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DENIAL OF SUBROGATION RIGHTS — A QUESTION FOR THE COURT OR THE LEGISLATURE?: WEINBERG v. DINGER

The purpose of the business of insurance is to lessen the risk of loss imposed on a party by distributing the loss among others potentially exposed to similar risks. Regulation of the insurance industry was formally delegated to the states when Congress passed the McCarran-Ferguson Act. The doctrine of subrogation originated centuries ago in the economic renaissance of Europe, but did not gain popularity in the United States until the early twentieth century. See W. Vance, Handbook on the Law of Insurance § 1, at 4 (3d ed. 1951). To achieve this distribution, the insurer assumes the risk of loss of many insureds, all of whom are susceptible to the same destruction or impairment of insurable interest; as consideration, the insurer receives a premium based on the insured’s proportionate share of the total risk. See id. at 4-5. In order for a contract calling for an assumption of risk to constitute an insurance contract, it must involve the payment of a premium and be a major part of a broad scheme providing for the distribution of risk. Id.; see generally K. Abraham, Distributing Risk: Insurance, Legal Theory, and Public Policy 1-3 (1986) (analyzing principal purpose of insurance law).


The McCarran-Ferguson Act was passed by Congress “to allay doubts” raised by the Supreme Court’s decision in United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944). See FTC v. Travelers Health Ass’n, 362 U.S. 293, 299 (1960) (discussing South-Eastern Underwriters). In the South-Eastern Underwriters decision, the Supreme Court held that the business of insurance was to be considered commerce and thereby subject to the regulatory powers of Congress under the Commerce Clause. See South-Eastern Underwriters, 322 U.S. at 539. For 75 years prior to the South-Eastern Underwriters decision, the Supreme Court had not considered the business of insurance to be commerce. See
originated in equity and allows an insurer to step into the shoes of its insured in order to recover from a culpable third party. Since


3 See Mullen, The Equitable Doctrine of Subrogation, 3 Mn. L. Rev. 201, 201 (1939). The doctrine of subrogation is derived from civil law, see Aetna Life Ins. Co., v. Middleport, 124 U.S. 534, 548-49 (1888), and based on ideas of justice and equity. See Prairie State Bank v. United States, 164 U.S. 227, 231 (1896). It provides for the substitution of a third party in place of the original claimant where the third party has extinguished the outstanding claim. See Aetna Life Ins., 124 U.S. at 548-49; W. Vance, supra note 1, § 134, at 787 & n.1.

Subrogation in equity requires that the party who made the payment was under an obligation to do so and, further, that the party actually made the payment now being sought from the original debtor. See Aetna Life Ins., 124 U.S. at 547-48; First Nat'l City Bank v. United States, 548 F.2d 928, 936 (Ct. Cl. 1977); see generally Note, Subrogation of an Insurer Who Pays Without Legal Liability, 36 Harv. L. Rev. 330 (1923) (discussion of what constitutes an obligation to make payment).

4 See 2 G. Richards, The Law of Insurance § 184 (5th ed. 1952). The doctrine is utilized to provide the insurer relief when forced to pay a legal obligation either wholly or partially owed by a third party. See Federal Ins. Co. v. Tamiami Trail Tours, 117 F.2d 784, 786 (5th Cir. 1941); see also Kimball & Davis, The Extension of Insurance Subrogation, 60 Minn. L. Rev. 841, 841 (1962) (discussion of rationale underlying doctrine of subrogation). It is generally held that the insurer is subrogated to all causes of action of the insured and subject to all defenses valid against the insured. See, e.g., Wager v. Providence Ins. Co., 150 U.S. 99, 108 (1893) (insured’s agreement with third party to allow credit for all insurance proceeds binding on insurer); Phoenix Ins. Co. v. Erie & Western Transp. Co., 117 U.S. 312, 321 (1886) (insurer’s rights limited to those insured had in contract with third party); Great Am. Ins. Co. v. United States, 575 F.2d 1031, 1034 (2d Cir. 1978) (insurer’s cause of action subject to same statute of limitations as insured’s).

