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MAY PLAINTIFFS INCLUDE THE UNITED STATES’ CLAIM UNDER THE FEDERAL MEDICAL CARE RECOVERY ACT WITHOUT GOVERNMENT INTERVENTION?

Major Michael F. Noone, Jr.

Soon after the inception of the Hospital Recovery Claims Program, Government agencies concluded that the most effective means of asserting and collecting claims under the provisions of 42 U.S.C. 2651-3 would be through the injured party’s attorney. Since approximately 95% of all personal injury claims are settled prior to trial, the question of who could sue if the claim could not be settled amicably remained unresolved. At the end of the first year all agencies were advised to request the plaintiff’s lawyers to include the Government’s claim as an item of special damages if suit were filed. Within a few months questions arose as to the injured party’s right to assert the Government’s claim and the necessity for the United States to be a party to the suit. In response to these questions the following information was distributed to the field:

The right of the injured party to assert the United States claim in his own name finds support in the general rule permitting a subrogor or partial-assignor to sue for the entire amount in his own name, the question of distribution being a matter exclusively between the subrogor and subrogee or assignor and assignee (Annot. 167 A.L.R. 1242; 46 C.J.S., Insurance, Sec. 1209; 29 Am. Jur., Insurance, Sec. 174). And the same bulletin contained a model allegation to be included in the injured party’s complaint:

Where the attorney for the injured party asks for a suggestion as to the form of allegation to be included in the injured party’s complaint, the Department of Justice recommends (after the allegation of the injuries):

As a result of said injuries the plaintiff has received (and in the future will continue to receive) medical and hospital care and treatment furnished by the United States of America. The plaintiff, for the sole use and benefit of the United States of America under the provisions of 42 United States Code 2651-2653, and with its express consent, asserts a claim for the reasonable value of said (past and future) care and treatment.

In the past 2½ years relatively few cases have arisen in which the injured party’s right to assert the Government’s claim has been challenged, but, in those few cases, the problem has been a serious one because neither the injured party’s attorney nor the base staff judge advocate have been prepared to oppose the defense motion to either strike the Government’s claim or name the United States a necessary party to the plaintiff’s suit. Of course, in jurisdictions which do not follow the collateral source doctrine the subrogor/assignor analogy outlined above is inapplicable. Nor can this argument be

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Rosenberg & Sovern, Delay and the Dynamics of Personal Injury Litigation, 59 Colum L. Rev. 1116, 1124.

Item I, AFJAG Repr. 1964/1 at 23, 18 Jan 1964.

Item IB, AFJAG Repr. 1964/13 at 29, 7 Dec 1964.

Vol. X, No. 5
used in those jurisdiction which require that the subrogee/assignee must be a named party in the assignor/subrogor's suit.7

While the Government's right to intervene has been firmly established,8 agencies prefer not to request Department of Justice intervention for two reasons: The burden on the U.S. Attorney's office (often located at some distance from the court in which the plaintiff's suit is to be heard) and the fact that the Government's claim is relatively so small that the U.S. Attorney, who has absolute authority over all affirmative claims of $5,000 or less, is prone to compromise the case while, if the plaintiff's attorney had included the claim in his suit, the Government could reasonably have expected payment in full.

Thus, any Air Force legal office handling Hospital Recovery Claims in the United States should be prepared with a brief explaining why the injured party has a right to include the United States' claim in his suit. There are two different defense plows which may call the brief into play: (1) The defense may question the right of the plaintiff's lawyer to represent the United States in full. (2) The defense may question the plaintiff's right to assert the Government's claim with no mention being made of the attorney's standing. It was to this motion that the 1964 JAG Reporter item9 was addressed. The Government argues since the statute describes its right as being one of subrogation,10 the general rules of subrogation apply. Among those rules is the principle that when the injured party's loss exceeds the amount paid by the insurer, the insurer is not a necessary or proper party to the suit. In this regard the annotations at 96 ALR 871 and 159 ALR 1245 supply cases in point for nearly every jurisdiction in the United States. However, since both annotations are somewhat dated and are not readily available in most legal offices, a brief discussion of each jurisdiction with appropriate citations should give base legal offices an outline for its brief:

1. United States: The Supreme Court has held that an insurer who makes a property damage settlement is authorized to sue in his own name as a real party in interest.11 Thus, the question arises as to whether the United States is a real party in interest and a necessary party within the meaning of Rules 17(a) and 19(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. Using Acta Casualty as authority it may be argued that the United States is a real party in interest but, that it is neither indispensable nor necessary. Although one district court has

7 Article 697 of the Louisiana Code of Civil Procedure states that the subrogee is the only party who can recover subrogated expenses. Smith v. Foucha, 172 So. 2d 378 (Ct. App. La. 1965) applied this rule to an injured party's suit in which, with the Government's consent, he had asserted a medical recovery claim. That portion of the suit was dismissed on appeal. See also Irby v. Government Employees Ins. Co., 175 So. 2d 97 (Ct. App. La. 1965).
10 The assertion of an insurance company's claim by a plaintiff's lawyer is common subrogation practice: The only difference in Medical Care Recovery Act claims is that the injured party's attorney has agreed not to charge the Government a fee,11 since it is prohibited by statute.12 Or, (2) the defense may question the plaintiff's right to assert the Government's claim with no mention being made of the attorney's standing. It was to this motion that the 1964 JAG Reporter item13 was addressed. The Government argues since the statute describes its right as being one of subrogation,14 the general rules of subrogation apply. Among those rules is the principle that when the injured party's loss exceeds the amount paid by the insurer, the insurer is not a necessary or proper party to the suit. In this regard the annotations at 96 ALR 871 and 159 ALR 1245 supply cases in point for nearly every jurisdiction in the United States. However, since both annotations are somewhat dated and are not readily available in most legal offices, a brief discussion of each jurisdiction with appropriate citations should give base legal offices an outline for its brief:
11 See note 3 supra.
disagreed, two other districts have held that the insured may sue in his own name for the full amount of the loss and that the tort-feasor may not seek joinder of the insurer.14

2. Alabama: Cases have held that the defendant may not object to an insured's suing for the full amount of the loss. Allen v. Zikos, 37 Ala. App. 361, 68 So. 2d 841 (1953); see also Carlisle v. Miller, 275 Ala. 440, 155 So. 2d 689 (1963).

3. Alaska: There are no reported cases involving this issue. Ishmael v. City Electric of Anchorage, Inc., 91 F. Supp. 688 (D. Alaska 1950) is not germane since it discusses the assignment of personal injury causes of action. Although a statement of assignment may be requested, it is not necessary and the United States' claim is one based on subrogation by operation of law.

4. Arizona: There are no recent cases directly in point. Harleysville Mutual Ins. Co. v. Lea, 2 Ariz. App. 353, 410 P. 2d 495 (1966), prohibits the voluntary assignment of a portion of a personal injury claim prior to judgment but, since Medical Care Recovery claims are not voluntarily assigned and since Arizona apparently follows the collateral source doctrine, there have been no objections to the injured party's assertion of the Government's claim.

5. Arkansas: McGeorge Contracting Co. v. Mizell, 216 Ark. 509, 222 S.W. 2d 566 (1950) held an insurer was not a real party in interest, that the insured could sue for the full amount of the loss, and that the portion which had previously been paid by the insurance company was held in trust for the latter. The rule was adhered to in Washington Fire and Marine Ins. Co. v. Hammett, 237 Ark. 954, 377 S.W. 2d 811 (1964).

6. California: The general rule that an insured may sue on behalf of the insurer and hold that portion of the recovery in trust for the latter was followed in Mode O'Day Corp. v. Ringsby Truck Lines, 100 Cal. App. 748, 224 P. 2d 368 (1950). Those California cases such as Field v. Manner v. Finston, Cal. 2d 354 P. 2d 1073, 1075 (1960), which prohibit assignment or subrogation of a personal injury case are distinguishable because under the Medical Care Recovery Act the Government does have a direct cause of action.

