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AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**JASON ROYLANCE and TEDDY SUE
ROYLANCE,**

Plaintiffs,

vs.

**JOHN ALDEN LIFE INSURANCE
COMPANY, dba ASSURANT HEALTH.**

Defendants.

Case No. **CV 2006 9218**

**MEMORANDUM DECISION AND
ORDER DENYING PLAINTIFFS'
MOTION TO ENFORCE
SETTLEMENT AGREEMENT AND
FOR SANCTIONS**

I. INTRODUCTION.

On December 11, 2006, plaintiffs filed a Complaint for Damages and Jury Demand. Plaintiffs John Roylance and Teddy Sue Roylance, husband and wife, allege bad faith breach of contract against their medical insurance carrier defendant John Alden Life Insurance Company (Assurant). Jason Roylance was injured on December 17, 2005, when he was run over by a semi-truck in British Columbia, Canada. Roylances filed a lawsuit in British Columbia against the driver of that truck for that driver's negligence. Roylances allege that after Jason exhausted his medical payments coverage under his auto policy with Progressive Insurance, he tendered his medical bills to Assurant, but Assurant refused to pay those medical bills.

Assurant filed a Notice of Appearance on April 19, 2007, but Assurant has yet to answer the Roylances' complaint. The parties engaged in settlement discussions, and on

July 17, 2007, Roylances filed their “Motion to Enforce Settlement Agreement and for Sanctions.” Roylances also filed a “Notice of Intent to Present Evidence and Testimony”, but in that pleading they did not mention who they anticipated calling as a witness. In Roylances’ Motion to Enforce Settlement Agreement and for Sanctions, Roylances argue that Assurant breached the parties’ settlement agreement. Roylances claim that on June 7, 2007, the parties reached a settlement that: a) John Alden Life [Assurant] would pay all of Jason’s past medical bills in the amount of \$115,478, plus \$130,000, “cash” or “new money” to Plaintiffs and their attorney, and b) In return, Plaintiffs would Release John Alden Life, et al [Assurant], from all claims; dismiss the lawsuit with prejudice; and submit all future medical bills related to the 12/17/05 accident (over and above the \$115,478) to Progressive Insurance Company pursuant to Jason’s \$150,000 medical payments coverage under the B.C. Insurance Act.” Affidavit of Plaintiffs’ Counsel, p. 3, ¶ 7. On June 26, 2007, Roylances’ attorney notified the Court by letter that the parties had settled the case amicably. *Id.*, ¶ 9. Roylances’ counsel then claims that: “On July 12, 2007, I discovered that John Alden Life [Assurant] had breached the settlement agreement by asserting and collecting a subrogation ‘lien’ in the amount of \$88,000, plus, for medical bills paid (inclusive of the \$82,108 re-paid to Plaintiffs.” *Id.*, p. 4, ¶ 10. Roylances’ attorney then claimed this breach broke Assurant’s promise to pay off Jason’s \$115,478 past medical bills and “Neither Plaintiffs, nor their counsel, would have agreed to submit all future medical bills arising from the 12/05 B.C. accident to Progressive had we known of John Alden Life’s [Assurant’s] intention and conduct in asserting and collecting the \$88,000, plus, lien and diminishing Jason’s remaining benefits by 60%.” *Id.*, ¶ 11. The hearing on Roylances’ “Motion to Enforce Settlement Agreement and for Sanctions” was noticed for August 8, 2007. On July 30, 2007, Roylances submitted a “Memorandum in Support of

Motion to Enforce Settlement Agreement and For Sanctions.” On August 6, 2007, Assurant filed “Defendant’s Response to Plaintiffs’ Motion to Enforce”, an “Affidavit of Troy Y. Nelson” (Assurant’s attorney) and an “Affidavit of Kathleen Lueth”, subrogation specialist for Assurant. Oral argument was held August 8, 2007. At oral argument, Roylances’ attorney David Ducharme asked to call Troy Nelson as a witness. Since that placed Nelson in an ethically precarious position, the hearing was continued to August 30, 2007, to allow Roylances to take Nelson’s deposition and to allow Nelson the opportunity to address the ethical considerations suddenly presented. On August 28, 2007, Roylances filed a “Reply to Defendant’s Response to Plaintiffs’ Motion to Enforce and For Sanctions.”

Oral argument was held on August 30, 2007. As of that date, Roylances had not taken the deposition of Troy Nelson, nor did Roylances ask that Nelson be called as a witness at the August 30, 2007, hearing. At the conclusion of oral argument, the Court asked for simultaneous briefing to be submitted on September 7, 2007, on the issue of Assurant’s “contractual right of exclusion”, and whether Assurant had a duty to mention that right in the settlement documents or face losing that right. Both Roylances and Assurant timely submitted the requested briefing. The matter is now at issue.

A tangential issue must be discussed, only because counsel for Roylance tied the issue into the settlement discussions. At the hearing on August 8, 2007, counsel for Roylances claimed “there was no right of subrogation in Canada” and announced that British Columbia law applies to this case. Since the hearing was being continued anyway to allow Ducharme to take the deposition of Troy Nelson, the Court requested Ducharme provide authority to support these claims he raised to the Court for the first time at oral argument (it is not contained in the briefing or any pleading up to this point). In Roylances’

Reply to Defendant's Response to Plaintiffs' Motion to Enforce and for Sanctions,

Ducharme provided that authority. Roylances argued in that brief:

Having been advised that their right of subrogation was worthless in British Columbia, JALIC [Assurant] never again mentioned the issue of subrogation during negotiations. See *Matilda v. MacLeod*, 2000 B.C.C.A. 1 (2000, B.C. Ct. of Appeal), B.C.J. No. 6 Vancouver Registry Nos. CA 023952 & CA 023953, (copy attached).

