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# CPLR 3002: Defense of Splitting Not Available to Defendant Who Knows of Subrogation of Portion of Property Damage Claim and Fails to Join Subrogee in Pending Action

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This case serves to put the practitioner on notice that those matters not *expressly* stipulated in writing will not be given effect.

## ARTICLE 30 — REMEDIES AND PLEADING

*CPLR 3002: Defense of splitting not available to defendant who knows of subrogation of portion of property damage claim and fails to join subrogee in pending action.*

The common-law doctrine of election of remedies was conceived as a means of precluding a plaintiff from being unjustly enriched by a double recovery and of preventing the harassment of a defendant and the courts with numerous suits involving the same transaction.[17] Although based on valid policy considerations, application of the doctrine has produced many harsh results.[18] CPLR 3002 was intended to modify this doctrine in certain instances. A related common-law doctrine is the rule against splitting a cause of action, *i.e.*, the rule that a single and indivisible claim cannot be divided and made the subject of several suits.[19] When a plaintiff institutes suit for only part of his damages, a subsequent suit for the remainder of such damages is thereby precluded. The rule against splitting has not been codified and the courts have assumed the responsibility of modifying this doctrine by creating exceptions thereto.

In *Clarcq v. Chamberlain Mobile Home Transport, Inc.*,[20] plaintiffs had received judgment in a previous action for breach of a contract to deliver a trailer and for the loss of the personal property contained therein; their complaint had specifically excluded a claim of damages for the trailer itself. Plaintiff's insurance company paid plaintiff for the value of the trailer and received in exchange subrogation rights against the defendant. Subsequently, the plaintiffs, as nominal parties in behalf of their subrogated insurer, commenced an action to recover payments made to the insured. Upon the insurer's motion for summary judgment, it was held that in as much as the defendant had notice of the insurer's position by means of a demand letter, and did not join it in the first action, the defense of splitting a cause of action was not available. Since the defendant had notice of the impending second suit, and therefore had the power to avoid a second trial by joining the insurer in the first action, failure to do so was a waiver of the "splitting" defense.

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[17] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶3002.01 (1968).

[18] Cases modifying the doctrine: Smith v. Kirkpatrick, 305 N.Y. 66, 111 N.E.2d 209 (1953); Clark v. Kirby, 243 N.Y. 295, 153 N.E. 79 (1926); Schenck v. State Line Tel. Co., 238 N.Y. 308, 144 N.E. 592 (1924).

[19] CLARK, LAW OF CODE PLEADING § 73 at 473 (2d ed. 1947).

[20] 58 Misc. 2d 227, 294 N.Y.S.2d 550 (Sup. Ct. Monroe County 1968).

Significantly, the insured, in its previous suit, had specifically excluded as an element of damage that for which the insurance company subsequently sued (loss of the trailer itself). The case of *Pearl Assurance Company v. Epstein*[21] involved similar facts except that the insured had sought recovery for his entire damages in his previous action. Also there was no evidence that the defendant had any notice of the insurance company's subrogation rights. The Court of Appeals under these circumstances concluded that the rule against splitting a cause of action precluded plaintiff-insurance company from recovering. Thus, it appears that the rule against splitting a cause of action is not applicable where at least a) there is a mutual exclusivity of the damages sought in each action, and b) the defendant has notice of the insurance company's rights.

Practitioners are therefore advised that if, in representing a defendant, notice is received of the subrogation rights of the plaintiff's insurer (or plaintiff's assignee), such insurer (or assignee) should be joined in a pending action in order to avoid multiple litigation.

*CPLR 3013: Court clarifies elements of cause of action versus insurer for bad faith refusal to settle.*

Recently, the appellate division, first department, further defined the material elements of a cause of action against an insurance company for its bad faith refusal to accept a settlement. Most liability insurance contracts protect the insurer by providing that the insurance company will represent the insured when he is sued for matters covered by the contract. In return for the protection the law has imposed a duty upon insurers to consider the interests of the insured while representing him in settlement negotiations. Today, in New York it is well established that an insurance company may incur liability to an insured, if, in "bad faith," it refuses to accept a reasonable offer of settlement within the policy limits.[22] This rule affords an insured who has had an excess judgment entered against him (which excess could have been avoided if the insurance company had acted in good faith) a cause of action.

Until recently, it was unsettled whether the cause of action accrued when the excess judgment was entered or subsequent to the insured's payment of such excess. In *Henegan v. Merchants Mutual Insurance Company*,[23] it was established that a cause of action is stated by an allegation that an excess judgment has been entered. The court reasoned that at this point the insured has

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[21] 295 N.Y. 674, 65 N.E.2d 325 (1946).

[22] Note, *Insurer's Liability for Refusal to Settle*, 42 ST. JOHN'S L. REV. 544, 552-56 (1968).

[23] 31 App. Div. 2d 12, 294 N.Y.S.2d 547 (1st Dep't 1968).