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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 INS 03156

Blue Cross Blue Shield of North Carolina Petitioner, v. NC Department of Insurance Respondent, and Andrea Greene, Josiah Greene, Richard Greene, and Greene and Son, Inc., Respondent-Intervenors, and The North Carolina Advocates for Justice, Amicus Curiae.	**PROPOSAL FOR SUMMARY JUDGMENT**

THIS MATTER came on for hearing before the Undersigned pursuant to the Parties' Cross Motions for Summary Judgment. All parties having been given the opportunity to be heard, the matter is now ripe for disposition.

APPEARANCES

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PARTIES

1. Petitioner Blue Cross Blue Shield of North Carolina ("Blue Cross") is a North Carolina hospital service corporation, as defined by Article 65 of Chapter 58 of the North Carolina General Statutes. Blue Cross is a health insurer licensed and supervised by the Commissioner of Insurance pursuant to N.C. Gen. Stat. §§ 58-65-1, 58-2-125.

2. Respondent N.C. Department of Insurance ("DOI") is a state agency of North Carolina subject to the provisions of Article 3A of the North Carolina Administrative Procedure Act. N.C. Gen. Stat. § 150B-38(a)(3). DOI is charged with the execution of laws related to insurance. N.C. Gen. Stat. § 58-2-1. The chief officer of DOI is the Commissioner of Insurance (the "Commissioner"), an elected officer of North Carolina. N.C. Const. art. III, § 7; N.C. Gen. Stat. § 58-2-5.

3. Respondent-Intervenors Andrea Greene and Richard Greene are the parents of Respondent-Intervenor Josiah Greene and members of a health benefit plan purchased by Respondent-Intervenor Greene and Sons, Inc. from Blue Cross. (Respondent-Intervenors are referred to herein collectively as the "Greenes").

4. The North Carolina Advocates for Justice ("NCAJ") is an association of legal professionals with expertise in representing clients in personal injury matters, including matters of reimbursement and insurance policies.

ISSUE

Does 11 N.C.A.C. 12 .0319 (the "Antisubrogation Rule") prohibit the inclusion in a health benefit plan of a provision giving the insurance company the right to reimbursement of benefits paid to an insured who has received payments from a liable third party?

PROCEDURAL BACKGROUND

1. On September 30, 2020, Blue Cross filed two requests seeking DOI approval to add a provision to its benefits booklets for certain health insurance plans pursuant to N.C. Gen. Stat. § 58-65-40 and 11 N.C.A.C. 12 .0329. Hereinafter, this proposed provision is referred to as the "Reimbursement Provision."

2. On the same date, DOI denied approval of the Reimbursement Provision, citing 11 N.C.A.C. 12 .0319 (the "Antisubrogation Rule").

3. On October 6, 2020, Blue Cross submitted a request for reconsideration to DOI.

4. On October 30, 2020, Blue Cross appealed DOI's decision by filing a "Petition for Final Agency Decision and Request for Public Hearing" with DOI pursuant to N.C. Gen. Stat. § 150B-38 and 11 N.C.A.C. 1 .0401.

5. On June 7, 2021, DOI denied Blue Cross' request for reconsideration. Letter from Ted A. Hamby, Deputy Insurance Commissioner, June 7, 2021.

6. On July 15, 2021, DOI directed the Director of the Office of Administrative Hearings. ("OAH") to appoint an Administrative Law Judge to preside over the hearing pursuant to N.C. Gen. Stat. §§ 58-2-55 and 150B-40(e). This contested case was commenced the same day.

7. On August 18, 2021, Blue Cross filed an amended petition with OAH.

8. On November 9, 2021, NCAJ and the Greenes filed a Motion to Intervene. At hearing on the proposed intervention on December 3, 2021, NCAJ withdrew its Motion to Intervene and moved to participate as *amicus curiae*. The Undersigned granted the Greenes' motion to intervene and NCAJ's motion to participate as *amicus curiae* on December 13, 2021.