At common law, it was generally assumed that the insurer had to bring the action in the insured’s name and not in its own name or right. See, e.g., United States v. American Tobacco Co., 166 U.S. 468, 474 (1897) (insurer must recover in name of claimant, unless insurer has a “legal cause of complaint”); St. Louis, Iron Mountain & S. Ry. Co. v. Commercial Union Ins. Co., 139 U.S. 223, 235 (1891) (other than in equity or admiralty, cause of action exists only in insured and must be brought in his name); cf. Hall & Long v. Railroad Cos., 80 U.S. (13 Wall.) 367, 370 (1871) (insurer may use name of assured to recover from carrier in maritime, but not land cases). Under some statutes, the insurer becomes the real party in interest once it has paid in full for the insured’s loss and must then bring suit in its own name, unless the applicable statute or rule expressly says otherwise. See United States v. Aetna Casualty & Sur. Co., 338 U.S. 366, 380-83 (1949) (if subrogee pays entire loss, it is real party in interest and must sue in own name); see also American Fidelity & Casualty Co. v. All Am. Bus Lines, 179 F.2d 7, 10 (10th Cir. 1949) (insured fully paid by insurer no longer real party in interest; so insurer must bring suit in own name); Point Tennis Co. v. Irvin Indus. Corp., 63 App. Div. 2d 967, 967, 405 N.Y.S.2d 506, 507 (2d Dep’t 1978) (legislature preserved right of insured to sue in own name where insurer issues “loan receipts”). It is not necessary that the third party’s liability for the damage be founded in tort. See, e.g., PaR Truck Leasing, Inc. v. Bonanza Inc., 425 F.2d 695, 696 (10th Cir. 1970) (per curiam) (subrogation claim can be asserted based on contractual obligation of third party to insured); General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 325-26, 130 S.E.2d 645, 652 (1963) (allowing subrogation for action arising from statutory imposition of vicarious liability); 6A J. Ar-
the enactment of the McCarran-Ferguson Act, the subrogation doctrine has been codified in many state statutes. In New Jersey, the state legislature has statutorily required fire insurers to include a clause permitting subrogation in standard fire insurance policies. Recently, however, in Weinberg v. Dinger, the New Jersey Supreme Court held that, although a third-party water company may be liable to an insured for damage caused by fire, the insurer's right of subrogation to the insured's cause of action should be denied.

In Weinberg, the plaintiffs' apartment complex was destroyed by a fire that fire fighters were unable to extinguish because of inadequate water pressure. Penns Grove Water Company ("Penns Grove"), a private water company responsible for the installation and maintenance of the water system in the municip-

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See, e.g., DEL. CODE ANN. tit. 21, § 2118(f) (1985) (allowing subrogation of no-fault insurance carrier to insured's rights); ILL. ANN. STAT. ch. 17, para. 375 (Smith-Hurd 1981) (requiring subrogation of insurer of financial institutions to rights of depositors); N.Y. INS. LAW § 3404(e) (McKinney 1985) (providing for subrogation clause in standard fire insurance policy); see also 16 G. COUCH, supra note 1, § 61:6 (identifying jurisdictions providing statutory rights of subrogation).

6 See N.J. STAT. ANN. § 17.36-5.20 (West 1985). The statute provides that the "[c]ompany may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company." Id.


8 See id. at 496, 524 A.2d at 380. The court decided that a private water company could be liable for negligence in failing to supply adequate water pressure for fighting fires. See id. This is a departure from the majority rule in the United States, which holds that private water companies are immune from similar liability absent an express contractual obligation to provide property owners with sufficient water or water pressure for fire fighting purposes. See, e.g., Libbey v. Hampton Water Works Co., 118 N.H. 500, 503, 389 A.2d 434, 436 (1978) (no tort liability for water company's negligent maintenance of pressure); H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 168, 150 N.E. 896, 899 (1928) (denying indefinite extension of liability of water company by enlargement of zone of duty); Clark v. Meigs Equip. Co., 10 Ohio App. 2d 157, 161-62, 226 N.E.2d 791, 793-94 (1967) (insured not permitted to sue as incidental beneficiary of water company contract). But see Haynie v. Sheldon, Inc., No. 80C-DE-107 (Del. Super. Ct. Jan. 21, 1985) (LEXIS, State library, Omni file) (liability imposed on water company in accordance with recognized tort principles).

9 See Weinberg, 106 N.J. at 491, 524 A.2d at 378.

10 See id. at 472, 524 A.2d at 367. Weinberg, the owner of the property, and the Coles, tenants in the apartment complex, brought this suit. Id.

11 Id.
ipality where the apartment complex was located, was charged by
the plaintiffs with negligence.\(^1\) Defendant Penns Grove, operating
under a filed tariff, had an ongoing service agreement with plaintiff
Weinberg.\(^2\)

Penns Grove's motion for summary judgment was granted by
the trial court, and affirmed by the Superior Court, Appellate Divi-
sion, on the basis of the Supreme Court of New Jersey's grant of
water company immunity in *Reimann v. Monmouth Consolidated
Water Co.*\(^3\) On appeal, the Supreme Court of New Jersey re-
quested that the parties prepare additional arguments addressing
two issues: the effect that abolishing the immunity would have on
the water companies' ability to obtain liability insurance; and the
rates that water companies would charge their customers in the
event the immunity was eliminated.\(^4\) After hearing the arguments,
the court reversed the appellate division, overruled *Reimann,* and
held that private water companies were no longer immune from
liability for negligently failing to provide adequate water pressure
for fire fighting.\(^5\) However, the court further held that subrogation
claims asserted by fire insurance companies against private water
companies would not be enforced.\(^6\)

\(^{12}\) Id. The alleged negligence on the water company's part consisted of failure to "in-
spect, maintain, and repair its water system, resulting in water pressure inadequate for fire
fighting." *Id.*

\(^{13}\) Id. The defendant operated "pursuant to the rules and regulations of the Board of
Public Utility Commissioners (BPUC)." *Id.* The contract with Weinberg, like the filed tariff,
adopted the rules and regulations of the BPUC. *Id.* at 473, 524 A.2d at 367-68. The Coles
had no direct contractual agreements with the water company. *Id.* at 473 n.1, 524 A.2d at
367 n.1.

