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Third Party Remedy of Insured's Loss Constitutes Defense in Mitigation of the Loss in Suit by Insured against Insurer.

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INSURANCE—Collateral Benefits—Third Party Remedy of Insured's Loss Constitutes Defense in Mitigation of the Loss in Suit by Insured Against Insurer

Hochheim Prairie Farm Mutual Insurance Association v. Campion, 581 S.W.2d 254 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

Bobbie Campion and his wife Gladys entered into a contract with Wilson Buildings, Inc. for the construction of two poultry houses on the Campions' property. Wilson was obligated under the contract to construct the buildings in a workmanlike manner, and Wilson also guaranteed the roofs against perforation by hail for fifteen years. The Campions obtained two insurance policies from Hochheim Prairie Farm Mutual Insurance Association covering damage to the poultry houses due to fire, hail, and other causes. Before the buildings were completed, the roofs and sides were damaged by a hailstorm. Wilson replaced the roofs on the buildings at no extra cost to the Campions but did not repair the sides. The Campions subsequently sued Hochheim on the policies for the damage to the buildings. At trial, the court excluded Hochheim's proof of Wilson's free replacement of the roofs and entered judgment on a jury verdict in favor of the Campions for all of the damage to the buildings. Hochheim appealed contending the Campions had sustained no loss since the roofs had been replaced by Wilson at no extra cost. Held—*Reversed and remanded.* Acts of third parties reducing the insured's loss on covered property constitute a defense in mitigation of the loss in a suit by the insured against the insurer.[1]

Insurance is essentially a contract providing compensation for damage sustained.[2] It is an undertaking by one person to protect another from losses which might arise out of certain risks.[3] Upon payment of consideration, the insured is covered under the terms and conditions specified in the insurance policy.[4] Property insurance is personal in nature[5] and provides

1. Hochheim Prairie Farm Mut. Ins. Ass'n v. Campion, 581 S.W.2d 254, 257 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

2. *See* 1 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 1.2 (2d ed. R. Anderson 1959); J. MAGEE, GENERAL INSURANCE 108 (5th ed. 1957); 1 RICHARDS ON THE LAW OF INSURANCE § 1 (5th ed. 1952).

3. McBroome-Bennett Plumbling, Inc. v. Villa France, Inc., 515 S.W.2d 32, 36 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.). *See generally* 1 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 1.2 (2d ed. R. Anderson 1959).

4. *See* McBroome-Bennett Plumbing, Inc. v. Villa France, Inc., 515 S.W.2d 32, 36 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.). *See generally* 1 RICHARDS ON THE LAW OF INSURANCE § 1 (5th ed. 1952).

5. *See* Maryland Cas. Co. v. Palestine Fashions, Inc., 402 S.W.2d 883, 888 (Tex. 1966) (denying benefit of fire insurance policy to purchasers of insured property when insurer had no knowledge of purchasers' identity); Home Ins. Co. v. Brownlee, 480 S.W.2d 491, 493 (Tex.

the insured indemnity against loss of the insured property.[6] An insurable interest[7] is an essential element of property insurance since the insured must have rights in the covered property in order to suffer a loss from its damage or destruction.[8]

The problem of unjust enrichment occurs when the insured suffers a loss covered by an insurance policy that is subsequently cured by a third party at no expense to the insured.[9] There is general agreement that property insurance incorporates the principle of indemnity, whereby the insured must sustain a loss as a prerequisite to recovery against the insurer.[10] The authorities are split, however, on the question whether acts of third parties subsequent to the actual damaging event may be considered in determining if the insured has sustained a loss.[11] The majority rule, as stated in the

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Civ. App.—Eastland 1972, no writ) (upholding policy provision that coverage was void upon change in ownership of covered property).

6. *See* Paramount Fire Ins. Co. v. Aetna Cas. & Sur. Co., 163 Tex. 250, 256, 353 S.W.2d 841, 845 (1962); Fire Ass'n v. Strayhorn, 211 S.W. 447, 448 (Tex. Comm'n App. 1919, holding approved). Indemnity has been defined as that objective of insurance which precludes a policy from conferring a greater benefit than the loss suffered. R. KEETON, INSURANCE LAW 88 (1971).

