

THE COMMON FUND DOCTRINE: COMING OF AGE IN THE LAW OF INSURANCE SUBROGATION

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INTRODUCTION

The “American Rule”—the euphemistic title given to the attorney fee allocation doctrine associated with American jurisprudence—has been the subject of much debate and criticism.¹ Pursuant to the “American Rule,” each party is obligated to pay its own attorney’s fees, regardless of the outcome of the litigation.² So much has been said and written on the subject of attorney fee allocation in America that the rule pertaining to the subject is often quoted

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1. See, e.g., Leonard R. Avilla, *Shall Counsel Fees Be Allowed?*, 13 CAL. ST. B.J. 42 (1938); Comment, *Court Awarded Attorney’s Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636 (1974); Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1966); Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849 (1929); Gregory A. Hicks, *Statutory Damage Caps are an Incomplete Reform: A Proposal for Attorney Fee Shifting in Tort Actions*, 49 LA. L. REV. 763 (1989); Calvin A. Kuenzel, *The Attorney’s Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984); Philip J. Mause, *Winner Takes All: A Re-Examination of the Indemnity System*, 55 IOWA L. REV. 26 (1969); Charles T. McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931); Gerald T. McLaughlin, *The Recovery of Attorney Fees: A New Method of Financing Legal Services*, 40 FORDHAM L. REV. 761 (1972); Phyliss A. Monroe, Comment, *Financial Barriers to Litigation: Attorney Fees and Problems of Legal Access*, 46 ALB. L. REV. 148 (1981); Thomas D. Rowe, Jr., *Predicting the Effect of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139 (1984); Thomas E. Shea, *Closing Pandora’s Box: Litigation Economics*, 22 CAL. W. L. REV. 267 (1986); Kenneth W. Starr, *The Shifting Panorama of Attorneys’ Fees Awards: The Expansion of Fee Recoveries in Federal Court*, 28 S. TEX. L. REV. 189 (1986); William B. Stoebuck, *Counsel Fees Included in Cost: A Logical Development*, 38 U. COLO. L. REV. 202 (1966); Erik B. Thueson, *Attorney Fees: Slipping from the American Rule Strait Jacket*, 40 MONT. L. REV. 308 (1979); John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567 (1993); Jon S. Hoak, Note, *Attorney Fees: Exceptions to the American Rule*, 25 DRAKE L. REV. 717 (1976).

2. See MARY F. DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES ¶ 1.02[1] (1997). By contrast, the “English Rule” provides that the prevailing party can collect its attorney fees from the loser. The “English Rule,” unlike the “American Rule,” allows for the shifting of legal fees to the losing party in the litigation. See Herbert M. Kritzer, *The English Rule*, A.B.A. J., Nov. 1992, at 54, 55. In virtually every other nation of the world, courts have awarded and continue to award attorney fees to the prevailing party either as an item of compensatory damages or cost. See Ehrenzweig, *supra* note 1, at 793.

without citation.³ Further, the bulk of the discourse concerning the rule is critical in nature and tends to be based on theory or conjecture.⁴ Consequently, anyone looking for something to debate would find the subject of allocation of attorney fees in America an attractive topic.

Rather than re-exploring charted waters, this Article will avoid debating the pros and cons of the "American Rule" and go beyond theory and examine the common fund exception to the "American Rule" in the limited context of insurance subrogation. This Article focuses on the substantive requirements of the common fund doctrine and examines the circumstances under which courts have traditionally awarded attorney fees to a subrogor's attorney. This Article is not an attempt at an exhaustive analysis of all the exceptions to the "American Rule" of not awarding attorney fees to a prevailing party. Rather, its purpose is to provide an in-depth analysis of the fund doctrine and to serve as an aid to the insurance practitioner in determining when an award of fees should be available in the context of insurance subrogation.

Part I of this Article chronicles the historic development of the common fund doctrine. Part II details the contours and discusses the policy objectives sought to be achieved by the doctrine. Part III examines the law of insurance subrogation. This Part also explores attempts by the insurance industry to preclude common fund application. Part IV examines the nuances of the fund doctrine in the context of insurance subrogation law.

The "American Rule" has never constituted an absolute bar to the shifting of attorney fees. From early common law days, courts have recognized several exceptions to the general principle that each party should bear the expenses of his own legal representation.⁵ These exceptions fit into one of four categories:

3. See *supra* note 1.

4. See John F. Vargo, *The American Rule On Attorney Fee Allocation: The Injured Person's Access To Justice*, 42 AM. U. L. REV. 1567 (1993). The justifications given for the "American Rule" are many and include such explanations as: (1) given that litigation is uncertain, one should not be penalized for bringing or defending a lawsuit; (2) if the penalty for losing a lawsuit included paying the opponent's counsel, the poor would be unjustly discouraged from instituting actions to vindicate their rights; (3) the time, expense and difficulty of litigating the reasonableness of attorney fees would impose substantial burdens on judicial administration; (4) responsibility for one's own legal expenses is thought to promote settlement; and (5) attorney fees and costs are not considered actual damages because they are not the legitimate consequences of the tort or breach of contract sued upon. See DERFNER & WOLF, *supra* note 2, ¶ 1.03.

5. See *McCallie v. McCallie*, 660 So. 2d 584 (Ala. 1995); *London v. Green Acres Trust*, 765 P.2d 538 (Ariz. Ct. App. 1988); *Gill v. Transcriptions, Inc.*, 892 S.W.2d 258 (Ark. 1995); *Bunnett v. Smallwood*, 793 P.2d 157 (Colo. 1990); *Marsh v. Solomon*, 529 A.2d 702 (Conn. 1987); *Oliver T. Carr Co. v. United Tech. Communications Co.*, 604 A.2d 881 (D.C. Cir. 1992); *State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830 (Fla. 1993); *Thornley v. Sanchez*, 857 P.2d 601 (Haw. Ct. App. 1993); *In re SRBA*, 912 P.2d 614 (Idaho 1995); *Leahy Realty Corp. v. American Snack Foods Corp.*, 625 N.E.2d 956 (Ill. App. Ct. 1993); *Willie's Constr. Co. v. Baker*, 596 N.E.2d 958 (Ind. Ct. App. 1992); *Smith v. Board of Supervisors*, 320 N.W.2d 589 (Iowa 1982); *Barber v. Town of Fairfield*, 460 A.2d 1001 (Me. 1983); *Collier v. MD-Individual Practice Ass'n*, 607 A.2d

recovery provided by statute;⁶ recovery pursuant to a contract provision;⁷ reimbursement ordered pursuant to equity rule;⁸ and recovery as an item of cost or damages to a wronged party involved in collateral litigation.⁹ The slow but steady erosion of the historic "American Rule" pursuant to a court's inherent equity power is changing forever the nature of litigation and the judicial function in many instances.¹⁰ This is especially true with regard to insurance subrogation

537 (Md. 1992); *Bournewood Hosp., Inc. v. Massachusetts Comm. Against Discrimination*, 358 N.E.2d 235 (Mass. 1976); *Burnside v. State Farm Fire & Cas. Co.*, 528 N.W.2d 749 (Mich. Ct. App. 1995); *Anderson v. Medtronic, Inc.*, 382 N.W.2d 512 (Minn. 1986); *Aqua-Culture Tech., Ltd. v. Holly*, 677 So. 2d 171 (Miss. 1996); *David Ranken, Jr. Technical Inst. v. Boykins*, 816 S.W.2d 189 (Mo. 1991); *First Nat'l Bank of Glaskow v. First Nat'l Bank of Montana N.A.*, 857 P.2d 726 (Mont. 1993); *Barrett v. Baird*, 908 P.2d 689 (Nev. 1995); *In re Thomas*, 651 A.2d 1063 (N.J. Super. Ct. App. Div. 1995); *Turpin v. Smedinghoff*, 874 P.2d 1262 (N.M. 1994); *Gordon v. Marrone*, 590 N.Y.S.2d 649 (N.Y. Sup. Ct. 1992); *Nottingdale Homeowners Ass'n v. Darby*, 514 N.E.2d 702 (Ohio 1987); *Booker v. Sears Roebuck & Co.*, 785 P.2d 297 (Okla. 1989); *Jones v. Muir*, 515 A.2d 855 (Pa. 1986); *Pullman Standard, Inc. v. Abex Corp.*, 693 S.W.2d 336 (Tenn. Ct. App. 1985); *Baja Energy, Inc. v. Ball*, 669 S.W.2d 836 (Tex. App. 1984); *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759 (Utah 1994); *Leiter v. Pfundston*, 556 A.2d 90 (Vt. 1988); *Mullins v. Richland Nat'l Bank*, 403 S.E.2d 334 (Va. 1991); *Rettkowski v. Department of Ecology*, 910 P.2d 462 (Wash. 1996); *Hayseed, Inc. v. State Farm Fire & Cas. Co.*, 352 S.E.2d 73 (W. Va. 1986); *DeChant v. Monarch Life Ins. Co.*, 547 N.W.2d 592 (Wis. 1996); *Snodgrass v. Rissler & McMurray Co.*, 903 P.2d 1015 (Wyo. 1995); *see also Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Hall v. Cole*, 412 U.S. 1 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Trustees v. Greenough*, 105 U.S. 527 (1881).

6. *See supra* note 5. For a list of over 200 federal statutory fee provisions, *see generally* DERFNER & WOLF, *supra* note 2, ¶¶ 5.01-5.05.

7. *See supra* note 5.

8. The equity exceptions to the "American Rule" consist of the following: common fund doctrine, substantial benefit/common benefit doctrine, private attorney general theory, and bad faith, obdurate behavior rule. Each of these exceptions share a uniquely federal common law origin. *See Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991) (bad faith rule); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (private attorney general rule); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) (substantial benefit doctrine); *Trustees v. Greenough*, 105 U.S. 527 (1881) (common fund doctrine).

