UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re:	)	
	)	**CHIEF JUDGE RICHARD L. SPEER**
Richard/Sandra Verhoff	)	
	)	Case No. 98-31972
Debtor(s)	)	
	)	

DECISION AND ORDER

This cause comes before the Court upon the Trustee's objection to the proof of claim submitted by Anthem Insurance Companies, Inc. (hereinafter referred to as Anthem). The initial legal basis for the Trustee's objection rests upon his contention that Anthem is not a secured creditor as is asserted in its proof of claim. On May 2, 2000, a Hearing was held on this matter. At the Hearing, and from the briefs submitted by the Parties, it can be gathered that the following represents an accurate depiction of the underlying events of this case:

The Debtors, who are husband and wife, are (or were) participants in an employee benefit program sponsored by the General Motors Corporation. Under this employee benefit program, the Debtors were provided with health insurance coverage in accordance with a collective bargaining agreement reached between the United Auto Workers and the General Motors Corporation. Anthem is the health insurance carrier under this collective bargaining agreement.

On July 31, 1995 and August 1, 1995, the Debtors were involved in two separate automobile accidents. As a result of these accidents, both of the Debtors suffered physical injuries for which they sought and received medical care. From September 19, 1996, until January 26, 1998, the Debtors collectively incurred medical expenses totaling Sixty Thousand Nine Hundred Four and 64/100 dollars ($60,904.64). Of this amount, Anthem paid to the Debtors' medical care providers a total of Twenty-four Thousand One Hundred Sixty-nine and 79/100 dollars ($24,169.79).

On July 30, 1997, the Debtors filed suit in the Wood County Court of Common Pleas against the tortfeasors allegedly responsible for the Debtors' injuries. However, before the case proceeded to trial, the Debtors, on May 6, 1998, filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code. At this time, no notice of the Debtors' bankruptcy petition was provided to Anthem.

Upon the commencement of the Debtors' bankruptcy case, Bruce French was appointed as the trustee of the Debtors' bankruptcy estate. Thereafter, in accordance with the powers the Bankruptcy Code confers upon a bankruptcy trustee, Mr. French continued to pursue on behalf of the Debtors' bankruptcy estate, the state law claims against the tortfeasors allegedly responsible for the Debtors' injuries. In addition, Mr. French undertook to notify Anthem that it may have an interest in both the state court proceedings and the Debtors' bankruptcy case; however, prior to the occurrence of this event, the facts of this case show that one of the Debtors' state law claims was settled for Eight Thousand dollars ($8,000.00).

Upon receiving notice of the Debtors' bankruptcy petition and the state court lawsuit, Anthem provided notice that it had a subrogation interest in the Debtors' state court lawsuit up to the amount of money that it had provided to the Debtors' medical care providers. In support of its right of subrogation, Anthem called this Court's attention to the collective bargaining agreement with the General Motors Corporation in which it is provided that:

> **"Reimbursement of GM Program for Third Party Liability"**
>
> If benefits are paid under the GM Program, and later it is determined that another party should have been responsible for the expenses, the GM Program is entitled to be reimbursed. In that way, financial liability remains where it belongs with the party responsible for incurring the expenses, and the GM Program costs are reduced.

> If you, or one of your covered dependents is involved in such a situation, you are required to provide the GM carrier with whatever assistance is necessary to recover payments made on behalf of the GM Program. If you, or your dependent, receive payment for medical expenses, you will be required to reimburse the GM program.

To protect its subrogation interest, Anthem filed, as a secured creditor, a proof of claim against the Debtors' bankruptcy estate for Twenty-four Thousand One Hundred Sixty-nine and 79/100 dollars ($24,169.79).

With regards to these foregoing facts and circumstances, the Parties, at the Hearing held on this matter, and in their briefs to the Court, raised a number of issues; foremost among them is whether and to what extent the Debtors' bankruptcy estate has an interest in Anthem's subrogation rights against the Debtors' alleged third-party tortfeasors. As a part of this argument, the Trustee has contested whether the collective bargaining agreement between the General Motors Corporation and the Debtors even establishes a right of subrogation for Anthem. The Parties have also brought to this Court's attention an additional issue concerning whether the doctrine known as the "make whole rule" is applicable in this case. This doctrine, which was embraced by the Sixth Circuit in *Copeland Oaks v. Haupt*, requires that "an insured be made whole before an insurer can enforce its right to subrogation under ERISA, unless there is a clear contractual provision to the contrary." 209 F.3d 811, 813 (6th Cir. 2000). However, with respect to the Trustee's objection to the secured status of Anthem's claim, the Parties did agree that Anthem is not a secured creditor under Ohio law or within the meaning of the Bankruptcy Code. Instead, Anthem simply argued that an identical result will be reached if Anthem's subrogation rights vis-a-vis the Debtors are excluded from estate property under 11 U.S.C. § 541. In addressing the foregoing arguments, the Court begins its analysis with the issue concerning whether Anthem has a right of subrogation, and if so, whether such a right is included within the scope of the Debtors' bankruptcy estate.

