

MYKOLAS ROMERIS UNIVERSITY
FACULTY OF LAW
DEPARTMENT OF BUSINESS LAW

DOROTA KOZUBOVSKA

European Business Law Programme
Code: 62401S120

SUBROGATION IN INSURANCE: THEORETICAL
AND PRACTICAL ASPECTS

Master thesis

Supervised by
Doc. Dr. Tomas Talutis

Vilnius, 2010

Table of Contents

Introduction	3
1. CONCEPT OF SUBROGATION AND ITS ORIGINS	8
1.1. The concept of subrogation	8
1.2. The historical background of the concept of subrogation	10
1.3. The institute of subrogation in different countries	14
2. EVALUATION OF THE SUBROGATION IN INSURANCE	18
2.1. The appearance of subrogation in insurance intercourse	18
2.2. The “step into the shoes” principle (the insurer steps into the shoes of the insured)	25
2.3. The indemnity principle (full compensation)	28
2.4. Statutory limitations period	31
2.5. Legal and conventional subrogation	35
2.6. Distinction between subrogation and recourse institutes	37
Conclusions	44
Suggestions	46
References	47
Summary in English	51
Summary in Lithuanian	52

Introduction

Subrogation is the legal technique under common law by which one party, commonly an insurer of another party steps into insured's shoes so as to have the benefit of his rights and remedies against a third party such as a defendant¹. Modern-day subrogation often involves an insurer taking some or all of the injured-insured's recovery from a third party, e.g. tortfeasor. That one's insurer has a right to such proceeds is news to many².

Subrogation arises as a consequence of the indemnity principle and refers to the right of an insurer, who has paid for a loss, to pursue the wrongdoer in the place of the insured. It enables liability for loss to be fixed to the person responsible without allowing the insured to recover from both that person and the insurer, which would violate the principle of indemnity³. The purpose of subrogation is to compel the ultimate payment of a debt by the party who, in equity and good conscience, should pay it. This subrogation is an equitable device used to avoid injustice.

In Lithuania subrogation was started to treat as an exchange of the participants in the obligation only in the new 2000 Civil Code of the Republic of Lithuania (in the thesis the author uses the full denomination "the Civil Code of the Republic of Lithuania" and its shorter name "the Civil Code" or the abbreviation "the CC")⁴. The 1964 Civil Code⁵ did not include the concept of subrogation, but the case-by-case legal norms regarding subrogation issues could be found. Considering that the Civil Code particularly regulates the institute of subrogation it is important to analyze and reveal the aspects of new legal regulation of the doctrine of subrogation.

The right of subrogation only appears where there is an obligation on the insurer to indemnify the insured. It is therefore, not available in relation to life assurance or honour policies. Furthermore, it only arises once the insurers have met their liability under the policy in respect of the relevant incident. Selected topic is relevant and important under the practical approach because subrogation in insurance gives a possibility for the insurer to get recovery of the compensation which was reworded by him to the insured because of suffered loss caused by the third party.

¹ <http://www.encyclo.co.uk/define/subrogation>, date of connection: 11/22/2010.

² Maher B.S. & Pathak R.A. Understanding and Problematizing Contractual Tort Subrogation. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1227323. P. .50; date of connection 11/14/2010.

³ Lowry J. and Rawlings P. Insurance Law: Cases and Materials. Oxford – Portland Oregon: Hart Publishing, 2004. P. 7.

⁴ Lietuvos Respublikos Civilinis Kodeksas//Valstybės žinios. 2000, Nr. 74-2262.

⁵ 1964 m. Lietuvos Respublikos Civilinis Kodeksas. <http://www.infolex.lt/scripts/sarasas2.dll?Tekstas=1&Id=8&Vr=39#238str>., connection date: 11/20/2010.