7. An insurable interest consists of the derivation of some benefit from the existence of property or the suffering of some loss from its destruction. *See* Smith v. Eagle Star Ins. Co., 370 S.W.2d 448, 450 (Tex. 1963) (right to use property owned by another held sufficient to constitute insurable interest); Hartford Fire Ins. Co. v. Evans, 255 S.W. 487, 489-90 (Tex. Civ. App.—Amarillo 1923, no writ) (interest of bailee in property in his possession held to constitute insurable interest).

8. *See* Smith v. Eagle Star Ins. Co., 370 S.W.2d 448, 450 (Tex. 1963); Hartford Fire Ins. Co. v. Evans, 255 S.W. 487, 489-90 (Tex. Civ. App.—Amarillo 1923, no writ).

9. *See* 4 G. PALMER, THE LAW OF RESTITUTION 342-45 (1978). Allowing the insured to recover against the insurer for the loss, as well as having the loss remedied by a third party, results in unjust enrichment of the insured. *See id.* at 342-43. Unjust enrichment is the inequitable retention of a benefit by one person at another's expense. *See* G. DOUTHWAITE, ATTORNEY'S GUIDE TO RESTITUTION 21-22 (1977). *See generally* J. DAWSON, UNJUST ENRICHMENT 3-8 (1951). The restitutionary remedies of constructive trust and subrogation are equitable tools for the prevention of unjust enrichment. *See* J. DAWSON, UNJUST ENRICHMENT 26-33, 36-37 (1951); 1 G. PALMER, THE LAW OF RESTITUTION 16-20, 21-24 (1978). The constructive trust is a claim against specific property held by another and results in transfer of the property to the person at whose expense the unjust enrichment occurred. *See* 1 G. PALMER, THE LAW OF RESTITUTION 16-20 (1978). Subrogation allows the person at whose expense the unjust enrichment occurred to acquire the rights of the unjustly enriched person against third parties. *See id.* at 21-24.

10. *See* Paramount Fire Ins. Co. v. Aetna Cas. & Sur. Co., 163 Tex. 250, 254, 353 S.W.2d 841, 844 (1962). *See generally* J. MAGEE, GENERAL INSURANCE 80 (5th ed. 1957); Lindblad, *How Relevant Is the Principle of Indemnity in Property Insurance?*, 1976 INS. L.J. 271.

11. *See* Young, *Some "Windfall Coverages" in Property and Liability Insurance*, 60 COLUM. L. REV. 1063, 1071 (1960); 35 S. CAL. L. REV. 501, 502 (1962). *Compare* Wolf v. Home Ins. Co., 241 A.2d 28, 39-41 (N.J. Super. Ct. App. Div. 1968) (acts of third parties cannot be considered) *with* Glens Falls Ins. Co. v. Sterling, 148 A.2d 453, 456-57 (Md. 1959) (acts of third parties can be considered).

leading case of *Foley v. Manufacturers' & Builders' Fire Insurance Co.*,[12] allows recovery against the insurer notwithstanding acts of third parties that reduce the insured's loss.[13] This rule is founded on the principle that property insurance premiums are based on the value of the property and the risks of loss, not on anticipation of remedies that may be provided to the insured by third parties.[14] Some of the early cases applying this rule resolved the problem under purely contractual principles, holding that the insurer is not relieved of its obligations by acts of third parties not in privity with the policy.[15] Other cases rely on the principle that the rights of insurer and insured are fixed at the time the property is damaged rather than at some later date when cognizance can be taken of acts of third parties that cure the damage.[16]

Under the minority rule, as stated in the leading case of *Ramsdell v. Insurance Company of North America*,[17] recovery against the insurer is denied when the acts of third parties have remedied the insured's loss.[18] Courts that have applied this rule interpret the principle of indemnity as requiring the insured to sustain actual pecuniary loss, and not merely loss of the insured property, before recovering against the insurer.[19] In determining whether actual pecuniary loss has been sustained, the acts of third parties subsequent to the damaging event must be considered.[20] Another

12. 152 N.Y. 131, 46 N.E. 318 (1897).

13. *Id.* at 135, 46 N.E. at 319. Sixteen other jurisdictions are presently in accord with this rule. *See, e.g.*, Milwaukee Mechanics Ins. Co. v. Maples, 66 So. 2d 159, 172 (Ala. Ct. App. 1953); First Nat'l Bank v. Boston Ins. Co., 160 N.E.2d 802, 804-05 (Ill. 1959); DeBellis Enterprises, Inc. v. Lumbermen's Mut. Cas. Co., 390 A.2d 1171, 1176 (N.J. 1978).