Reply to Defendant's Response to Motion to Enforce and For Sanctions, p. 5. The reason Roylances' counsel Ducharme claimed this was relevant, was because Ducharme told Assurant that Assurant had no right of subrogation (errantly as we will soon see), and Ducharme then claims Assurant thereafter immediately dropped the subrogation issue in negotiations. Ducharme then expands Assurant's dropping the subrogation issue against the truck driver, to also include, without any writing on Assurant's part to prove this expanded view of settlement discussions, that Assurant was also giving up its right of subrogation as against Progressive. Assurant denies that it ever gave up its right of subrogation as against Progressive. It is clear from the April 5, 2007, letter from Progressive to Ducharme that Assurant was affirmatively enforcing that right. Affidavit of Kathleen Lueth, Exhibit E. At the continued hearing on August 30, 2007, Assurant's counsel pointed out that Section 25 of the Insurance (Motor Vehicle) Act which *Matilda* interpreted as abolishing subrogation, was **repealed** in 2003, and that with the addition of Section 84 of that Act added in 2003, there **is** subrogation in British Columbia. Assurant's counsel pointed out the *Matilda* case was decided **prior** to the statutory change adding back the right of subrogation. Assurant's counsel is correct, Section 25 of the Insurance (Motor Vehicle) Act has been repealed, and Section 84 added. There is a right of subrogation in British Columbia, and there has been a right of subrogation at all times since the accident in question. In any event, even if Assurant did not have a right to subrogate

against the other driver (which it clearly did), there is nothing about British Columbia law that would control as to the rights between Assurant, Roylances and Progressive in this lawsuit. Certainly Ducharme would like to think that Assurant took his representation that Assurant had no right of subrogation, to the bank, and Assurant then dropped its right of subrogation as against Progressive, but there is no evidence to support that. The April 5, 2005, letter Ducharme received from Progressive specifically indicates just the opposite, that Assurant is asserting its subrogation rights against Progressive. Finally, there are two bullet-proof reasons why Assurant would not do this. First, British Columbia law wouldn't control the legal relationship between Assurant and Progressive and their mutual insured Roylances, and second, British Columbia has at all times pertinent allowed subrogation.

II. ANALYSIS.

There is no written settlement agreement which was signed by the parties. The “Confidential Settlement Agreement and Release”, attached to Roylances’ Memorandum in Support of Motion to Enforce Settlement Agreement and for Sanctions, was not signed by any party. Thus, the Court is not interpreting the language of a written agreement. The Court is being asked to determine the significance of correspondence between the parties to determine if there was an oral agreement. The Court must also determine if Assurant has an affirmative duty to further discuss their right of exclusion in ongoing settlement discussions, or risk waiving that right.

A. Contractual Analysis.

Assurant has a valid contractual right of exclusion under its policy with Roylances. Kathleen Lueth Affidavit, Exhibit A, p. 19. That contractual right of exclusion states Assurant will not pay benefits for “Charges for which there is automobile or liability insurance providing medical payments.” *Id.* There is no doubt that Progressive and

Roylances' attorney, David Ducharme, were on notice of Assurant's intent to exercise their contractual right of exclusion against Progressive. Exhibit E to the Kathleen Lueth Affidavit is an April 5, 2007, letter to Ducharme from Hope Carraro of Progressive Insurance stating:

I am writing to you in regards to the subrogation notice I received from Assurant Health, Jason's Health Insurance Company. They are looking for Progressive to **indemnify** them over \$88,000.00 for medical bills they have paid in regards to Jason's motor vehicle accident. I have spoken to the representative on the case from Assurant Health, Kathleen Lueth, and she has advised me that she has sent two checks in the amounts of \$60,660.70 and \$14879.27 to you, at your office, for payments to be made to foreign providers.

(emphasis added). From a contractual analysis, there was no agreement between Roylances and Assurant as to Assurant's waiver of its right of exclusion. All the evidence is to the contrary. From Roylances' standpoint, at best, there was no meeting of the minds on this issue. The Court's analysis is as follows.

Assurant argues the emails between the parties show this contractual right of exclusion was "unresolved". Defendant's Supplemental Brief, p. 2; Affidavit of Troy Y. Nelson, Exhibit H, p. 2. In that exhibit, Assurant's attorney Nelson received an email from Roylances' attorney Ducharme, dated July 10, 2007, at 10:25 a.m., which in fact shows this contractual right of exclusion was not resolved:

Hi Troy: I've reviewed the "Roylfin.doc" Release. It seems to be OK – although I don't remember ever agreeing to submit any disputes to federal court. Not a deal killer tho.

Nonetheless I have one unresolved issue:

From Day one of our negotiations, you kindly & professionally made it clear that JALIC [Assurant] was going to "step up" & pay Jason's medical bills, in addition to any other cash settlement we may reach. In light of that, we have agreed to submit all future medical bills incurred as a result of 12/05 B.C. accident to Progressive (under Jason's med pay – per B.C. law). **My concern is that JALIC [Assurant] will eventually assert a subrogation right as to the \$115,478 in medical bills paid per the settlement agreement.** This would reduce the remaining available Med Pay coverage to approx. \$34,500 (ie., \$150K - \$115,500) & both 1.) vitiate JALIC's intent to

“step-up” for the medicals owed under the policy in the first place; and 2.) leave insufficient funds for Jason’s future treatment.

Affidavit of Troy Y. Nelson, Exhibit H, p. 2. (emphasis added). This email shows that **post-“settlement”** Ducharme was still concerned about Assurant being able to do the very thing that Ducharme was told Assurant **would** do in the April 5, 2007, letter from Progressive’s Hope Carraro...exercise its right of exclusion. This email from Ducharme was written by Ducharme more than one month **after** Ducharme claims that the parties reached a settlement. Ducharme claims on June 7, 2007, the parties reached an agreement that: “a) John Alden Life [Assurant] would pay all of Jason’s past medical bills in the amount of \$115,478, plus \$130,000, “cash” or “new money” to Plaintiffs and their attorney, and b) In return, Plaintiffs would Release John Alden Life, et al [Assurant], from all claims; dismiss the lawsuit with prejudice; and submit all future medical bills related to the 12/17/05 accident (over and above the \$115,478) to Progressive Insurance Company pursuant to Jason’s \$150,000 medical payments coverage under the B.C. Insurance Act.” Affidavit of Plaintiffs’ Counsel, p. 3, ¶ 7. Ducharme’s Affidavit continues: Jason and Teddy Sue were confident that the \$150,000 medical payments coverage with Progressive would be sufficient to pay for Jason’s ongoing care needs until we resolved the British Columbia litigation with the driver of the Semi-tractor trailer (now pending).” *Id.* No doubt Jason and Teddy sue *wanted* the entire \$150,000 Progressive policy limits available to them, but nothing explains why Jason and Teddy Sue were “confident” that this would happen. Indeed, Roylances’ insurance policy with Assurant indicated it would not happen, and the April 5, 2007, letter from Progressive to Roylances’ attorney indicated it would **in fact** not happen as Assurant was exercising its subrogation rights.