9. On December 22, 2022, DOI and the Greenes filed a Joint Motion for Summary Judgment.

10. On January 10, 2023, Blue Cross filed a Motion for Partial Summary Judgment.

11. The Motions for Summary Judgment and partial Summary Judgment were heard before the Undersigned on January 25, 2023. All parties having been given the opportunity to be heard, the Matter is now ripe for disposition.

UNCONTESTED FACTS

1. The Reimbursement Provision would provide Blue Cross with a contractual right to be reimbursed by a plan participant for medical payments Blue Cross paid to medical providers. The reimbursement would be required in cases where the insured receives a payment as a result of the insured's injury by a potentially liable third party, such as a tortfeasor, and in certain other cases.

2. On October 9, 2000, DOI issued a one page memorandum to the insurance provider community regulated by DOI advising that, pursuant to the Antisubrogation Rule, "subrogation provisions, including any provisions having the same effect or result of subrogation, are prohibited in life and accident and health policies." Memorandum of Maston T. Jacks, DOI Deputy Commissioner, Life and Health Division, dated October 9, 2000 (the "Memorandum").

3. DOI staff relied on the Memorandum for their September 30, 2020 denial of inclusion of the Reimbursement Provision in Blue Cross health plans. A DOI deputy commissioner also relied on the Memorandum for his denial of Blue Cross' request for reconsideration.

CONCLUSIONS OF LAW

1. OAH has personal and subject matter jurisdiction over this contested case. The parties received proper notice of the hearing in the matter. To the extent that the Uncontested Facts contain Conclusions of Law, or that the Conclusions of Law are Uncontested Facts, they should so be considered without regard to the given labels.

2. DOI is subject to Article 3A of Chapter 150B. N.C. Gen. Stat. § 150B-38(a)(3).

3. DOI properly instructed the Director of OAH to assign an administrative law judge to act as a hearing officer in this contested case. N.C. Gen. Stat. §§ 58-2-55; 150B-40(e).

4. The Undersigned has the authority and duties of a DOI hearing officer, under Article 3A and DOI rules. The Undersigned must make a proposal for final decision on this matter to the Commissioner of Insurance. N.C. Gen. Stat. § 150B-40(e).

5. The purpose of summary judgment is to bring litigation to an expeditious and efficient conclusion on the merits where only a question of law on the undisputable facts is in controversy. Summary judgment is proper under Rule 56 of the North Carolina Rules of Civil Procedure if "there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56; 11 N.C.A.C. 1 .0414(1) and .0416(6).

6. Summary judgment "is an extreme remedy and should be awarded only where the truth is quite clear." *Lee v. Shor*, 10 N.C. App. 231, 233, 178 S.E.2d 101, 103 (1970). "[A]ll inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

7. "[W]hen a moving party has met his burden of showing that he is entitled to an award of summary judgment in his favor the nonmoving party cannot rely on the allegations or denials set forth in her pleading, and must, instead, forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment." *Steele v. Bowden*, 238 N.C. App. 566, 577, 768 S.E.2d 47, 57 (2014) (internal citation omitted).

8. Blue Cross is required to obtain approval from DOI to include the Reimbursement Provision in Blue Cross health plans. Once the request to include the Reimbursement Provision was submitted, DOI was required to make a determination whether the Reimbursement Provision

conformed to the requirements of Articles 65 and 66 of Chapter 58 of the North Carolina General Statutes, and all rules promulgated by DOI under the authority of those Articles. DOI was required to notify Blue Cross of its approval or disapproval of the inclusion of the Reimbursement Provision. N.C. Gen. Stat. § 58-65-40.

9. Sitting as hearing officer in this contested case, the Undersigned's authority is limited to proposing that the Commissioner of Insurance (the "Commissioner") either approve or disapprove of the inclusion of the Reimbursement Provision in Blue Cross health plans. *Id*.