9. There is a substantial body of case law which supports the view that where the wrongful act of one person has caused litigation between another and a third person or has made it necessary for the other person to incur legal expenses to protect his interest, those expenses, including attorney's fees, are recoverable. *See, e.g., Collier*, 607 A.2d at 537; *Willard v. Paracelsus Health Care Corp.*, 681 So. 2d 539 (Miss. 1996); *Nix v. Nix*, 862 S.W.2d 948 (Mo. Ct. App. 1993); *Albright v. Fish*, 422 A.2d 250 (Vt. 1980); *Wells v. Aetna Ins. Co.*, 376 P.2d 644 (Wash. 1962).

10. Pursuant to the "American Rule" a prevailing party cannot recover his legal fees, whether classified as "costs" or "damages," unless there is an exception to the general rule. The classification of attorney fees as either "costs" or "damages" does at times alter the responsibility of the court and jury. For a good discussion concerning the difficulty of classifying attorney fees,

law and is due in significant part to the fact that the "Rule" is based more on precedence than policy.¹¹

I. THE HISTORICAL DEVELOPMENT OF THE COMMON FUND DOCTRINE

The common fund doctrine found its way into American jurisprudence in the case of *Trustees v. Greenough*.¹² In *Greenough*, Francis Vose, a large holder of bonds of the Florida Railroad Company filed suit on behalf of himself and other bondholders against the trustees of the Internal Improvement Fund of Florida and various other named defendants. The fund consisted of ten or eleven million acres of land which had been conveyed by the state as security for a bond issue of the Florida Railroad Company. Vose charged the trustees of the fund with waste and destruction of the fund by selling the land at nominal prices and failing to provide for the payment of interest or sinking fund on the bonds. His bill prayed that the fraudulent conveyances be set aside, the trustees be enjoined from selling more lands, and a receiver be appointed to manage the fund.

After more than a decade of vigorous and expensive litigation, Vose's lawsuit resulted in the restoration of a large amount of the trust fund, the appointment of a court appointed receiver to manage the fund, and realization of a significant amount of money and dividends to the bondholders.¹³ Vose, without assistance from the other bondholders, bore the entire financial burden of the litigation and advanced the money used to reach the successful results. Therefore, Vose petitioned the court for reimbursement of his expenses from the fund which, as a result of the judicially appointed receiver, was still within the control of the court. Justice Bradley, writing for a majority of the Court, observed:

But in a case like the present, where the bill was filed not only in behalf of the complainant himself, but in behalf of the other bondholders having an equal interest in the fund; and where the bill sought to rescue that fund from waste and destruction arising from the neglect and misconduct of the trustees, and to bring it into court for administration according to the purposes of the trust: and where all this has been done; and done at great expense and trouble on the part of the complainant; and the other bondholders have come in and participated in the benefits resulting from his proceedings,—if the complainant is not a trustee, he has at least acted the part of a trustee in relation to the common interest.¹⁴

The Court's analogy of Vose to a trustee alone would have supported application

see DERFNER & WOLF, *supra* note 2, ¶ 1.01[2].

11. Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 639 (1974).

12. 105 U.S. 527 (1881).

13. *Id.* at 529.

14. *Id.* at 532.

of the rule that a trust estate must bear the expenses of its administration.¹⁵ However, the Court further premised its decision on equity because, as Justice Bradley noted, to deny Vose reimbursement for expenses

would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge upon the fund is the most equitable way of securing such contribution.¹⁶

The influence of equity on the Court's holding in *Greenough* was significant.¹⁷ Equity, however, is never without limit and the Court recognized this fact in distinguishing between reimbursing Vose for legal expenses as a client and reimbursing Vose for his own time and expenses.¹⁸ The latter expenses, the Court concluded, lacked both reason and support for reimbursement.¹⁹

Less than four years after the *Greenough* decision was rendered, its boundaries were tested. In *Central Railroad & Banking Company v. Pettus*,²⁰ the Western Railroad Company, an Alabama corporation, purchased and took possession of the railroad and all other property of the Montgomery and West Point Railroad Company. Western agreed, as a condition of the sale, to assume the payment of all outstanding debts and obligations of West Point. Several years after this transaction, secured creditors of Western Railroad Company initiated a suit to procure a sale of the property of said railroad, including that purchased from the former Montgomery and West Point Railroad Company. A sale was ordered subject to a lien in respect to the property formerly owned by West Point in favor of holders of its mortgage bonds.

Thereafter, several holders of bonds of West Point, who were not secured by mortgage, hired Pettus & Dawson and Watts & Sons to represent them in litigation against Western Railroad Company. Plaintiffs sought to have their unsecured mortgage interest in the former Montgomery and West Point Railroad declared superior to any mortgages executed by Western Railroad Company. Ultimately, the plaintiffs were successful in having their unsecured mortgage interest adjudged superior to any executed by Western Railroad Company.²¹

In *Pettus*, unlike *Greenough*, the claim on the fund was asserted by the

15. *Id.*

16. *Id.*

17. *Id.* at 537.

18. *Id.* at 538.

19. *Id.* The Court concluded that if Vose was reimbursed for private expenses and personal services it would tempt parties to intermeddle in the management of funds in which they held only a creditor's interest. *Id.*

20. 113 U.S. 116 (1885).

21. *Id.* at 119.

attorneys directly. Unsecured creditors, who had not retained but who had benefitted from the attorneys' services, objected to the claim for fees on the grounds that the attorneys had already been compensated by their clients pursuant to a contract.²² The Court, in response to this contention, cavalierly noted that the unsecured creditors who retained the attorneys understood that the attorneys believed

they had the right to demand, and would demand, such additional compensation as was reasonable, in respect of unsecured creditors who accepted the fruits of their labor by filing claim; that, but for this understanding, appellees would have stipulated a larger compensation than that agreed to be paid by their particular clients²³

The absence of a contract of employment between the attorneys and the passive unsecured creditors was of little consequence to the Court

[w]hen the litigation was commenced, the unsecured bonds of the Montgomery & West Point Railroad Company was [sic] without any value in the financial market. That litigation resulted in their becoming worth all, or nearly all, that they called for. The creditors who are entitled to the benefits of the decree had only to await its execution in order to receive the full amount of their claims; and that result was due to the skill and vigilance of the appellees, so far as the result of litigation may, in any case, be referred to the labors of counsel.²⁴

The Court further observed, in response to there not being a contract for services, that the creditors had notice, by the bill, that the suit was a class action for the benefit of all similarly situated persons.²⁵ Consequently, those who accepted "the fruits of the labors" of the attorneys should expect to be called upon to contribute to the expenses including reasonable attorney fees.²⁶ To secure their rights to fees, the lawyers were given a lien on the railroad assets which had been saved by the order.

The impact of the *Pettus* decision on the development of the common fund doctrine was astounding. One scholar notes that:

[t]he Court seemed to be cheerfully unaware that it had leaped across a gulf. The *Greenough* case three years before had approved the claim of a client for contribution to the litigation costs that he had incurred but under the usual rule could not recover from his losing opponents. The *Pettus* case totally transformed this into an independent right of the *lawyer*, reinforced by lien, to an extra reward so that he might share the wealth of strangers. The lawyer was suddenly thought of as producer of

22. *Id.* at 125.

23. *Id.*

24. *Id.* at 126.

25. *Id.* at 126-27.

26. *Id.* at 127.

this wealth, though he did nothing more than perform his contract with his own client, and furthermore had been paid by his client in full the sum he had agreed to accept

The net result is that either client or lawyer can secure a charge on a *Greenough*-type fund for legal services rendered in successful litigation. In the rare case where the client sues it is taken for granted, and *Greenough* itself implied, that the claim for legal services is a first charge on the fund and must be satisfied before any distribution occurs. The same priority is assumed for the lawyer's own claim when asserted independently, and where the issue of priority rises to the surface this is made explicit. The lawyer's claim is independent in the sense that he can assert it, though foreclosure of his lien may destroy the fund or so deplete it that there is nothing left to pay his own client.²⁷

The next significant step in the evolution of the common fund doctrine was taken in the case of *Sprague v. Ticonic National Bank*.²⁸ Although the holding in *Sprague* itself is of little consequence, the Court's broad reasoning went far beyond that required under the facts of the case. Consequently, it has displaced, at least in terms of frequency of citation, both *Greenough* and *Pettus*. In *Sprague*, petitioner deposited in trust certain funds with the Ticonic Bank. Ticonic subsequently was taken over by People's National Bank which acquired all the assets, including petitioner's deposits and assumed all indebtedness of the Ticonic Bank. After both banks went into receivership, petitioner filed a bill against the banks to impress upon the proceeds of the bonds a lien for her trust deposits. This proceeding terminated in favor of petitioner, who then sought contributions for legal expenses, including attorneys fees, from the beneficiaries of fourteen other trusts that had been similarly situated. Petitioner alleged that by vindicating her claim to a lien on the proceeds, she had established as a matter of law the right of the beneficiaries of the similarly situated trusts to recover.²⁹

In *Sprague*, the Court had in its possession an identifiable fund, even though none of the bonds had been allocated to the individual beneficiaries. Consequently, *Sprague* did not fit precisely into either of the two types of cases to which the Court had previously applied the common fund doctrine.³⁰ Nonetheless, the Court found that *Sprague* presented a variation of the situation where a petitioner's litigation benefits a group which he does not profess to represent.³¹ This fact, however, does not necessarily explain why the Court did

27. John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1603-04, 1606-07 (1974) (emphasis in original).

28. 307 U.S. 161 (1939).

29. *Id.* at 163.

30. Justice Frankfurter noted that the doctrine had been applied to two types of cases: where the complainant professes to sue for the common interest of a group and where a fund is created for a group though the complainant did not profess to represent the group. *Id.* at 166.