Assurant cites *Veritext/PA Reporting Co. L.L.C. v. E-Reporting Stenographic Affiliates of Pennsylvania, Inc.*, 2006 WL 3524375 (E.D.Pa. 2006). That case is

factually similar. The parties in that case told the court that the case had settled. After that, a disagreement ensued over a covenant not to sue and the release of two individuals. As in this case, the agreement was oral and never reduced to writing before the dispute arose over the language to be used in the written agreement. The federal district court refused to enforce the settlement agreement because there was no meeting of the minds as to all material settlement terms. “The parties' failure to resolve [a] crucial term renders their tentative agreement impossible to interpret and/or to enforce.” *Id.*, citing *Porreco v. Maleno Developers, Inc.*, 761 A.2d 629, 633 (Pa.Cmwlth. 2000) ; see also *Krebs v. United Ref. Co. of Pennsylvania*, 893 A.2d 776, 785(Pa.Superior Ct. 2006). The federal district court noted it could not fill in missing terms and: “In short, the Court cannot write a settlement agreement for the parties when they have failed to reach a meeting of the minds on a term as fundamental as the release.” *Id.* In the present case, this exercise of Assurant’s right of exclusion is a material settlement term. There was no meeting of the minds.

B. Insurance Law Analysis.

It is undisputed that the proposals back and forth between the parties’ attorneys which led to the draft Confidential Settlement Agreement and Release were silent on Assurant’s right of exclusion. The next issue is whether Assurant has an affirmative duty to further discuss their right of exclusion in ongoing settlement discussions. If they have that duty, then they may have “waived” their ability to enforce their right of exclusion.

At oral argument, the Court requested briefing on an insurance company’s right of exclusion and its corresponding right of reimbursement on one hand, and a right of subrogation on the other hand. Additional briefing was requested on the contractual right of subrogation (which Assurant has in this case) and an equitable right of subrogation.

Finally, briefing was requested on who has the burden of discussing subrogation rights in settlement: the insurance company to keep from waiving that right, or the insured to clarify that the right was waived. Neither party's brief shed much light on these issues.

As mentioned above in the contractual analysis, Assurant has a valid contractual right of exclusion set forth in its insurance policy with the Roylances. Kathleen Lueth Affidavit, Exhibit A, p. 19. That contractual right of exclusion states Assurant will not pay benefits for "Charges for which there is automobile or liability insurance providing medical payments." *Id.* Along with that right of exclusion is Assurant's corresponding "right of reimbursement", which states that if Assurant pays a claim and Roylances recover from any person or organization, then Assurant has a right to recover those monies directly from Roylances. The Right of Reimbursement provision reads:

Right of Reimbursement: If benefits are paid under this plan, and you recover against any person or organization by settlement, judgment or otherwise, we have a right to recover from you an amount equal to the amount we have paid. This includes recoveries against such third party, against any liability coverage for such third party or against your automobile insurance in the event a claim is made under the uninsured or underinsured motorist coverages.

Kathleen Lueth Affidavit, Exhibit A, p. 24. This right of reimbursement is a contractual right in the policy that allows Assurant to go **directly** after Roylances for payment. Assurant has a contractual right of exclusion, which means it will not pay for any "charges for which there is automobile or other liability insurance providing medical payments", and if Assurant does make payment for such charges, then Assurant is also contractually allowed to go directly after Roylances for any such monies Assurant paid. It is different than a subrogation right. A subrogation right is **derivative** of any right the insured (Roylances) might have. The right of subrogation is still conveyed in the insurance policy, but the insurance company's (Assurant) right is derivative from its insured (Roylances). In this case, Assurant has

subrogated rights to the entities to whom Roylances have rights, but Assurant has to go through Roylances (ie., derivative rights) to get to those entities. As an example, Assurant has no direct right against the truck driver that injured Jason Roylance, but Assurant steps into the shoes of Jason Roylance as against that truck driver and his insurance company.

The right of subrogation is set forth in the insurance contract:

Subrogation Right: Upon payment of benefits, we will be subrogated to all rights of recovery you may have against any person or organization. This includes recoveries against such third party, against any liability coverage for such third party or against your automobile insurance in the event a claim is made under the uninsured or underinsured motorist coverages. Such right extends to proceeds received by settlement, judgment or otherwise; but is limited to the amount of benefits we have paid. You must:

- do nothing to prejudice any right of recovery;
- execute and deliver any required instruments or papers; and
- do whatever else is necessary to secure such rights.

If we are precluded from exercising our subrogation right, we may exercise our right of reimbursement.

Kathleen Lueth Affidavit, Exhibit A, p. 24.

Assurant's "right of exclusion" simply enumerates the situations in which it does not have to pay a claim. In this case, the specific situation is Assurant "will not pay benefits for..."charges for which there is automobile or liability insurance providing medical benefits." Lueth Affidavit, Exhibit A, p. 19. All the right of exclusion does is give Assurant the right not to pay in the first instance. What happens if they do pay is covered by the "subrogation right" and "right of reimbursement". In a nutshell, the "subrogation right" allows Assurant to go after those *other* individuals and organizations to which Roylances have a right to go after. The "right of reimbursement" allows Assurant to go after *Roylances* directly for any amounts Roylances have received from either Assurant or from any other person or organization. The "right of reimbursement" is Assurant's contractual ability to get payment directly from Roylances, and it can be used in a subrogated interest situation, or in a situation in which Assurant has paid benefits but should not have due to its

“right of exclusion”. In this case, the amount Progressive eventually agreed to pay in settlement is both a subrogated interest of Assurant, and an item for which Assurant has paid even though it had a “right of exclusion” and in which it has a “right of reimbursement” to go after Roylances directly.