Novelty of the topic. Subrogation in insurance as a topic of this thesis is not only relevant to legal practice of Lithuania, it is not completely disclosed in the legal doctrine of other countries. The essence of subrogation functioning in the insurance is profound. The subrogation is often being confused with other legal rights such as the right of recourse. The novelty of legal intercourse of insurance, especially in the field of subrogation, and also formation of the practice of the courts, shortage of idea of harmonizing legal contracts of insurance and lacking scientific analysis shows that legal intercourse in the sphere of subrogation in insurance is the question of great importance for scientific analysis and discussion.

The subject of the thesis is theoretical and practical aspect of subrogation in insurance on the bases of legal intercourse, genesis of this doctrine, historical development and its implementation into practice.

The aim. The thesis aims to highlight the main features of subrogation in the insurance in legal intercourse, to identify the gaps of legal regulating concerned with practical implementation and to propose some solutions related to subrogation in insurance.

Tasks. Considering the aim of the thesis which was mentioned above brings up the following tasks:

1. To determine the circumstances where the right of subrogation can be assumed by the insurer;
2. To reveal regulation problems regarding the subrogation in the insurance in Lithuania and other countries legal practice;
3. To determine the features influencing whether an insurer's claim to the person responsible for the damages should be treated as a subrogation claim or as a recourse claim;
4. To explore and summarise whether under applicable law the insurer acquires only right to claim the amount paid to its policyholder or also other rights the policyholder had in primary (original) obligation;
5. To determine what applicable law governs the insurer's claim: law applicable to insurance contract or law applicable to relations between policyholder (the insured, beneficiary) and the person liable for the default;
6. To highlight the regulation concerning the statutory limitations periods to be applied for the insurer's claim: the statutory limitations period applicable for the claims arising from the insurance contract and the statutory limitations period applicable for the recourse claim or the statutory limitations period application for primary (original) obligation;

The problems of the topic.

First problem. Unjustified enrichment and exchange of participants in insurance intercourse.

When an insured undergoes losses under circumstances that make a third person liable to reimburse the insured, there are few possibilities to recover suffered losses among the three parties involved. The problem appears when a policyholder gets a chance to recover damages from the insurer and the tortfeasor and he gets more than a full compensation. In order to avoid this situation the right of subrogation appears and the insurer trades places with the insured. It places the premium payer (insurer) in exactly the same position as the policyholder.

In order to resolve the problem author refers to legal practice and theory on subrogation doctrine.

Second problem. The statutory limitations period regarding Subrogation doctrine.

The problem appears when the case is being heard at the court and the question on statutory limitations period arises. Judges confront with the difficulties to decide what statutory limitations periods have to be applied for the insurer's claim: the statutory limitations period applicable for the claims arising from the insurance contract and the statutory limitation period applicable for the recourse claim or the statutory limitations period application for primary (original) obligation.

In order to deal with the problem author refers to Lithuanian case law and the Civil Code.

Third problem. The subrogation and recourse institutes are sometimes confused because the implementation of both institutes is not fully explored. There is a lack in theoretical and practical application analysis regarding the institutes of Subrogation and Recourse and the changes of participants which leads to errors or misunderstanding concerning the institutes and their nature, particularities or consequences of the implementation in the legal intercourse as well.

In order to examine the difference between subrogation and recourse doctrine author refers to Lithuanian case law and the Civil Code (Art. 6.111, 6.112, 6.114 and 6.1015).

Hypothesis.

1. The subrogation right appears only after the fulfilment of the obligation of recompensation regarding the policyholder: the subrogation is based on the indemnity principle without creating a new legal intercourse.

2. The subrogation and recourse doctrines are not clearly determined and involve misunderstanding in the decision making in the case law of Lithuania.

Sources. The subrogation topic is not sufficiently revealed in Lithuania, subrogation concept and its principles as well as particular cases are analysed by T. Kontautas in his monograph “Draudimo sutarčių teisė” (*Insurance contract law*)⁶, 2007 and D. Ambrasienė, E. Baranauskas et al. in “Civilinė teisė. Prievolių teisė“, 2009, E. Saukalas prepared an article named “Practical aspects of use of the property insurance causation rules in case law” where some problems concerning the subrogation in property insurance were revealed. The subject is quite widely analysed in foreign literature, but the problem is the approaches regarding subrogation are different depending on the country. B.S. Maher and R. A. Patrak present the subrogation highlights in the USA, J. Birds and N. J. Hird reflect the situation in UK. The Law in Lithuania sometimes uses the term “subrogation” as a synonym and puts in parentheses to cession as in e.g. Civil Code Chapter VII “Assignment of claim for the third person in order of recourse” (VII Skyrius. Reikalavimo perėjimas trečiajam asmeniui regreso tvarka (subrogacija))⁷.