7. Colorado: A very early case, Crissie & Fowler Lumber Co. v. Denver & R. G. R. Co., 17 Colo. App. 275, 68 P. 670 (1902) states that an insured may sue on behalf of the insurer and hold the money in trust for the latter. The defendant has no grounds to object to such an arrangement.

8. Connecticut: Both Smith v. Waterbury & Milldale Tramway Co., 99 Conn. 446, 121 Atl. 937 (1923) and Conn. Bank & Trust Co. v. Zering, 2 Conn. Circ. Repts. 383, 199 A. 3d 18 (1963), stand for the proposition that the insured may sue for the full amount of the claim even though the insurer may have paid part of the loss and the Smith case also holds that the assignor remains the real party in interest.

9. Delaware: Catalfano v. Higgins, Del 188 A. 3d 357 (1962), ruled that an insurer's subrogation suit, even though payment in full had been made, must be under the name of the insured. This provision was noted by the local federal court in Hugley v. Aetna Casualty & Surety Co., 32 F.R.D. 340 (D. Dela. 1963) and in an opinion on the same case at 220 F. Supp. 147 (D. Dela. 1963).

10. District of Columbia: Boston Ins. Co. v. Eggleston, 185 A. 2d 914 (D.C. Mun. App. 1962) and Lanes v. Allstate Ins. Co., 136 A. 2d 586 (D.C. Mun. App. 1957) have both interpreted the federal cases discussed supra to mean that while the insurer may be a necessary party to the insured's suit, he is not an indispensable one.

11. Florida: Both Titus v. Emmco Ins. Co., Fla 109 So. 2d 781 (1959) and Scott v. Rosenthal, Fla 118 So. 2d 555 (1960) stand for the proposition that an insured may sue on behalf of the insurer. The Titus case states that the insured holds that portion of the judgment which relates

to the insurer's payment in trust for the latter. See also Florida Public Utilities Co. v. Wester, 150 Fla. 378, 7 So. 2d 788 (1942).


13. Hawaii: No reported cases discovered.

14. Idaho: Wilde v. Hansen, 70 Ida. 8, 211 P. 2d 153 (1949), held that an insured was the real party in interest in suing for property damage even though an insurer may have paid for the loss. See also Mitchell v. Dyer, 81 Ida. 344, 341 P. 2d 891 (1959).

15. Illinois: Standard Industries v. Thompson, 19 Ill. App. 2d 319, 152 N.E. 2d 500 (1958), allows an insurer to sue on behalf of the insured, and apparently the reverse is true as well.

16. Indiana: Powers v. Ellis, 231 Ind. 273, 108 N.E. 2d 132 (1952) and Risner v. Gibbons, Ind. App. Ind., 197 N.E. 2d 184 (1964), stand for the proposition that where the insurer has paid only a part of the loss, the insured may sue for the full amount and is the real party in interest.

17. Iowa: Clancy v. Ragdale, 251 Ia. 793, 102 N.W. 2d 890 (1960) and Kurseck v. Gee, 237 Ia. 1823, 25 N.W. 2d 312 (1946), are among those cases holding the insured to be the real party in interest and authorizing suit in his name only. See also Van Wie v. United States, 77 F. Supp. 22 (N.D. Iowa 1948).

18. Kansas: Two recent cases, Ellsaeesser v. Mid-Continent Casualty Co., 195 Kan. 117, 403 P. 2d 185 (1965) and Deemer v. Reichert, 195 Kan. 232, 404 P. 2d 174 (1965), have reaffirmed the right of the insured to sue on behalf of the insurer and hold the insurer's portion of the judgment in trust for him. Both cases also hold that the defendant may not move to join the insurer as a necessary party.