10. The Memorandum is a nonbinding interpretative statement without legal authority.

11. The interpretation of rules is informed by the canons of statutory construction.

12. "Statutory interpretation properly begins with an examination of the plain words of the statute." *Lanvale Properties, LLC v. Cty. of Cabarrus*, 366 N.C. 142, 154, 731 S.E.2d 800, 809 (2012) (citation and quotation marks omitted). "[U]ndefined words in a statute 'must be given their common and ordinary meaning' when interpreting the plain language." *Schooldev East, LLC v. Town of Wake Forest*, 284 N.C. App. 434, 445, 876 S.E.2d 607, 617 (2022) (citation omitted). "To determine the intended meaning of the language, courts may resort to dictionaries to determine definitions of words within statutes." *Black v. Littlejohn*, 312 N.C. 626, 638, 325 S.E.2d 469, 478 (1985) (citing *State v. Martin*, 7 N.C. App. 532, 173 S.E.2d 47 (1970)).

13. "An additional principle of statutory construction recognizes that 'when a term has long-standing legal significance, it is presumed that legislators intended the same significance to attach by use of that term, absent indications to the contrary, . . .' *Sheffield v. Consolidated Foods*, 302 N.C. 403, 276 S.E.2d 422 (1981). Intertwined with this same principle is the general rule that 'when technical terms or terms of art are used in a statute they are presumed to have been used with their technical meaning in mind, absent a legislative intent to the contrary. *In Re Appeal of Martin*, 286 N.C. at 77-78, 209 S.E.2d at 744 (1974)." *Black*, 312 N.C. at 639, 325 S.E.2d at 478.

14. When a rule is directed at matters affecting the community generally, the words used have the meaning attached to them in the common and ordinary use of language. If the statute or rule affects a particular community, and the words used are those that community knows and understands have a particular meaning, then the words may be construed as a term of art having that particular meaning, though it may differ from the common or ordinary meaning of the words.

15. The word "subrogation," when used in the context of North Carolina insurance law, means 1) the right of an insurer to stand in the shoes of its insured to pursue a claim against a liable third party (herein referred to as "traditional subrogation"), or 2) the right of an insurer to recover, from its insured, payments made to the insured by a liable third party (herein referred to as "reimbursement"), or 3) both traditional subrogation and reimbursement. The context of the use of the word "subrogation" is the indicator of which of the three possible meanings apply in a given case.

16. The term "subrogation of benefits" in the Antisubrogation Rule means the right of an insurer to recover benefits paid to an insured either by traditional subrogation or by reimbursement.

17. DOI must prohibit the inclusion of the Reimbursement Provision in Blue Cross health plans as it is "a provision allowing subrogation of benefits" prohibited by the Antisubrogation Rule.

ANALYSIS

I. Background

DOI promulgated a rule against subrogation (the "Antisubrogation Rule") in 1978. The Antisubrogation Rule provides, in its entirety, as follows:

> Life or accident and health insurance forms shall not contain a provision allowing the subrogation of benefits.
>
> 11 N.C.A.C. 12 .0319.

In the late 1990s, DOI relied on the Antisubrogation Rule to prohibit Blue Cross from adding "a subrogation or recovery of payments provision" to its health plans.[1] Blue Cross and other insurance companies whose plans were similarly affected by the Antisubrogation Rule sought a declaratory ruling that the rule was invalid as exceeding the Commissioner's statutory authority.

In upholding the validity of the Antisubrogation Rule, the North Carolina Court of Appeals did not examine the scope of the rule. Since the Court held that the Commissioner had "the broad authority to limit insurance policy provisions, like subrogation," a technical analysis of the phrase "subrogation of benefits" as used in the rule, was not necessary. *In re Declaratory Ruling by the N.C. Comm'r of Ins. Regarding 11 N.C.A.C. 12 .0319*, 134 N.C. App. 22, 30, 517 S.E.2d 134, 140 (1999).

In 2020, decades after *In Re Declaratory Ruling* was decided, Blue Cross submitted the Reimbursement Provision for DOI approval. Blue Cross does not deny that the Antisubrogation Rule applies to Blue Cross health plans. However, Blue Cross maintains that the Antisubrogation Rule prohibits only provisions granting it traditional subrogation rights. Blue Cross' objective in submitting the Reimbursement Provision was to negotiate a right to reimbursement provision that the Commissioner could approve as consistent with Chapter 58 of the General Statutes.

