insured. The application of the rule becomes more complex when the facts presented involve more than one policy and more than one insured. Where there are two policies, one a general liability policy and the second a compensation policy, ASR does not apply. *Hartford Accident & Indem. Co. v. Michigan Mutual Ins. Co.*, 463 N.E.2d 608 (1984). However, where there are two separate policies, each naming a different insured, purchased by the same entity, and issued at the same time by the same insurer, the ASR applies. *North. Star Reinsurance Corp*, supra. The ASR does not prevent subrogation against a co-insured where the insurer's obligation to the co-insured arises under a different policy, even where both insured parties are also covered under a separate, original policy that gave rise to the insurer's obligation to defend the first-party action. *HDI-Gerling Am. Ins. Co. v. Navigators Ins. Co.*, 2016 WL 4148216 (D. Mass. 2016) (applying NY law).

In *ACE Am. Ins. Co. v. Am. Guarantee & Liab. Ins. Co.*, 2017 WL 2840286 (S.D. N.Y. 2017), Richard Wager, an employee of Wager Contracting Company, Inc., was injured while performing demolition work for Pelham Union Free School District. Several policies covered Wager and/or Pelham:

1. *NGM Insurance Company* had issued a \$1 million primary general liability policy insuring both Wager Contracting and Pelham. However, the NGM policy included workers' compensation and employers' liability exclusions that, in general, barred coverage to Wager Contracting for employees' bodily injuries unless Wager Contracting had assumed that liability by contract. In this case, however, Wager Contracting had assumed such liability by contract with Pelham.
2. *American Guarantee* had issued a \$5 million Commercial Umbrella Liability Policy covering both Wager and Pelham. The American Guarantee policy was excess to the NGM Policy, to which the American Guarantee policy "followed form." In other words, the American Guarantee policy adopted in general the NGM policy's underlying substantive terms and thus provided the same basic coverage at the excess layer.

3. *New York Schools Insurance Reciprocal* (“NYSIR”) provided insurance to Pelham with limits of \$1 million primary and \$15 million excess.
4. *ACE American* issued a Specific Excess Workers’ Compensation and Employers’ Liability Insurance policy covering Wager. This policy was issued to the Special Trades Contracting and Construction Trust, a group self-insurance program authorized by the New York Workers’ Compensation Law. Wager was a participant in Special Trades, and hence was covered under the ACE policy. The ACE policy was excess to Special Trades’ \$1 million workers’ compensation/employers’ liability self-insured retention. Theoretically, the ACE Policy provided unlimited workers’ compensation and employers’ liability coverage. However, the ACE policy purported to limit its coverage to “damages imposed upon Wager by law,” as opposed to liabilities assumed by contract.

The net of all this was that Pelham was covered by the NYSIR policy (\$1 million primary/\$15 million excess), by the NGM policy (\$1 million primary), and by the American Guarantee policy (\$5 million excess to the NGM policy). Wager Contracting was covered, as to workers’ compensation/employers’ liability claims, by the \$1 million SIR and by the ACE Policy (unlimited excess to the SIR), and, for general liability, by the NGM policy (\$1 million primary) and by the American Guarantee policy (\$5 million excess to the NGM policy). To complicate matters further, these policies covered bodily injuries under different (and sometimes mutually exclusive) theories of liability. For example, the American Guarantee policy excluded from coverage liability for bodily injury based on a theory of common-law indemnity, whereas the ACE Policy by implication excluded from coverage liability for bodily injury based on a theory of contractual indemnity. In the third-party action, the dispositive issue in this case is whether New York’s ASR prevented American Guarantee from bringing an indemnity claim as the subrogee of one of American Guarantee’s insureds, Pelham, against Wager Contracting, another of American Guarantee’s insureds, Wager Contracting. If such a claim is permitted under New York state law, then American Guarantee may shift its liability for Richard Wager’s injury, which American Guarantee incurred through insuring Pelham, to Wager and, potentially, to ACE, the real party in interest. If such a claim is barred under New York state law, however, then American Guarantee is stuck with the \$5 million liability.