\(^{14}\) See Weinberg v. Penns Grove Water Co., 216 N.J. Super. 409, 411-13, 524 A.2d 403,

\(^{15}\) 9 N.J. 134, 87 A.2d 325 (1952). In *Reimann,* the Supreme Court of New Jersey held
that, absent an express contractual or statutory obligation, a private water company was not
liable to an individual for negligently failing to provide a sufficient supply of water to com-
bat fires. See *id.* at 137-38, 87 A.2d at 327. This had long been the rule in New Jersey. See
Baum v. Somerville Water Co., 84 N.J.L. 611, 615, 87 A. 140, 141 (1913); Hall v. Passaic
Water Co., 83 N.J.L. 771, 776, 85 A. 349, 351 (1912). In affirming the lower court in Wein-
berg, the Appellate Division acknowledged that the judicial grant of total immunity to water
companies for fire damage resulting from their negligence stands like a "dinosaur from the
past," but stated that it was bound to follow the precedent set by the Supreme Court.

\(^{16}\) See Weinberg, 216 N.J. Super. at 413, 524 A.2d at 405.

\(^{17}\) See id. at 492, 495, 524 A.2d at 378, 380. The court reserved for future determination
"the issue [of] whether recognition of subrogation claims can be justified by the prospect of
Writing for the court, Justice Stein found that Penns Grove could be held liable for negligence predicated upon the breach of duty to the plaintiffs, a duty which arose from the plaintiffs' reliance on the water company to supply adequate water for fire fighting. Moreover, as a matter of public policy, this newly established liability should not encompass claims stemming from the subrogation rights of fire insurance companies. Justice Stein stated that this limitation was necessary to prevent windfall recoveries by insurance carriers and avoid an imposition of undue financial burden on the water companies.

Justice Handler, dissenting in part, and Justice Garibaldi, dissenting, argued that the majority's decision to limit subrogation rights was based on insufficient evidence and was a determination best left to the legislature. Justice Handler reasoned that the ap-

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a reduction in fire-insurance rates commensurate with the increase in liability-insurance costs for water companies.” *Id.* at 495, 524 A.2d at 380.

20 See *id.* at 483-92, 524 A.2d at 373-78. The court relied in part on Doyle v. South Pittsburgh Water Co., 414 Pa. 199, 199 A.2d 875 (1964), “[a] leading case imposing a common-law duty of care upon water companies.” See *Weinberg*, 106 N.J. at 482, 524 A.2d at 373. The Doyle court reasoned that although the water company involved was under no obligation to install fire hydrants originally, once installed, the plaintiff was justified in relying on them and the water company had a duty to properly maintain them. See Doyle, 414 Pa. at 205, 199 A.2d at 878.

21 *Weinberg*, 106 N.J. at 486-93, 524 A.2d at 376-78. In support of limiting its holding, the court opined that “[t]he result of imposing subrogation-claim liability on water companies in such cases would be to shift the risk from the fire-insurance company to the water company, and, ultimately, to the consumer in the form of increased water rates.” *Id.* at 492, 524 A.2d at 378.

22 *Weinberg*, 106 N.J. at 497, 524 A.2d at 381 (Handler, J., concurring in part, dissenting in part); *id.* at 498, 503-08, 524 A.2d at 381, 384-86 (Garibaldi, J., dissenting). Justice Handler concurred in the majority's decision to abrogate water company immunity, but felt that this abrogation should not have been limited to exclude subrogation claims. *See id.* at 496-98, 524 A.2d at 380-81 (Handler, J., concurring in part, dissenting in part).

Justice Garibaldi, on the other hand, asserted that the majority should have neither removed the judicially created immunity nor created an exception for subrogation claims; in her view, both actions conflicted with legislative policy. See *id.* at 498-508, 524 A.2d at 381-86 (Garibaldi, J., dissenting). Such a policy, she posited, was reflected in the legislature's decision to delegate to the BPUC authority over public utilities and the presence of a statute requiring a subrogation clause in a standard fire insurance policy. See *id.* at 503, 524 A.2d at 384 (Garibaldi, J., dissenting).
propriate judicial role is to insure consistent and rational application of liability rules,\(^2\) not to predict their effect on social interests.\(^3\) Justice Garibaldi observed that the denial of subrogation claims is a far-reaching policy decision and that the case at hand was not a subrogation case, that neither the parties nor the majority of the amicus curiae participants had briefed or argued the subrogation issue, and that no insurance company had appeared before the court.\(^4\) Consequently, the court was not provided with an appropriate record upon which to base its decision.\(^5\)

In abrogating private water companies' immunity from liability for negligently failing to maintain adequate water pressure for fire fighting, it is suggested that the \textit{Weinberg} court properly removed an ancient legal relic inconsistent with modern concepts of justice and fair dealing. It is submitted, however, that by limiting its holding to cases not involving subrogation claims of fire insurance carriers, the court unjustly denied the insurers' legal rights and acted inconsistently with well-established principles of modern tort and insurance law. This Comment will consider the legislatively prescribed system of insurance carrier regulation, the carrier's statutory and common-law right to subrogation, and the weakness of the court's public policy rationale for the denial of subrogation rights.