An illustration may help. As just stated, the amount Progressive agreed to pay in settlement is both a subrogated interest of Assurant, and an item for which Assurant has paid even though it had a “right of exclusion”. Were Progressive to pay Roylances for these same bills, Assurant would have its “right of reimbursement” to go after Roylances directly. Progressive had not paid these bills at the time of settlement, but Progressive acknowledged Assurant’s subrogated interest, and presumably, Progressive would have paid Assurant directly due to that subrogated interest. On the other hand, any amount that might eventually be recovered by Roylances against the truck driver, the tortfeasor, is not covered by Assurant’s “right of exclusion”. In the unlikely event the truck driver’s insurance immediately stepped in and agreed to pay all Jason Roylance’s medical bills, but was slow in doing so, Assurant would still have to make payment for those medical expenses in the first instance. Assurant has no contractual right to exclude payment of those bills just because the tortfeasor promised to pay. But Assurant would still have its subrogated right to go after the truck driver to recoup any payment Assurant has made. If Roylances received those payments directly from the truck driver, Assurant could exercise its right of reimbursement directly against Roylances.

Given that illustration, we need to look at the present situation. Assurant did not have to pay for amounts Progressive now admits it should have paid, but Assurant paid them anyway. Assurant has no contractual **direct** “Right of Reimbursement” at this time against Roylances, because Roylances have not received payment from Progressive.

Assurant has no direct action against Progressive. Assurant's rights against Progressive are **derivative**, Assurant steps into Roylances' shoes. Assurant is subrogated to Roylances' rights with Progressive. The amount in dispute, the amount owed by Progressive to Roylances for past medical bills, is a subrogated right of Assurant.

Assurant's subrogated right to monies owed by Progressive to Roylances is a contractually conferred right in the insurance policy Assurant has with Roylances. It is not an equitable right of subrogation. This appears to be a distinction without a difference, as the result is apparently the same.

The doctrine of subrogation is not necessarily limited to contract terms or assignments. As stated in 29 Am.Jur., Insurance, Sections 1335 and 1336:

"The general rule is that upon payment of a loss, the insurer, or insurers in the case of coinsurance, is entitled to be subrogated pro tanto to any right of action which the insured may have against a third person whose negligence or wrongful act caused the loss. Although many policies, including policies in the standard form, now provide for subrogation, and thus determine the rights of the insurer in this respect, the equitable right of subrogation is the legal effect of payment, and inures to the insurer without any formal assignment or any express stipulation to that effect in the policy.

"The insurer's right of subrogation against third persons causing the loss paid by the insurer to the insured does not rest upon any relation of contract or privity between the insurer and such third person, but arises out of the contract of insurance and is derived from the insured alone."

The equitable doctrine of subrogation is simply one of substitution and may be invoked whenever a party, not a volunteer, satisfies the obligation of another for which a third party is responsible. It is not dependent upon a particular contract but has its roots in the principles of equity. See *Federal Deposit Ins. Corporation v. Wilhoit*, 297 Ky. 339, 180 S.W.2d 72; *Travelers Indemnity Co. v. Moore*, 304 Ky. 456, 201 S.W.2d 7; *Grubbs v. Slater*, Ky. 1953, 266 S.W.2d 85.

Employers Mutual Liability Ins. Co. v. Griffen Construction Co., 280 S.W.2d 179, 181-82.

Assurant cites two non-insurance cases, *Cowles Publishing Co. v. Kootenai County*

Board of Commissioners, 159 P.3d 896, 903 n.5 (2007) and *Riverside v. Ritchie, et al.*, 650 P.2d 657, 662 (1982), for the proposition that waiver requires a voluntary, intentional relinquishment of a known right and the intent to waive must clearly appear. Defendant's Supplemental Brief, p. 4. That is the law on waiver generally, but Assurant misses the point as **insurance law** and its subtleties must be analyzed.

Neither party cited *Cedarholm v. State Farm Insurance Companies*, 81 Idaho 136, 338 P.2d 93 (1959). *Cedarholm* is on point, and has not been overturned. Cedarholms, insured by State Farm, were hit by a car driven by a person named Calton, insured by Farmers. Cedarholms sued Calton and the parties negotiated toward settlement. While settlement was pending, Cedarholms' attorney contacted the State Farm agent to see if State Farm intended to claim their right of subrogation in the action against Calton. The agent replied that as far as he knew "his company did not plan to do so." 81 Idaho at 139, 338 P.2d at 94. Cedarholms and Calton settled for \$8,500. Farmers sent State Farm a check for \$1,249.50 for their subrogated interest and Farmers sent Cedarholms a check for \$7,250.50, the remaining balance of the \$8,500. Cedarholms then sued State Farm for that \$1,249.50. State Farm admitted it notified Farmers of its claim for subrogation but did not notify its own insured, the Cedarholms, of its intention to secure reimbursement. *Id.*

The Idaho Supreme Court held:

Assuming-without deciding-the agent had authority to speak for the [State Farm] in this regard, his statement as set out in the amended complaint simply expressed his lack of knowledge of the company's intention, and did not constitute an express waiver. Nor did the respondent impliedly waive the right of subrogation by its acts or inaction. [State Farm] notified [Farmers] of its claim during the course of negotiations for settlement; there was no unreasonable delay on [State Farm]'s part such as would constitute a waiver. 16 A.L.R.2d annotation, Waiver by insurance company of right to subrogation, p. 1269, at pp. 1275-1276.

The settlement between [Cedarholms] and [Calton] was for a lump sum. The amended complaint states:

“* * * That at the time said agreement was made, and prior to the time the drafts were sent to the [Cedarholms], no mention was made of whether the sum of \$8500.00 was to constitute payment for merely the personal injuries suffered by the Cedarholms] or was to cover such injuries and also the property damage to the [Cedarholms]' automobile.’