19. Kentucky: In Louisville & N.R. Co. v. Mack Mfg. Corp., 269 S.W. 2d 707 (Ky. App. 1954), the court held that an insurer who made partial payment of the loss sued for was subject to joinder as a necessary party. However, Works v. Winkle, 814 Ky. 91, 24 S.W. 2d 312 (1950), held that the insured could sue for the full amount.

20. Louisiana: As pointed out in the introduction, it was held in Smith v. Foucha, 172 So. 2d 318 (La. App. 1965), writ refused, 173 So. 2d 542 (La. App. 1965), that the United States, as subrogee, is the only party who can recover medical expenses. It should be noted, however, that the court stated that the injured party showed no authority to collect these expenses. And a subsequent decision by the same court, Irby v. Government Employees Insurance Co., 175 So. 2d 9 (La. App. 1965), considered an arrangement in which the injured party's attorney did represent the Government's interest and found nothing objectionable. Thus, an injured party may apparently sue for his medical expenses, with the Government's consent. Cudd v. Great American Insurance Co., 202 F. Supp. 237 (W. D. La. 1962) ; Ayers v. Watt, 185 So. 84 (La. App. 1938). The defendant has no grounds to object. Wood v. Becker Welding Co., 34 So. 2d 124 (La. App. 1948) ; Stein v. Williams Lumber Co., 36 So. 2d 62 (La. App. 1948).

21. Maine: Leavitt v. Canadian Pac. Ry. Co., 90 Me. 153, 37 Atl. 886, 38 L.R.A. 152 (1897) and Dyer v. Maine Cent. R. Co., 99 Me. 195, 58 Atl. 995 (1904) stand for the proposition that an insurer's suit for damages (paid in whole or in part) should be in the name of the insured, and it appears that an insured is authorized to sue on behalf of the insurer in his own name.

22. Maryland: No reported cases discovered.

23. Massachusetts: General Exchange Ins. Corp. v. Driscoll, 315 Mass. 360, 56 N.E. 2d 970 (1944), involved a suit by an insurer who had made a partial settlement with the insured and joined in the insured's suit against the tort-feasor. When the injured party (plaintiff) settled with the defendant, the insurer claimed an interest in the settlement and successfully sued the plaintiff's attorney. Dicta in General Exchange sug-
gests that Massachusetts still follows the rule of Stevens v. Stewart-Warner Speedometer Corp., 223 Mass. 44, 111 N.E. 771 (1915) that the insurer may sue in the name of the insured, and it may be assumed that the reverse is true as well.

24. Michigan: Apparently the insurer is normally required to join the insured's suit, General Accident Fire & Life Assur. Corp. v. Sircey, 354 Mich. 478, 93 N.W. 2d 315 (1958), but the defense may waive any objection, Coniglio v. Wyoming Valley Fire Ins. Co., 337 Mich. 38, 59 N.W. 2d 74 (1953). It should be noted that both these cases relate to suits where the insured did not sue for the full amount of the loss, and it may be that formal joinder is not necessary if the insured agrees to protect the insurer's interest in his suit for the full amount of the claim.

25. Minnesota: Blair v. Espeland, 231 Minn. 444, 43 N.W. 2d 274 (1950), held that where the insurer has not completely reimbursed the insured, the latter may sue for the total loss, holding the insurer's portion in trust if judgment is rendered in his favor. See also, Coble v. Lacy, 257 Minn. 352, 101 N.W. 2d 594 (1960); Hayward v. State Farm, 212 Minn. 500, 4 N.W. 2d 316 (1942); Flor v. Buck, 189 Minn. 131, 248 N.W. 743 (1938).

26. Mississippi: While there are no cases directly in point, Home Ins. Co. v. Hartshorn, 128 Miss. 282, 91 So. 1 (1922), implies that an insured may sue on behalf of his insurer assuming that his complaint alleges this loss as an item of damages.