31. *Id.*

not rely upon its previous holdings in both *Greenough* and *Pettus*—where a fund exists in the control of a court, where benefits accrue to others, and where the client prosecuted the action at her own expense, these were sufficient reasons for allowing a claimant to seek reimbursement for legal expenses. Though *Sprague*, in her litigation, did not purport to represent the interest of a group, the Court, relying upon the principles of *stare decisis*³² and equity,³³ noted that such allowances were appropriate in exceptional cases and for dominating reasons of justice.³⁴ This fact, along with the Court's reliance upon and analysis of its inherent equity power, suggests that the judiciary possesses broad discretion in ascertaining those circumstances that require an additional dosage of equity.³⁵ Because the power to award fees "is part of the original authority of the chancellor to do equity in a particular situation,"³⁶ courts have not hesitated to exercise this inherent equitable power whenever "overriding considerations indicate the need for such a recovery."³⁷

II. THE DOCTRINE ARTICULATED

The common fund doctrine variously has been referred to as the trust fund doctrine, equitable fund doctrine or fund doctrine.³⁸ Despite the variations in

32. In view of the consequences of *stare decisis*, the petitioner by establishing her claim necessarily established the claims of 14 other trusts pertaining to the same bonds. *Id.*

33. The inherent equity power of courts to award fees to the prevailing party is of English common law ancestry. JOSEPH STORY, 1 EQUITY JURISPRUDENCE, §§ 57-58 (14th ed. 1918).

34. *Sprague*, 307 U.S. at 167.

35. This seemed to be the case despite the fact that the court expressly noted that such awards "are appropriate only in exceptional cases and for dominating reasons of justice." *Id.* at 167. See also Dawson, *supra* note 27, at 1610 (noting that the *Sprague* decision may be viewed "as a part of a sweeping assertion of the inherent power of equity courts to redistribute the costs of litigation").

36. *Sprague*, 307 U.S. at 166.

37. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970); see also *Hall v. Cole*, 412 U.S. 1, 5 (1973); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

38. See *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1044 (Del. 1996); *Oklahoma Tax Comm'n v. Ricks*, 885 P.2d 1336, 1339 (Okla. 1994).

The common fund doctrine is more than an exception to the "American Rule." The doctrine also effectively operates as an exception to the requirement that an attorney/client relationship must exist in order for an attorney to be entitled to compensation. See *Commercial Union Ins. Co. v. Scott*, 158 S.E.2d 295 (Ga. Ct. App. 1967); *Kindred v. City of Omaha Employees' Retirement Sys.*, 564 N.W.2d 592 (Neb. 1997); *United Servs. Auto Ass'n v. Hills*, 109 N.W.2d 174 (Neb. 1961); *Hatcher v. United States Nat'l Bank*, 643 P.2d 359 (Or. Ct. App. 1982).

Some courts use the term "common fund" to describe the process of awarding fees where the attorney's services have not created, protected or preserved a fund. This is a misuse of the term "common fund." The process of granting an award of fees in the absence of a fund is better and more accurately referred to as the substantial benefit/common benefit exception to the "American Rule." This exception is a derivative of the common fund doctrine. It is justified on the theory that

nomenclatures the primary purpose of the doctrine is universally accepted as one which:

provides that when a party through active litigation creates, reserves or increases a fund, others sharing in the fund must bear a portion of the litigation costs including reasonable attorney fees. The doctrine is employed to spread the cost of litigation among all beneficiaries so that the active beneficiary is not forced to bear the burden alone and the "stranger" (i.e. passive) beneficiaries do not receive their benefits at no cost to themselves.³⁹

The policy which perpetuates the common fund doctrine is firmly rooted in equity.⁴⁰ Nevertheless, the doctrine has been applied only in a few well defined

to allow others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation would be to enrich the others unjustly at the plaintiff's expense. See *Hall*, 412 U.S. at 5-6; *Mills*, 396 U.S. at 392. Some courts use the term "valuable service" as a synonym for substantial benefit. See also *Southerland v. International Longshoremen's & Warehousemen's Union*, 845 F.2d 796, 799 (9th Cir. 1987).

Initially a two-factor test was developed to determine application of the substantial benefit test, which consisted of: (1) whether the litigation conferred a substantial benefit on the members of an ascertainable class; and (2) whether the court's jurisdiction over the subject matter makes possible an award that will operate to spread the costs proportionately among the class. See *Hall*, 412 U.S. at 5; *Mills*, 396 U.S. at 393-94. The United State Supreme Court reaffirmed the substantial benefit doctrine of *Hall* and *Mills* in *Alyeska Pipeline Services Co. v. Wilderness Society*, 421 U.S. 240 (1975). Therein, the Court used a three prong standard: (1) the class of beneficiaries is "small in number and easily identifiable;" (2) "the benefits could be traced with some accuracy;" and (3) the costs could be shifted "with some exactitude" to those who actually benefitted from the litigation. *Id.* at 264-65.

The requirement that the benefit to the class be substantial, in lieu of a fund, is intended to discourage nuisance suits. In order to justify an award, the benefits need not be capable of being measured in monetary terms. However, a substantial benefit must be something more than technical in its consequence and be one that accomplishes a result which corrects an abuse which would prejudice the rights and interests of the class or affect the enjoyment or protection of an essential right to the class. Whether the benefit is substantial is a question of law. See, e.g., *Schechtman v. Wolfson*, 244 F.2d 537, 540 (2d Cir. 1957); *Bosch v. Meeker Coop. Light & Power Ass'n*, 101 N.W.2d 423, 426-27 (Minn. 1960).

39. *Means v. Montana Power Co.*, 625 P.2d 32, 37 (Mont. 1981); see also *Serrano v. Priest*, 569 P.2d 1303, 1310-11 (Cal. 1977); *Dennis v. State*, 451 N.W.2d 676, 687 (Neb. 1990); *Guild, Hagen & Clark, Ltd. v. First Nat'l Bank*, 600 P.2d 238 (Nev. 1979).

40. The policy underlying the common fund doctrine is based on:

fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be promptly and directly

situations.⁴¹

The common fund doctrine requires the existence of a fund. The creation and/or preservation of a trust estate,⁴² class actions,⁴³ and insurance subrogation proceeds,⁴⁴ illustrate the types of cases subject to fund creation or preservation.⁴⁵ However, to justify an award of fees under the doctrine, the claimant must have brought suit to create, preserve, increase or protect a fund which benefits himself and others.⁴⁶ The fund must also be within the control of the court and bear such a relationship to the benefitted class that the award will operate to spread the costs of litigation proportionately and, with some degree of exactitude, among identifiable beneficiaries of the claimant's success.⁴⁷ The "within the control of the court" requirement is met if the court has, at a minimum, constructive custody or control over the fund.⁴⁸ The test for control is whether the court has the power to assess a fee proportionately and accurately from each of the passive beneficiaries' traceable portion of a distinct fund.⁴⁹ The basic tenets of the fund

compensated should his efforts be successful.

First Nat'l Bank, 600 P.2d at 239 (quoting *In re Stauffer's Estate*, 346 P.2d 748, 752-53 (Nev. 1959)); see also *Alyeska Pipeline Co.*, 421 U.S. at 257; *City of San Francisco v. Sweet*, 38 Cal. Rptr. 2d 620, 626 (1995); *Means*, 625 P.2d at 37 ("The common fund doctrine is rooted in the equitable concepts of quasi-contract, restitution and recapture of unjust enrichment."); *Washington Fire & Marine Ins. Co. v. Hammett*, 377 S.W.2d 811 (Ark. 1964). See generally 20 AM. JUR. 2D *Costs* § 85 (1985); J.F. Riley, Annotation, *Right of Attorney for Holder of Property Insurance to Fee Out of Insurer's Share of Recovery from Tortfeasor*, 2 A.L.R.3d 1441 (1984); 7A C.J.S., *Attorneys & Clients* § 334 (1980).

41. See *infra* CONCLUSION.

42. See *Sprague*, 307 U.S. at 161; *United States v. Equitable Trust Co.*, 283 U.S. 738 (1931); *Harrison v. Perea*, 168 U.S. 311 (1897).

43. See, e.g., *Edelman & Combs v. Law*, 663 So. 2d 957 (Ala. 1995); *Montalvo v. Chang*, 641 P.2d 1321 (Haw. 1982); *Brundidge v. Glendale Fed. Bank*, 659 N.E.2d 909 (Ill. 1995).

44. See *infra* Part IV.

45. See also *Oklahoma Tax Comm'n v. Ricks*, 885 P.2d 1336, 1340 (Okla. 1994) ("The existence of a judgment, an effect upon real property and court-ordered fund segregation" also illustrate types of cases which reflect fund creation and preservation.).

46. This is said to be the test for determining application of the common fund doctrine. See *Alyeska Pipeline Servs. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-58 (1975); *Sierra Club v. Louisiana Dep't of Wildlife & Fisheries*, 560 So. 2d 976, 978 (La. Ct. App. 1990); see also *Crane Towing v. Gorton, Inc.*, 570 P.2d 428, 437 (Wash. 1977).

47. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 394-95 (1970); *Alyeska Pipeline Servs. Co.*, 421 U.S. at 265 n.39.

48. See *Van Holt v. Izumo Taisha Kyo Mission*, 355 P.2d 40, 49 (Haw.), *aff'd on reh'g*, 355 P.2d 44 (Haw. 1960); *Flynn v. Kucharski*, 306 N.E.2d 726, 731-32 (Ill. App. Ct. 1973); *Milster v. City Council*, 47 S.E. 141, 141-42 (S.C. 1904).