Research methods: theoretical and empirical methods used in the thesis are as follows:

Theoretical methods:

Comparative historical method is used when analysing Roman law and modern days legal practice.

Systemic analysis method is used to analyse the interaction between different articles of the legal regulation (Art. 6.111, 6.112, 6.114 and 6.1015 of the Civil Code).

Generalization method is used to review the scientific literature and bringing to conclusions.

Comparative method is used to draw distinctions and analogues between the subrogation and other closely related doctrines.

Empirical methods:

Document analysis is used to examine the Lithuanian law and the case practice concerning subrogation.

⁶ Kontautas T. Draudimo sutarčių teisė: monografija. Vilnius: Justitia, 2007.

⁷ Mikėlnas V., Bakanas A., Bartkus G. ir kiti. Lietuvos Respublikos civilinio kodekso komentaras. Šeštoji knyga. Prievolių teisė. Vilnius: Justitia, 2003. P. 153.

The structure of the thesis.

The doctrine of subrogation seen in a horizon of legal intercourse is analyzed from the theoretical and practical points of view. In the first part theoretical questions are linked with the subrogation in insurance, and in the other parts peculiarities and problems of its practical implementation are stressed.

1) Introduction;

The author enumerates the problems of the topic, emphasizes the aim and tasks of the master thesis and reveals the hypothesis of the work.

2) Definition of subrogation and it's historical background;

The author reviews the definition of conception of Subrogation in ancient Roma legal principles, and in modern days in Lithuania as well as in England, United States and Russia.

3) The principles of subrogation;

The author reviews the principles of subrogation: unjust enrichment, “step into the shoes” of the insured, the exchange of the participants in insurance and defines statutory limitations period. The author points out distinction and analogues of subrogation and recourse and reviews the case law regarding subrogation issue.

4) Conclusions;

In this part of the master thesis author presents conclusions which emerged during the research of the subject of the doctrine of subrogation.

5) Suggestions;

The author suggests some possibilities how the operation of the doctrine of subrogation in insurance could be improved.

1. CONCEPT OF SUBROGATION AND ITS ORIGINS

1.1. The concept of subrogation

“**Subrogation**” literally means “substitution”; the word derives from the same Latin roots as the more familiar word “surrogate”. The Law dictionary⁸ defines **Subrogation** as “one’s payment or assumption of an obligation for which another is primarily liable, McClintock, Equity § 123 (2d ed. 1948)”, but this definition is not extensive enough. “This doctrine is not dependent upon contract, nor upon privity between the parties; this is the creature of equity, and is founded upon principles of natural justice.... Subrogation has been generally classified as being either legal or conventional. Legal subrogation arises by operation of law where one having a liability, or right, or a fiduciary relation in the premises, pays a debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he has paid. Conventional subrogation, on the other hand, arises where by express or implied agreement with the debtor, a person advancing money to discharge a prior lien might be substituted to the prior lienee, 18 S.E. 2d 917,920...”⁹ Subrogation typically arises when an insurance company pays its insured pursuant to a policy; the company is then subrogated to the cause of action of its insured.

Seeking to clarify the conception of the institute of subrogation the author is relying on the definition from The Longman dictionary of law which describes **subrogation** as substitution which refers to a remedy intended to ensure that rights are transferred from one person to another by operation of law, e.g. an insurer’s right to enforce a remedy which the assured could have enforced against a third party¹⁰. Subrogation is often defined as a doctrine that allows one party to “stand in the shoes” of another for the purpose of recovering money that the former had paid to the latter¹¹.