[Cedarholms], though subrogors of [State Farm], brought the action against [Calton]. It was incumbent upon [Cedarholms], either in the settlement or by request for a special finding on this point, upon payment of their property damage, to separate from the total sum they recovered the sum payable to [State Farm], subrogee, by reason of its right of subrogation. [Cedarholms] cannot be permitted to jeopardize [State Farm]'s right of subrogation by combining the claims and making a lump sum settlement, and then urging such a settlement in defeat of [State Farm]'s right as subrogee. See *North River Insurance Co. v. McKenzie*, 261 Ala. 353, 74 So.2d 599, 51 A.L.R.2d 687; *Iowa National Mutual Insurance Co. v. Huntley*, Wyo., 328 P.2d 569.

This Court is cognizant of the view expressed in the case of *Powers v. Calvert Fire Ins. Co.*, 216 S.C. 309, 57 S.E.2d 638, 16 A.L.R.2d 1261-a case cited by both parties-to the effect the division of the settlement proceeds into compensation for personal injury and for property damage is a question of fact for a jury. However, the Court finds the views as expressed by the Alabama and Wyoming courts are the better reasoned and are consistent with the principle of subrogation. See also 140 A.L.R. annotation, Rights and remedies incident to subrogation to one but not both elements of a single cause of action for injury to person and damage to property, at p. 1246 ff., for a discussion of full recovery by an insurer.

Recovery by [State Farm] under its right of subrogation, however, is subject to reduction by the amount [Cedarholms] expended for collection.

“The general rule is that the insured may retain out of the fund recovered from the wrongdoer, after the payment of the policy, the costs and reasonable expenses incurred in the litigation, for it would be unjust to require him to incur expenses for the recovery of money for the benefit of the insurer, without being allowed to reimburse himself. * * *’ 29 Am.Jur., Insurance, sec. 1346, p. 1008.

See also *Iowa National Mutual Insurance Co. v. Huntley*, *supra*. There was an express subrogation contract between the parties. Under this express agreement, [State Farm] required [Cedarholms] to proceed by its inaction and was obligated to pay the necessary expenses which appellant incurred to protect respondent under paragraph 7 of the agreement, and this would therefore harmonize the conclusion reached herein with *Felton v. Finley*, 69 Idaho 381, 209 P.2d 899.

81 Idaho at 141-42, 338 P.2d at 95-96. If State Farm was entitled to its right of subrogation

as against Cedarholms, even when a State Farm agent told Cedarholms' attorney that as far as he knew "his company did not plan to (exercise its subrogation rights)", then in the present case, Assurant should certainly be entitled to its right of exclusion when Assurant specifically told Progressive that they would enforce that right, and Progressive informed Roylances' attorney of that fact. *Cedarholm* has been cited with approval in *Miner v. Farmers Insurance Company of Idaho*, 116 Idaho 656, 228 P.2d 778 (1989), and other cases. However, all these cases address the concept last discussed in the above quoted portion, that the subrogated insurance carrier must pay its pro rata share of costs and attorney fees to its insured's attorney for that attorney's efforts in obtaining the overall amount for the insured.

In *Baugh v. Mission Insurance Co.*, 836 F.2d 1164, 1174 (9th Cir 1988), the Ninth Circuit Court of Appeals held an insurance company (Lloyd's of London) was estopped from asserting a breach of its insured's duty to subrogate, where its insured assigned the insured's claim to another party and where the insurance company knew about the assignment during settlement negotiations and failed to object. The Ninth Circuit Court of Appeals held the State of Washington had adopted equitable estoppel by silence and cited to a non-insurance case: *Huff v. Northern Pacific Railway, Co.*, 38 Wash.2d 103, 114-15, 228 P.2d 121, 128 (1951). In the present case, Assurant was not silent. Assurant notified Progressive of its contractual right of exclusion, and Progressive passed that information along to Roylances' attorney. There is absolutely no evidence to indicate Assurant ever changed its position.

Roylances cite *Lumbermens Mutual Casualty Co. v. Foremost Insurance Co.*, 425 So.2d 1158 (Fla.App. 3 Dist. 1983). Plaintiff's Memorandum Re: Defendant's Duty to Expressly Reserve its Rights at Settlement, p. 4. In that very brief opinion, the

appellate court held: “Lumbermens, in negotiating and settling the claim against their insured, failed to obtain from Foremost an identifiable agreement, either oral or written, preserving a cause of action against Foremost for either indemnity, contribution and/or equitable subrogation and, by its failure to do so, it has waived any claim thereto.” 425 So.2d at 1159-60, citing *Lehman-Eastern Auto Rentals, Inc. v. Brooks*, 370 So.2d 14 (Fla. 3d DCA 1979). This case actually cuts against Roylances as Assurant did notify Progressive of its contractual right of exclusion, and Progressive passed that information along to Roylances’ attorney. Given the brevity of *Lumbermens*, even after reading the related case of *Argonaut Insurance Company v. Maryland Casualty Company*, 372 So.2d 960 (Fla.3d DCA 1979), it is impossible to tell who Foremost insured, but it appears Foremost had no direct contractual relationship with Lumbermens. It is obvious Lumbermens could only get to Foremost through Lumbermens’ insured (via indemnity, contribution or equitable subrogation). Since Lumbermens settled its claim with its insured without protecting any right it had through its insured toward Foremost, it lost that right. In this case, Assurant protected its right against Progressive.