\section*{Regulation of Insurance Carriers}

The New Jersey Legislature vested the Commissioner of Insurance with the authority to regulate the business of insurance.\(^6\) Included in that grant of authority is the power to determine the

\(^{23}\) See id. at 497, 524 A.2d at 381 (Handler, J., concurring in part, dissenting in part). Justice Handler maintained that the judicial role when "cleans[ing] the tort system of its irrational and anomalous elements" is to promote "principled, consistent" and uniform rules of tort liability. See id. (Handler, J., concurring in part, dissenting in part).

\(^{24}\) See \textit{id.} (Handler, J., concurring in part, dissenting in part). Justice Handler noted that the legislature is the proper forum for determination of what policies best serve prevalent social interests. See \textit{id.} (Handler, J., concurring in part, dissenting in part).

\(^{25}\) See \textit{id.} at 505, 524 A.2d at 385 (Garibaldi, J., dissenting). The only participant to address the issue of subrogation was the Amicus Department of the Public Advocate; since the positions of the fire insurers and the liability insurance carriers for water companies were not presented in this proceeding, the Public Advocate determined that the court should not address the question of subrogation rights. \textit{Id.} (Garibaldi, J., dissenting).

\(^{26}\) See \textit{id.} at 505-08, 524 A.2d at 385-86 (Garibaldi, J., dissenting).

\(^{27}\) See \textit{N.J. STAT. ANN. §§ 17:1C-1 to :1C-6 (West 1984).} The New Jersey Legislature delegated to the Commissioner of Insurance the authority to issue and adopt rules and regulations deemed necessary to regulate the business of insurance. See \textit{id.} § 17:1C-6(e).
equity and fairness of all insurance policy provisions.\textsuperscript{28} Additionally, the legislature has required that all standard fire insurance policies contain a clause allowing the insurer to be subrogated to all rights of the insured.\textsuperscript{29} Typically, the Commissioner of Insurance decides whether the subrogation rights of an insurer should be limited on the basis of public policy.\textsuperscript{30} Where no such action has taken place, a presumption arises that the clause is fair, equitable and in the public interest.\textsuperscript{31} Accordingly, it is suggested that it was improper for the \textit{Weinberg} court to substitute its judgment regarding subrogation rights for that of the legislatively appointed Commissioner.\textsuperscript{32}

In New Jersey, it is well settled that the legislature, not the judiciary, is the appropriate branch of government to declare public policy.\textsuperscript{33} The court may not supplant legislative determinations

\textsuperscript{28} See \textit{id.} § 17:36-5.15 (West 1985). More specifically, the Commissioner may, within his discretion, permit variations to the legislatively prescribed standard fire policy provisions as long as the variations are, "with respect to the peril of fire," the equivalent of, or more favorable to the insured than, the standard form. See \textit{id.} § 17:36-5.20. All policy forms utilized by insurers must be filed with the Commissioner, see \textit{id.} § 17:36-5.15, and "[i]f the Commissioner shall at any time notify any insurer of his disapproval of any such policy form because it contains provisions which are unjust, unfair, inequitable, misleading or contrary to law, it shall be unlawful for such insurer thereafter to issue any policy in the form so disapproved." \textit{Id.}

\textsuperscript{29} See \textit{id.} § 17:36-5.20; \textit{supra} note 6 (text of provision).


\textsuperscript{31} See \textit{Edelstein v. Ferrell}, 120 N.J. Super. 583, 594-95, 295 A.2d 390, 397 (Law Div. 1972) (court substituting its judgment for that of duly appointed official held improper).
simply because it disagrees with the underlying policy.\textsuperscript{34} It is thus suggested that while the \textit{Weinberg} court was free to question the legislature's decision to allow subrogation for fire insurance carriers, it was beyond the court's authority to refuse to apply that decision absent a finding of unconstitutionality.\textsuperscript{35} Moreover, the only occasion for the judiciary to interfere with an administrative decision is if that decision is clearly shown to be statutorily unauthorized or arbitrary.\textsuperscript{36} As the relevant statute in \textit{Weinberg} is not unconstitutional and the Commissioner's failure to reject insurer subrogation is neither arbitrary nor contrary to law, it is submitted that the \textit{Weinberg} court acted contrary to the cogent statutory objective of allowing fire insurer subrogation.