New York has applied the ASR to block indemnity claims brought by excess insurers such as American Guarantee. *Jefferson Ins. Co. of N.Y. v. Travelers Indem. Co.*, 703 N.E.2d 1221 (N.Y. 1998). American Guarantee argues that the ASR does not apply because it frames this case as a coverage priority dispute that only concerns how Wager Contracting’s insurers must allocate coverage among themselves. It argues that its policy is excess to ACE’s policy, and, because the ACE Policy is unlimited for the injury at issue, American Guarantee’s excess layer is simply never reached. The district court ruled that this case involved a carrier attempting to bring a subrogation claim on behalf of one insured against another insured. American Guarantee also argued that the ASR does not apply when the policy justifications underlying the rule are absent, as they supposedly are here. New York created the ASR both to prevent the insurer from passing the loss to its own insured and to guard against the potential for conflict of interest that may affect the insurer’s incentive to provide a vigorous defense for its insured. American Guarantee argues that it was not seeking to pass its loss to its own insured because ACE’s policy provided unlimited coverage for the injury, and there was no conflict of interest because American Guarantee did not control the defense of Wager or Pelham. The court held this argument not persuasive. American Guarantee was, in fact, trying to shift its liability to a policyholder that it insured for that very risk. In other words, American Guarantee, which insures Wager for bodily injuries to its employees as they arise out of contractual assumptions of liability, was trying to shift the liability for the injury to Wager Contracting. American Guarantee’s argument that this somehow does not implicate the ASR erroneously relies on the fact that Wager was separately covered for this risk by the ACE Policy. In an ASR analysis, the relevant question is whether the common insurer’s policies respond to the underlying liability, not whether some other insurer’s policy happens also to respond to that risk. Accordingly, because American Guarantee insures Wager Contracting for Richard Wager’s injury, American Guarantee’s attempt to avoid funding the settlement violated the ASR.

A truck lessor, which had obtained a policy providing primary insurance coverage for leased trucks, in which the policy included the lessee as an insured, could not assert a subrogation or indemnification claim against the lessee on behalf of a subrogated insurer after the insurer paid a claim on behalf of lessor for liability arising out of the lessee’s use of vehicle, because this represented an attempt by the insurer to recover from the lessee, its insured, for the very loss for which the lessee was supposed to be covered. *Pennsylvania Gen. Ins. Co. v. Austin Powder Co.*, 502 N.E.2d 982 (N.Y. 1986). Where an insurance policy is restricted to liability for any bodily injury “caused, in whole or in part” by the “acts or omissions” of the named insured, the coverage applies to injury proximately caused by the named insured only. *Burlington Ins. Co. v. NYC Tr. Auth.*, 2017 WL 2427300 (N.Y. 2017). Therefore, where an unnamed additional insured is solely responsible for an injury, subrogation would be permissible against the unnamed additional insured as the policy would not apply to that particular injury as it only applies to injuries caused in some way by the named insured. *Id.*

In *Jefferson Ins. Co. of N.Y. v. Travelers Indemnity Co.*, 703 N.E.2d 1221 (N.Y. 1998), the New York Court of Appeals examined insurance policy language to determine whether the insurer could pursue a subrogation action against a permissive user who caused an automobile accident. With the insured's vehicle. The policy contained a clause which provided, "[a]nyone else is an insured while using with your permission a covered auto you [the named insured] own, hire or borrow." Because the policy "explicitly provid[ed]" coverage for all permissive users, the court found that the insurer lacked subrogation rights. Most tellingly, the court concluded that for purposes of the ASR, there is no contrast between named insureds and permissive users "except to the extent that the specific policy terms require [ ] a difference in treatment."

New York is also one of the first states to chime in on the application of the ASR to Owner-Controlled Insurance Programs/Contractor-Controlled Insurance Programs (OCIP/CCIP), stating that the ARS barred a construction contractor and its client from asserting causes of action against subcontractors to recover damages for breach of contract and for declaratory relief, where subcontractors were members of Contractor Controlled Insurance Program (CCIP) implemented by contractor, and CCIP imposed \$500,000 retention obligation on contractor as to each occurrence under policy. *Wausau Underwriters Ins. Co. v. Gamma USA, Inc.*, 89 N.Y.S.3d 186 (N.Y. App. Div. 2018).

### **NORTH CAROLINA**

ASR yet to be determined.