27. Missouri: Subscribers Etc. v. Kansas City Public Service Co., 230 Mo. App. 468, 91 S.W. 2d 227 (1936), held that the insured could sue for the full amount of the loss, holding the subrogation portion of the judgment in trust for his insurer. Cf. General Exchange Ins. Corp. v. Young, 357 Mo. 1099, 212 S.W. 2d 396 (1948), and Hoorman v. White, ____ Mo. App. ____ , 349 S. W. 2d 379 (1961), where the insured had assigned his entire claim to the insurer.

28. Montana: One very early case, Gaugler v. Chicago, M. & P. S. Ry. Co., 197 Fed. 79, 83 (D. Mont. 1912), states that normal practice has been for a partial assignee to join with the assignor and sue in the name of both. Routinely, however, state courts in Montana have allowed the injured party to include the Government's claim in his suit.


30. Nevada: While there are no cases directly in point, Valley Powder Co. v. Toiyabe Supply Co., 80 Nev. 458, 386 P. 2d 137 (1964) seems to stand for the proposition that an insurer is the real party in interest only if it has paid the full extent of the loss while Davenport v. State Farm Mutual Automobile Ins. Co., 81 Nev. 361, 404 P. 2d 10, 11 (1965) implies that the injured party is the real party in interest for a suit involving, inter alia, reimbursed medical expenses.

31. New Hampshire: Zielinski v. Cornwall, 100 N. H. 34, 118 A. 2d 734 (1955) and Richard D. Brew & Co. v. Auclair Transportation, Inc., 106 N.H. 370, 211 A. 2d 897 (1965) stand for the proposition that the insured may sue for the full amount of the loss, and the former case held that the insurer's interest should not be revealed to the jury.

32. New Jersey: George M. Brewster & Son v. Catalytic Const. Co., 17 N.J. 20, 109 A. 2d 805 (1954) stands for the proposition that an insured may sue on behalf of the insurer while Federal Ins. Co. v. Englehorn, 139 N.J. Eq. 250, 50 A. 2d 833 (1947); 141 N.J. Eq. 349, 57 A. 2d 478 (1948) held that the insured will hold his recovery in trust for the insurer.

33. New Mexico: The leading case on this topic is Seliman v. Haddock, 62 N.M. 391, 310 P. 2d 1045 (1957), reconsidered on other grounds 66 N.M. 206, 345 P. 2d 416 (1959), which ruled that an insurer who paid a partial loss was an indispensable party to the suit on the grounds that to do otherwise would be to allow splitting of a cause of action. The decision was extensively criti-
cized in Walden, The "New Rules" in New Mexico, 25 F.R.D. 107, 123-128. A subsequent case, Home Fire & M. Ins. Co. v. Pan American Petroleum Corp., 72 N.M. 165, 381 P. 2d 675, 678 (1963) suggested that the federal procedure should be followed but the New Mexico court has continued to follow Sellman, Torres v. Gamble, 75 N.M. 741, 410 P. 2d 959 (1966). The United States Court of Appeals for the Tenth Circuit in Tyler v. Dowell, Inc., 274 F. 2d 890 (10th Cir. 1960) has acquiesced with some reluctance to this interpretation as it applies to cases arising in New Mexico.

34. New York: Cases involving the insured's right to include the insurer's claim in his suit appear to be inconsistent but may be divided into two groups. A series of cases hold that when a loan receipt has been issued, the insurer remains the real party in interest even though the full amount of the loss has not been paid. Simpson v. Hart-ranf, 157 Misc. 387, 283 N.Y.S. 764 (1935); accord Scarborough v. Bartholomew, 22 N.Y.S. 2d 635 (1940), aff'd without opinion, 263 App. Div. 765, 30 N.Y.S. 2d 971 (1941); see also Kuleim v. Bayza, 46 N.Y.S. 2d 869 (1944); Maurice Slater Trucking Co. v. Maus, 273 App. Div. 139, 77 N.Y.S. 2d 343 (1948), appeal denied 273 App. Div. 929, 78 N.Y.S. 2d 383 (1948). However, other cases in which no loan receipt was involved have held that the insured is the real party in interest and can sue for the full amount of the claim. See Henderson v. Park Central Motors Service, 225 App. Div. 788, 232 N.Y.S. 511 (1929), affirmed 183 Misc. 183, 244 N.Y.S. 2d 409 (1930); Zamochnick v. New York Cent. R. Co., 191 Misc. 368, 80 N.Y.S. 2d 65 (1948); Skinner v. Klein, 24 A.D. 2d 433, 260 N.Y.S. 2d 799 (1965). We believe that the latter rule applies in subrogation claims involving Government medical care.