Historically, the New Jersey Legislature has indicated areas where it felt application of the doctrine of subrogation would be against public policy.\textsuperscript{37} In enacting the New Jersey Tort Claims

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\textsuperscript{34} \textit{See A} \& \textit{B Auto Stores of Jones St.,} Inc. v. City of Newark, 59 N.J. 5, 19, 279 A.2d 693, 700 (1971); State v. Galiyano, 178 N.J. Super. 393, 396, 429 A.2d 385, 387 (App. Div.), \textit{certification denied}, 87 N.J. 424, 434 A.2d 1086 (1981); Sabato v. Sabato, 135 N.J. Super. 156, 166, 342 A.2d 886, 889-91 (Law Div. 1975). The court in \textit{A} \& \textit{B Auto Stores} stated that it had the duty to uphold a legislative decision to deny subrogation under the State Mob Riot Act, N.J. \textit{STAT. ANN.} \S 2A:48-1 (West 1987), even if the policy underlying that decision was unappealing. \textit{See A} \& \textit{B Auto Stores}, 59 N.J. at 19, 279 A.2d at 700. A court's role in considering the validity of any socioeconomic regulation should be limited to a determination of whether the rule has a rational basis. \textit{See, e.g.,} Kelley v. Johnson, 425 U.S. 238, 247 (1976) (only rational basis needed to uphold legislation); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (not for courts to contradict legislative finding unless it lacks rational basis).
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\textsuperscript{37} \textit{See, e.g.,} N.J. \textit{STAT. ANN.} \S 2A:48-1 (West 1987). In 1969, the New Jersey Legislature amended section 2A:48-1, which deals with the liability of a municipality for property loss resulting from mob violence or riots, to disallow subrogation rights of insurance carriers. \textit{See}
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Act, the legislature expressly barred subrogation claims in suits against public entities and employees. The legislature’s rationale "reflect[ed] a recognition that profit-making insurance companies were in a better position to withstand losses... than [were] the already economically burdened public entities." The Weinberg court suggested that this same reasoning was applicable to insulate a private water company from a subrogation claim by an insurer. It is submitted, however, that this rationale should not be extended to private water companies. Although water companies may be classified as public utilities, a majority are privately owned and operate under the same profit-motive as insurance carriers. Unlike insurance carriers, water companies, because of the essential nature of their business, operate as a public monopoly free from competition. The court's decision to force an unprotected

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*See N.J. STAT. ANN. § 59:9-2(e) (West 1982). In pertinent part, the statute provides that, “[n]o insurer or other person shall be entitled to bring an action under a subrogation provision in an insurance contract against a public entity or public employee.” Id.

*See Weinberg, 106 N.J. at 492, 524 A.2d at 378. However, the Supreme Court of the United States has refused to equate actions by a public utility with actions by the state. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358-59 (1974).

*See Lewandowski v. Brookwood Musconetcong River Property Owners Ass'n, 37 N.J. 433, 443, 181 A.2d 506, 512 (1962). Two conditions must be met in order for a water company to be brought within the definition of public utility: “(1) that it [the water company] owns, operates, manages or controls a water system for public use, and (2) that it does this under privileges granted by the State or any of its political subdivisions.” Id. at 443-44, 181 A.2d at 512; see N.J. STAT. ANN. § 48:2-13 (West 1969 & Supp. 1987) (definition of public utility).

*See generally 2 A. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION, THEORY AND APPLICATION 751-70 (1969) (analysis of operation and regulation of water companies). Municipalities are granted immunity on the basis of public policy and not because the beneficiary of the municipality's actions is the general public. See Sunderland, *The Liability of Water Companies for Fire Losses*, 3 MICH. L. REV. 443, 450 (1905). Consequently, evidence that a water company's business benefits the public is not enough to qualify the company for this "technical exception" to general liability rules. See id.


The Weinberg court stated that because water companies are public utilities, their operating costs are paid primarily by their customers, and, therefore, no subrogation liability should be imposed. See Weinberg, 106 N.J. at 492, 524 A.2d at 378. However, the corollary to this rationale would suggest that subrogation should be denied in all cases involving a
insurance carrier to bear the financial burden of a competitively protected water company's negligence shifts the loss away from the wrongdoer and on to a party without fault. This not only increases the water company's ability to earn monopolistic profits but undermines the purpose of finding the water company's behavior actionable.

STATUTORY AND COMMON-LAW RIGHT TO SUBROGATION

Although not an absolute right, subrogation is a favored principle in the law. Derived from statute, contractual agreement, or judicial decree, an insurer may be subrogated to any action business entity since the operating costs of all profitable businesses are paid by the consuming public.