Blue Cross' request to include the Reimbursement Provision in its health plans was rejected the same day the request was submitted. In doing so, DOI staff relied on the interpretation of the Antisubrogation Rule contained in the Memorandum. The Memorandum states that "subrogation provisions, including any provisions having the same effect or result of subrogation, are prohibited in life and accident and health policies." DOI denied Blue Cross' request for reconsideration of

[1] Jt. Pet. For Dec. Ruling before Comm'r of Ins. Oct. 15, 1997, p 11. (Ex. B to Amicus Curiae Br. in Opp. to Mtn. for S.J). In seeking to add what it described as "a subrogation or a recovery payment provision" to its health plans, Blue Cross may have been seeking to gain some form of reimbursement right, but the record is not clear on this matter and the *In Re Declaratory Ruling* opinion does not address this.

denial and referred Blue Cross' petition for public hearing and final determination to OAH to hold a hearing and to prepare a proposed final decision.

Blue Cross seeks an ultimate ruling from the Commissioner that - 1) the Antisubrogation Rule does not apply to reimbursement provisions, and 2) the approval of a provision allowing Blue Cross some rights to reimbursement which will satisfy the requirements of Chapter 58.

II. The Reimbursement Provision is a Provision Allowing "Subrogation of Benefits" and thus Prohibited by the Antisubrogation Rule.

A. The Meaning of "Subrogation of Benefits" is Ambiguous.

The parties disagree on the scope of the Antisubrogation Rule. Does it prohibit only traditional subrogation, or does it also prohibit reimbursement?

Neither the word "subrogation" nor the phrase "subrogation of benefits" is defined in Chapter 58, which contains the statutes authorizing the Antisubrogation Rule. "[U]ndefined words in a statute 'must be given their common and ordinary meaning' when interpreting the plain language." *Schooldev*, 284 N.C. App. at 445, 876 S.E.2d at 617 (citation omitted). "To determine the intended meaning of the language, courts may resort to dictionaries to determine definitions of words within statutes." *Black*, 312 N.C. at 638, 325 S.E.2d at 478 (citing *State v. Martin*, 7 N.C. App. 532, 173 S.E. 2d 47 (1970)).

Merriam-Webster's definition of "subrogation" describes only traditional subrogation:

> the act of subrogating. *specifically*: the assumption by a third party (such as a second creditor or an insurance company) of another's legal right to collect a debt or damages.

Subrogation, Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/subrogation (last accessed March 23, 2023).

Black's Law Dictionary also defines "subrogation" as traditional subrogation. The entry, in relevant part, reads as follows:

> The principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.

Subrogation, Black's Law Dictionary (11th ed. 2019).

The definition of "subrogation clause," in relevant part, describes traditional subrogation, but also includes a type of reimbursement recovery:

> (1872)1. Insurance. A provision in a property- or liability-insurance policy whereby the insurer acquires certain rights upon paying a claim for a loss under the policy.

> These rights include (1) taking legal action on behalf of the insured to recover the amount of the loss from the party who caused the loss, and (2) receiving a full or proportionate amount of the benefits (such as disability compensation) **paid to the insured under a statutory plan.**
>
> *Subrogation Clause*, Black's Law Dictionary (11th ed. 2019) (emphasis added).

Neither of these dictionaries provide a definition for the phrase "subrogation of benefits." Modifying the concept of traditional subrogation with the words "of benefits" renders the plain meaning of the phrase nonsensical. In the context of a rule governing health plans, "benefits" means payments from the insurer to the insured for an injury covered by the health plan.[2] An insurer can be said to be subrogated to the *rights* of the insured to pursue a claim for *damages* from a liable third party. However, an insured has a claim for "benefits" only against the insurance company to whom he pays his health plan premiums.

As Blue Cross has argued convincingly throughout this contested case, there is no principle of substitution involved when an insurer seeks reimbursement of benefits it has paid to its insured from its insured. "'[R]eimbursement' is limited to repayment by the insured; no parties are substituted." 1/10/23 Pet'r. Br. in Opp. to MSJ, p. 6.