In “A dictionary of law” (Sixth Edition), edited by Oxford University Press, the Subrogation is defined as the substitution of one person for another so that the person substituted succeeds to the rights of the other. Thus an insurer who indemnifies his insured against the loss

⁸ Gifis S.H. Law Dictionary (Forth Edition). New York: Barron’s legal guides, 1996. P. 493.

⁹ Ibid.

¹⁰ Curzon L.B. and Richards P.H. The Longman dictionary of law (Seventh Edition). Edinburgh: Pearson Longman, 2007. P. 559.

¹¹ Maher B.S. & Pathak R.A. Understanding and Problematising Contractual Tort Subrogation. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1227323. date of connection 11/14/2010.

of goods may be subrogated to the insured person's rights against a third party whose negligence caused the loss¹².

Definitions mentioned above give an initial understanding of the conception of subrogation *per se*, however, it is not enough to cognize the concept, the deep meaning of subrogation must be analysed, so the topical issues of subrogation will be researched on the legal basis as well.

Subrogation is one of the legal tools of Law on obligations, which is the part of the civil law. Civil law theory of liability (*obligatio*) defines a legal intercourse with one party (the debtor) to make the other party (the creditor) in *favor* of certain actions or refrain from them, but the creditor is entitled to require the debtor to meet its obligation. In modern civil law, the obligation is not considered to be unchangeable rule of construction. This means that the obligations arising from the rights and responsibilities can be transferred to third parties, and it does not affect the very existence of the obligation. The Civil Code of the Republic of Lithuania defines one of the objects of civil rights and law on obligations in Art. 1.112. Thus, the obligation arising from the creditor's claim is treated as an independent right of civil legal intercourse between the object and can be transferred to another person in the general framework (par. 2, Article 1.112 of the CC).

The right to claim can be transferred as well as any property for the third parties¹³. When the right to claim is transferred, mentioned right moves from the third person on the legal basis or transfers the debtor obligations, the exchange of participants occurs. The science defines individual who changed in the contractual law his obligations with another individual as a new person at the accession of the former creditor or debtor¹⁴. The New Civil Code of Republic of Lithuania¹⁵ which came into force on July 1st, 2001, distinguishes three types of the exchange of participants regarding obligations:

1. The transfer of the right to claim – cession (*Latin, cessio*);
2. The transfer of the debt (*Latin, cessio debitis*);
3. The transposition of the right to claim for the third party by the method of recourse (subrogation).

Analysing the doctrine of subrogation the institute of session has to be mentioned. Under the civil law system, cession is an act by which a personal claim is transferred from one party (the cedent) to another (the cessionary). Whereas real rights are transferred by delivery,

¹² Martin E.A. and Law J. A dictionary of law (Sixth Edition). New York: Oxford University Press Inc., 2006. P.289.

¹³ K. Zweigert, H. Kotz. Lyginamosios teisės įvadas. Vilnius, Eugrimas, 2001. P. 374.

¹⁴ Ambrašienė D., Baranauskas E. ir kt. Civilinė teisė. Prievolių teisė: vadovėlis: ketvirtoji laida. Vilnius: Mykolo Romerio universiteto Leidybos centras, 2009. P.77.

¹⁵ Lietuvos Respublikos Civilinis Kodeksas//Valstybės žinios. 2000, Nr. 74-2262.

personal rights are transferred by cession. Once the obligation of the debtor is transferred, the creditor is entirely substituted. The original creditor (cedent) loses his right to claim and the new creditor (cessionary) gains that right¹⁶. Hence, the cession can be treated as an agreement between the old and the new creditors regarding the transposition of a debt. The debt in this case means that the debtor has not yet fulfilled his obligation to the creditor at the time of transfer of the right to claim, therefore, the creditor has a valid right to make a claim against the debtor, which by making the assignment agreement can be transferred for the new creditor. The main purpose of the assignment (cession) agreement is the fact that the new creditor entering into an assignment contract is attempting to gain the right to claim from the original creditor. The conception of the cession is regulated by the new Civil Code clauses, i.e. articles 6.101 – 6.110. If one person performs a duty of another they are then “equitable subrogated” to the rights of the person owed the duty. “The most common form of subrogation is when an insurance company pays a claim caused by the negligence of another. The act of putting by a transfer, a person in the place of other person, or a thing in the place of another thing. It is the substitution of a new for an old creditor, and the succession to his rights, which is called subrogation; *transfusio unius creditoris in alium*. It is precisely the reverse of delegation”¹⁷. Subrogation can be said the reverse of delegation.