### **NORTH DAKOTA**

An insurer is not entitled to subrogation from its own insured for a claim arising from the very risk for which the insured was covered. *American Nat'l Fire Ins. Co. v. Hughes*, 658 N.W.2d 330 (N.D. 2003). Additionally, an insurer is not entitled to subrogation from entities named as insureds in the insurance policy or entities deemed to be additional insureds under the policy. *Id.* An entity not named as an insured in an insurance policy is an additional insured protected by the ASR when, under the circumstances, the insurer is attempting to recover from the insured on the risk the insurer had agreed to take upon payment of premiums. *Id.* Fraud or design can potentially allow subrogation against an insured party to proceed. *Id.* Subrogation is not prohibited against a subcontractor not named on the owner's builder's risk policy. *Tri-State Ins. Co. of Minnesota v. Commercial Group West, LLC*, 698 N.W.2d 483 (N.D. 2005). In *Hughes*, Hughes was the vice president of United Crane, a corporation owned entirely by Hughes' parents. United Crane was insured by American National Fire Ins. Co. ("American") when Hughes accidentally started a fire in the United Crane workshop by attempting to suck gasoline out of his snowmobile using a shop-vac. Hughes was not acting as an employee of the corporation at the time, but Hughes, his brother, and his father kept and worked on their snowmobiles in the United Crane workshop frequently. American paid \$250k in damages to United Crane and then attempted to subrogate for that amount against Hughes. American's subrogation attempt was barred by the court because the court found that Hughes was an implied co-insured under United Crane's policy, and that allowing subrogation, given the circumstances, would be allowing subrogation by the insurer for the very risk they had agreed to assume under the policy.

### **OHIO**

An insurance company has no subrogation rights against its own insured. *Chenoweth Motor Co. v. Cotton*, 207 N.E.2d (Ohio 1965). An insurer may not subrogate against a tortfeasor if the tortfeasor is insured under the policy which gave rise to right of subrogation. In *Chenoweth*, the defendant was in an auto accident while driving a vehicle loaned to him by Chenoweth Motor Co. Chenoweth had a collision insurance policy on the auto with Ohio Farmers Insurance Co. The defendant, as bailee of the insured auto, was included as an additional insured under the Ohio Farmers policy. Ohio Farmers paid a portion of the property damages pursuant to the policy, and then joined Chenoweth in filing suit against the tortfeasor to recover the amounts paid under the policy. However, because the tortfeasor was a co-insured, the court held that Ohio Farmers had no right to subrogation. *Aetna Cas. & Sur. Co. v. Urban Imperial Bldg. & Rental Corp.*, 526 N.E.2d 819 (Ohio Ct. App. 1987). "Subrogation does not permit an insurer to stand in the shoes of one insured to recover losses occasioned by another insured under the same policy." *Indiana Ins. Co. v. Barnes*, 846 N.E.2d 73 (Ohio Ct. App. 2005). In *Urban Imperial Bldg. & Rental Corp.*, a residence, which was titled to the Urban Imperial Building & Rental Corporation ("Urban"), the president



of the corporation, and his wife, was severely damaged by a fire that Urban employees negligently started. Urban, the president, and his wife were all listed as named insureds on the building's insurance policy that was issued by the Aetna Casualty & Surety Company ("Aetna"). Aetna paid the president and his wife for the damages they had suffered as a result of the fire and then Aetna attempted to subrogate against Urban for the fire on the basis that Urban's employees had negligently started the fire. The court barred Aetna from subrogating against Urban by invoking the rule that no right of subrogation exists where the tortfeasor is insured under the policy which gave rise to the right of subrogation.

## **OKLAHOMA**

An insurer may not subrogate against their insured or a co-insured on the policy. *Travelers Ins. Companies v. Dickey*, 799 P.2d 625 (Okla. 1990). The agreement between the property owner and subcontractor determines whether a subcontractor is a co-insured on the policy. *Id.* In *Dickey*, a building that Dickey was replacing the roof on suffered extensive damage after Dickey negligently failed to waterproof the roof. Travelers Insurance Company ("Travelers") paid the building owner for the water damage and then sought to subrogate against Dickey for the damage. Dickey attempted to block the subrogation claim on the basis that he was a co-insured under the owner's policy and that the owner had previously agreed to not hold Dickey liable for damages. The court ruled that subrogation could proceed on the basis that Dickey was not co-insured under the owner's policy because Dickey was not expressly named, there was no reference in the agreement to it applying to anyone else besides the owner, and the agreement expressly required Dickey to hold his own liability insurance. The court also found that the previous agreement to not hold Dickey liable also did not apply because that agreement also required that Dickey hold liability insurance, and limited the owner's requirement to only holding insurance for damage to the roof itself. Because the damage that occurred was to the interior of the building, the agreement to not hold Dickey liable did not hold because it only applied to damage to the roof, not for damage to the interior, that damage was supposed to be covered by Dickey's general liability insurance.