49. See *Townsend v. Edelman*, 518 F.2d 116, 123 (7th Cir. 1975); *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118, 1122-23 (9th Cir. 1981); *District of Columbia v. Green*, 381 A.2d 578, 581 (D.C. 1977); *City of East Peoria v. Tazewell County*, 308 N.E.2d 824, 825 (Ill. App. Ct. 1974).

doctrine have been incorporated into a prima facie case requiring proof of:

(1) The existence of a fund over which the court has jurisdiction and from which fees can be awarded; (2) The commencement of litigation by one party which is terminated successfully; (3) The existence of a class which received, without otherwise contributing to the lawsuit, substantial benefits as a result of the litigation; (4) The creation, preservation, protection or increase of the fund as a direct and proximate result of the efforts of counsel for that party; and, (5) A reasonable relationship between the benefit established and the fees incurred.⁵⁰

In the context of insurance subrogation cases, the prima facie case has been condensed to require: (1) the attorney has been compensated from a common fund; (2) the attorney's services must have benefitted that fund; and, (3) the party that seeks the fee and the party that is to be charged with the fee must have some interest in the fund.⁵¹ This prima facie case can be further compared to that of Illinois which allows an attorney to collect fees under the common fund doctrine if: (1) the fund from which fees are sought was created as a result of the legal services performed by the attorney; (2) the claimant of the fund did not participate in its creation; and (3) the claimant benefitted or will benefit from its creation.⁵² Despite nuances in the language used to describe the appropriate circumstances under which the common fund doctrine is applicable, both prima facie cases reflect that courts are predisposed to examine the source of the fund and the significance of the contribution of the attorney as it relates to the creation, preservation, or protection of same versus that of the beneficiary. These considerations operate quantitatively on balance with the end sought to be achieved—equity.

The party seeking application of the fund doctrine is entitled to be awarded a reasonable fee. Courts have broad discretion in determining what constitutes a reasonable fee award.⁵³ They tend, however, to rely upon one of three standards to measure the reasonableness of fee awards in common fund cases. These standards are the fee arrangement set out in the attorney/client contract,⁵⁴

50. *Community Nat'l Bank v. Rishoi*, 567 So. 2d 1053, 1054 (Fla. Dist. Ct. App. 1990).

51. *Henley & Clarke v. Blue Cross-Blue Shield*, 434 So. 2d 274, 276 (Ala. Civ. App. 1983).

52. *Tenny v. American Family Mut. Ins. Co.*, 470 N.E.2d 6, 7 (Ill. App. Ct. 1984). *Cf. Blake v. Cannon*, 439 S.E.2d 302, 304 (S.C. Ct. App. 1993) (setting out prima facie case followed in South Carolina).

53. *See infra* note 52; *see also* *Gigot v. Cities Serv. Oil Co.*, 737 P.2d 18, 25 (Kan. 1987); *Sant v. Perronville Shingle Co.*, 146 N.W. 212, 215 (Mich. 1914); *In re Alcolac, Inc.*, 903 S.W.2d 680, 682 (Mo. Ct. App. 1995) (court's discretion is not without limits).

54. This is the measure used in the vast majority of insurance subrogation cases. *See, e.g.*, *Lyons v. Geico Ins. Co.*, 689 So. 2d 182, 183-84 (Ala. Civ. App. 1997); *Commercial Standard Ins. Co. v. Combs*, 460 S.W.2d 770, 772-73 (Ark. 1970); *Washington Fire & Marine Ins. Co. v. Hammett*, 377 S.W.2d 811, 813 (Ark. 1964); *City of San Francisco v. Sweet*, 38 Cal. Rptr. 2d 620, 621-22 (Cal. Ct. App. 1995); *Forsyth v. Southern Bell Tel. & Tel. Co.*, 162 So. 2d 916, 919 (Fla. Dist. Ct. App. 1964); *Foremost Life Ins. Co. v. Waters*, 337 N.W.2d 29, 32 (Mich. Ct. App. 1983);

the lodestar method or a percentage of the fund calculation.⁵⁵ The standard used often depends upon the nature of the litigation. Nevertheless, the award is recoverable from either the fund or directly from the passive beneficiaries and not the losing party.⁵⁶ The practice, however, is to tax the award against the

Amica Mut. Ins. Co. v. Maloney, 903 P.2d 834, 841 (N.M. 1995); *State Farm Mut. Auto. Ins. Co. v. Elkins*, 451 S.W.2d 528, 530 (Tex. App. 1970).

The cases uniformly refer to the attorney client contract as the measure of recovery without detailed analysis. The law, with regard to determining reasonable attorney fees in general, as well as that in regards to the common fund, is clear that the contract is not the sole factor to be considered. *See Barreca v. Cobb*, 668 So. 2d 1129 (La. 1996); *United Servs. Auto. Ass'n v. Hills*, 109 N.W.2d 174 (Neb. 1961); *Amica Mut. Ins. Co.*, 903 P.2d at 834; *State Farm Mut. Auto. Ins. Co. v. Geline*, 179 N.W.2d 815 (Wis. 1970).

The discretion of courts to award fees is not limited by the attorney/client contract. The court may override or ignore the contract under appropriate circumstances. *See, e.g., Montalvo v. Chang*, 641 P.2d 1321, 1327 (Haw. 1982); *Gigot*, 737 P.2d at 23; *Sant*, 146 N.W. at 215.

55. There has been much litigation over the issue of whether the lodestar method or the percentage of the fund measure should be used to measure the reasonableness of the fee award in common fund cases. The Tenth and Eleventh Circuit Courts of Appeals and the D.C. Circuit have explicitly adopted the percentage method for computing attorney fees in common fund cases. *See Uselton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 853 (10th Cir. 1993); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 775 (11th Cir. 1991); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993).

The United States Court of Appeals for the Third Circuit appointed a Task Force on Court Awarded Attorney Fees whose report is published at 108 F.R.D. 237 (1985). After noting a number of concerns, the Task Force observed:

Accordingly the Task Force recommends that in the traditional common-fund situation and in those statutory fee cases that are likely to result in a settlement fund from which adequate counsel fees can be paid, the district court, on its own motion or its own initiative and at the earliest practical moment, should attempt to establish a percentage fee arrangement agreeable to the Bench and to Plaintiff's counsel

Id. at 255-56.

Other circuit courts leave the choice between methods to the trial court. State court decisions also reflect that courts are accorded broad discretion with respect to the standard used to measure reasonableness in common fund cases. Both state and federal judicial opinions, especially in class action suits, reflect a preference for the percentage of the fund measure. For an in-depth and detailed discussion of the standards, see *Edelman & Combs v. Law*, 663 So. 2d 957 (Ala. 1995); *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039 (Del. 1996); *Montalvo*, 641 P.2d at 1321; *Brundidge v. Glendale Fed. Bank*, 659 N.E.2d 909 (Ill. 1995); *Citizens Actions Coalition of Indiana, Inc. v. PSI Energy, Inc.*, 664 N.E.2d 401 (Ind. Ct. App. 1996); *Crouch v. Tenneco, Inc.*, 853 S.W.2d 643 (Tex. App. 1993); *Bowles v. Washington Dep't of Retirement Sys.*, 847 P.2d 440 (Wash. 1993); *Wisconsin Retired Teachers Ass'n v. Employee Trust Funds Bd.*, 558 N.W.2d 83 (Wis. 1997).

56. *Alyeska Pipeline Servs. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *see also Boeing Co. v. Van Gamert*, 444 U.S. 472 (1980); *B.P. North Am. Trading, Inc. v. Vessel Panamax Nova*, 784 F.2d 975 (9th Cir. 1986); *Municipality of Anchorage v. Gentile*, 922 P.2d 248 (Alaska

fund.⁵⁷

An insurance company may request the court to reduce the amount of fees it owes by demonstrating that they are unreasonable. This right to claim a reduction arises out of the fact that the insurer is not contractually bound by the fee agreement between insured and its counsel.⁵⁸ The amount of the fee owed by the insurer should be apportioned according to the dictates of equity.⁵⁹ Consequently, if the insurer can show that the fees assessed are excessive and inequitable, the court may reduce them accordingly.⁶⁰ Whether the attorney's fee arrangement with the insured is consistent with customary fee arrangement in the profession is a relevant consideration in determining reasonableness.⁶¹

III. EXISTENCE OF SUBROGATION

The right to subrogation in the defendant and its protection by plaintiff's counsel are essential to a claim for attorney fees under the common fund doctrine.⁶² Subrogation has been variably defined as:

the substitution of one person in the place of another, whether as a creditor or as the possessor of any rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and to its rights, remedies, or securities.⁶³

The right to subrogation is founded, not necessarily upon contract but upon justice and equity, and is based upon the principle that substantial justice should

1996); *Kuhn v. State*, 924 P.2d 1053 (Colo. 1996); *Goodrich*, 681 A.2d at 1039; *Wisconsin Retired Teachers Ass'n*, 558 N.W.2d at 83.

57. See *Hatcher v. United States Nat'l Bank*, 643 P.2d 359 (Or. Ct. App. 1982); *Miller v. Myers*, 150 A. 588 (Pa. 1930); *Seattle Trust & Sav. Bank v. McCarthy*, 617 P.2d 1023 (Wash. 1980). Cf. *Montgomery v. Hoskins*, 432 S.W.2d 654 (Tenn. 1968) (the fund being exhausted the award should be taxed to the beneficiaries).

58. *Amica Mut. Ins. Co.*, 903 P.2d at 834. See *supra* note 54.

59. See *supra* note 58.

60. See *supra* note 58.

61. See *supra* note 58.

62. As a general rule, the subrogee steps into the shoes of the subrogor; consequently, if the plaintiff has done anything to destroy the insurer's right to seek subrogation plaintiff's counsel is not entitled to an award of fees because the required fund never came into existence. Likewise, if plaintiff's counsel has taken an adversarial position with regards to the insurer's right to subrogation fees may not be recovered. See *infra* Part IV.

63. *Indiana Lumbermen's Mut. Ins. Co. v. Curtis Mathes Manuf. Co.*, 456 So. 2d 750, 754 (Miss. 1984).