According to the Weinberg court, if fire insurance carriers were permitted to enforce subrogation claims, water companies would raise water rates to cover increased costs, thereby passing the potential loss onto the consumer in the form of higher rates. See Weinberg, 106 N.J. at 492, 524 A.2d at 378. The court believed that this forced consumers to "pay twice": first, directly in the form of personal property insurance premiums and second, indirectly through increased water rates used by the water company to purchase liability insurance. See id. Typically, however, subrogation rights have been allowed even where the consumer may be required to "pay twice." See, e.g., Iowa Power & Light Co. v. Board of Water Works Trustees of Des Moines, 281 N.W.2d 827, 834 (Iowa Ct. App. 1979) (water company held strictly liable for loss, subrogation upheld).

See Weinberg, 106 N.J. at 504, 524 A.2d at 384-85 (Garibaldi, J., dissenting).

See Morris, Enterprise Liability and the Actuarial Process—The Insignificance of Foresight, 70 YALE L.J. 554, 590 (1961). If the decision as to whom should bear the burden of the loss is made on the basis of which enterprise is financially better off, then there is little purpose in the application of a negligence standard. See id. at 590 n.75. Under theories of enterprise liability, if a company is not held financially responsible for its actions, then the purpose of the law finding the company's conduct actionable is not met. See id. at 598. It has been argued that it is not unreasonable to impose liability on a water company because of the economic benefit it receives as a result of its activities. See Recent Cases, Torts—Liability of Water Company to Individuals for Failure to Furnish Water, 26 TEMP. L.Q. 214, 217 (1953).

See Standard Accident Ins. Co. v. Pellecchia, 15 N.J. 162, 171-72, 104 A.2d 288, 292-93 (1954); GA J. Appleman, supra note 4, § 4051. Subrogation will not be allowed when it will deprive the party against whom it is claimed of any legal or equitable rights. See Standard Accident, 15 N.J. at 171-72, 104 A.2d at 292-93; see also Ray v. Donohew, 352 S.E.2d 729, 738 (W. Va. 1986) (subrogation allowed only where strong case of right to such equitable relief exists and no injustice will result to other party).


See Aetna Ins. Co. v. Gilchrist Bros., Inc., 85 N.J. 550, 560, 428 A.2d 1254, 1259 (1981). Some states, including New Jersey, have enacted statutes expressly allowing the in-
found to exist between its insured and the wrongdoer,\textsuperscript{50} so long as the actionable conduct was the underlying cause of the damage paid for by the insurer.\textsuperscript{51} Courts in many jurisdictions, including New Jersey, have repeatedly recognized a conventional and an equitable right to subrogation,\textsuperscript{52} the latter of which allows subrogation to the assured’s cause of action absent a contractual agreement.\textsuperscript{53}

In standard insurance policies, statutory approval or denial of the insertion of a subrogation provision determines an insurance carrier’s right to subrogation.\textsuperscript{54} In numerous jurisdictions, the state legislature has determined the provisions to be contained in every insurer to assert subrogation claims. See supra notes 5-6 and accompanying text (discussing such provisions). Lack of a statutory provision or contractual agreement will not bar an insurer’s right to subrogation; the court will impose subrogation where equity requires. See, e.g., Memphis & Little Rock R.R. v. Dow, 120 U.S. 287, 301-02 (1887) (subrogation a “creature of equity . . . [and] enforced solely for the purpose of accomplishing the ends of substantial justice”).

\textsuperscript{50} See Standard Accident, 15 N.J. at 171, 104 A.2d at 292. Subrogation is solely a derivative action, with the insurer succeeding to rights no broader in scope than those of the insured. See Standard Accident, 15 N.J. at 172-73, 104 A.2d at 293; Board of Educ. v. Kane Acoustical Co., 51 N.J. Super. 319, 327, 143 A.2d 853, 858 (App. Div. 1958); 16 G. Couch, supra note 1, § 61:37; see also supra note 4 and accompanying text (limit of insurer’s right to subrogation).


\textsuperscript{52} See Jorski Mill & Elevator Co. v. Farmers Elevator Mut. Ins. Co., 404 F.2d 143, 147 (10th Cir. 1968); Public Serv. Co. v. Black & Veatch, 328 F. Supp. 14, 16 (N.D. Okla. 1971); Standard Accident, 15 N.J. at 171-72, 104 A.2d at 292-93; see generally Kimball & Davis, supra note 4, passim (discussion of distinction between equitable and conventional).


\textsuperscript{54} See, e.g., Home Mut. Ins. Co. v. Dean, 367 N.W.2d 568, 569 (Minn. Ct. App. 1985) (state no-fault insurance act limits insurer’s subrogation rights); Gilchrist Bros., 85 N.J. at 562, 428 A.2d at 1250 (contractual agreement for subrogation not binding if contrary to statutory provision); Eckmeyer, 138 N.J. Super. at 167, 350 A.2d at 308-09 (auto insurance statute contains provision allowing subrogation, subrogation permitted notwithstanding absence in policy).
fire insurance policy.\textsuperscript{55} The standard fire insurance policy in New Jersey contains a subrogation clause allowing the insurer to require the insured to assign to it all rights of recovery.\textsuperscript{56}

