

March 8, 2002

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Re: Insurance company's right to recover from restitution received by city

Dear City Recorder,

I am in receipt of a copy of February 25 correspondence forwarded to the "Treasurer" of your city by a company, who describe themselves as "restitution recovery specialists." An agent asserts in the letter that the insurance company is entitled to "first recovery" of any money received as restitution from a woman, in connection with her convictions for theft, forgery, and fraud. It is my understanding that the woman was a public official who stole money from your city in an amount over \$80,000.00. The insurance company paid the city \$20,000.00 for this loss caused by the woman. No other payment has been received by the city, although the woman has been ordered to make monthly restitution payments.

You will note that restitution recovery specialists are based in Tucson, Arizona, which may explain their ignorance of Tennessee law. A more likely scenario is that "restitution recovery" firms frequently get money to which they are not entitled simply by sending letters containing such demands to persons who lack the benefit of legal expertise.

The insurance company is not entitled to any money your city receives from the woman, unless and until the city is "made whole" by receiving all of the funds stolen by the woman.

The claim asserted by the insurance company falls under the area of law known as "subrogation." The Tennessee Supreme Court has spoken with finality concerning this area of law in the state, and has expressed very clearly that no insurance carrier is entitled to subrogation, or the repayment of insurance funds paid, until the insured is "made whole." Blankenship v. Bain, 5 S.W.3d 647 (Tenn. 1999).

The Court defines subrogation as follows:

A right of subrogation may arise by contract ("conventional subrogation"), by application of equitable principles of law ("legal subrogation"), or by application of a statute ("statutory subrogation").

It is based on two fundamental premises:

- 1) that an insured should not be permitted recovery twice for the same loss....and
- 2) that the tortfeasor should compensate the insurer for payments the insurer made to the insured.

York v. Sevier County Ambulance Auth., 1999 WL 1051166 (Tenn. 1999).

The Court further has determined that the claims of insurance companies for subrogation are guided by "general principles of equity":

The doctrine of subrogation in insurance does not arise from,

nor is it dependent upon, statute or custom or any of the terms of the contract; it has its origin in general principles of equity and in the nature of the insurance contract as one of indemnity. The right of subrogation rests not upon a contract, but upon principles of natural justice. Wimberly v. American Casualty Co., 584 S.W.2d 200, 202-3 (Tenn. 1979).

Therefore, it does not matter what the contract for insurance states with regard to restitution or subrogation rights, as:

there is no equitable basis for allowing subrogation where an insured has not been made whole because there simply is no risk that the insured may recover twice for the same loss.
Blankenship v. Bain, 5 S.W.3d 647, 651 (Tenn. 1999).

The Blankenship and York opinions quoted above concern medical insurance and personal injury cases, in which the injured party had a claim for recovery against a party responsible for their damages. Some states treat subrogation claims differently if connected with property loss claims, such as loss suffered through theft or arson, and do not extend the “made whole” rule to prevent an insurance company from recovering when the insured has not been fully compensated. Tennessee, however, is different and the “made whole” doctrine applies to most property loss claims as well. In Wimberly v. American Casualty Co., 584 S.W.2d 200 (Tenn. 1979), the insured suffered property damage of \$44,619.00, and recovered \$25,000.00 from the defendant’s insurance policy and \$15,000.00 from their own insurance policy. The Supreme Court held that the insurance company was not entitled to any share of those proceeds, as the insured had not received funds sufficient to cover all of their losses suffered.

It is my opinion that your city is entitled to retain any and all restitution paid by the woman, unless the total amount recovered, including the money paid by the insurance company exceeds the amount lost by the city due to the woman’s conduct. Only after the city has been reimbursed in full does the insurance company have a justifiable claim to any portion of the restitution.

I hope this information is helpful. Please feel free to contact me should you have any questions or need further information.

Sincerely,

Melissa A. Ashburn
Legal Consultant