## **OREGON**

An insurer cannot subrogate against its own insured. *Koch v. Spann*, 92 P.3d 146 (Or. App. 2004). An insurer cannot subrogate against a co-insured on a policy. *California Cas. Ins. Co. v. David Douglas School Dist.*, 693 P.2d 54 (Or. App. 1984). A negligent sub-subcontractor tortfeasor cannot seek indemnification from a subcontractor if the subcontractor is an insured on the policy that is suing the sub-subcontractor for damages. *Factory Mut. Ins. Co. v. Peri Formworks Systems, Inc.*, 223 F.Supp.3d 1133 (D. Or. 2016). In *David Douglas School Dist.*, Salvo, a district administrator for the David Douglas School District ("School District"), hit and injured a pedestrian while performing a task that was authorized by the School District. Salvo's personal auto insurer, California Casualty Insurance Company ("California"), paid \$50,000 to the pedestrian, and the School District's business auto liability insurer paid \$34,000 to the pedestrian. California sought indemnification from the School District and its insurer under ORS § 30.285, a statute which requires public employers to indemnify employees while in the course of their duties. California, as subrogee of Salvo's rights, argued that they should be indemnified by the School District and its insurer. However, the court ruled against California finding that the School District was an insured under Salvo's policy due to a clause which extended coverage to an "other person or organization but only with respect to his or its liability because of acts or omissions of an insured [Salvo]." Because the School District was also an insured under Salvo's policy, the ASR blocked California's subrogation attempt. In *Peri Formworks Systems, Inc.*, Factory Mutual Insurance ("Factory") sued Peri Formworks Systems, Inc. ("Peri"), a subcontractor of McClone, for payments that Factory was forced to pay on a builders' risk policy after Peri was negligent in laying concrete. Peri in turn sued McClone, citing a contractual indemnification provision, seeking indemnification for any payments they would have to make to Factory for the damages. McClone argued that they were not required to pay for any damages because McClone was an insured on the policy Factory was now suing Peri over. The court reasoned that McClone is indeed an insured on Factory's policy and, therefore, the ASR is triggered which bars Peri from forcing McClone to indemnify Peri in the lawsuit.

## PENNSYLVANIA

An insurer cannot recover by means of subrogation against its own insured. *Remy v. Michael D's Carpet Outlets*, 571 A.2d 446 (Pa. Super. 1990). An insurer cannot pay a general contractor for its losses and then attempt to recover from a subcontractor who is named, directly, or indirectly, as an additional insured in the same policy. *Keystone Paper Converters, Inc. v Neemar, Inc.*, 562 F. Supp. 1046 (E.D. Pa. 1983).

## RHODE ISLAND

The ASR has not yet been embraced by Rhode Island courts. *Nationwide Property & Cas. Ins. Co. v. D.F. Pepper Constr., Inc.*, 59 A.3d 106 (R.I. 2013). A federal court applying Rhode Island law held that if an insurer has paid a loss to one of the insureds under its policy, it cannot subrogate against another party for whose benefit the insurance was written even if the latter's negligence caused said loss, if there had been no design or fraud on his part. *New Amsterdam Cas. Co. v. Homans-Kohler, Inc.*, 310 F.Supp. 374 (D. R.I. 1970). In *D.F. Pepper Const., Inc.*, Pepper is the sole owner and shareholder of D.F. Pepper Construction ("DFP"). Pepper, while driving a dump truck owned by DFP and insured by Merchants Mutual Insurance Company ("Merchant"), hit a patch of black ice and crashed into his own home that was insured by Nationwide Property and Casualty Insurance ("Nationwide"). Nationwide paid for the damages to the home and then sought to subrogate against DFP. The trial judge ruled that the ASR was not invoked as Pepper and DFP were distinct legal entities. On appeal, DFP argued that the trial court erred in finding that the ASR was not invoked because Nationwide subrogating against DFP would result in Merchant paying Nationwide and then subrogating Pepper for the damages that Merchant would have to pay to Nationwide. Meaning that if Nationwide subrogated against DFP, Nationwide would also be indirectly subrogating against their insured, Pepper. The appeals court agreed with the trial court that the ASR was not invoked in this case, and that the appropriate time to raise the ASR in court would not be until Merchant attempted to subrogate against Pepper.