Roylances then cite *Design Professionals Ins. Companies, Inc. v. St. Paul Fire and Marine Ins. Co.*, 123 N.M. 398, 940 P.2d 1193 (Ct.App.New Mex. 1997) for the proposition that “If an insurer participates in settlement negotiations and voluntarily contributed to the settlement without reservation, the insurer is estopped from later asserting, in an action seeking reimbursement from another insurer, that it should not have been required to contribute.” Plaintiff’s Memorandum Re: Defendant’s Duty to Expressly Reserve its Rights at Settlement, p. 5. This was a case where a contractor performed work on an airport runway. The contractor was insured by two carriers,

Design Professionals and St. Paul. The contractor tested the lights, and in doing so, electrocuted and killed a man. The decedent's estate sued the contractor. On behalf of the contractor, in an agreed settlement, St. Paul paid the estate \$400,000 and Design Professionals paid the estate \$100,000, but of that \$100,000 the contractor paid \$17,373. The contractor then sued St. Paul for bad faith, and St. Paul and the contractor settled that lawsuit, with the contractor signing a release. Design Professionals then sued St. Paul to recover the amount it paid to the decedent's estate, claiming it was only an excess insurer and not liable until the St. Paul policy was exhausted. St. Paul defended that suit on the ground that in the bad faith suit the contractor had executed a release with St. Paul that precluded Design Professionals from bringing a claim against St. Paul. Summary judgment was granted for St. Paul against Design Professionals on the ground that "the only rights Design Professionals possessed to be able to sue St. Paul were subrogation rights derived from standing in the shoes of the insured, Contractor-Insured." 123 N.M. 398, 400, 940 P.2d 1193, 1195. The court noted "Design Professionals was not a party to the release and had not put Contractor-Insured on notice of any intention to pursue a future claim against St. Paul." 123 N.M. 398, 402. 940 P.2d 1193, 1197. What was determinative in *Design Professionals*, as in this case, is the following:

We noted previously that the trial court was persuaded by the fact that Design Professionals did nothing during the settlement of Decedent's lawsuit to reserve its rights, instead contributing to the settlement without comment. We agree with the trial court that Design Professionals should not be permitted to fully participate in settlement negotiations without expressing any objections or reservations, then agree to pay a portion of the settlement amount, only to later claim it should not have been required to contribute on the various theories argued below and now on appeal.

20. Other jurisdictions have had occasion to address similar circumstances involving an insurer that contributed to settlement without reservation, then later denied coverage and sought reimbursement. In

Home Insurance Co. v. Certain Underwriters at Lloyd's London, 729 F.2d 1132, 1134-35 (7th Cir.1984), an insurer was estopped from asserting noncoverage where it had not raised the argument before the second insurer's settlement with the victim. The reason is obvious. If the second insurer (St. Paul) had known of the noncoverage argument (from Design Professionals), its settlement strategy with Decedent might have been different. At least St. Paul could have structured the settlement in a manner to facilitate proof of which policy covered what damages. See *id.* Where, as here, both insurers fully participated in settlement with Contractor-Insured and Decedent's estate, without objection or reservation of rights, either participant should in equity be held to have waived any rights to contribution from the other and should be estopped from recovering any amount from the other insurer. See *Hanover Ins. Co. v. Travelers Ins. Co.*, 355 F.2d 552, 552-53 (2d Cir.1966).

The distinction that leaps out in comparison to the present case is that in *Design Professionals*, "Design Professionals did nothing during the settlement of Decedent's lawsuit to reserve its rights". *Id.* In the present case, Assurant put Progressive and Roylances on notice that it would exercise its right of exclusion.

Roylances next cite *Jefferson Ins. Co. v. Travelers Ins. Co.*, 159 Vt. 46, 614 A.2d 385 (Vermont 1992) for the proposition that "when an insurer makes a voluntary payment for which it is not liable, the right to seek repayment is waived when the insurer failed to reserve its rights." Plaintiff's Memorandum Re: Defendant's Duty to Expressly Reserve its Rights at Settlement, p. 5. The last eight words of that quote are crucial, as Assurant did reserve its rights. In *Jefferson*, the town of Weatherfield, Vermont was sued for negligence on the part of its ambulance service. Weatherfield had comprehensive coverage in the amount of \$300,000 from Travelers. At some point Travelers notified Weatherfield it would no longer insure for ambulance service. Weatherfield then bought an additional policy from Jefferson for its ambulance service. The limits on the Jefferson policy was \$100,000. By mistake, the Travelers policy was never modified to exclude ambulance service. Travelers did not participate in the lawsuit, but during trial, Travelers realized a jury verdict exceeding \$100,000 was likely,

so Travelers stepped in and a settlement in the amount of \$250,000 was reached, with Travelers paying \$187,500 and Jefferson paying \$62,500 (75% vs. 25% based on ratio of policy limits). Jefferson then wanted Travelers to pay 75% of its defense costs, and Travelers refused. Jefferson sued Travelers, which created this lawsuit. The trial court found in favor of Travelers by reforming the contract to put in place the intended exclusion for ambulance service, and thus, Jefferson could not get contribution from Travelers. On appeal, the Supreme Court of Vermont affirmed but on a different ground that Jefferson failed to reserve any right it might have had against Travelers. The Supreme Court of Vermont held: “When an insurer undertakes the defense of a claim on behalf of its insured and pays out an award, it generally may preserve issues it disputes with its insured or another third party for later resolution only by specifically reserving rights to do so in an agreement with other parties to the settlement.” 614 A.2d 385, 388. In doing so, the *Jefferson* court cited *American Fidelity Co. v. Kerr*, 138 Vt. 359, 363, 416 A.2d 163, 165 (1980), (also cited by Roylances) for the proposition that a unilateral reservation of rights is ineffective. Since Jefferson entered into the settlement and made a “voluntary payment” without reserving its rights against Travelers, it had no rights against Travelers. The *Jefferson* court cited the rule announced in *Norfolk & Dedham Firs Insurance Co.*, 132 Vt. 341, 344, 318 A.2d 659, 661 (also cited by Roylances):

that when an insurer makes a voluntary payment for which it is not liable, it cannot be subrogated to the rights of the insured. The rule is based on the policy that “[d]iscouraging voluntary payment encourages prompt resolution of disputes before payment has induced a change in reliance on payment and before passing time interferes with any determination that may be necessary as to the facts.” *Id.* The absence of a reservation of rights requirement would result in an inhibition on the part of parties to enter into settlement agreements, because they could not be assured that an agreement would finally conclude their responsibilities in the matter.

In the present case, there was a written reservation of rights by Assurant that Progressive acknowledged and conveyed to Roylances' attorney David Ducharme in the April 5, 2007, letter from Progressive. Lueth Affidavit, Exhibit E. *Jefferson* focused only on the rights between the two insurance companies. The rights of the insured, Weatherfield, Vermont, were not at issue. The Supreme Court of Vermont concluded: "We will not permit [Jefferson] to pursue [Travelers] without warning for further contribution, when to do so would strip from [Travelers] the benefit of certainty and finality that induced its participation in the settlement." 159 Vt. 46, 614 A.2d 385, 389.