Despite continuous legislative and judicial approval of the doctrine of subrogation in New Jersey,\textsuperscript{57} the Weinberg court denied the insurer's right to subrogation without a hearing on the issue.\textsuperscript{58} Where an insurer's claim to subrogation is permitted by statute\textsuperscript{59} and is based on a valid cause of action, the insurer has a legal right to subrogation.\textsuperscript{60} It is submitted that the denial of this right without a hearing is a violation of the insurer's constitutionally protected right of due process.\textsuperscript{61}

\textsuperscript{55} See, e.g., N.J. STAT. ANN. § 17:36-5.20 (West 1985); see also CAL. INS. CODE § 2071 (Deering 1976 & Supp. 1987); N.Y. INS. LAW § 3404 (McKinney 1985); see generally Rodes, supra note 2 (discussing statutory regulation of insurance industry).

\textsuperscript{56} See N.J. STAT. ANN. § 17:36-5.20 (West 1985); supra note 6 (text of provision).


\textsuperscript{58} See supra notes 54-56 and accompanying text.

\textsuperscript{59} See supra notes 54-56 and accompanying text.

\textsuperscript{60} See Standard Accident Ins. Co. v. Pellecchia, 15 N.J. 162, 172, 104 A.2d 288, 293 (1954) (subrogee can recover only when a valid cause of action exists); see also 6A J. APFELMANN, supra note 4, § 4053 (subrogation arises by operation of law or through formal assignment of claim). Where a water company has been found liable to an insured for property damage caused by fire, the insurer has been found to have a right to subrogation of the claim. Powell & Powell v. Wake Water Co., 171 N.C. 290, 295, 88 S.E. 426, 429-30 (1916); cf. Virginia Elec. & Power Co. v. Carolina Peanut Co., 186 F.2d 816, 820 (4th Cir. 1951) (insurer subrogated to insured's negligence action against electric power company).

\textsuperscript{61} See U.S. CONST. amend. XIV, § 1; see also Armstrong v. Manzo, 380 U.S. 545, 550 (1965) (minimum requirement to insure due process is notice of a hearing); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (due process requires interested parties be given notice and opportunity to be heard); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("fundamental requisite of due process of law is the opportunity to be heard"). New Jersey also recognizes the right to a hearing as an essential element of due process. See Darmstatter v. City Council, 81 N.J.L. 162, 165, 79 A. 545, 546 (Sup. Ct. 1911); State v. Lebbing, 158 N.J. Super. 209, 216, 385 A.2d 938, 942 (Law Div. 1978) (due process requires fundamental right to be heard). The party to be bound must have adequate notice to be permitted representation in the proceedings. See Armstrong, 380 U.S. at 550; Mullane, 339 U.S. at 314; see also Parks v. Colonial Penn Ins. Co., 98 N.J. 42, 47, 484 A.2d 4, 7 (1984) (right of insurer to be present at liability hearing); Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 344, 476 A.2d 250, 254 (1984) (unjust for court to enact procedural rule denying party right to be heard). In determining the applicability of the due process provisions, the correct focus is on the nature of the right denied and not on the weight of the party's interest. See Goss v. Lopez, 419 U.S. 565, 575-76 (1975); see also State ex rel. D.G.W., 70 N.J. 488, 502,
The Weinberg court found that the third-party water company was liable in tort to the insured for its negligence, but was not subject to the insurer's subrogation claim. The primary function of the law of torts is to provide compensation for injuries sustained by one person as a result of the wrongful actions of another. Tort liability may be imposed upon a finding that a party has increased the danger of a situation, or deprived an injured party the opportunity of seeking help from alternate sources. Absent a duty to personally provide assistance, an actor is minimally required to use reasonable care to assure that its actions do not prevent others from providing aid. Where a party has interfered with one rendering assistance, or increased the danger of a situation, resultant damages may be apportioned on the basis of the contribution to the total harm. Therefore, despite valuation diffi-

361 A.2d 513, 520 (1976) (due process protections expanded to property interests). No state has the authority to "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Action by a state court is deemed to be action by the state itself. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 (1982) (issuance of writ of attachment by state court constitutes state action); J. NOWACK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 12.1, at 421 (3d ed. 1986). Following this rationale, it is submitted that the Weinberg court's denial of subrogation rights without notice or an opportunity to be heard may be viewed as a due process violation.

62 Weinberg, 106 N.J. at 495, 524 A.2d at 380.

64 See St. Louis-San Francisco Ry. Co. v. Simons, 176 F.2d 654, 659 (10th Cir. 1949) (once railroad learns trespasser in position of danger, duty arises to avoid increasing that danger); Cincinnati, N.O. & T.P. Ry. v. Marra, 119 Ky. 954, 957, 85 S.W. 188, 190 (1905) (duty to prevent drunk from wandering around train yard); Parvi v. City of Kingston, 41 N.Y.2d 553, 559, 394 N.Y.S.2d 161, 165, 362 N.E.2d 960, 964-65 (1977) (police have duty not to relocate drunk to area of danger).