There are many ways that a rule could express the meaning that only traditional subrogation was intended, the simplest of which would be to not include the phrase "of benefits" and merely prohibit provisions "allowing subrogation." Since "no part of a statute is mere surplusage, . . . each provision adds something not otherwise included therein," *Duke Power Co. v. High Point*, 69 N.C. App. 378, 387, 317 S.E.2d 701, 706 (1984), this Tribunal may not ignore the words "of benefits." Thus, the phrase "subrogation of benefits" is ambiguous and judicial construction is required to ascertain the meaning of the Antisubrogation Rule.

B. "Subrogation" has a Meaning within the Community of North Carolina Insurers and Insurance Regulators Distinct from that of the Nonspecialized Legal Community.

1. The meaning understood within the relevant community controls.

> When a term has long-standing legal significance, it is presumed that legislators intended the same significance to attach by use of that term, absent indications to the contrary, . . .' *Sheffield v. Consolidated Foods*, 302 N.C. 403, 276 S.E. 2d 422 (1981). Intertwined with this same principle is the general rule that 'when technical terms or terms of art are used in a statute they are presumed to have been used with their technical meaning in mind, absent a legislative intent to the contrary.' *In Re Appeal of Martin*, 286 N.C. at 77-78, 209 S.E. 2d at 744 (1974).
>
> *Black*, 312 N.C. at 639, 325 S.E.2d at 478.

[2] *E.g.* N.C. Gen. Stat. § 58-50-75(a)(c)(1) ("benefits" defined for the purpose of health benefit plan external review statutes).

The Antisubrogation Rule is directed at the highly regulated community of North Carolina health plan providers and written by regulators of that community. Therefore, if "subrogation" is a word understood differently by that community than it is by the general community, the targeted community's understanding would control. Thus, this Tribunal must examine the use of the term "subrogation" within the community of North Carolina health plan providers who are subject to the rule and those assisting and regulating these insurers.

As discussed above, the sole North Carolina case involving the Antisubrogation Rule, *In re Declaratory Ruling*, addressed only whether the rule was within the statutory authority of the Commissioner to promulgate. *In re Declaratory Ruling by the N.C. Comm'r of Ins. Regarding 11 N.C.A.C. 12 .0319*, 134 N.C. App. 22, 517 S.E.2d 134 (1999). The Court of Appeals in that case was not asked to address the meaning of "subrogation of benefits" as used in the Antisubrogation Rule.

Nonetheless, the Court described traditional subrogation in the second paragraph of its decision. "Known historically as the principle of substitution, the doctrine of subrogation allows a party who has compensated a creditor under the color of some obligation, to step into the shoes of the creditor, thereby succeeding to the creditor's rights to proceed against the debtor for reimbursement." *Id.* at 24, 517 S.E.2d at 137 (citing *Journal Pub. Co. v. Barber*, 165 N.C. 478, 487–88, 81 S.E. 694, 698 (1914)).

However, the *In re Declaratory Ruling* Court did not restrict its own use of the term "subrogation" to cases involving traditional subrogation. The Court referred to *Moore v. Beacon*, 54 N.C. App. 669, 284 S.E.2d 136, 138, *disc. rev. den.*, 305 N.C. 307, 291 S.E.2d 150 (1981) as a case in which "equitable subrogation rights have been recognized in the context of recovering payments for medical expenses, as in uninsured motorists automobile insurance policies." 134 N.C. App. at 31-32, 517 S.E.2d at 141. The *Moore* case did not involve the insurer acquiring the rights of the insured against a third party, but something more akin to reimbursement. The insurer sought to deny the insured additional benefits for the same medical benefits twice, once under an uninsured motorist clause and again under a medical payments clause. No principles of substitution were involved in this case.