14. Wolf v. Home Ins. Co., 241 A.2d 28, 32 (N.J. Super. Ct. App. Div. 1968); *see* Board of Trustees v. Cream City Mut. Ins. Co., 96 N.W.2d 690, 695 (Minn. 1959); Foley v. Manufacturers' & Builders' Fire Ins. Co., 152 N.Y. 131, 135, 46 N.E. 318, 319 (1897).

15. *See* Aetna Ins. Co. v. Baker, 71 Ind. 102, 115-16 (1880); Foster v. Equitable Mut. Fire Ins. Co., 68 Mass. 216, 220 (1854).

16. Wolf v. Home Ins. Co., 241 A.2d 28, 38 (N.J. Super. Ct. App. Div. 1968) (time limits within which notice and proof of loss must be made support principle that time of damage is time of loss); *see* Springfield Fire & Marine Ins. Co. v. Boswell, 167 So. 2d 780, 785 (Fla. Dist. Ct. App. 1964) (disruptions associated with delays in settlement of property damage claims not outweighed by insured's chance of double recovery); Alexandra Restaurant, Inc. v. New Hampshire Ins. Co., 71 N.Y.S.2d 515, 518 (App. Div. 1947) (terms of policy fix time of damage as time of loss). In Texas, in case of total loss of property under a fire insurance policy, the policy itself is transformed into a liquidated demand against the insurer at the time the property is destroyed. *See* TEX. INS. CODE ANN. § 6.13 (Vernon 1963).

17. 221 N.W. 654 (Wis. 1928).

18. *Id.* at 655; *accord*, Glens Falls Ins. Co. v. Sterling, 148 A.2d 453, 456 (Md. 1959); MFA Mut. Ins. Co. v. Farmers & Merchants Ins. Co., 443 S.W.2d 220, 222 (Mo. Ct. App. 1969); Paramount Fire Ins. Co. v. Aetna Cas. & Sur. Co., 163 Tex. 250, 256, 353 S.W.2d 841, 845 (1962).

19. *See* Glens Falls Ins. Co. v. Sterling, 148 A.2d 453, 456-57 (Md. 1959); Paramount Fire Ins. Co. v. Aetna Cas. & Sur. Co., 163 Tex. 250, 255, 353 S.W.2d 841, 844 (1962).

20. *See, e.g.*, Smith v. Jim Dandy Mkts., 172 F.2d 616, 618 (9th Cir. 1949); Glens Falls

basis for this rule is the theory that allowing the insured a double recovery converts the insurance policy into a wagering contract, contrary to public policy.[21] Commentators have suggested this rule avoids inducing the insured to intentionally destroy covered property.[22]

Paramount Fire Insurance Co. v. Aetna Casualty & Surety Co.[23] aligned Texas with the minority rule denying recovery to the insured.[24] The court limited its holding, however, to situations in which both the insured and the third party who cured the loss carried insurance on the damaged property, and in which the third party was under an enforceable contractual obligation to remedy the loss.[25] The holding in *Paramount* regarding third party cure of the insured's loss has been recognized to constitute a waivable defense that the insurer has the burden of proving.[26] The *Paramount* rule was held inapplicable, however, in *Cheatwood v. De Los Santos,*[27] where only the insured and not the third party was protected by insurance.[28]

In *Hochheim Prairie Farm Mutual Insurance Association v. Campion,*[29]

Ins. Co. v. Sterling, 148 A.2d 453, 455-56 (Md. 1959); Ramsdell v. Insurance Co. of N. America, 221 N.W. 654, 655 (Wis. 1928).

21. *See* Glens Falls Ins. Co. v. Sterling, 148 A.2d 453, 456 (Md. 1959); Ramsdell v. Insurance Co. of N. America, 221 N.W. 654, 655 (Wis. 1928). *But see* Harnett & Thornton, *Insurable Interest in Property: A Socio-Economic Reevaluation of a Legal Concept,* 48 COLUM. L. REV. 1162, 1177-81 (1948) (criticizes wagering theory as mere fiction).