## SOUTH CAROLINA

No right of subrogation arises in favor of the insurer against its own insured or against a person who holds the status of an additional insured by the terms of the policy. *Aetna Cas. & Sur. Co. v. Security Forces, Inc.*, 347 S.E.2d 903 (Ct. App. 1986).

## SOUTH DAKOTA

ASR yet to be determined.

## TENNESSEE

An insurer cannot subrogate against a wrongdoer if the wrongdoer is an insured under the same policy. *Dattel Family, Ltd. Partnership v. Wintz*, 250 S.W.3d 883 (Tenn. App. 2007) If a policy is taken out by the mortgagor for the mutual benefit of the mortgagor and mortgagee, mortgagor and mortgagee are co-insured parties and, therefore, subrogation is forbidden against either party. *Miller v. Russell*, 674 S.W.2d 290 (Tenn. Ct. App. 1983). The ASR does not prevent an insurer from bringing a subrogation claim against its own insured if the underlying policy does not cover the risk at issues. *Phoenix Co. v Estate of Garnier*, 212 S.W.2d 270 (Tenn. Ct. App. 2006).

## TEXAS

Absent a contractual or statutory right, an insurer cannot subrogate against its own insured for a claim arising *from the very same risk* for which the insured is covered. *Matagorda County v. Texas Ass'n of Counties*, 975 S.W.2d 782 (Tex. App. 1998), *aff'd*, 52 S.W.3d 128 (Tex. 1996); *AGIP Petroleum Co. v. Gulf Island Fabrication, Inc.*, 920 F.Supp. 1318 (S.D. Tex. 1996); *Stafford Metal Works, Inc. v. Cook Paint & Varnish Co.*, 418 F.Supp. 56 (N.D. Tex. 1976); *McBroome-Bennet Plumbing v. Villa France*, 515 S.W.2d 32 (Tex. App. 1974). There is a "special relationship" between an insurance company and its insured, giving rise to duties of good faith and fair dealing. *Crim Truck*

& *Tractor Co. v. Navistar Intern. Transp. Corp.*, 823 S.W.2d 591 (Tex.1992); *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210 (Tex.1988); *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165 (Tex.1987). In *State Farm Mut. Auto. Ins. Co. v. Perkins*, 216 S.W.3d 396 (Tex. App. 2006), State Farm paid Perkins UM benefits because the defendant was uninsured. Perkins recovered from the owner of the defendant vehicle who was insured by State Farm *under a separate policy*. The ASR did not prohibit reimbursement of UM benefits to State Farm because it involved *different insureds and separate and distinct policies*. The policy concerns of the ASR were not present in *Perkins*. Exceptions to the ASR include:

- Contractual and statutory subrogation;
- Subrogation against insured under a separate and distinct insurance policy; and
- Equitable concerns (case-by-case fact analysis);

In *Stafford Metal Works, Inc.*, Continental (fire insurer for Stafford and liability insurer for tortfeasor Cook) settled with Stafford for more than the limits and withdrew instead of defending the subrogation action remaining against Cook. There was no contractual subrogation language in the policy, so the court held that subrogation was equitable and the ASR prohibited subrogation. The federal district court gave five basic reasons for the ASR, noting there was not contractual subrogation language in the policy and, focusing on the equities, stated that Continental had a “profound opportunity for mischief.” In *McBroome-Bennet Plumbing*, Westchester Fire Insurance Company (“Westchester”) issued a builder’s risk insurance policy to Villa France, Inc., the owner-general contractor of an apartment house under construction. McBroome-Bennett Plumbing, Inc. (“McBroome”) was a subcontractor whose employees caused a fire resulting in \$15,719.37 in damage, which Westchester paid to Villa France. Westchester, as subrogee of Villa France, sued McBroome to recover the amount paid. McBroome argued that it was not liable to Westchester on the subrogation claim because it was an *unnamed co-insured* party under the insurance contract because some of its property was destroyed and arguably insured under the Westchester policy. The Court of Appeals held that McBroome was not an insured under the insurance policy issued to Villa France. To deny the insurer its right of subrogation here and under the circumstances presented would be contrary to basic principles of equity and justice.