Roylances' reliance on the *Norfolk* case is misplaced as **no notice** at all was provided, let alone an absence of a reservation of rights. Roylances cite *Norfolk & Dedham Fire Ins. Co. v. Aetna Cas & Sur. Co.*, 132 Vt. 341, 344, 318 A.2d 659 (Vermont 1974), for the proposition that "when an insurer makes a voluntary payment for which it is not liable, it cannot be subrogated to the rights of the insured" which is "based on the policy that 'discouraging voluntary payment encourages prompt resolution of disputes before payment has induced a change in reliance on payment and before passing time interferes with any determination that may be necessary as to the facts.'" Plaintiff's Memorandum Re: Defendant's Duty to Expressly Reserve its Rights at Settlement, p. 5. Norfolk provided homeowner's insurance and Aetna provided auto insurance to the same insured who was sued for a dog bite. The insured left her dog in a car and a child came into the car and was bitten. After Norfolk settled the claim with the injured party, it sued for subrogation against Aetna. The filing of that suit was the first Aetna had ever heard of the claim. The Supreme Court of Vermont held Norfolk paid under its policy when it had no obligation to, and that Norfolk "admits that through its own error it did not rely upon the Special Exclusions of its policy." 132

Vt. 341, 347, 318 A.2d 659, 663. It was important to the Supreme Court of Vermont that not only did Aetna have no notice of what happened on the day of the dog bite, but had no notice for six years until Norfolk sued Aetna. This was an “inexcusable and unconscionable delay” which “inequitably prejudiced [Aetna] from investigating and evaluating the facts of the underlying claim and disputing its liability for it.” *Id.* “The equities in the case run counter to [Norfolk’s] claim of restitution.” *Id.*

Roylances cited *Jefferson* which in turn cited *Mutual of Enumclaw Ins. Co. v. State Farm Mutual Automobile Ins. Co.*, 37 Wash.App. 690, 694, 682 P.2d 317, 319-20 (Wash.App. 1984), for the proposition that “the absence of a reservation of rights requirement would result in an inhibition on the part of parties to enter into settlement agreements, because they could not be assured that an agreement would finally conclude their responsibilities in the matter.” Plaintiff’s Memorandum Re: Defendant’s Duty to Expressly Reserve its Rights at Settlement, p. 5. Again, this is a reservation of right situation between insurance companies. As between Assurant and Progressive, Assurant clearly stated its intent to reserve its rights against Progressive, and Progressive notified its insured’s attorney David Ducharme of that fact in the April 5, 2007, letter from Progressive’s Hope Carraro. Lueth Affidavit, Exhibit E. In *Mutual of Enumclaw*, the Washington Court of Appeals held Mutual of Enumclaw had to obtain a signed express reservation of rights against State Farm “in the final settlement documents”, or it would be “presumed to have waived its claim to indemnification from State Farm.” 37 Wash.App. 690, 694, 682 P.2d 317, 319 (Wash.App. 1984). The reason the appellate court required Mutual of Enumclaw to have obtained a signed express reservation of rights from State Farm in the “final settlement documents” (or lose any subrogated right), was because years before, counsel for Mutual of Enumclaw

signed the stipulation to dismiss the underlying tort action in which its insured was a party. Those facts are absent here as both Assurant and Progressive insure Roylances.

Roylances cite *American Fidelity Co. v. Kerr*, 138 Vt. 359, 416 A.2d 163 (1980), for the proposition that if an insurer assumes the insured's defense without obtaining a reservation of rights or a non-waiver agreement and with knowledge of the facts indicating noncoverage, all policy defenses, including those of noncoverage, are waived, or the insurer may be estopped from raising them. Plaintiff's Memorandum Re: Defendant's Duty to Expressly Reserve its Rights at Settlement, p. 6. In that case, American insured a person named Kerr, who was found liable in the wrongful death of a person named Atwood. Lumbermens insurance had a subrogated right through Atwood. The Supreme Court of Vermont held that American's conduct of Kerr's defense at the trial caused American to waive its claim of non-coverage by Kerr's breach of the cooperation clause. Thus, *American Fidelity* is not on point.

Roylances cite *In re Lynch*, 226 B.R. 813 (Bankr. D.Vt. 1998), for the proposition that "when an insurance company *undertakes the defense of its insured*, it waives any defenses it might have against payment under the policy unless it explicitly reserves its rights." Plaintiff's Memorandum Re: Defendant's Duty to Expressly Reserve its Rights at Settlement, pp. 5-6. (italics added). The italicized portion is the key distinction in *Lynch* which causes it to be inapplicable to the present case. Phico was malpractice insurer for a doctor. The doctor signed non-waiver agreements but they were not specific. Vermont law requires "When an insurance company undertakes the defense of its insured, it waives any defenses it may have against payment under the policy unless it explicitly reserves its rights." 226 B.R. 813, 814, citing *American Fidelity Co. v. Kerr*. In that situation, a non-waiver agreement is required rather than a unilateral

reservation of rights for an insurance company to avoid waiving defenses to coverage. 226 B.R. 813, 817, again citing *American Fidelity Co. v. Kerr*. The predicate for that requirement is *the insurance company undertakes the defense of its insured*. Since that predicate is not an issue in the present case, the duty does not follow.

Roylances next cite *Farmers Texas County Mutual Insurance Co. v. Wilkinson*, 601 S.W.2d 520 (Tex.Civ.App. 1980), for the proposition that “if an insurer assumes the insured's defense without obtaining a reservation of rights or a non-waiver agreement and with knowledge of the facts indicating noncoverage, all policy defenses, including those of noncoverage, are waived, or the insurer may be estopped from raising them.” Plaintiff’s Memorandum Re: Defendant’s Duty to Expressly Reserve its Rights at Settlement, p. 6. That is a direct quote from that case. 601 S.W.2d 520, 521-22.