That the *In Re Declaratory Ruling* Court did not examine the scope of the Antisubrogation Rule may reflect the general understanding that, by the time of the adoption of the Antisubrogation Rule, the term "subrogation" had broadened from its creation in equity as a means for one party to obtain another's right to a claim against a third party, to include an insurance company's right to reimbursement by its insured who had already recovered from the third party. Further evidence of expansion of the meaning of "subrogation" in the insurance law context is found in North Carolina statutes and legal and insurance industry writing, as discussed below.

2. North Carolina Statutes Governing Governmental Insurers Refer to Reimbursement Rights as "Subrogation."

The community of insurance providers and their regulators using the term "subrogation" to describe reimbursement includes the North Carolina General Assembly. Two North Carolina statutes governing the rights of governmental health plans to reimbursement refer to these rights

as "subrogation." One statute grants the State Health Plan the right to recover benefits by - 1) standing in the shoes of its insured to pursue the insured's claim, *i.e.*, traditional subrogation, and 2) pursuing an insured for reimbursement. The second statute grants the state Medicaid plan the right to reimbursement from the proceeds a Medicaid beneficiary receives from a tortfeasor. Although they are not located within Chapter 58, these statutes illustrate the legislature's understanding of the meaning of "subrogation" in the context of insurance recoveries.

The statute governing the "subrogation" rights of the North Carolina State Health Plan provides as follows:

> (a) The Plan shall have the **right of subrogation** upon all of the Plan's members right to recover from a liable third party for payment made under the Plan, for all medical expense, including provider, hospital, surgical, or prescription drug expenses, to the extent those payments are related to an injury caused by a liable third party. The Plan member shall do nothing to prejudice these rights. The Plan has the right to first recovery on any amounts so recovered, **whether by the Plan or the Plan member**, and whether recovered by litigation, arbitration, mediation, settlement, or otherwise . . ..
> . . .
> (c) In the event a Plan member recovers any amounts from a liable third party to which the Plan is entitled under this section, the Plan may recover the amounts directly from the Plan member . . ..
>
> N.C. Gen. Stat. § 135-48.37 (emphasis added).

The term "subrogation" used by the legislature in North Carolina's Medicaid subrogation statute, N.C. Gen. Stat. § 108A-57, entitled "Subrogation rights; withholding information a misdemeanor," applies the term "subrogation" **solely** to the Medicaid plan right of reimbursement. Nothing in the "subrogation" statute gives the State the right to sue the tortfeasor in the name of the injured person.

> The statute, in its pertinent part, provides as follows:
>
> Notwithstanding any other provisions of the law, to the extent of payments under this Part, the State shall be **subrogated** to all rights of recovery, contractual or otherwise, of a beneficiary against any person. Any claim brought by a medical assistance beneficiary against a third party shall include a claim for all medical assistance payments for health care items or services furnished to the medical assistance beneficiary as a result of the injury or action, hereinafter referred to as the "Medicaid claim."
> . . .
>
> The medical assistance beneficiary or any attorney retained by the beneficiary shall, out of the proceeds obtained by or on behalf of the beneficiary by settlement with, judgment against, or otherwise from a third party by reason of injury or death, distribute to the Department the amount due pursuant to this section as follows . . .

N.C. Gen. Stat. § 108A-57.

3. Insurance Industry and Legal Writings Refer to Recovery by Reimbursement as "Subrogation."

The general understanding of the term "subrogation" in the insurance context is found in submissions of third-party publications by Blue Cross to this Tribunal. Many of the submissions support the broader definition of the term "subrogation" in the insurance law context as found in the North Carolina statutes discussed above.

For example, The Rawlings Company, a subcontractor for Blue Cross engaged in the business of helping insurance companies obtain reimbursement of medical benefits from insureds, publishes a book entitled *The Rawlings & Associates National Subrogation Law Manual.* The book surveys state laws governing traditional subrogation and reimbursement. The text of the book uses the term "subrogation" solely for traditional subrogation. However, the title of the manual reflects the common understanding of the term to include reimbursement.

On The Rawlings Company website, its manual is described as follows:

> We publish the only national treatise on subrogation, *The Rawlings & Associates National Subrogation Law Manual*. Currently in its 26th edition, this manual is the expert resource used by the entire industry for advice and guidance on how to proceed with subrogation law.

