THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE	)	CASE NO. 96-51462
	)	
CHARLEY MAE NELSON	)	CHAPTER 13
	)	
DEBTOR(S)	)	JUDGE MARILYN SHEA-STONUM
	)	
	)	**ORDER DENYING MOTION**
	)	**TO COMPROMISE**
	)	**CONTROVERSY**

This matter came before the Court on the debtor's "Motion for Authority to Compromise Controversy and for Authority to Waive, by Consent of Certain Secured and Administrative Claimants, Certain Claims," which was filed on September 9, 1998 (the "Motion"). Mutual Health Services Company ("Mutual Health") and Subro Audit filed an objection to the Motion on October 6, 1998 (the "Objection"). A hearing on the matter was held on October 8, 1998 and appearances were as noted in the record. At the conclusion of the hearing, the Court granted the debtor until October 19, 1998 to file a response to the Objection. The debtor's response was timely filed and the matter was then taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the arguments of counsel and the pleadings filed herein, the Court makes the following findings of fact and conclusions of law:

I. FACTS

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The relevant facts in this case are not in dispute. The debtor filed a chapter 13 bankruptcy petition on June 28, 1996. At the time of filing, the debtor was being treated for injuries sustained in a motor vehicle accident and was being represented by counsel in a pending personal injury action against the tortfeasor. In her bankruptcy petition, the debtor's personal injury claim was listed on Schedule B as a contingent and unliquidated asset of the estate with an estimated value of $40,000.00. By order of this Court dated August 23, 1996, the debtor's personal injury attorney was retained by the estate to pursue the pending action against the tortfeasor.

At the time of the accident, the debtor had medical insurance provided by Mutual Health. Subro Audit is the representative and claims administrator for Mutual Health. Pursuant to the terms of the debtor's insurance plan, Subro Audit paid the debtor $21,766.22 for medical expenses incurred due to the accident. The debtor's insurance agreement with Mutual Health contains a subrogation provision. On Schedule F of her bankruptcy petition, the debtor lists Mutual Health as holding a contingent $35,000.00 claim for subrogated medical expenses. Neither Mutual health nor Subro Audit has filed a proof of claim in this bankruptcy case.[1]

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[1] In the Objection, it is conclusively stated that the insurance agreement between the debtor and Mutual Health contains a subrogation provision that applies to the case at bar. It is also conclusively stated that pursuant to the insurance agreement between the debtor and Mutual Health, Subro Audit, as claims administrator, actually compensated the debtor for her medial expenses and is, therefore, the subrogated party. During the October 8 hearing and in her subsequent reply to the Objection, the debtor did not raise any counter-argument regarding the existence and/or application of the referenced subrogation provision or payment by Subro Audit (and not Mutual Health) to the debtor. The Court will, therefore, construe debtor's non-response as acquiescence (i) that the subrogation provision exists in the debtor's insurance agreement, (ii) that the subrogation provision applies to the case at bar and (iii) that Subro Audit is the subrogated party pursuant to that subrogation provision. None of the parties attached the relevant subrogation provision to their pleadings.

On August 14, 1996, the debtor filed a first amended chapter 13 plan. That plan provided for a 100% payment of general unsecured claims, contingent upon the successful negotiation and settlement of the debtor's personal injury claim. The plan further provided that payment to unsecured creditors would be made only after the payment of all costs of litigating the debtor's personal injury claim, compensation of the debtor's bankruptcy and personal injury counsel and the payment to the debtor of her claimed exemption in the proceeds of that lawsuit. In the event that the settlement proceeds were insufficient for a 100% distribution to unsecured creditors, distribution would be made on a pro rata basis after the payment of all costs and expenses. An Order approving the first amended plan was entered on November 6, 1996.

On September 9, 1998, the debtor filed the Motion seeking Court approval of a $75,000.00 settlement of the pending personal injury action. As proposed, that settlement contains certain conditions, which include, *inter alia*, that any subrogation claim of Mutual Health or Subro Audit be disallowed. On October 6, 1998, Mutual Health and Subro Audit objected to the Motion to the extent that the proposed settlement acts to prejudice Subro Audit's independent right of subrogation against the tortfeasor for medical expenses paid on behalf of the debtor. In the Objection, Subro Audit asserts that because its subrogation claim is not property of the estate, it cannot be compromised by the debtor. The debtor contends that the failure by either Mutual Health or Subro Audit to file a proof of claim in her bankruptcy case precludes either of those entities from objecting to the Motion.

II. DISCUSSION

Ohio has long recognized an insurer's right of subrogation if provided for in an insurance policy. *McDonald v. Republic-Franklin Ins. Co.*, 45 Ohio St. 3d. 27; 543

N.E.2d 456 (1989); *Shealy v. Campbell*, 20 Ohio St. 3d 23; 485 N.E.2d 701 (1985); *Newcomb v. Cincinnati Ins. Co.*, 22 Ohio St. 382 (1872). The right of subrogation substitutes one party in the place of another with reference to a lawful claim, demand or right, so that the substituted party succeeds to the rights of the other to the extent of the debt or claim paid. *Newcomb v. Cincinnati*, 22 Ohio St. at 387. *See also* 6 Wright & Miller, Federal Practice & Procedure, Subrogation (1971), §1546; 16 Couch on Insurance 2d (1983), §§ 61.26, 61:36. In the case at bar, once the debtor was compensated for medical expenses incurred due to the accident, all of her rights to pursue the tortfeasor for the amount of those expenses were transferred to Subro Audit.