22. E. PATTERSON, ESSENTIALS OF INSURANCE LAW § 22 (1st ed. 1935); 35 S. CAL. L. REV. 501, 504 (1962). *But see* Harnett & Thornton, *Insurable Interest in Property: A Socio-Economic Reevaluation of a Legal Concept,* 48 COLUM. L. REV. 1162, 1181-83 (1948) (criticizes moral hazard theory as unrealistic).

23. 163 Tex. 250, 353 S.W.2d 841 (1962).

24. *Id.* at 256-57, 353 S.W.2d at 845. In *Paramount* both buyer and seller procured fire insurance on property that was the subject of a contract of sale. Despite the destruction by fire of improvements on the property prior to the closing, buyer paid seller the full contract price and received an assignment of the seller's insurance rights in return. In a suit between the parties' insurers to determine liability for the loss, the court held the entire loss fell on the buyer's insurer. *Id.* at 256, 353 S.W.2d at 845. The court reasoned that since the seller's interest became merely pecuniary when the contract of sale was executed, the buyer's tender of the full contract price resulted in no loss to the seller. *Id.* at 256, 353 S.W.2d at 845.

25. *Id.* at 256, 353 S.W.2d at 845. *Ramsdell* also involved two insurers of the same property, and it suggested that a proration of the loss between the insurers would yield the most equitable result. *See* Ramsdell v. Insurance Co. of N. America, 221 N.W. 654, 655 (Wis. 1928). The *Paramount* court, although relying heavily on *Ramsdell* for authority, refused such a proration in deference to a strict application of risk of loss allocation under the doctrine of equitable conversion. *Compare* Paramount Fire Ins. Co. v. Aetna Cas. & Sur. Co., 163 Tex. 250, 256, 353 S.W.2d 841, 845 (1963) *with* Ramsdell v. Insurance Co. of N. America, 221 N.W. 654, 655 (Wis. 1928).

26. Leggio v. Millers Nat'l Ins. Co., 398 S.W.2d 607, 611-12 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.).

27. 561 S.W.2d 273 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.).

28. *Id.* at 279. The seller/insured was awarded the unpaid balance of the purchase price out of the insurance proceeds, retaining the remainder subject to a constructive trust for the benefit of the buyer. *Id.* at 279.

29. 581 S.W.2d 254 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

the Corpus Christi Court of Civil Appeals was confronted with the issue whether landowners could collect from their insurer for damages to buildings already repaired by a third party.[30] The court, holding in favor of the insurer, found *Paramount* to be controlling.[31] Primary reliance was placed on the interpretation of the indemnity principle that requires actual pecuniary loss to be sustained before recovery will lie against the insurer.[32] The acts of the Campions' building contractor in replacing the roofs free of charge were held to constitute a defense in mitigation of their loss.[33] To allow the Campions double recovery for the value of the damaged roofs, the court stated, would constitute unjust enrichment.[34]

The divergent views on the issue whether third pary cure of the insured's loss extinguishes the insurer's liability can be partially reconciled on the basis of factual distinctions among the cases.[35] The most obvious distinction is illustrated by the two leading cases.[36] In *Foley* the third party had not remedied the insured's loss at the time the suit was brought against the insurer, but rather was under a contractual obligation to do so.[37] In *Ramsdell,* however, the third party had already remedied the loss at the time suit was brought.[38] Recovery by the insured against the third party in *Foley* was an uncertainty that the insurer could legitimately be expected to guard against;[39] while in *Ramsdell,* the third party's cure was an accomplished fact, and no contingency remained for the insurer to guard against.[40] Since cure by the third party in *Hochheim* had already occurred at the time suit was brought, application of this distinction would favor the insurer.[41]

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30. *See id.* at 256.

31. *Id.* at 257; *see* Paramount Fire Ins. Co. v. Aetna Cas. & Sur. Co., 163 Tex. 250, 256, 353 S.W.2d 841, 845 (1962).

32. Hochheim Prairie Farm Mut. Ins. Ass'n v. Campion, 581 S.W.2d 254, 257 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

33. *Id.* at 257.

34. *Id.* at 256-57.

35. *See* 35 S. CAL. L. REV. 501, 503-05 (1962). *See generally* 4 G. PALMER, THE LAW OF RESTITUTION 342-82 (1978).