Roylances also cite all the cases that *Wilkinson* cited: *Pacific Indemnity Co. v. Acel Delivery Service, Inc.*, 485 F.2d 1169 (5th Cir. 1973); *Ferris v. Souther Underwriters*, 109 S.W.2d 223 (1937); *Automobile Underwriters’ Insurance v. Murrah*, 40 S.W.2d 233 (1931); 81 A.L.R. 1326 (1932)38 A.L.R.2d 1148 (1954); 7C Appleman, Insurance Law & Practice § 4892 (1979), but without discussing any of those cases or treatises.

Wilkinson is simply a case where four years after the accident, Farmers Texas told its insured Wilkinson there was no coverage under the policy, and they sought a declaratory judgment action. Four days after the accident Farmers Texas paid the injured party’s property damage for their damaged car, and when suit was instituted by the injured party, Farmers Texas continued to defend Wilkinson. The trial court held Wilkinson had coverage under the policy, and that decision was affirmed on appeal. It was in that context that the quote: “if an insurer assumes the insured's defense without obtaining a reservation of rights or a non-waiver agreement and with knowledge of the

facts indicating noncoverage, all policy defenses, including those of noncoverage, are waived, or the insurer may be estopped from raising them.” *Id.* That has no relevance in the present case, no one is defending Roylances. Not Assurant, not Progressive.

Roylances simply take an out of context quote from these various cases and attempt to make them applicable to the facts of this case. None of the cases cited by the parties deal with a duty of an insurance company to place **its insured** on notice of the insurance company’s right to subrogate. The cases concern the duty of one insurance company to put another insurance company on notice of such right. Some of the cases deal with the duty to defend question, not an issue here since Roylances are not defending anything. The most important distinction between these cited cases and the present case is the fact that in the cited cases **there was a final settlement**. That has yet to occur in the present case.

This Court finds as a matter of law Assurant had no affirmative duty to further discuss their right of exclusion or their subrogation right in the ongoing settlement discussions following the April 5, 2007, letter from Progressive to Ducharme. Exhibit E to the Kathleen Lueth Affidavit. Assurant has not “waived” their ability to enforce their right of exclusion or their subrogation right.

C. Equitable Analysis.

From an equitable standpoint, Assurant wins. Assurant made it clear to Progressive and to Roylances’ attorney Ducharme that it was seeking its right of exclusion. April 5, 2007, letter from Hope Carraro of Progressive to David Ducharme. Kathleen Lueth Affidavit, Exhibit E. On the other hand, Roylances never told Assurant that Roylances wanted all the \$150,000 in coverage they had with Progressive to be available for all new medical expenses incurred by Roylances in the future. Counsel for Roylances argues that

this desire was made obvious when Assurant “promised” to “pay all of Jason’s past medical bills.” Affidavit of Plaintiffs’ Counsel, p. 2, ¶ 6. (emphasis in original). According to the “agreement” (which was not finalized) Assurant agreed to pay those past medical bills, but had also made it clear on April 5, 2007, that it would go after Progressive for those medical bills. Counsel for Roylances also argues the fact that under this “agreement” (which was not finalized) Roylances would “submit all future medical bills related to the 12/17/05 accident (over and above the \$115,478) to Progressive Insurance Company pursuant to Jason’s \$150,000 medical payments coverage...”, indicates Assurant agreed to not go after Progressive for the medical payments Assurant was agreeing to make. *Id.* The flaw with in argument is the language set forth in Ducharme’s affidavit really indicates **the exact opposite**. Jason’s past medical bills were \$115, 478, and Assurant was agreeing to pay those medical bills plus give an additional \$130,000 to Roylances, and Roylances agreed to “submit all future medical bills related to the 12/17/05 accident (over and above the \$115,478) to Progressive Insurance Company pursuant to Jason’s \$150,000 medical payments coverage...” If anything, **this language recognizes Assurant’s right to exclude payment for those benefits and corresponding subrogation right against Progressive**. Assurant was agreeing to pay \$115.478 in past medical bills and Roylances agreed to look to Progressive to pay for future medical bills over that amount. This language does nothing to put anyone on notice of Roylances’ “desire” to have the full \$150,000 from Progressive available for Roylances’ **future** medical expenses.

D. The Remedy.

Based on the above, what is the remedy? Roylances are asking this Court to compel Assurant to “comply with the terms of the Parties’ Settlement Agreement, and for

Sanctions.” Motion to Enforce Settlement Agreement and for Sanctions, p. 1. For the reasons set forth above, this Court is unable to graft a term that does not exist into either the parties’ Confidential Settlement Agreement and Release or any oral agreement from discussions leading up to that document. This Court is simply unable to interpret the Confidential Settlement Agreement and Release or any oral agreement in the manner Roylances would like the court to interpret the document. Thus, Roylances’ Motion to Enforce Settlement Agreement must be denied.

The Court has not been asked by Assurant to enforce the settlement agreement the way Assurant interprets the document.

Assurant argues the Roylances’ interpretation is not supported by law, and that “The parties’ failure to resolve a crucial term renders any alleged agreement impossible to interpret and/or enforce.” Defendant’s Supplemental Brief, p. 2. This Court agrees. Assurant then urges this Court to deny Roylances’ Motion to Enforce Settlement Agreement and for Sanctions, and to allow the parties to continue negotiating and/or proceed with the present litigation.” *Id.* p. 7. The parties are always free to continue negotiating. Assurant has yet to answer the complaint, and must do so for litigation to proceed. At this juncture, Roylances have simply made the motion to interpret the Confidential Settlement Agreement and Release or some oral agreement in a certain way, and this Court is unable to do so.

III. ORDER.

IT IS HEREBY ORDERED Roylances’ Motion to Enforce Settlement Agreement is DENIED. As a result, Roylances’ Motion for Sanctions is DENIED.

IT IS FURTHER ORDERED Assurant answer the Complaint within twenty (20) days, and this matter is now scheduled for a jury trial to begin May 12, 2008, at 9:00 a.m.

Entered this 20th day of October, 2007.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of October, 2007, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>Fax #</u>	<u>Lawyer</u>	<u>Fax #</u>
David Ducharme	208 765-6795	Troy Y. Nelson	509 838-0007

Secretary