Summarising it should be stated the subrogation is the substitution of one person by another so that the person substituted succeeds to the rights of the other. Thus an insurer who indemnifies his insured against the loss of goods may be subrogated to the insured person’s rights against a third party whose negligence caused the loss.

1.2. The historical background of the concept of subrogation

Starting the analysis of the development of the institute of subrogation, it is necessary to note that the rudiments of regulation of the institute began in ancient Roman times. Roman law interpreted the existing institute of subrogation as follows: “If the debt is paid for Brutus by Claudia instead of Ceasar, Claudia transfers into Brutus’s place and gets the right to recover the amount paid from Ceasar”¹⁸. Roman jurists considered the legal intercourse between a creditor and the debtor solely as a personal obligation and all the legal consequences arising out of it affected the persons involved in the relation. Roman law had another approach to the origins of

¹⁶ http://www.answers.com/topic/cession#Civil_law ;date of connection 10/27/2010.

¹⁷ <http://lectlaw.com/def2/s084.htm> , date of connection: 11/19/2010.

¹⁸ O’Brien J. The origins of subrogation/O’Brien & Hennessy education series topic // www.subrogation.net/docs/edu/edu3.doc; date of connection: 11/20/2010.

the institute of subrogation. Proponents of this approach revealed its origins to the nature of the institute of transfer of a claim. This means that some of the Roman jurists by subrogation meant a specific transfer of the requirement and there have been used terms „*cessio actorium*“, „*cessio nominum: subrogation*“.

According to the Roman law the obligation arising from a transaction between the parties had to be carried out by a particular creditor, but it was related only to the particular borrower (debtor), and the transaction was considered to represent a legal union between a creditor and a debtor. In the case of a withdrawal of one of the parties (e.g. death) automatically meant the termination of the obligation. Thus, the old *ius civile*¹⁹ recognized only a personal relation between a debtor and a creditor in the obligation case and basically never recognise any transfer of a right for a third party. Later on that Roman rule gradually changed. Due to the dominant type of personal liability in the Roman law only limited changes of participants was allowed for a long time, which usually occurred in the case of a succession. The law of the *Twelve Tables (Leges Duodecim Tabularum)*²⁰ provided an opportunity to split a claim against several heirs of their inheritance as a provision in Roman law existed stating that "the heir of the deceased is like a like successor of the personality"²¹. The *Justiniano Digestos*²² provided a possibility for the heir to sell the inherited assets, together with the claim. Thus, the legal relation in succession was the area, where was primarily allowed a limited number of participants' changes in the liability.

In the Subsistence Economy conditions the old Roman law provisions not allowing participants change was functioning without any problems. Subsistence economy changed into marketable production in long term and the need occurred to provide the obligation to transfer the rights of liability to third parties. To achieve this objective the *novation (novatio)* was introduced. The main idea of the novation is the termination of the original obligation with one creditor and creation of a new obligation that the participant is another creditor. In other words, in the case of a novation the old debtor and the new creditor consented a contract similar to the initial agreement that was concluded between the old debtor and the creditor. Novation had some negative problems: First, the termination of the old obligation involved the termination to all the guarantees. Another problem was the fact that any new agreement needed not only the old and new creditors' consent, but the debtor's consent²³. Thus, due to the mentioned deficiencies the

¹⁹ http://en.wikipedia.org/wiki/Ius_civile, date of connection: 11/22/2010.

²⁰ <http://www.historyguide.org/ancient/12tables.html>, date of connection: 11/20/2010.