Res.-Int. Notice of Filing, 8/31/22, p 5.

Another example of a Blue Cross submission suggesting the right of reimbursement is properly termed a right of subrogation is Stephen J. Spurr, *The Growth of Subrogation and the Future of Personal Injury Litigation*, 36(6) J. Ins. Reg. 1, 16 (2017). Petitioner's Reply filed November 7, 2022, Exhibit B. In a section entitled, "What is Subrogation?" a footnote contains the following from a Connecticut Supreme Court decision:

> The proposition is well established that an insurer's right to subrogation . . . includes a claim against any judgment secured by the insured against any party at fault for the amount paid by the insurer in satisfaction of the insured's damage claim . . ..

Automobile Ins. Co. of Hartford v. Conlon, 153 Conn. 415, 419, 216 A.2d 828, 829 (1966) (citations omitted).

The Connecticut case was decided in 1966, well before the Antisubrogation Rule was adopted in 1978. An article cited in the Spurr article contains the same quote and asserts, generally, not with respect to Connecticut law alone:

> The right of subrogation technically gives the insurer only the right to recover from the tortfeasor or other third parties, but not from its insured. Nevertheless, it has

> come to include the right of an insurer to recover its outlays, either from a tortfeasor or from an insured who has already collected from a tortfeasor.

Jeffrey A. Greenblatt, *Insurance and Subrogation: When the Pies Isn't Big Enough, Who Eats Last?*, 64 U. Chi. L. Rev. 1337, 1338 (1997).

Another example of scholarly work submitted by Blue Cross, a North Carolina law journal, shows the broad meaning of subrogation was common as early as 1948. June F. Entman, *More Reasons for Abolishing Federal Rule of Civil Procedure 17(a): The Problem of the Proper Plaintiff and Insurance Subrogation*, 68 N.C. L. Rev. 893 (1990). The article quotes the 1948 edition of Moore's Federal Practice to the effect that insurance companies are "entitled by principles of subrogation" to reimbursement from insured from funds insured received from tortfeasor. Moore, 2 *Moore's Federal Practice*, ¶ 1.02(a)[1] at 113 n.1, cited in 68 N.C. L. Rev. at 913.

The author criticizes Moore as failing "to distinguish a right to reimbursement from a right to bring suit," but not with respect to his use of the term "subrogation." Instead, she maintains that the distinction is necessary to determine the real party in interest. 68 N.C. L. Rev. at 913. Earlier, the author, herself, stated that the the right to subrogation includes reimbursement:

> At a minimum, a compensating insurer may be entitled to reimbursement from damages recovered from a third party liable for the compensated loss. . . . The term 'subrogation,' however, typically implies much more. It means that the insurer has acquired all of the rights of the insured—including the right to bring suit—with regard to that portion of the insured's claim that the insurer has compensated. When the insurer is subrogated in this sense, . . ."

68 N.C. L. Rev. at 909. The contrast of the right to "reimbursement from damages recovered from a third party" to "all of the rights of the insured – including the right to bring suit" clearly indicated the author recognized that insurers can be "subrogated" in two ways, reimbursement and traditional subrogation.

4. Blue Cross Referred to the Right of Reimbursement when Explaining the Public Benefit of Subrogation in 1997.

In a document submitted during the *In Re Declaratory Ruling* proceeding, Blue Cross stated that "the insurer's right to subrogation" would mean "allowing an insurer to recover for benefits paid to an insured when the insured has received payment from third-party tortfeasor for the same loss . . .." Jt. Pet. For Dec. Ruling before Comm'r of Ins. Oct. 15, 1997, p 11. (Ex. B to Amicus Curiae Br. in Opp. to Mtn. for S.J). Blue Cross was already the major insurance provider in North Carolina in the late 1990s. The use of the term "subrogation" to mean reimbursement by a prominent member of the North Carolina health plan provider community governed by the Antisubrogation Rule is evidence of the distinct meaning of that term to the community.