LEGAL ANALYSIS

Subrogation can be defined as "[t]he substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities." BLACK'S LAW DICTIONARY 1427 (6th ed. 1990); *see also Bureau of Support v. Kreitzer*, 16 Ohio St.2d 147, 151 243 N.E.2d 83, 86 (1968) (stating that in its broadest sense subrogation is the "substitution of one person in the place of another with reference to a lawful claim or right.") Stated more simply, a right of subrogation allows an insurer to stand in the shoes of an injured party and exercise the injured party's right to sue the tortfeasor. In Ohio, a right of subrogation may arise under two different circumstances. First, Ohio law recognizes the principle of equitable subrogation which arises by operation of law, or by statutory grant. Secondly, a right of subrogation may be conventional, which occurs when a contract, either express or implied, creates the subrogation right. *Erie Ins. Co. v. Kaltenbach*, 130 Ohio App.3d 542, 546 (Ohio Ct.App. 1998). It is the latter, which Anthem asserts is applicable in this case by virtue of the collective bargaining agreement that exists between the General Motors Corporation and the Debtors. The Trustee, however, strongly contests this assertion.

The creation of a contractual subrogation right, such as the one asserted in this case, is controlled by general contractual principles of interpretation. *Id*. Under Ohio law, words in a contract, including an insurance policy, "must be given their plain and ordinary meaning," and if a contract is ambiguous, the language will be liberally construed in favor of the party who did not draft the agreement. *Blue Cross & Blue Shield Mut. of Ohio v. Hrenko*, 72 Ohio St.3d 120, 122, 647 N.E.2d 1358, 1360 (1995). Here, in accordance with these principles, it is the position of this Court that the plain language of the collective bargaining agreement that exists between the General Motors Corporation and the Debtors unambiguously provides for a right of subrogation. In particular, the Court can glean a clear picture that under the terms of the collective bargaining agreement, an intent

undoubtedly existed to create a right of subrogation. Of upmost importance in this decision is the fact that Anthem reserved the right, as is common in most subrogation agreements, to place liability against any party responsible for causing injury to the insured. Additional terms of the collective bargaining agreement further support this conclusion. Specifically, the Court observes that under the terms of the collective bargaining agreement, the Debtors were required, as is also very common in many subrogation agreements, to reimburse Anthem for any medical expenses that they received, and to provide Anthem with what ever assistance was reasonably necessary to enable Anthem to recover from any responsible third-party tortfeasor. In addition, a review of Ohio case law shows that other courts, when interpreting provisions of an insurance policy similar to the one in this case, have reached identical results. For example, in the case of *Martin v. Dillow*, an Ohio state court in applying Ohio law found that the following clause created a right of subrogation:

> In the event benefits are paid for charges incurred by an employee as a result of Accidental Bodily Injury or Illness sustained by such employee or any of his covered Dependents,
>
> > (1) the employee will reimburse the Plan to the extent of such benefit payments (a) out of any recovery by the employee (whether by settlement, judgment or otherwise) from any person or organization responsible for causing such Injury or Illness, or from their insurers . . . .
> >
> > (2) the employee or Dependent will execute and deliver such instruments and papers as may be required by the Plan . . . and do whatever else is necessary to secure the rights of the Plan under (1) above.

93 Ohio App.3d 108, 109, 637 N.E.2d 961, 961-62 (Ohio Ct.App. 1994); s*ee also Zinader v. Copley-Fairlawn City School Dist.*, 95 Ohio App.3d 623, 626, 643 N.E.2d 172, 174 (Ohio Ct.App. 1994) (holding that a subrogation agreement which stated that a person shall hold in trust any recovery and reimburse the plan to the extent of the recovery, constituted an enforceable subrogation clause). Accordingly, based upon the foregoing analysis as it relates to the particular facts and circumstances

of this case, it is the holding of this Court that Anthem, as a result of the collective bargaining agreement that exists between the General Motors Corporation and the Debtors, has a right of subrogation in the Debtors' state law cause of action.[1] Resolution of this issues necessarily leads to the central issue of this case which is: Does a party's right of subrogation become property of a debtor's bankruptcy estate pursuant to 11 U.S.C. § 541?