²¹ Vėlyvis S., Nekrošius I., Nekrošius V. Romėnų teisė. Vilnius: Justitia, 1999. P. 225.

²² Justiniano digestes, www3.mruni.eu/padaliniai/leidyba/jurisprudencija/juris25.doc, date of connection: 11/19/2010.

²³ Vėlyvis S., Nekrošius I., Nekrošius V. Romėnų teisė. Vilnius: Justitia, 1999. P. 226.

novation was not an advanced way to transfer claim and ensure the smooth commercial production process.

Later on the Roman law provided the opportunity to transfer the right of claim by implementing the institute of procedural right of representation, which was based on of the transfer agreement (*Mandatum agendi*) between a creditor willing to transfer the right of claim (*cedento/ grantor*) and the person to whom the right of claim was transferred (*grantee*). Grantee was called *procurator in rem suam* - authorized for its own benefice²⁴. He acted as a representative of a procedural grantor in the court and was entitled to get for himself anything recovered from the debtor's assets without any control, but the transfer agreement could be unilaterally terminated and *Mandatum agendi* was automatically terminated in case of the death of the grantor. In case of the direct fulfilment of the obligation of the debtor against the creditor, the obligation to cease was terminated and the grantee lost his legitimate rights.

Thus, the position of the grantee was precarious until the full implementation of the transferred rights and there was a possibility of ever losing the rights transferred to the grantor. For this reason, later cedent was given the right of action in the name of cedent (*actio atilis suo nomine*) adding the condition that the grantor is the grantor's successor. In the case that he expresses claim against the debtor, the debtor had an obligation for the new creditor and the old creditors (the grantor) was unable to cancel the assignment of claim, claiming the debtor, and thus there was a complete change of the creditors²⁵. Hence, theoretically the old Roman law never recognised a transfer of rights arising from liability, the subsequent Roman law recognized the transfer of right of claim or subrogation, although limited.

Roman law also established the principle "*Nemo plus iuris ad alium transfere potest quam ipse haberet*" (Ulpian) (no one can transfer to another more rights than possesses on its own). It is a principle requiring the agreement from the creditor in the case of exchange of the former debtor (*expromissio*) and this principle still exists²⁶. The Roman law principle has remained to these days and its modified manifestations appear in the Civil Code of the Republic of Lithuania²⁷, the par 2 Art. 6.101 Chapter VI of the Sixth Book, which provides that the purchaser of the right acquires the obligation to ensure the fulfillment of the law and other complementary rights. The Roman law principle is also enshrined in the Civil Code, par 1, Art. 6.107 which contains the debtor's right to express the new creditor any defense that had to refer to the original creditor at the time of notification of the assignment. Thus, the new creditor

²⁴ Vėlyvis S., Nekrošius I., Nekrošius V. Romėnų teisė. Vilnius: Justitia, 1999. P. 226.

²⁵ Ambrasienė D., Baranauskas E., Cirtautienė S. ir kiti. Civilinė teisė. Prievolių teisė: vadovėlis: ketvirtoji laida. Vilnius: Mykolo Romerio universiteto Leidybos centras, 2009. P. 77.

²⁶ Idem.. P. 78.

²⁷ Lietuvos Respublikos Civilinis Kodeksas//Valstybės žinios. 2000, Nr. 74-2262.

(grantee) acquired a right in its scope and enforcement of conditions to be similar to the old creditor (the grantor) should be transferred and rights or a part of them.