36. *Compare* Foley v. Manufacturers' & Builders' Fire Ins. Co., 152 N.Y. 131, 135, 46 N.E. 318, 319 (1897) (third party's cure not accomplished at time of suit) *with* Ramsdell v. Insurance Co. of N. America, 221 N.W. 654, 655 (Wis. 1928) (third party's cure effected at time of suit).

37. *See* Foley v. Manufacturers' & Builders' Fire Ins. Co., 152 N.Y. 131, 135, 46 N.E. 318, 319 (1897) (building contractor obligated to complete building despite its destruction before completion).

38. *See* Ramsdell v. Insurance Co. of N. America, 221 N.W. 654, 655 (Wis. 1928) (lessee had rebuilt premises after fire damage).

39. *See* Foley v. Manufacturers' & Builders' Fire Ins. Co., 152 N.Y. 131, 135, 46 N.E. 318, 319 (1897); 35 S. CAL. L. REV. 501, 502-04 (1962).

40. *See* Ramsdell v. Insurance Co. of N. America, 221 N.W. 654, 655 (Wis. 1928); 35 S. CAL. L. REV. 501, 502-04 (1962).

41. *See* Hochheim Prairie Farm Mut. Ins. Ass'n v. Campion, 581 S.W.2d 254, 255-57

A further distinction arises in cases such as *Hochheim* in which third party cure has already occurred.[42] In some cases the third party has remedied the insured's loss under contractual obligation,[43] while in others the third party's actions have been gratuitous.[44] Recovery by the insured has been denied in the former situation on the basis that the benefit of the contractual obligation equitably inures to the insurer.[45] In the latter situation, however, the insured is allowed recovery on the basis that the gratuitous benefit is intended for, and therefore inures to only the insured.[46] The facts in *Hochheim* do not establish whether the third party remedy of the insured's loss was contractual or gratuitous in nature.[47]

Another distinction among the cases can be made regarding the type of property interest being insured.[48] When a pecuniary interest is the subject

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(Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.); 35 S. CAL. L. REV. 501, 502-04 (1962).

42. *See* Hochheim Prairie Farm Mut. Ins. Ass'n v. Campion, 581 S.W.2d 254, 255 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

43. *See* Glens Falls Ins. Co. v. Sterling, 148 A.2d 453, 456 (Md. 1959) (building contractor obligated to rebuild structure damaged before completion); Paramount Fire Ins. Co. v. Aetna Cas. & Sur. Co., 163 Tex. 250, 256, 353 S.W.2d 841, 845 (1962) (buyer of property under contract of sale obligated to pay contract price despite destruction of improvements on the property).

44. *See* Hughes v. Potomac Ins. Co., 18 Cal. Rptr. 650, 656 (Ct. App. 1962) (insured's property repaired gratuitously by flood control district); Alwood v. Commercial Union Assurance Co., 131 S.E.2d 594, 596 (Ga. Ct. App. 1963) (insured's property repaired gratuitously by lessee); Ramsdell v. Insurance Co. of N. America, 221 N.W. 654, 655 (Wis. 1928) (insured's property repaired gratuitously by lessee under lessee's insurance coverage).

45. *See* Glens Falls Ins. Co. v. Sterling, 148 A.2d 453, 456 (Md. 1959); Paramount Fire Ins. Co. v. Aetna Cas. & Sur. Co., 163 Tex. 250, 255-56, 353 S.W.2d 841, 845 (1962).

46. *See* Hughes v. Potomac Ins. Co., 18 Cal. Rptr. 650, 656 (Ct. App. 1962); Alwood v. Commercial Union Assurance Co., 131 S.E.2d 594, 596 (Ga. Ct. App. 1963). The *Ramsdell* case presents an anomaly. While conceding that a third party acting gratuitously cannot relieve the insurer of liability for the insured's loss, the court ignores the fact that the third party in the case before it was under no obligation to remedy the insured's loss. *See* Ramsdell v. Insurance Co. of N. America, 221 N.W. 654, 655 (Wis. 1928); 4 G. PALMER, THE LAW OF RESTITUTION 375-76 (1978); 29 COLUM. L. REV. 362, 363 (1929).