Property that is included in a debtor's bankruptcy estate is subject to being administered by the bankruptcy trustee. 11 U.S.C. § 323(a) (a trustee is a representative of the estate). Conversely, any property that is not encompassed within the scope of estate property under 11 U.S.C. § 541 may be managed according to the rights and interest afforded to any interested party under state law. In conformance with the latter tenet, Anthem has argued that any funds recovered by the Debtors up to the Twenty-four Thousand One Hundred Sixty-nine and 79/100 dollars ($24,169.79) Anthem paid to the Debtors' medical providers is excluded from the Debtors' bankruptcy estate on account of Anthem's right of subrogation in such funds. In support thereof, Anthem has cited to various cases which have addressed this particular issue, all of which have held that a right of subrogation against a third-party tortfeasor does not become property of a debtor's bankruptcy estate in accordance with 11 U.S.C. § 541. *See Ginley v. Blue Cross and Blue Shield of Ohio (In re DuBose)*, 174 B.R. 260 (Bankr. N.D.Ohio 1994); *In re Squyres*, 172 B.R. 592(Bankr. C.D. Ill. 1994); *Arizona Health Care Cost Containment System v. Nelson (In re Yakel)*, 97 B.R. 580 (Bankr. D.Ariz 1989). However, for the following reasons, this Court must respectively disagree with these decisions.

---

[1] It should be noted that it is a fundamental principle of subrogation rights that an insurer-subrogee obtains no greater rights than the insured-subragor. Thus, if the Debtors' third-party tortfeasors have a valid defense against the Debtors, such rights would be equally applicable against Anthem. *Ohio Dep't. of Human Serv. v. Kozar*, 99 Ohio App.3d 713, 715, 651 N.E.2d 1039, 1040 (Ohio Ct.App. 1995)

Under § 541(a) of the Bankruptcy Code, property of the estate is defined so as to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). It was the intent of Congress that this definition be all encompassing so that anything that the debtor has of value is brought into the estate. *In re Greer*, 242 B.R. 389, 393 (Bankr N.D.Ohio 1999). By way of example, tangible and intangible property, causes of actions and leasehold interest are unquestionably included within the scope of estate property under § 541(a). S.Rep. No. 989, 95th Cong., 2nd Sess. 83, H.R.Rep. No. 595, 95th Cong., 1st Sess. 367 (1977), U.S.Code Cong. & Admin.News 1978, 5787, 5869, 6323. However, as the above definition of estate property shows, an item of property does not necessarily itself become property of the estate. Instead, it is only a debtor's interest in an item of property that becomes encompassed within the scope of estate property for purposes of § 541(a). To this end, federal law determines if an interest in property is estate property, however, it is state law which, in the absence of a strong countervailing federal interest, determines the extent to which, if any, a debtor actually has an interest in an item of property that could be included within the scope of estate property. *In re Greer*, 242 B.R. at 394 (Bankr. N.D.Ohio 1999) *citing Butner v. United States*, 440 U.S. 48, 54-55, 99 S.Ct. 914, 917-18, 59 L.Ed.2d 136 (1979). Consequently, as all the events giving rise to this case transpired in Ohio, the Court will turn to Ohio law to determine if the Debtors have an interest in that portion of their state law claim against which Anthem has a right of subrogation.

Under Ohio law a right of subrogation has been held to constitute "a real and existing right at any time the injured-insured is in a position to release a liable party from its liability." *Zinander*, 95 Ohio App.3d at 627, 643 N.E.2d at 175. Simply put, a right of subrogation is not dependent upon the time the insurer actually pays on the policy. As stated by the Supreme Court of Ohio, "a right of subrogation . . . is a full and present right in and of itself wholly independent of whether a later judgment obtained by use of such right will be reduced to collection from the tortfeasor." *Bogan v. Progressive Cas. Ins. Co.*, 36 Ohio St.3d 22, 31, 521 N.E.2d 447, 455-456 (1988), *modified in part*

in McDonald v. Republic- Franklin Ins. Co., 45 Ohio St.3d 27, 543 N.E.2d 456 (1989). Further, it has also been held that under Ohio law an insured retains an interest in litigation even after an insurer has paid on a claim unless the insurer has fully compensated the insured for his or her loss; thus denoting that until an insured has been fully compensated for his or her loss, both the insurer and the insured have a substantive interest in any claim against an alleged tortfeasor. 59 OHIO JUR.3d *Insurance* §§ 1226 & 1227; s*ee also Permanent Insurance Company v. Cox*, 99 Ohio App. 389, 392,133 N.E.2d 627, 630 (Ohio Ct.App. 1955) (holding that where the amount of damages in an automobile collision case exceeds the amount due on an existing policy, the insured is the real party in interest, and the insurer, who has paid a part of the damages, is a proper but not a necessary party to the action); *Hoosier Condensed Milk Co. v. Doner*, 96 Ohio.App. 84, 121 N.E.2d 100, 101 (Ohio Ct.App. 1951) (when actual losses exceeded the amount an insurer is required to pay under a policy, the insured is the real party in interest); *Shealy v. Campbell*, 20 Ohio St.3d 23, 25, 485 N.E.2d 701, 703 (1985) (when an insurer fully pays for the loss occasioned by the insured and the insurer becomes subrogated to the insured's claim against the tortfeasor, the insurer is the real party in interest as the insured no longer has a right of action against the tortfeasor).