Roman law in the subsequent period of limited recognition of the obligations arising from the assignment of rights guaranteed the grantor and the grantee only the judicial protection of their interests. There were certain rights, which generally can not be transferred - in particular those related to the creditor in person (for example, the right to alimony, the right to compensation). The radical law named *lex Anastasiana*²⁸ of the Roman emperor Anastasius in the year 506 has to be mentioned. This order requires that grantee who bought the right of the claim from the debtor shall not be entitled to recover a higher amount than that paid by the grantor for the right. *Lex Anastasiana* prohibited the grantee to recover from the debtor more than the amount paid by the grantor for the transfer of a right without paying attention to the risk of exposure to opportunities for recovery and for this reason the transfer for the claim was unattractive and severely limited. This decree was to deal with the commerce of rights of claim, which was the subject of a particular kind of business, and, without doubt, greatly restricted the civil circulation. According to R. Zimmermann *Lex Anastasiana*²⁹ was “a special protection against professional purchasers of claims who wanted to benefit from the bad economic climate: if they had paid less than the actual amount of the debt when purchasing the claim, they could not recover more from the debtor than they had paid themselves”. Later legislators and courts have from time to time viewed assignment with a somewhat suspicious eye³⁰. In order to preserve the rights of claims circulation, there were strict exceptions provided to this Order later on³¹.

Summarizing all being recited the concept of transfer of one's rights was set far in the Roman law and was constantly revised according to the economical and political circumstances. The author points out that apparently both the requirement for the transfer (assignment) and the first institution of subrogation rights began in Roman times. The concepts of assignment, subrogation and application of basic principles from the Roman law developed later on and to these days there is a number of European countries civil laws based upon the Roman law.

²⁸ Vėlyvis S., Nekrošius I., Nekrošius V. Romėnų teisė. Vilnius: Justitia, 1999. P. 228.

²⁹ Zimmermann R. The law of obligations - Roman foundations of the civilian tradition. New York: Oxford University press, 1996. P. 66.

³⁰ Ibid.

³¹ Vėlyvis S., Nekrošius I., Nekrošius V. Romėnų teisė. Vilnius: Justitia, 1999. P. 228.

1.3. The institute of subrogation in different countries

In general, the formation of the institute of subrogation was influenced by restitution and the purpose of subrogation has been named as the execution of restitution in trilateral legal intercourse, acting in the way, that that one party could not become unduly rich at the expense of the other party.

Subrogation often involves an insurer taking some or all of the insurer-insured's recovery from a third-party tortfeasor. Brendan S. Maher & Radha A. Pathak accentuated the importance of the information for Americans saying that "they should know the meaning of "tort subrogation" as it directly impacts two of their most significant concerns: their health and their finances"³². Everyone living or visiting the United States of America should be aware about the fact that one's insurer has a right to such proceeds. The Wall Street Journal covered the subrogation subject on the front page in 2008, although the idea of "subrogation" has antecedents in Roman law as well as many concepts of the modern civil law institutes. The Institute of subrogation was developed and its basics revealed in the Law of England, the United States of America, France and other states. England and the United States of America are attributed to common law countries, and a particularly high value is given there to the court precedents, which form the basis of all the law cases and develops legal norms. J. Birds and N. J. Hird underlines the fact, that a number of authorities refer to subrogation "as a creature of equity" and some modern cases "refer to it as a common law doctrine arising out of a term implied into every contract of indemnity insurance"³³.

D. Ambrasiene³⁴ is of opinion that the participants in legal intercourse and institutes have not been clearly defined except revealing essential features of transfer of the cession (*Latin cessio*), the transfer of the debt (*Latin cessio debitis*) and the transposition of the right to claim for the third party by the method of recourse (subrogation), but there was little attention paid to their practical application and the analysis of court decisions taken. Problems related to the institutes were not revealed neither possible solution was proposed.

In order to understand the possible variations of subrogation's regulation, author briefly reviews the legal implementation of subrogation in foreign countries. With regard to the legal regulation of subrogation, it should be noted that in many countries of Europe the Institute of subrogation is associated with the insurance law area.

³² Maher B.S. & Pathak R.A. Understanding and Problematising Contractual Tort Subrogation. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1227323, date of connection 11/14/2010.

³³ Birds J. and Hird N.J. Birds' Modern Insurance Law. Sixth edition. London : Sweet & Maxwell, 2004. P.296.

³⁴ Ambrasienė D. Asmenų pasikeitimas prievolėje (kai kurie teoriniai ir praktiniai aspektai)//Jurisprudencija, 2002, t. 28(20). P. 97.