35. North Carolina: Powell & Powell v. Wake Water Co., 171 N.C. 290, 88 S.E. 426 (1916) held that if the insurance paid was less than the total loss, the action was in the name of the insured who held the insurer's portion of any judgment in trust for him. The rule was affirmed in Burgess v. Trevathan, 236 N.C. 157, 72 S.E. 2d 231 (1952) and Phillips v. Alston, 257 N.C. 225, 125 S.E. 2d 580 (1963) which held that the insurer was not a necessary party. Cf. Sham-bley v. Jobe-Blackley Plumbing & Heating Co., 264 N.C. 456, 142 S.E. 2d 18 (1965); Parnell v. Nationwide Mutual Insurance Co., 263 N.C. 445, 139 S.E. 2d 723 (1965); Mil-waukee Ins. Co. v. McClean Trucking Co., 256 N.C. 721, 125 S.E. 2d 25 (1962) in which the insurer had paid the full loss and was the proper party to bring suit.

36. North Dakota: Regent Coop. Equity Exch. v. Johnston's Fuel Liners, ___ N.D. __, 122 N.W. 2d 151 (1963), affirmed ___ N.D. __, 130 N.W. 2d 165 (1964) held that the insured was the real party in interest when the insurer had paid only part of the loss and that the defendant could not join the insurer in the suit.

37. Ohio: Shaw v. Chell, 176 Ohio St. 375, 199 N.E. 2d 869 (1964) held that a defendant may waive his right to have the insurer join in the insured's suit for the uncompensated portion of his loss. However, this case relates to the problem which arises when the insurer and insured attempt to split their causes of action. Permanent Ins. Co. v. Cox, 99 Ohio App. 389, 133 N.E. 2d 627 (1955) and Hoosier Condensed Milk Co. v. Doner, 96 Ohio App. 84, 121 N.E. 2d 100 (1961), hold that when suit is brought for the full amount of the loss, the insured, not the insurer, is the real party in interest.

38. Oklahoma: Harrington v. Central States F. Ins. Co., 169 Okla. 255, 36 P. 2d 738, 96 ALR 859 (1934), ruled that the insured could include in his suit a claim for that portion of his loss paid by the insurer and would hold that portion of the recovery in trust. The decision also stated that the insurer was not a necessary party to the suit. These rules were recently affirmed in Great American Ins. Co. v. Watts, ___ Okla. __, 393 P. 2d 236 (1964).

39. Oregon: Waters v. Bigelow, 210 Or. 317, 310 P. 2d 624 (1957) held that in a normal subrogation situation, the insurer is a necessary party, subject to joinder. It distinguished between a simple subrogation payment and that made on a loan receipt (Furrer v. Yew Creek Logging Co., 206 Or. 382, 292 P. 2d 499 (1956)). This distinction
is still drawn. *Cf. Lawshway v. Slate*, 238 Or. 352, 395 P. 2d 110 (1964) with *Waterways Terminal Co. v. P. S. Lord Mechanical Constr.*, 242 Or. 1, 406 P. 2d 566 (1965). Thus, on proper motion it appears that the United States would be subject to joinder.

40. *Pennsylvania*: *Frantz Tractor Co. v. Providence Washington Ins. Co.*, 383 Pa. 542, 119 A. 2d 495 (1956) ruled that if the insurer would be required to pay nothing if the plaintiff (insured) won his suit, the insurer (subrogee) should be the real party in interest. This decision is apparently based on the majority rule that when the insurer has paid the full loss, suit should be brought in its name. The ruling is not clear since in that case the insurer had only paid a portion of the loss. *Cf. Towmotor Co. v. Frank Cross Trucking Co.*, 205 Pa. Super. 448, 211 A. 2d 38 (1965) where the insurer had paid the full amount of the loss but the insured brought the action in its name.