47. *See* Hochheim Prairie Farm Mut. Ins. Ass'n v. Campion, 581 S.W.2d 254, 255-57 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.). Although the roofs of the poultry houses were guaranteed by the builder against perforation by hail, the applicability of the guarantee is questionable since the evidence at trial was conflicting as to whether the roofs were perforated. *See id.* at 256. The court fails to consider the builder's potential liability to the Campions under the rule imposing the risk of loss of a building under construction on the building contractor. *See id.* at 254-57; *cf.* Lonergan v. San Antonio Loan & Trust Co., 101 Tex. 63, 76, 104 S.W. 1061, 1067 (1907) (contractor obligated to rebuild despite damage due to defect in architectural plans); City of Houston v. L.J. Fuller, Inc., 311 S.W.2d 285, 289 (Tex. Civ. App.—Houston 1958, no writ) (contractor obligated to rebuild structure damaged before completion except when damage attributable to fault of owner).

48. *See* R. KEETON, INSURANCE LAW 174-75 (1971); 4 G. PALMER, THE LAW OF RESTITUTION 388-90 (1978). *Compare* Flint Frozen Foods, Inc. v. Fireman's Ins. Co., 86 A.2d 673, 674 (N.J. 1952) (property serving as security for debt was subject matter of insurance) *with* Wolf v. Home Ins. Co., 241 A.2d 28, 35-37 (N.J. Super. Ct. App. Div. 1968) (property owned by insured was subject matter of insurance).

of insurance, such as when the covered property serves as security for an obligation, the insured has been required to seek recovery on the obligation itself before looking to the insurer to compensate for loss of the security.[49] The owner of a title or possessory interest in property, however, seeks to insure the physical property, and loss to the insured in this situation has been held to occur when the physical property is damaged, notwithstanding subsequent third party acts of cure.[50] Since the Campions owned the property which they insured, application of this distinction to *Hochheim* would favor them.[51]

The court in *Hochheim,* rather than applying these distinctions, held that the insured cannot recover for any loss that is remedied by a third party.[52] This holding greatly exceeds the limitations in *Paramount* concerning both concurrent insurance coverage of the insured and the third party[53] and the existence of a contractual obligation of the third party to cure the insured's loss.[54]

A major shortcoming in cases involving third party cure is the failure of courts to consider the interests of the third party when resolving disputes between insurers and insureds.[55] The reasoning that the insured will be unjustly enriched if allowed a double recovery is not merely a ground for denying recovery against the insurer. Rather, a finding of unjust enrichment creates rights in the third party who remedied the insured's loss and at whose expense the unjust enrichment would occur.[56] The equitable rem-

49. *See* Flint Frozen Foods, Inc. v. Fireman's Ins. Co., 86 A.2d 673, 674 (N.J. 1952); Paramount Fire Ins. Co. v. Aetna Cas. & Sur. Co., 163 Tex. 250, 256, 353 S.W.2d 841, 845 (1962). *But see* Pink v. Smith, 274 N.W. 727, 729 (Mich. 1937) (mortgagee not required to exhaust remedy upon mortgage note before looking to insurer); Paramount Fire Ins. Co. v. Aetna Cas. & Sur. Co., 163 Tex. 250, 257-58, 353 S.W.2d 841, 846-47 (1962) (Griffin, J., dissenting) (mortgagee can elect to earn interest on obligation rather than collecting immediately).

50. *See* Milwaukee Mechanics Ins. Co. v. Maples, 66 So. 2d 159, 167 (Ala. Ct. App. 1953); Wolf v. Home Ins. Co., 241 A.2d 28, 36-37 (N.J. Super. Ct. App. Div. 1968).

51. *See* Hochheim Prairie Farm Mut. Ins. Ass'n v. Campion, 581 S.W.2d 254, 256 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

52. *See id.* at 257.

53. *Compare* Paramount Fire Ins. Co. v. Aetna Cas. & Sur. Co., 163 Tex. 250, 256, 353 S.W.2d 841, 845 (1962) (requires both insured and third party to be protected by insurance) *with* Hochheim Prairie Farm Mut. Ins. Ass'n v. Campion, 581 S.W.2d 254, 255-57 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (failure to apply this requirement).

54. *Compare* Paramount Fire Ins. Co. v. Aetna Cas. & Sur. Co., 163 Tex. 250, 255-56, 353 S.W.2d 841, 844-45 (1962) (third party obligated under specifically enforceable contract) *with* Hochheim Prairie Farm Mut. Ins. Ass'n v. Campion, 581 S.W.2d 254, 256 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (conflicting evidence as to applicability of third party's guarantee).