65 See United States v. Gavagan, 280 F.2d 319, 328-29 (5th Cir. 1960) (Coast Guard's negligent failure to rescue ship actionable since potential rescuers abstained in reliance on Coast Guard efforts), cert. denied, 364 U.S. 933 (1961); Sneider v. Hyatt Corp., 390 F. Supp. 976, 980 n.2 (N.D. Ga. 1976) (innkeeper's failure to check on guest after repeated phone calls advising of suicidal tendency constituted negligent interference with rescue). Liability is imposed on any person who knowingly or negligently prevents a third person from rendering assistance necessary to prevent physical harm. RESTATEMENT (SECOND) OF TORTS § 327 (1965).


67 See Hughes v. Great Am. Indem. Co., 236 F.2d 71, 75 (5th Cir. 1956), cert. denied,
culpities, the water company in Weinberg would be liable only for damages caused by its own negligence.

In furtherance of the general principles of tort liability, insurers are generally permitted to assert subrogation claims against tortfeasors to avoid unjust enrichment. Disallowing subrogation claims absolves the wrongdoer of liability as a result of the insured’s prudence in obtaining insurance. A wrongdoer thereby

352 U.S. 989 (1957); Ristan v. Frantzen, 26 N.J. Super. 225, 230-31, 97 A.2d 726, 728 (App. Div. 1953), aff’d, 14 N.J. 455, 102 A.2d 614 (1954); RESTATEMENT (SECOND) OF TORTS § 433A (1965). The Restatement will allow apportionment of damages where the harms caused are distinct or where there is a “reasonable basis” for determining the contribution of each cause to a single harm. See RESTATEMENT (SECOND) OF TORTS § 433A (1965). “There may be many . . . cases in which the original wrongdoer is liable for the additional harm caused by the intervening negligence of the later one, while the latter is liable only for what he himself caused.” Id. at comment 6.

The general rule in New Jersey is that the defendant is only liable for such portion of the total damage as may properly be attributed to the defendant’s negligence. See Commonwealth Land Title Ins. Co. v. Conklin Assocs., 152 N.J. Super. 1, 10, 377 A.2d 740, 747 (Law Div. 1977), aff’d, 167 N.J. Super. 392, 400 A.2d 1208 (App. Div. 1979); Jenkins v. Pennsylvania Ry. Co., 67 N.J.L. 381, 386, 51 A. 704, 706 (Sup. Ct. 1902). A distinction is made between damages that would have resulted from natural causes or from another party’s negligence had defendant’s conduct been reasonable, and damages in excess of those which are attributable to defendant’s negligence. See id. at 335, 51 A. at 705.


See W. PROSSER & W. KEETON, supra note 63, § 2 (general discussion of policies underlying tort liability).


See Sentry Ins. Co. v. Stuart, 246 Ark. 680, 684-85, 439 S.W.2d 797, 800 (1969) (third party should not benefit from injured party’s insurance). Subrogation serves the concept of justice in two ways: first, by prohibiting the wrongdoer from escaping the legal obligation of his tortious act; and second, by disallowing double recovery by the insured. See Standard Accident, 15 N.J. at 171, 104 A.2d at 292; Frost v. Porter Leasing Corp, 386 Mass. 425, 428,
benefits from the insured’s insurance policy without being either a party to or a third-party beneficiary of the policy.\textsuperscript{73} The \textit{Weinberg} court, by excluding the insurer’s subrogation claim,\textsuperscript{74} has enabled the water company to avoid responsibility for its actions despite its culpability.\textsuperscript{75} It is submitted that such a result is contrary to public policy and is less desirable than requiring water companies to bear the burden of their negligent actions.

\section*{Conclusion}

This Comment has suggested that the New Jersey Supreme Court’s decision to limit its holding by denying insurance carriers’ subrogation claims was unjustified. Extinguishing the rights of the insurance carrier without an opportunity to be heard was a violation of their constitutionally guaranteed due process rights. Further, the right of the insurance carrier to be subrogated to any valid claim of the insured is inherent in the well-settled doctrine of subrogation. The New Jersey Legislature specifically granted fire insurance carriers the right to subrogation and vested the Commissioner of Insurance with the authority to evaluate policy provisions; therefore, it is for the Commissioner to determine in which cases this right should be denied. Although the need to limit the potential liability exposure of private water companies may be a serious policy consideration, it was beyond the court’s authority to determine in which way that exposure should be limited.

\textit{Beth Jacobwitz}

\footnotesize

\begin{itemize}
\item \textsuperscript{73} See \textit{Kimball & Davis}, \textit{supra} note 4, at 841.
\item \textsuperscript{74} See \textit{Weinberg}, 106 N.J. at 493, 524 A.2d at 378.
\item \textsuperscript{75} See \textit{16 G. Couch}, \textit{supra} note 1, § 61:18. Avoiding this type of unjust enrichment of a third-party tortfeasor is the underlying rationale for the doctrine of subrogation. \textit{See id.}
\end{itemize}