In the specific context of insurance law, subrogation has been defined as "the right of the insurer to be put in the position of the insured in order to pursue recovery from third parties legally responsible to the insured for a loss paid by the insurer." GEORGE JAMES COUCH, *COUCH ON INSURANCE* § 61:1 (2d ed. 1983).

be attained regardless of form.⁶⁴ It is a creature of equity and is the method equity has chosen to compel the payment of a debt by one who, in fairness and good conscience, ought to pay.⁶⁵ The right to subrogation ordinarily arises when the insurer has paid to an insured the proceeds of the policy.⁶⁶ The insurer however, as a general rule, may not exercise the right, even though it exists, until the insured has been made whole.⁶⁷

When an insurer pays the claim of its insured, it is “subrogated by operation of the law to recovery of its payments against the person who caused the loss.”⁶⁸ The right of subrogation allows an insurer who has compensated his insured to step into the shoes of the insured and collect what it has been paid from the

64. There are two forms of subrogation, legal—which arises by operation of the law—and conventional—which arises by convention or the contract between the parties. This distinction between legal and conventional subrogation is rarely significant because the same facts which give rise to legal subrogation will also support a conventional subrogation claim. *Id.* § 61:2.

Conventional subrogation provisions are, however, significantly different from subrogation rights that arise by operation of the law in that they may provide the insurer with greater rights than it would have by operation of law. The contract provisions control and are enforceable unless they contravene public policy. *Id.*

65. Couch states the following:

Subrogation has the dual objective of (1) preventing the insured from recovering twice for the one harm, as would be the case if he could recover from both the insurer and from a third person who caused the harm, and (2) reimbursing the surety for the payment which it has made.

Id. § 61:18.

66. *See id.* § 61:4. Payment by insurer is a condition precedent to the right of subrogation. The insurer is only subrogated to the extent of the payment made to insured. *Id.* §§ 61:39, 61:49 & 61:51. The right to subrogation usually arises out of payments made to the insured. However, the right can also arise out of any act that discharges the insurer’s obligation to the insured such as replacement, repair or reconstruction of the damaged property. *Id.* § 61:52.

67. Subrogation is basically an equitable doctrine and is normally accorded upon the principles of justice and fairness. Consequently, even where the right to subrogation is declared contractually, equity may intervene and require that the insured be made whole before the insurer’s right to subrogation arises. *Id.* § 61:20; *see also* ROBERT E. KEETON & ALAN I. WIDISS, *INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES* § 3.10(1), at 219-20 (student ed. 1988); 46A C.J.S. *Insurance* § 1466, at 361 (1993). *Cf.* *Equity Fire & Cas. Co. v. Youngblood*, 927 P.2d 572 (Okla. 1996) (Make whole rule is the majority view. ERISA Plans provision may, under certain circumstances, circumvent the application of the common law make whole rule).

“Made” whole is generally computed by determining whether total recovery exceeds total loss. If total recovery exceeds total loss then the insurer may seek subrogation. *See CNA Ins. Cos. v. Johnson Galleries*, 639 So. 2d 1355 (Ala. 1994).

68. Generally, in the absence of a clear and unambiguous provision, an insurance company may not seek to enforce its right to subrogation against its insured. 46A C.J.S. *Insurance* §§ 1465-1466 (1993). However, if insured recovers from the tortfeasor and has received the proceeds of the policy he must account therefor to the company. *Id.* § 1470.

wrongdoer.⁶⁹ When the amount paid by the insurer under the insurance policy does not cover the insured's total loss, leaving an excess loss to be paid by the tortfeasor, the insured retains the right of action for the entire loss.⁷⁰ Consequently, in the action against the tortfeasor, the claim in essence belongs to the insured and the insurer is deemed to be merely an indispensable party. As such, the role of the insurer in the litigation is quite limited.⁷¹ However, because subrogation "is founded upon the relationship of the parties and upon equitable principles, for the purpose of accomplishing the ends of justice,"⁷² the insured is obligated to protect the insurer's subrogation interest when pursuing its claim against the tortfeasor.⁷³ Thus, when the insured pursues its claim against the tortfeasor,

the insured becomes a trustee and holds the amount of recovery, equal to the indemnity for the use and benefit of the insurer. [This] rule is founded on the principle that the wrongful act was single and indivisible, and gives rise to but one liability. Upon this theory the splitting of cause of action is avoided and the wrongdoer is not subjected to a multiplicity of suits.⁷⁴

In insurance subrogation cases, where both the insurer and insured have claims against the tortfeasors, there is but one cause of action for the entire

69. Some jurisdictions recognize the right of the insurance company to bring an independent action to recover directly from the tortfeasor. Where the insurance company has paid the insured's entire loss it is the real party in interest and must sue in its own name. *Id.* §§ 1490-1492.

70. *Id.* §§ 1491-1492.

71. See, e.g., *Safeco Ins. Co. v. United States Fidelity & Guaranty Co.*, 679 P.2d 816, 818 (N.M. 1984) (insurer's presence as party should not be revealed to the jury, but that after judgment insurer can come forward and present evidence proving its subrogated interest); *Landrum v. National Union Ins. Co.*, 912 P.2d 324 (Okla. 1996) (even where insurer has right to intervene court may take any appropriate steps to prevent intervenor from prejudicing the trial of the action).

72. JOHN ALAN APPLEMAN, 6A INSURANCE LAW AND PRACTICE § 4054, at 142-44 (1995).

73. 46A C.J.S. *Insurance* §§ 1491-1493 (1993). The right to subrogation, where provided in the policy, may allow an insurance company which has paid its insured for a loss to recover payments made to the insured by the party responsible for that loss to the extent of the payment made. *Id.* § 1470.

74. *Bowen v. American Family Ins. Group*, 504 N.W.2d 604, 605 (S.D. 1993); see also *North River Ins. Co. v. McKenzie*, 74 So. 2d 599 (Ala. 1954); *Erwin, Inc. v. Arkansas Louisiana Gas Co.*, 550 S.W.2d 174 (Ark. 1977); *Krause v. State Farm Mut. Auto. Ins. Co.*, 169 N.W.2d 601 (Neb. 1969); *Amica Mut. Ins. Co. v. Maloney*, 903 P.2d 834 (N.M. 1995); *Farmers Ins. Exch. v. Arlt*, 61 N.W.2d 429 (N.D. 1953); *Muskogee Title Co. v. First Nat'l Bank & Trust Co.*, 894 P.2d 1148 (Okla. Ct. App. 1995).

"Although the judicial decisions are in conflict, a majority hold that a splitting of a tort cause of action is not allowed. Furthermore, at least some of the decisions that appear to approve splitting the action actually can be explained on a rationale that is consistent with the majority rule." KEETON & WIDISS, *supra* note 67, § 3.10(2), at 242-43.

recovery, and that action lies in the name of the insured.⁷⁵ The insurer, however, is entitled to: (1) join with the insured and participate in settlement negotiations for the entire settlement amount; and, (2) intervene in any legal action.⁷⁶ Where the insurer chooses not to exercise either of these rights it is deemed to be relying upon the efforts of the insured to protect its subrogation interest.⁷⁷

Producers of insurance products, in lieu of subrogation provisions in the policy, have circumvented the fund doctrine by contractually articulating the basis of the right to recover from third parties in terms of assignments, loans or reimbursement provisions. For example, in *Mathews v. Bankers Life & Casualty Co.*,⁷⁸ plaintiff's attorney sought recovery of fees from client's insurer for having reached a successful settlement of the plaintiff's claim with a third party tortfeasor. The policy provided that insurer would pay charges incurred by insured if: "[t]he family member (or if incapable, his or her legal representative) agrees in writing to pay us back *out of any third party payments*, for charges we've paid."⁷⁹ Under this provision, Bankers Life advanced its insured James Godwin \$114,776.50 for medical expenses incurred as a result of an automobile accident with a third-party tortfeasor.

The policy in issue was drafted for the purpose of avoiding application of the common fund doctrine.⁸⁰ Consequently, the court formulated the dispositive issue as:

whether an insurance policy which expressly grants insurer a right to be reimbursed out of any fund which insured recovers from third parties but does not expressly grant a right to subrogate to the insured's claim against third parties avoids application of "the common fund" doctrine even though the insurer is entitled to reimbursement out of the insured's recovery.⁸¹

Though an issue of first impression, the court analyzed the issue from the perspective of equity and recognized that the right to reimbursement out of the fund recovered from the third-party tortfeasor, rather than the right to be subrogated to the claim, triggers application of the common fund doctrine.⁸²

The influence of equity on the analysis in *Mathews* is reflected in the manner

75. 46A C.J.S. *Insurance* §§ 1491-1493 (1993); see also *Krause*, 169 N.W.2d at 601; *Furia v. City of Philadelphia*, 118 A.2d 236 (Pa. Super. Ct. 1955); *Tennessee Farmers Mut. Ins. Co. v. Pritchett*, 391 S.W.2d 671 (Tenn. Ct. App. 1964).

76. 46A C.J.S. *Insurance* §§ 1491-1493 (1993).

77. See *supra* note 75; see also *State Farm Mut. Auto. Ins. Co. v. Elkins*, 451 S.W.2d 528 (Tex. App. 1970); *Metropolitan Life Ins. Co. v. Ritz*, 422 P.2d 780 (Wash. 1967); *Newcomb v. Cincinnati Ins. Co.*, 22 Ohio St. 382 (1872).

78. 690 F. Supp. 984 (M.D. Ala. 1988).

79. *Id.* at 985 (emphasis in original).

80. *Id.* at 986.