The debtor claims that because her petition listed Mutual Health as holding a contingent $35,000.00 claim for subrogated medical expenses and because neither Mutual Health nor Subro Audit have filed proofs of claim in her bankruptcy, those entities do not have standing to object to the Motion. Such an argument assumes that the subrogated claim for medical expenses is property of the debtor's estate which can be administered, and in this case altered, through the bankruptcy process. This assumption is incorrect.

Exactly what property interests of the debtor become property of a bankruptcy estate is determined by §541 of the Bankruptcy Code. Section 541 provides, in relevant part:

> **§541. Property of the Estate.**
>
> (a) The commencement of a case under section 301, 302 or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) ...all legal or equitable interests of the debtor in property, as of the commencement of the case.

11 U.S.C. §541(a)(1). Pursuant to §541, it is clear that a bankruptcy estate includes all

choses in action held by the debtor as of the commencement of the case. It is equally clear, however, that an estate does not include choses of action held by third parties against others. *See Ginley v. Blue Cross and Blue Shield of Ohio (In re DuBose)*, 174 B.R. 260 (Bankr. N.D. Ohio 1994), *citing Pearlman v. Reliance Ins. Co.*, 371 U.S. 132 (1962) (noting that property rights, such as subrogation rights, existing before bankruptcy in persons other than the debtor must be recognized and respected in bankruptcy). *See also In re Squyres*, 172 B.R. 592, 594 (Bankr. C.D. Ill. 1994) (noting that to the extent that the legal or equitable interest of the debtor in property is limited in the debtor's hands, it is equally limited as property of the estate). In the case at bar, once the debtor was compensated for medical expenses due to the accident, Subro Audit was subrogated to the debtor's claim against the tortfeasor for the amount of those medical expenses. In other words, Subro Audit, and not the debtor, held the right to pursue the tortfeasor for contribution. By conditioning the proposed settlement on the disallowance of Subro Audit's distinct, legal right, the debtor is attempting to control property which does not

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[2] In addition to the fact that Subro Audit's right to independently pursue the tortfeasor is not property of this debtor's estate, courts have generally not permitted an insured to bargain away its insurer's known right of subrogation as consideration for a settlement with alleged tortfeasors. *See Jackson v. Zurich Am. Ins. Co.*, 542 N.W.2d 621 (Minn. 1996) (disagreeing with the argument that even if the subrogee does not consent to a settlement, the insured may agree to a general release of all claims and foreclose any action by the subrogee against third-party tortfeasors); *Community Mutual Ins. Co. v. Taylor*, 61 Ohio Misc. 2d 627; 581 N.E.2d 1186 (Ohio Mun. Ct. 1991) (holding that an unlimited release executed by an insured-subrogor for consideration not specifically including an amount designated as covering the insurer's subrogation interest, does not bar subsequent subrogation action by an insurer-subrogee against the tortfeasor if the tortfeasor or his insurance carrier had knowledge of insurer-subrogee's interest prior to release); *St. Paul Fire & Marine Ins. Co. v. Amerada Hess Corp.*, 275 N.W. 2d 304 (N.D. 1979) (holding that a subrogee does not, absent its consent, waive its right of subrogation and that any attempt to limit the insurer's right of subrogation by a full release to which it is not a party is a nullity and does not preclude a subsequent action by the subrogee; *Sentry Ins. Co. v. Stuart*, 439 S.W.2d 797 (Ark. 1969) (opining that a

belong to her bankruptcy estate.[2]

Upon initial review it appears that by filing the Objection Subro Audit is attempting to protect its distinct, legal right to pursue the tortfeasor for contribution. Upon closer review, however, it is somewhat unclear as to whether Subro Audit still has any distinct, legal right to protect. As a subrogee to the debtor's claim against the tortfeasor, Subro Audit has no rights greater than those of the debtor. *See St. Paul Fire and Marine Ins. Co. v. R.V. World, Inc.*, 62 Ohio App. 3d 535, 577 N.E.2d 72 (Ohio Ct. App. 1989); *American Ins. Group v. McCowin*, 7 Ohio App. 2d 62, 218 N.E.2d 746 (Ohio Ct. App. 1966). In this case the debtor's rights against the tortfeasor are governed in part by Ohio Rev. Code §2305.10(A), which provides that a cause of action for bodily injury must be brought within two years after the cause of action accrues. *See* Ohio Rev. Code §2305.10(A).

The accident at issue occurred in July, 1994 and the debtor's complaint against the tortfeasor to recover for injuries sustained in that accident was filed in April, 1995. Although not specifically addressed in the pleadings, it does not appear that Subro Audit has initiated a lawsuit against the tortfeasor to recover on its subrogated right to contribution. If in fact no such action has been initiated, then the debtor's attempt to disallow Subro Audit's subrogation claim may be obviated by the fact that Subro Audit's right to pursue the tortfeasor is time barred. However, because this issue was not raised in the pleadings, it is not before this Court and will not be considered in determining whether to grant or deny the Motion.

III. CONCLUSION

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subrogee, having been accorded the right of indemnification for that which is paid, may not have its right affected by a settlement and release to which it is not a party).

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In an effort to fund her plan, the debtor has authority to enter into a settlement which provides for a release of the estate's claim against the tortfeasor. However, because Subro Audit's subrogated claim for medical expenses does not constitute property of the debtor's estate, she does not have authority to enter into a settlement which provides for the disallowance and release of that claim. Accordingly, and for the reasons stated herein, the Motion is hereby denied.

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 12/4/98