5. *The Meaning of the Term "Subrogation" Given by Courts in other Jurisdictions is not Persuasive*.

Blue Cross provided this Tribunal with law from other States which distinguishes, in the context of insurers of health plans, "subrogation" as a right of an insurer to an insured's claim against a third party, from the right to reimbursement. Presumably, the insurance provider and regulator community in those jurisdictions would not use "subrogation" to refer to both the rights to a claim and the rights to reimbursement from an insured's recovery on a claim. However, Blue Cross has presented no North Carolina law making this distinction. Indeed, as discussed above, the few references found in North Carolina statutes regarding reimbursement rights refer to those rights as "subrogation." This Tribunal has found no evidence that "subrogation of benefits," as used in the Antisubrogation Rule, is or was in 1978 when the rule was adopted, understood in North Carolina by the relevant community, as applying only to traditional subrogation.

The edition of Black's Law Dictionary quoted above for the definitions of "subrogation" and "subrogation clause" ignores the existence of the jurisdictions making the distinction between "subrogation" and "reimbursement," in its definition of "antisubrogation rule." The entry for "antisubrogation rule" reads, in its entirety, as follows:

> (1993) Insurance. The principle that an insurance carrier has no right of subrogation — that is, no right to assert a claim on behalf of the insured or for payments made under the policy — against its own insured for the risk covered by the policy. See subrogation.

Antisubrogation Rule, Black's Law Dictionary (11th ed. 2019).

The cite to the entry to "subrogation," which entry is quoted above, is interesting as that entry defines subrogation as only traditional subrogation. The inconsistency of stating that the "right of subrogation" includes a right of an insurance carrier to "payments made under the policy against its own insured" and then citing a definition of subrogation which restricts its meaning only to the "right to assert a claim on behalf of the insured" can only be understood as an indication that the meaning of "subrogation" in the insurance provider context is not everywhere understood to be limited to traditional subrogation. Based on the discussion above, this Tribunal concludes that the "subrogation of benefits" in the North Carolina insurance provider and regulator community includes both methods by which a medical benefits provider is compensated for benefits paid out, either by pursuing a claim against a liable third party (*i.e.*, traditional subrogation), or by reimbursement of the benefits by its insured from payments the insured has obtained from a liable third party.

This Tribunal finds that the commonly understood meaning of a "provision allowing subrogation of benefits" includes provisions, such as the Reimbursement Provision. The Antisubrogation Rule prohibits to the Reimbursement Provision because the provision allows "subrogation of benefits." Pursuant to the Antisubrogation Rule, the Commissioner must prohibit the inclusion of the Reimbursement Provision in Blue Cross health plans.

CONCLUSION

The Antisubrogation Rule prohibits the inclusion of the Proposed Reimbursement Provision in Blue Cross health plans. Since the Memorandum is a correct interpretation of the Antisubrogation Rule and not an illegal rule, this Tribunal finds that DOI did not use improper procedure in relying on the Memorandum for the denial of Blue Cross' request for approval of the inclusion of the Reimbursement Provision.

PROPOSAL FOR DECISION

BASED UPON the foregoing, the Undersigned proposes that the Insurance Commissioner deny Petitioner's request to add the Reimbursement Provision to the "Additional Terms of Your Coverage" section of its benefits booklet and GRANT summary judgment in favor of Respondent and Respondent-Intervenors. The Undersigned further proposes that Blue Cross' Motion for Partial Summary Judgment be denied.

NOTICE

The agency making the final decision in this contested case is required to give each party an opportunity to file exceptions to this Proposal for Decision, to submit proposed Findings of Fact and to present oral and written arguments to the agency. N.C.G.S. § 150B-40(e).

The agency that will make the final decision in this contested case is the North Carolina Department of Insurance.

A copy of the final agency decision or order shall be served upon each party personally or by certified mail addressed to the party at the latest address given by the party to the agency and a copy shall be furnished to any attorney of record. N.C.G.S. § 150B-42(a).

IT IS SO ORDERED.

This the 24th day of March, 2023.

Linda F. Nelson
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center which subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 24th day of March, 2023.

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