81. *Id.*

82. *Id.* at 987; see also *Lee v. State Farm Mut. Ins. Co.*, 129 Cal. Rptr. 271 (Cal. Ct. App. 1976).

in which the court dealt with the judicial observation that:

[a]pplication of the "common fund" doctrine to the facts of this case is not particularly compelling since plaintiffs have recovered already a large attorney fee and the Godwins [clients] have obtained a recovery substantially in excess of five million dollars.⁸³

Though client and attorney, in the principal case, had been substantially compensated the court recognized the unfair impact that a contrary rule might have where the client's recovery was less than, equal to, or slightly more than the amount owed the insurer.⁸⁴ Under any of these circumstances the client would receive little if anything and still owe an attorney fee, while the insurer received full reimbursement at no cost. Such a result, the court concluded, would be "manifestly unjust."⁸⁵ As a whole, the decision in *Mathews* demonstrates equity's regard for substance over form.⁸⁶

IV. COMMON FUND APPLICATION TO INSURANCE SUBROGATION

The common fund doctrine was first conceptualized in the context of insurance subrogation law in the case of *Newcomb v. Cincinnati Insurance Co.*⁸⁷ Therein, the court in ascertaining the extent of an insurance company's subrogation right against proceeds in the hands of its insured observed that:

[w]here the assured, as in case of partial insurance, sustains a loss, in excess of the reimbursement or compensation by the underwriter, he has an undoubted right to have it satisfied by action against the wrong-doer. But if, by such action, there comes into his hands, any sum for which, in equity and good conscience, he ought to account to the underwriter, reimbursement will, to that extent, be compelled in an action by the

83. *Mathews*, 690 F. Supp. at 987.

84. *Id.*

85. *Id.*

86. *Wilkie v. Philadelphia Life Ins. Co.*, 197 S.E. 375, 378 (S.C. 1938). Substance not form is controlling; consequently, a document labeled "loan receipt," "assignment," or "reimbursement agreement," which is in substance a right to subrogation parading in disguise will be treated as a right to subrogation. *State Farm Mut. Auto. Ins. Co. v. Geline*, 179 N.W.2d 815, 819 (Wis. 1970).

Though similar in effect, a significant distinction exists between the legal rules applicable to a subrogation provision and a reimbursement provision. The right to subrogation substitutes the insurer in the place of the insured and entitles the former to assert the action and rights of the latter. Reimbursement, on the other hand, entitles the insured to repayment of the amount paid by the insured. In determining whether a provision is one of subrogation or reimbursement the language used and the rights granted must be examined. Where the language gives the insurer the right to assert the action and rights of the insured against the tortfeasor, the provision is treated as one of subrogation. "A true reimbursement provision does not allow the insurer to proceed against the tortfeasor." *Barreca v. Cobb*, 668 So. 2d 1129, 1131 (La. 1996); *see also* *Metropolitan Life Ins. Co. v. Ritz*, 422 P.2d 780 (Wash. 1967).

87. 22 Ohio St. 382 (1872).

latter, based on his right in equity to subrogation. But the assured will not, in the forum of conscience, be required to account for more than the surplus, which may remain in his hands, after satisfying his own excess of loss in full, and his reasonable expenses incurred in its recovery; unless the underwriter shall, on notice and opportunity given, have contributed to, and made common cause with him, in the prosecution.⁸⁸

This articulation of the doctrine merely accorded an insured, in a partial insurance case, the right to calculate the costs and expenses of recovering from the third party in the equation for determining whether he had been fully compensated for his loss.⁸⁹ The common fund doctrine, as we now know it however, was first articulated by the Nebraska Supreme Court in *United States Automobile Assn. v. Hills*.⁹⁰ In *Hills*, the court observed that:

the applicable rule is that where the holder of the subrogation right does not come into the action, whether he refuses to do so or acquiesces in the plaintiff's action, but accepts the avails of the litigation, he should be subjected to his proportionate share of the expenses thereof, including attorney's fees.⁹¹

As in other types of cases to which the fund doctrine has been applied, an attorney seeking compensation from the proceeds represented by the recovered subrogation fund must have assumed the risk and expenses of litigation to the exclusion of the insurance company and successfully contributed to the existence or protection of the subrogation proceeds in which his client and the insurance company have a mutual interest.⁹² However, the doctrine has a number of requirements peculiar to the insurance subrogation context.

For example, early application of the fund doctrine in subrogation cases required that the attorney provide the holder of a subrogated interest with timely notice that a claim has or will be asserted and that unless the holder elects to join in the action as a party thereto, a reasonable fee for services rendered in accomplishing collection of the subrogated interest will be charged.⁹³ This

88. *Id.* at 388.

89. *Camden Fire Ins. Ass'n v. Missouri, Kan. & Tex. Ry. Co.*, 175 S.W. 816, 821 (Tex. App. 1915) (citing *Newcomb*, 22 Ohio St. at 388). The modern rule is that attorney fees may not be computed in determining whether there is an excess available for subrogation. Thus, attorney fees may not be considered in computing an insured's total loss. See, e.g., *CNA Ins. Cos. v. Johnson Galleries*, 639 So. 2d 1355 (Ala. 1994); see also *supra* note 10.

90. 109 N.W.2d 174 (Neb. 1961).

91. *Id.* at 177.

92. The attorney's client, as well as the passive beneficiaries, must have a mutual interest in the fund in order to apply the fund doctrine. See *Mathews v. Bankers Life & Cas. Co.*, 690 F. Supp. 984, 987 (M.D. Ala. 1988); *In re Cash Currency Exch., Inc. v. Shamrock Hill Farm, Inc.*, 80 B.R. 113, 115 (Bankr. N.D. Ill. 1987); *B.P. North Am. Trading, Inc. v. Vessel Panamax Nova*, 784 F.2d 975, 977 (9th Cir. 1986).

93. STUART M. SPEISER, ATTORNEYS' FEES § 10:3, at 378 (1973); see also *Newcomb*, 22

requirement was extracted from the judicial articulation of the doctrine in *Newcomb*. The objective of the notice requirement, also expressed in *Newcomb*, is to provide the insurance company an opportunity to join the action and to be represented by counsel of its own choosing.⁹⁴

The notice requirement, as described above, never received widespread judicial acceptance. This fact is due, in large part, to the insurance industry's development and adoption of sophisticated and complex contracts of adhesions which contained comprehensive subrogation provisions designed for the sole purpose of strengthening the company's position and protecting its right to subrogation. The standard form contract not only defined the extent of the company's rights, but also obligated the insured to notify, protect and cooperate with the company in the enforcement of its rights. Consequently, when common fund application to insurance began to gain widespread acceptance, the notice requirement was relaxed.⁹⁵ This relaxation was effectuated by placing the burden on the insurance company, if it wished to be informed of the insured's intention to assert a claim against the tortfeasor, to insert such a provision in the subrogation agreement.⁹⁶

Obligating insurance companies to require notice in the contract of insurance is not unduly burdensome. This requirement merely corresponds with the practice already engaged in by a substantial segment of the industry.⁹⁷ Insurers, simultaneously with payment of the proceeds under the policy, as a matter of course apprise the insured of the terms and conditions of the payment. Thereafter the insured, obligated by the terms of the policy and rules of equity, stands in a position of trust to the extent of the payment made.⁹⁸ Insurers also customarily notify the third-party tortfeasor of his or her right to indemnification.

Ohio St. at 382; *Commercial Standard Ins. Co. v. Combs*, 460 S.W.2d 770 (Ark. 1970); *State Farm Mut. Auto. Ins. Co. v. Geline*, 179 N.W.2d 815 (Wis. 1970).

94. See *supra* note 93.

95. See, e.g., *Alfa Mut. Ins. Co. v. Head*, 655 So. 2d 975 (Ala. 1995) (request for fees made during course of litigation); *County Workers Compensation Pool v. Davis*, 817 P.2d 521 (Colo. 1991) (request for fees made during course of litigation); *Tennessee Farmers Mut. Ins. Co. v. Pritchett*, 391 S.W.2d 671 (Tenn. Ct. App. 1964).

96. See *Washington Fire & Marine Ins. Co. v. Hammett*, 377 S.W.2d 811, 812 (Ark. 1964); *Davis*, 817 P.2d at 526 n.5; see also *Barreca v. Cobb*, 668 So. 2d 1129 (La. 1996). In *Barreca*, the court stated that:

[I]n subrogation cases, an important prerequisite to the assessment of attorney fees is timely notice to the insurer. Timely notice is necessary to allow the insurer to exercise its right to join the action, or bring its own action, and be represented by legal counsel of its own choosing if it so elects.

Id. at 1132.

97. As observed in the text, the objectives of the notice requirement were to give the insurer an opportunity to join the action as a party and to choose an attorney of its choice. These objectives are not compromised by placing the notice requirement in the law of subrogation. See *supra* notes 95 & 96.

98. See 46A C.J.S. *Insurance* §§ 1469-1470 (1993).

Notice to the tortfeasor, prior to settlement with the insured, binds the tortfeasor to the right, claims and interest of the insurer.⁹⁹ Consequently, the third-party tortfeasor can not escape his or her obligation to indemnify the insurer by subsequently settling with the insured.¹⁰⁰

Though notice of an intent to file a claim against the tortfeasor is not a literal requirement for common fund application in a majority of jurisdictions, notice from the insured's attorney to the insurance company can serve another purpose unique to fund doctrine application. As a matter of practice, notification is often used by the attorney to express his willingness to represent and protect the subrogated interest of the insurer. Notice in this context, even if the offer of representation is rejected, evidences the fact that the attorney recognizes, appreciates and intends to protect the interest of the insurance company along with that of his client. Thus, the insurer is aware that the attorney expects to be compensated. Notice of a willingness to represent also negates the existence of an adversarial relationship which operates as a defense to common fund application.¹⁰¹

An insurance company's rejection of insured's attorney's offer to represent the insured alone does not necessarily preclude application of the fund doctrine.¹⁰² This rule, though not absolute, has been applied with some consistency where the insurer rejects an offer, directs insured's attorney to take no action to protect its interest, and thereafter fails to take any action to protect its own interest.¹⁰³ The decisional law explains this result as a consequence of the rule against splitting causes of actions.¹⁰⁴ However, the better explanation is that equity does not favor the position of one who sits idly by and allows another, who obviously expects to be paid, to perform valuable services for him, to escape

99. *See id.* § 1472.