It follows then that unless an insured has been fully compensated for a loss, an insured retains at least a residual interest in a cause of action, notwithstanding the fact that an insurer has a direct right of subrogation in that particular interest. Therefore, given the broad scope afforded to property of the estate under § 541(a), (see discussion, supra), such an interest will, upon the filing of the insured's bankruptcy petition, pass to the trustee. In this respect, however, a bankruptcy trustee still takes the debtor's interest in a cause of action fully subject to an insurer's right of subrogation; it being a fundamental principle of bankruptcy law that, unless the trustee can avail himself to the avoiding powers contained in the Bankruptcy Code, the trustee generally gains no greater rights in an item of property than what was held by the debtor as of the commencement of the bankruptcy case. *Borison v. Harrison (In re Borison)*, 226 B.R. 779, 786 (Bankr. S.D.N.Y. 1998). Therefore, despite the

Debtors' entire state law claim being included within the scope of estate property under § 541(a), Anthem is still entitled to be subrogated to the Debtors' state court cause of action under the same terms and conditions as if the Debtors had not filed for bankruptcy relief with, however, one notable exception. Namely, as the Debtors' entire state court cause of action is included within the scope of estate property under § 541, the Trustee is entitled to receive compensation for any money he recovers and then distributes to Anthem as a result of Anthem's right of subrogation in the Debtors' state court lawsuit.[2] The Court specifically mentions this issue as the Parties raised a concern about it at the Hearing held on this matter.

The final issue raised by the Parties concerns how the "make whole rule" effects Anthem's right of subrogation in the Debtors' state court cause of action. As stated earlier, the "make whole rule" requires that "an insured be made whole before an insurer can enforce its right to subrogation under ERISA, unless there is a clear contractual provision to the contrary." *Copeland Oaks v. Haupt*, 209 F.3d 811, 813 (6th Cir. 2000). However, as this definition of the "make whole rule," clearly shows, the rule by its very nature requires the ascertainment of the full extent of the damages incurred by the insured, as well as to the amount of recovery that the insured will receive, issues which have yet to be fully resolved in this case. Thus, at this time, the Court feels that it is premature to make a ruling on the application of the "make whole rule."

In conclusion, the Court finds that Anthem has a valid right of subrogation against the Debtors for any moneys that it has disbursed for the Debtors' medical care expenses. Further, it is the position

---

2

At the Hearing held on this matter, the Parties, with regards to the Eight Thousand dollars ($8,000.00) already recovered by the Trustee on behalf of the Debtors, had raised this issue. From the representations made by the Parties, the Court understood that there was no disagreement that the Trustee was entitled to be fairly compensated for any recovery he makes on behalf of Anthem. This holding merely reiterates this understanding.

of this Court that the Debtors have an interest in their entire state law cause of action which then passed to the Trustee pursuant to 11 U.S.C. § 541, notwithstanding the fact that Anthem has a valid right of subrogation with respect to a portion of the Debtors' state law cause of action. However, as the Trustee must take the Debtors' interest in their state law claim subject to Anthem's right of subrogation, Anthem is entitled to receive from the Debtors' bankruptcy estate the amount of its subrogation interest as long as this would be permitted under applicable state and federal law.

In order to implement the Decision of this Court, Anthem will be permitted to pursue its right of subrogation against the Debtors' bankruptcy estate under the same terms and conditions as if Anthem was pursuing such a right against the Debtors in their personal capacity.[3] In this regard, Anthems right of subrogation will be subject to all applicable state and federal laws, and thus any defenses that the Debtors may have had against Anthem's right of subrogation will be equally applicable to the Trustee. In addition, it should be noted that unless the Trustee decides to abandon his interest in the Debtors' state law cause of action, this Court will retain jurisdiction over the property.

In reaching the conclusions found herein, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Decision.

---

[3] It should be noted that the Debtors received their bankruptcy discharge on September 11, 1998, thus the automatic stay is not in effect. *See* 11 U.S.C. § 362(c)(2)(C).

Accordingly, it is

ORDERED that the Trustee's objection to the secured status of the proof of claim submitted by Anthem Insurance Companies, Inc., be, and is hereby, SUSTAINED.

It is ***FURTHER ORDERED*** that Anthem Insurance Companies, Inc. be permitted to pursue, subject to the jurisdiction of this Court and all applicable state and federal laws, its right of subrogation against the bankruptcy estate of Richard and Sandra Verhoff.

Dated:

____

Richard L. Speer

Chief Bankruptcy Judge