55. *See* 4 G. PALMER, THE LAW OF RESTITUTION 387-90 (1978).

56. *See* J. DAWSON, UNJUST ENRICHMENT 3-8 (1951); 4 G. PALMER, THE LAW OF RESTITUTION 342-45 (1978).

edies of subrogation[57] and constructive trust[58] are avenues courts can use to adjust the rights of all three parties.[59] Subrogation enables the third party who has cured the insured's loss to obtain the insured's rights against the insurer.[60] A constructive trust may be impressed on the proceeds of an insurance policy when the insured would be unjustly enriched if permitted to retain them.[61]

In *Hochheim* the court's finding that the Campions would be unjustly enriched by a recovery against their insurer ignored the possibility that Wilson could obtain the benefit of the Campions' insurance through the principles of constructive trust and subrogation.[62] This shortcoming in the *Hochheim* rationale might induce an insured to recover against his insurer before the loss is mitigated by a third party.[63] The insured could then enforce the third party's contractual obligation notwithstanding previous payment by the insurer.[64]

Because of the failure of courts to recognize the three party nature of the problem, neither the rationale underlying the *Foley* line of cases nor that underlying the *Ramsdell* line suffices in all situations.[65] The most salient

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57. *See* 1 G. PALMER, THE LAW OF RESTITUTION 21-24 (1978).

58. *See id.* at 16-20.

59. *See* Cheatwood v. De Los Santos, 561 S.W.2d 273, 278-79 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.) (insurance proceeds impressed with constructive trust for benefit of third party); Kost v. Resolute Underwriters of R.I. Ins. Co., 211 S.W.2d 758, 760 (Tex. Civ. App.—Galveston 1948, writ dism'd) (third party subrogated to insured's rights against insurer).

60. *See* J. DAWSON, UNJUST ENRICHMENT 36-37 (1951); D. DOBBS, REMEDIES 251 (1973).

61. *See* Omohundro v. Matthews, 161 Tex. 367, 373, 341 S.W.2d 401, 405 (1960). *See generally* 1 G. PALMER, THE LAW OF RESTITUTION 16-20 (1978).

62. *See* Hochheim Prairie Farm Mut. Ins. Ass'n v. Campion, 581 S.W.2d 254, 256-57 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.); *cf.* Omohundro v. Matthews, 161 Tex. 367, 373, 341 S.W.2d 401, 405 (1960) (constructive trust remedy for unjust enrichment); Cheatwood v. De Los Santos, 561 S.W.2d 273, 279 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.) (insurance proceeds impressed with constructive trust for benefit of third party); Kost v. Resolute Underwriters of R.I. Ins. Co., 211 S.W.2d 758, 760 (Tex. Civ. App.—Galveston 1948, writ dism'd) (third party subrogated to insured's rights).

63. *See* Board of Trustees v. Cream City Mut. Ins. Co., 96 N.W.2d 690, 695-96 (Minn. 1959) (suit by insured against insurer before enforcing third party's obligation to pay contract price for damaged property); Foley v. Manufacturers' & Builders' Fire Ins. Co., 152 N.Y. 131, 132-34, 46 N.E. 318, 319 (1897) (suit by insured against insurer before enforcing third party's obligation to rebuild damaged structure).

64. *See* Foley v. Manufacturers' & Builders' Fire Ins. Co., 152 N.Y. 131, 132-34, 46 N.E. 318, 319 (1897) (third party obligated to rebuild damaged structure despite payment by insurer). While the insurer may obtain a subrogation right against the third party by payment on the policy, this right is generally ineffective unless the third party is responsible for the loss. *See* Board of Trustees v. Cream City Mut. Ins. Co., 96 N.W.2d 690, 695-96 (Minn. 1959); J. MAGEE, GENERAL INSURANCE 86 (1957); 2 RICHARDS ON THE LAW OF INSURANCE 657 (5th ed. W. Freedman 1952).

65. *See* 4 G. PALMER, THE LAW OF RESTITUTION 387-90 (1978) (criticizing failure of courts to recognize three party nature of the problem); Young, *Some "Windfall Coverages" in*