100. *Id.*

101. *See CNA Ins. Cos. v. Johnson Galleries*, 639 So. 2d 1355, 1359 (Ala. 1994); *Commercial Union Ins. Co. v. Scott*, 158 S.E.2d 295, 297 (Ga. Ct. App. 1967).

The requirement that the relationship between the client and the passive beneficiaries of the fund not be adversarial is based on the general proposition that the same attorney may not represent adverse parties in the same action. Consequently, the relationship is not adversarial unless the subrogor is denying that subrogee has a subrogated interest in the proceeds. Conflicts, such as disputes over the right to intervene, distribution of the funds or as between the subrogee and the attorney as to the attorney's right to, or amount of a fee, do not involve the type of adverse relationship which would preclude application of the common fund doctrine. *See Lyons v. GEICO Ins. Co.*, 689 So. 2d 182, 184 (Ala. Civ. App. 1997); *Baier v. State Farm Ins. Co.*, 361 N.E.2d 1100, 1102-03 (Ill. 1977).

102. *See, e.g., Forsyth v. Southern Bell Tel. & Tel. Co.*, 162 So. 2d 916 (Fla. Dist. Ct. App. 1964); *United Servs. Auto. Ass'n v. Hills*, 109 N.W.2d 174 (Neb. 1961).

103. *See, e.g., Commercial Standard Ins. Co. v. Combs*, 460 S.W.2d 770 (Ark. 1971); *Forsyth*, 162 So. 2d at 916; *Hills*, 109 N.W.2d at 174; *Lancer Corp. v. Murillo*, 909 S.W.2d 122 (Tex. App. 1995).

104. *Hills*, 109 N.W.2d at 174; *Travelers Ins. Co. v. Williams*, 541 S.W.2d 587, 589 (Tenn. 1976).

with the value of those services without compensating for same.¹⁰⁵

Application of the foregoing rule has by no means been universal. For example, in *Travelers Insurance Co. v. Williams*,¹⁰⁶ the insurance company wrote the insured's attorney and advised him not to protect its subrogation right and that it would protect its own interest.¹⁰⁷ Thereafter, it communicated its right to be indemnified to the tortfeasor's liability carrier. Months later, a settlement was executed and the insured sought to have Travelers, which had done nothing in addition to notifying the parties of its interest, pay a pro rata share of the costs and attorneys fees expended in achieving the settlement. The court, after discussing the merits and objectives of the fund doctrine, noted that:

This device, known as the "fund doctrine," was invented by courts of equity to prevent passive beneficiaries of the fund from being unjustly enriched. It is therefore, never applied against persons who employed counsel on their own account to represent their interests. Thus, the right to employ counsel of one's own choosing is preserved.¹⁰⁸

Justice Brock, writing for the court in *Travelers*, observed that the issue of whether the attorney was entitled to a fee depended upon the existence of an express, implied or quasi contractual relationship between the attorney and insurance company.¹⁰⁹ Relying upon this analysis, Justice Brock concluded that no such relationship existed in light of the insurer's rejection of the attorney's services. This conclusion, according to Justice Brock, was also supported by the absence of any unjust enrichment on the part of the company.¹¹⁰

The holding and dictum of *Travelers* do not accurately reflect or characterize the state of the law in the majority of jurisdictions. The common fund doctrine, contrary to the court's opinion, has been consistently applied against insurance companies which have retained counsel and even intervened in the litigation.¹¹¹

105. See, e.g., *Tennessee Farmers Mut. Ins. Co. v. Pritchett*, 391 S.W.2d 671 (Tenn. Ct. App. 1964). Therein, the court observed that the case was "another glaring example of an insurance company sitting back on its haunches, doing nothing and waiting to get its share of a claim procured by attorneys, but not wanting to pay its share of an attorney's fee." *Id.* at 674.

106. 541 S.W.2d 587 (Tenn. 1976); see also *Wyoming Farm Bureau Mut. Ins. Co. v. Mondale*, 502 P.2d 39 (Mont. 1972) (court reached same result without referring to common fund doctrine). The holdings and dicta in decisional law from other jurisdictions seemingly support the view espoused by the court in the *Travelers* opinion. In these cases, however, the refusal to apply the fund doctrine was not premised solely upon the rejection of the offer of representation as in *Travelers*, but rather upon the fact that the insurer actively participated in the recovery. See, e.g., *Abston v. Aetna Cas. & Sur. Co.*, 346 N.W.2d 63 (Mich. Ct. App. 1983); *Oakley v. Fireman's Fund*, 470 N.W.2d 882 (Wis. 1991).

107. *Travelers Ins. Co.*, 541 S.W.2d at 590.

108. *Id.* at 590 (citations omitted).

109. *Id.*

110. *Id.*

111. See, e.g., *Alston v. State Farm Mut. Auto. Ins. Co.*, 660 So. 2d 1314 (Ala. Civ. App. 1995); *Castellari v. Partners Health Plan*, 860 P.2d 593 (Colo. Ct. App. 1993); *Amica Mut. Ins. Co.*

Furthermore, the fund doctrine in conjunction with the facts of the *Travelers* case, provides the required implied or quasi contractual relationship that serves as the foundation for the award of fees. Thus, where the insurance company rejects the offer of representation, sits by and subsequently seeks to recover in full from the insured, equity recognizes not only the existence of an implied or quasi contractual relationship, but also unjust enrichment on the part of the company. This view is in keeping with the basic premise of the fund doctrine which is to prevent *passive beneficiaries* from being unjustly enriched by requiring them to bear a share of the cost of the litigation.¹¹²

An insurance company's rejection of representation is not the sole determinative factor in determining common fund application.¹¹³ Were the case otherwise, the insurance industry could immunize itself from the consequences of the doctrine by merely unambiguously disclaiming the services of attorneys, other than one chosen by the company. Unambiguous policy provisions which provide that the insured may not deduct expenses incurred in the recovery of funds payable to the insurance company are valid.¹¹⁴ However, no recorded opinion has withstood the ambiguity analysis.¹¹⁵

A company's rejection of an offer of representation from the insured's attorney is better considered along with the other actions of the company. For example, where the company declines the offer of representation and informs the attorney that it will pursue an alternative avenue to protect its interest and does

v. Maloney, 903 P.2d 834 (N.M. 1995); *Lancer Corp. v. Murillo*, 909 S.W.2d 122 (Tex. App. 1995).

112. See *supra* note 39 and accompanying text.

113. See *Dunn v. State Farm Ins., Co.*, 426 N.E.2d 315 (Ill. 1981).

114. See *Wiswell v. Shelby Mut. Ins. Co.*, 515 N.E.2d 1214 (Ohio Ct. App. 1986).

115. Courts universally agree that insurance contracts are to be construed as any other contract. The principle of freedom of contract, except where it has been declared to contravene public policy, is applicable to every aspect of the insurance policy. The exercise of the right to freely contract in the context of insurance has, at time, fallen victim to judicial scrutiny. For example, it is uniformly agreed that in the absence of ambiguity the provisions of the insurance contract control. This observation has been made in the context of both the principle of subrogation and the common fund doctrine. However, courts have short circuited application of this rule by applying either the doctrine of ambiguity, the reasonable expectations of the insured, or the maxim of unconscionability. The dynamic of looking beyond the principle of freedom of contract merely reflects that judicial discretion to respond to equity cannot be bargained away. Thus, the principle of equity is subject to judicial review even where the parties have otherwise entered into an agreement. Equity is the exclusive domain of the judiciary. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Clinton*, 518 P.2d 645 (Or. 1974); *Higginbotham v. Arkansas Blue Cross & Blue Shield*, 849 S.W.2d 464 (Ark. 1993), *rev'g Franklin v. Healthsource of Arkansas*, 942 S.W.2d 837 (Ark. 1997) (allowing the literal language of the contract to control ignores insured's equitable right to subrogation). Cf. *Wiswell*, 515 N.E.2d at 1214 (court upheld policy provision).

For a detailed discussion of the most influential principles and doctrines employed by courts to justify looking beyond the insurance contract, see KEETON & WIDISS, *supra* note 67, §§ 6.1-6.3, at 614-45.

in fact pursue the alternative avenue, then the doctrine is certainly inapplicable.¹¹⁶ Preclusion of the doctrine however, arises not out of the company's rejection of the offer of representation, but rather out of the fact that it was not a passive but active contributor to the fund.¹¹⁷ This approach to the problem has led to the development of the uniformly accepted— active beneficiary and incidental benefit—defenses to common fund application. The common fund doctrine is not an absolute rule. It is limited to the preservation or creation of a fund and does not allow for the recovery of fees incurred in attempting to recover the initial fees.¹¹⁸ There are two defenses which an insurer can assert to avoid having to pay a share of the insured's attorneys fees and costs. The first is the active participation defense. This defense requires that the insurer prove that it actively participated in or its efforts substantially contributed to the creation or preservation of the subrogated fund.¹¹⁹ The extent to which an insurer must actively participate or contribute to the recovery to avoid application of the fund doctrine varies from jurisdiction to jurisdiction. Some jurisdictions require very little participation and have rejected application of the doctrine when the insurer rejects the offer of representation from insured's attorney, hires its own counsel and intervenes in the litigation or pursues an alternate theory of recovery.¹²⁰ The focus of the examination in these jurisdictions is on whether the insurer was a passive beneficiary in the literal sense of the term.

Other jurisdictions require substantially more participation or contribution and define the defense accordingly:

[I]n order for the insurer to claim active participation in a settlement, it must demonstrate that it participated in the settlement negotiations with the insured for the *entire* settlement and substantially contributed to that *total* settlement award. Similarly, to show active participation in a judgment against the tortfeasor, the insurer must show that it intervened in the suit and participated in the case. . . or at the very least demonstrate that it significantly contributed to discovery.¹²¹

Whether the insurer has substantially participated or contributed under this definition turns upon whether it performed services in aid of the recovery of the fund.¹²² It is the value of the services expended by insurer in the creation of the

116. See *Washington Fire & Marine Ins. Co. v. Hammett*, 377 S.W.2d 811 (Ark. 1964); *Osborne v. State Farm Mut. Auto. Ins. Co.*, 923 P.2d 304 (Colo. Ct. App. 1996); *Dunn*, 426 N.E.2d at 318; *Abston v. Aetna Cas. & Sur. Co.*, 346 N.W.2d 63 (Mich. Ct. App. 1983); *Oakley v. Fireman's Fund*, 470 N.W.2d 882, 887 (Wis. 1991).