## UTAH

An insurer cannot subrogate against its own insured, or a co-insured under the policy. *Bd. of Educ. of Jordan School Dist. v. Hales*, 566 P.2d 1246 (Utah 1977). Where an insurance company attempts to recover, as a subrogee, from a co-insured generally covered under a fire insurance policy, the action must fail in the absence of design or fraud on the part of the co-insured. *Id.* In *Hales*, the Board of Education of the Jordan School District (“School District”) hired a contractor to construct a new school, and one of the subcontractors hired to work on the school negligently started a fire which caused significant damage to the school. The School District’s insurer attempted to subrogate against the subcontractor on the basis that their builder’s risk insurance covered property damage only and, therefore, the subcontractor could be subrogated against for the liability the subcontractor incurred by negligently starting the fire. The court reasoned that an “insurer which accepts a premium based partially on the inclusion of a co-insured under a policy of insurance has assumed the risk of its negligence.” Therefore, the subcontractor was an insured under the policy and subrogation was barred.

## VERMONT

An insurer cannot subrogate against its own insured. *Travelers Indem. Co. of America v. Deguise*, 914 A.2d 499 (Vt. 2006). This rule extends to both express and implied co-insureds. *Id.* Whether a party is a co-insured under a policy must be determined by looking at the agreement between the subrogor and the target. *Travelers Indem. Co. of America v. Deguise*, 914 A.2d 499 (Vt. 2006); *Union Mut. Fire Ins. Co. v. Joerg*, 824 A.2d 586 (Vt. 2003); *Town of Stowe v. Stowe Theatre Guild*, 180 Vt. 165 (Vt. 2006). In *Town of Stowe*, a town building suffered water damage after the negligent use of “flash powder” by the Stowe Theater Guild (“Guild”) resulted in the building’s fire suppressant system being activated. The Royal Insurance Co. (“Royal”) was the town’s fire insurer, and after paying the town for the damages to the building, sought to subrogate against the theater company. The Guild had an oral lease with the town where the Guild paid a nominal \$1 a month rent and performed general maintenance

and upgrades to their theater space, in exchange for the opportunity to use the space for performances. The Guild argued that they were a co-insured under the lease and, therefore, Royal should not be allowed to subrogate against the Guild. The court reasoned that the oral lease contained neither an implied nor express intent to have the Guild be a co-insured party under the town's policy, therefore, subrogation was permissible.

## VIRGINIA

Where a plaintiff has contracted to protect the defendant from a loss by procuring insurance, the plaintiff (or his subrogee) may not recover for that loss from the defendant even if the loss is caused by the defendant's negligence. *Walker v. Vanderpool*, 302 S.E.2d 669 (Va. 1983). ASR applies to insurers, not self-insurers. *Farmers Ins. Exch. v. Enter. Leasing Co.*, 708 S.E.2d 852 (Va. 2011). However, a self-insurer can be ruled to be an insurer if certain criteria are met. See *Group Hospitalization Medical Service, Inc. v. Smith*, 372 S.E.2d 159 (Va. 1988).