41. *Rhode Island*: *Cadillac Auto Co. v. Fisher*, 52 R.I. 123, 158 A. 717 (1932); *Royal Ins. Co. v. Kirwin*, 51 R.I. 165, 152 A. 797 (1931); *Ferraiolo v. Lamson Oil Co.*, 49 R.I. 426, 143 A. 779 (1928) held that the insurer is not a necessary party in the insured's suit and that suit should be brought in the latter's name. *Hospital Service Corp. of R.I. v. Pennsylvania Ins. Co.*, — R.I. —, 227 A. 2d 105 (1967), suggests that Rhode Island now follows the federal definition of real party in interest (see discussion of Federal Law *supra*).


43. *South Dakota*: *Parker v. Hardy*, 73 S.D. 247, 41 N.W. 2d 555 (1950) ruled that the insured could sue for the full amount of the loss and, on recovery, would hold the insurer's portion of the judgment in trust for him. Moreover, the insurer is not a necessary party to the insured's suit.

44. *Tennessee*: *Globe & Rutgers Fire Ins. Co. v. Cleveland*, 162 Tenn. 83, 34 S.W. 2d 1059 (1931) states that an insured may include the insurer's claim in his suit or that the insurer may intervene. *See also National Cordova Corp. v. City of Memphis*, 214 Tenn. 371, 380 S.W. 2d 793 (1964) which involves a suit in which the insurer had paid the full loss claim and sued in the insured's name.


46. *Utah*: *Johanson v. Cudahy Packing Co.*, 107 Utah 114, 162 P. 2d 98 (1944) held that an insured under a workmen's compensation policy was the proper party to sue for the full amount of the loss and would act as a trustee for that portion of the claim relating to the insurer. This rule was affirmed in *Cederloff v. Whited*, 110 Utah 45, 169 P. 2d 777 (1946) and *Raymer v. Hi-Line Transport, Inc.*, 15 Utah 2d 427, 394 P. 2d 383 (1964).

47. *Vermont*: *Moulthrop v. Gorham*, 113 Vt. 317, 34 A. 2d 96 (1943) held that suit should be for the full amount of the loss, in the insured's name and that the insured would act as a trustee for the insurer's portion of any recovery.

48. *Virginia*: No cases discovered.

49. *West Virginia*: No cases discovered.


51. *Wisconsin*: *Leonard v. Bottomley*, 210 Wis. 411, 245 N.W. 849 (1932) ruled that the insurer should be a party to the insured's suit in order to protect the tortfeasor from paying the same damage twice. Of course, this problem would not arise if the insured included the insurer's claim in his suit. *Liner v. Mittelstadt*, 257 Wis. 70, 42 N.W. 2d 604 (1950) and *United States Guarantee Co. v. Liberty Mut. Ins. Co.*, 244 Wis. 317, 12 N.W. 2d 59 (1944) can be distinguished on the grounds that in
both cases the insurer paid the full amount of the loss.

52. Wyoming: The majority rule that the insured may include as an item of special damages that portion of the loss compensated by insurance and will hold that portion in trust was announced in Iowa National Mutual Co. v. Huntley, 78 Wyo. 380, 328 P. 2d 569 (1958). That decision and Gardner v. Walker, --- Wyo. ---, 373 P. 2d 598 (1962) held that the insurer is not a real party in interest.

Of course, the cases listed above are not definitive. They are merely research leads for each jurisdiction and illustrate the various tacks which may be taken to oppose efforts to split the Government's claim from that of the injured party's. If the brief is unavailing, and if the defendant's insurer refuses to honor or denies the Government's claim depending on the outcome of the injured party's suit, then intervention may be the only course.