117. See *supra* note 116.

118. See, e.g., *Amica Mut. Ins. Co. v. Maloney*, 903 P.2d 834 (N.M. 1995).

119. See *County Workers Compensation Pool v. Davis*, 817 P.2d 521 (Colo. 1991); *Maloney*, 903 P.2d at 834; *Lancer Corp. v. Murillo*, 909 S.W.2d 122 (Tex. App. 1995).

120. See *Dunn*, 426 N.E.2d at 318; *Abston*, 346 N.W.2d at 66; *Oakley*, 470 N.W.2d at 883.

121. *Maloney*, 903 P.2d at 840 (emphasis added).

122. See, e.g., *Alston v. State Farm Mut. Auto. Ins. Co.*, 660 So. 2d 1314 (Ala. Civ. App. 1995); *Blue Cross & Blue Shield v. Freeman*, 447 So. 2d 757 (Ala. Civ. App. 1983); *Kavanaugh*

fund which is the decisive factor.¹²³

The second defense to common fund application is the incidental benefit rule. This defense is ordinarily recognized in cases where the insurer has attempted to actively protect its interest without involving itself in the insured's efforts. For example, in *Dunn, Brady, Goebel, Ulbrich, Morel, Kombrink & Hundman v. State Farm Insurance Co.*¹²⁴ The insurer rejected the insured's attorney's offer of representation and informed said attorney that it would pursue its claim directly with the tortfeasor's liability carrier. Thereafter, insurer's efforts led to an agreement with the tortfeasor's carrier whereby its subrogation claim would be paid in installments. Months later, both insurer and insured, on the same day, signed release agreements with the liability carrier. The attorney for insured thereafter sought fees from insurer. The court expressly noted that "the facts graphically demonstrate that defendant [insurer] expended direct and substantial time and energy in pursuing its subrogation claims directly with Commercial."¹²⁵ Consequently, any benefit that insurer received from the insured's litigation was purely incidental.¹²⁶ The same conclusion was reached in *Osborne v. State Farm Mutual Automobile Insurance Co.*¹²⁷ which involved very similar facts.

The incidental benefit defense is also applicable to instances in which the insured's attorney asserts a position adverse to the insurer's subrogation interest.¹²⁸ Thus, in *CNA Insurance Co. v. Johnson Galleries*,¹²⁹ the court, as a result of the insured's attorney's legal position, observed that

if the attorney is simply acting on behalf of his client, and a benefit only incidentally comes to others, the attorney is not entitled to a fee from those receiving the incidental benefit. In this regard, a benefit can be incidental, rather than an intended, result of an attorney's efforts, if the relationship between the attorney and the "nonclient" person receiving the benefit is an adversarial one.¹³⁰

An adversarial position by the insured's attorney is not a defense if it does not go toward the creation of the fund.¹³¹ Thus, conflicts over whether the insurer

v. City of Sunnyvale, 284 Cal. Rptr. 698 (Cal. Ct. App. 1991); *Castellari v. Partners Health Plan*, 860 P.2d 593 (Colo. Ct. App. 1993); *Lancer Corp.*, 909 S.W.2d at 125.

123. Merely intervening in the litigation or notifying the parties of the subrogation interest does not assist or aid in the creation of the fund in these jurisdictions. *See supra* note 121.

124. *Dunn*, 426 N.E.2d at 317.

125. *Id.* at 318.

126. *Id.*

127. 923 P.2d 304 (Colo. Ct. App. 1996).

128. *See, e.g.*, *CNA Ins. Cos. v. Johnson Galleries*, 639 So. 2d 1355 (Ala. 1994); *Baier v. State Farm Ins. Co.*, 361 N.E.2d 1100 (Ill. 1977); *Peppertree Resorts, Ltd. v. Cabana Ltd.*, 431 S.E.2d 598 (S.C. App. 1993).

129. *CNA Ins. Cos.*, 639 So. 2d at 1355.

130. *Id.* at 1359 (citations omitted).

131. *Baier*, 361 N.E.2d at 1103.

should be allowed to intervene, how much subrogee is entitled to or between the attorney and subrogee as to the amount of the fees, do not involve the adverse relationship with which the defense is concerned.¹³²

The distinction between the substantial participation/contribution and incidental benefit defenses is at times obscure. However, the former is primarily concerned with the value of the insurer's services in the context of either the insured's settlement efforts or litigation. The latter is primarily concerned with the value of the attorney's services when compared to the means employed by the insurer, other than joining in insured litigation or settlement efforts, to protect its own interest. The focus of both defenses is on the value of the services to the creation of the fund. It is only in those instances where the value of the insurer's services is so substantially disproportionate to that of the insured's attorney that they constituted an insignificant contribution toward the creation of the fund that either defense is applicable.

One other peculiarity of the common fund doctrine in the context of insurance subrogation law is the practice of requesting the tortfeasor's liability carrier to submit payment in the form of multiple drafts—one to the order of attorney and client and the other to the order of the attorney and insurer.¹³³ This practice did not evolve out of any legal requirement. Rather it was developed as a means of avoiding inconvenience to the insured, the client of both the attorney and subrogee. This practice not only prevents inconvenience but also does not jeopardize the legal position of any of the parties, including the liability carrier.

CONCLUSION

The paths along which the common fund doctrine has developed have been clear and well defined. All states, except New Hampshire and Wyoming, have adopted the common fund doctrine. Jurisdictions which have adopted the doctrine have uniformly applied it to trust and class action cases. However, only 20 states have expressly recognized that the doctrine is applicable to insurance subrogation cases.¹³⁴ The remaining jurisdictions have either not addressed this

132. *Id.*; see also *Alfa Mut. Ins. Co. v. Head*, 655 So. 2d 975 (Ala. 1995).

133. See, e.g., *Commercial Standard Ins. Co. v. Combs*, 460 S.W.2d 770 (Ark. 1970); *United Servs. Auto. Ass'n v. Hills*, 109 N.W.2d 174 (Neb. 1961); *State Farm Mut. Auto. Ins. Co. v. Clinton*, 518 P.2d 645 (Or. 1974).

134. See *Blue Cross & Blue Shield v. Freeman*, 447 So. 2d 757, 759 (Ala. Civ. App. 1983); *Washington Fire & Marine Ins. Co. v. Hammett*, 377 S.W.2d 811, 813 (Ark. 1964); *Lee v. State Farm Mut. Auto. Ins. Co.*, 129 Cal. Rptr. 271 (Cal. Ct. App. 1976); *County Workers Compensation Pool v. Davis*, 817 P.2d 521, 526 (Colo. 1991); *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162 (Del. 1989) (no limitations on the type of cases to which doctrine applies); *Forsyth v. Southern Bell Tel. & Tel. Co.*, 162 So. 2d 916 (Fla. Dist. Ct. App. 1964); *Baier*, 361 N.E.2d at 1102; *Lafayette Orthopedic Clinic v. Guardianship of Bell*, 670 N.E.2d 956, 958 (Ind. Ct. App. 1996); *Barreca v. Cobb*, 668 So. 2d 1129 (La. 1996); *Foremost Life Ins. Co. v. Waters*, 337 N.W.2d 29 (Mich. Ct. App. 1983); *United Servs. Auto. Ass'n v. Hills*, 109 N.W.2d 174, 175 (Neb. 1961); *Amica Mut. Ins. Co. v. Maloney*, 903 P.2d 834, 837 (N.M. 1995); *Wiswell v. Shelby Mut. Ins. Co.*, 515 N.E.2d

issue or not had opportunity to apply the doctrine in the context of insurance subrogation. Nevertheless, it should be noted that there is no logical reason to limit the doctrine to class actions and trust cases. The imposition of a trust or class action requirement "would be inconsistent with the equitable foundations of the common benefit exception. . . . The form of suit is not a deciding factor; rather, the question to be determined is whether a plaintiff, in bringing a suit either individually or representatively, has conferred a benefit on others."¹³⁵ This position is consistent with that of the United States Supreme Court in *Sprague v. Ticonic National Bank*,¹³⁶ wherein it was observed that "the absence of an avowed class suit . . . hardly touch[es] the power of equity in doing justice as between a party and the beneficiaries of his litigation."¹³⁷

1214, 1216 (Ohio Ct. App. 1986); *Clinton*, 518 P.2d at 647; *Caldwell v. Keystone Ins. Co.*, 243 A.2d 448 (Pa. Super Ct. 1968); *Peppertree Resorts Ltd. v. Cabana Ltd.*, 431 S.E.2d 598, 600 (S.C. Ct. App. 1993); *Tennessee Farmers Mut. Ins. Co. v. Pritchett*, 391 S.W.2d 671, 674 (Tenn. Ct. App. 1964); *State Farm Mut. Auto. Ins. Co. v. Elkins*, 451 S.W.2d 528 (Tex. App. 1970); *Metropolitan Life Ins. Co. v. Ritz*, 422 P.2d 780 (Wash. 1967); *State Farm Mut. Auto. Ins. Co. v. Geline*, 179 N.W.2d 815 (Wis. 1970).

135. *Tandycrafts, Inc.*, 562 A.2d at 1166 (quoting *Reiser v. Del Monte Properties Co.*, 605 F.2d 1135, 1139-40 (9th Cir. 1979)); see also *Citizens Action Coalition v. PSI Energy, Inc.*, 664 N.E.2d 401 (Ind. Ct. App. 1996).

136. 307 U.S. 161 (1939).

137. *Id.* at 167.