## WASHINGTON

An insurer has no right of subrogation against their own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty. *Sherry v. Financial Indem. Co.*, 160 P.3d 31 (Wash. 2007). It is well established in Washington that "the insurance company, having paid a loss to one insured, cannot, as subrogee, recover from another of the parties for whose benefit the insurance was written even though his negligence may have occasioned the loss, there being no design or fraud on his part." *General Ins. Co. of America v. Stoddard Wendle Ford Motors*, 410 P.2d 904 (Wash. 1966). Co-insured status for any loss under a builder's risk policy does not automatically insulate the co-insured from subrogation by the insurer for damage to all property covered therein; instead, the first question is whether the owner and the contractor agreed that the owner would purchase insurance to cover damage to the project caused by the contractor's negligence. See *Western Washington Corp. of Seventh Day Adventists v. Ferrellgas, Inc.*, 7 P.3d 861 (Wash. Ct. App. 2000). An insurer that issued separate policies to the subrogor and target may not subrogate. *Royal Exchange Assur. of America, Inc. v. SS President Adams*, 510 F.Supp. 581 (W.D. Wash. 1981). In *Royal Exchange Assurance v. SS President Adams*, 510 F.Supp. 581 (W.D. Wash. 1981), machinery, which the Lee Torgerson Machinery Company ("Torgerson") had hired the American President Lines ("American") shipping company to transport across the ocean, was damaged during transport. Torgerson's insurer, the Royal Exchange Assurance of America, attempted to subrogate against American for the money they had paid to Torgerson for the damaged machinery. The court blocked subrogation though, as American had an unrelated liability policy from Torgerson for American's stevedoring operations. In *Ferrellgas*, a partially completed church was destroyed by a fire negligently caused by Art & Sons, Inc., and the propane supplier, Ferrellgas, Inc. The court found that Ferrellgas was a co-insured on the Church's policy because the policy extended protection to Ferrellgas' propane tanks, but the court rejected the doctrine that the policy extending protection to Ferrellgas' property made Ferrellgas a co-insured for damage to all insured property. The court instead ruled that the first question the court should ask is "whether the owner and the contractor agreed that the owner would purchase insurance to cover damage to the project caused by the contractor's negligence." The court found that Ferrellgas presented no evidence that the Church had intended to purchase builder's risk insurance on behalf of Ferrellgas and, therefore, Ferrellgas was not protected from subrogation for damage done to the Church's property.

## WEST VIRGINIA

The right of subrogation cannot arise in favor of an insurer against its own insured, since by definition subrogation arises only with respect to rights of the insured against third persons to whom the insurer owes no duty. *Norfolk S. Ry. Co. v. Nat'l Union Fire Ins. of Pittsburgh*, 999 F. Supp.2d 906 (S.D. W. Va. 2014); *Richards v. Allstate Ins. Co.*, 455 S.E.2d 803 (W. Va. 1995). However, in the absence of a conflict of interest between the insurer and its insured, a reimbursement right clearly stated in the policy is enforceable against the insured, even where the insured and the negligent third party are insured by the same carrier. *Ferrell v. Nationwide Mut. Ins. Co.*, 617 S.E.2d 790 (W. Va. 2005).

## WISCONSIN

As a general rule, an insurer has no right of subrogation or indemnification against its own insured. *Rural Mut. Ins. Co. v. Peterson*, 395 N.W.2d 776 (Wis. 1986). However, neither statute nor public policy prohibits provisions in motor vehicle policies allowing insurer reimbursement from insured for amounts paid by insurer to third party. *Id.* Subrogation against an insured is permitted if the insured intentionally causes damage to an insured property, such as through arson. *Madsen v. Threshermen's Mut. Ins. Co.*, 439 N.W.2d 607 (Wis. Ct. App. 1989). In *Peterson*, after Rural insured Peterson's fleet of trucks, Peterson purchased an additional truck and leased it to Beguelin, who acquired his own insurance for the truck. Although Rural never explicitly agreed to insure the leased truck, Rural was dragged into litigation involving the leased truck after it was involved in an accident and a court ruled Rural technically covered the truck under a blanket coverage provision included in the original policy it issued to Peterson. Rural subsequently settled the lawsuit but Peterson refused to sign off on the settlement because the settlement did not include any language indicating that Rural would drop any reimbursement claims it had against Peterson. The original contract between Peterson and Rural contained a clause that allowed Rural to seek reimbursement from Peterson for any damages Rural was required to pay for only because a financial responsibility law of the state required Rural to make a payment. Rural then sued Peterson seeking reimbursement for the settled lawsuit. The court ruled in Rural's favor, reasoning that the reimbursement clause in the original contract between Peterson and Rural did not violate statute or public policy.

## WYOMING

In the aftermath of an environmental loss which implicates an insured's property and liability insurance policies, the property insurer which has paid benefits may recover them from the liability insurer. *Compass Ins. Co. v. Cravens, Dargen and Co.*, 748 P.2d 724 (Wyo. 1988) (in essence permitting a property insurer to subrogate against its insured).

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