Meanwhile, the law in France implements the subrogation institute in order to as a way to avoid the French CC Article 1690 regarding the formal requirement of the debtor (*fr. signification*) and his agreement regarding the assignment (*fr. acceptation*). This institute is established in Art. 1249 and Art. 1250 of French CC and is called personal subrogation */Subrogation personnelle*³⁵. “If the debtor does not pay the debt, and a third person, the third party that is paying, becomes the main creditor regarding the debtor with the condition that the original creditor agrees”³⁶. According to the French law factoring transactions are carried out on the basis of subrogation as well.

The “subrogation” term was enshrined into Russian law in 1994 for the first time, in the current Civil Code of the Russian Federation (Art. 965, regarding the legal intercourse in the insurance). “When an insured creditor receives insurance compensation from his insurance company in the event of causation of harm to him, his rights of claim against the tortfeasor automatically pass to the insurance company by operation of law”³⁷. Such assignment of delictual rights is denominated in Art. 965 (Transfer to the Insurer of Rights of the Insured to Compensation of Damages (Subrogation)) of the Civil Code as subrogation. Christopher Osakwe points out in the “Russian Civil Code. Parts 1-3: text and Analysis”³⁸ that a creditor may “assign his rights under a delictual obligation to a third party of law in three general situations, i.c., by subrogation to an insurance company under Art. 387 of the Civil Code, through an indemnification action under Art. 1081 of the Civil Code and by legal succession under Art. 387 of the Civil Code”³⁹. In Russian law “subrogatsiya” is translated as subrogation and “concerns Russian insurance law”⁴⁰. In case of subrogation to the insurer of the creditor’s insurance rights against the debtor responsible for the occurrence of the insured event the transfer of creditor’s rights to another person occur in insurance law. The sums claimed must not exceed the insurer’s paid amounts to the insured as the insurance benefits. Thus, in Russian law, subrogation is used in cases where a third party indemnifies the creditor instead of the debtor and the original creditor’s rights pass to the new creditor to the extent that subrogate has paid to the original creditor.

³⁵ Zweigert K., Kotz H. *Lyginamosios teisės įvadas*. Vilnius: Eugrimas, 2001. P. 381.

³⁶ *Idem*. P.381.

³⁷ Civil Code of the Russian Federation, <http://www.russian-civil-code.com/PartI/SectionIII/Subsection1/Chapter25.html>, date of connection: 12/09/2010.

³⁸ Osakwe Ch. “Russian Civil Code. Parts 1-3: text and Analysis”, <http://books.google.lt/books?id=JcanG8FDWdcC&printsec=frontcover#v=onepage&q=subrogation&f=false>, date of connection: 12/09/2010.

³⁹ *Idem*. P.23.

⁴⁰ *Idem*, P.24.

In Lithuania the new Civil Code of the Republic of Lithuania⁴¹ treats subrogation as an exchange of the participants in the obligation. The old (1964) Civil Code⁴² did not include the concept of subrogation. However nowadays the Lithuanian court practice formulates the definition and enshrines the implementation rules of an appropriate concept of subrogation institute.

The United Kingdom and the United States of America describe the law of subrogation as a transfer of a right, where one party takes place of another party and is entitled to claim the paid amounts from the person responsible for the loss: “Subrogation is an equitable remedy that seeks to impose ultimate responsibility for a wrong or loss on the party who, in equity, ought to bear it.”⁴³ Subrogation seeks to impose a loss on the party who, in equity and good conscience, ought to bear it. When an insurer pays for a loss in the first instance, subrogation allows the loss to be transferred to the party who ultimately caused it. The law of insurance subrogation always has been somewhat obscure, and it has evolved as one might expect--in fits and starts, without much uniformity or coherence. “The lack of judicial consensus in this area has been noted in the past, and that problem has continued over the last several years”⁴⁴ (*in the USA, stated in 1998*). In the USA subrogation rights may arise by contract (conventional subrogation), by equity (equitable subrogation), or by statute. Statutory subrogation usually applies only in specific contexts, such as worker’s compensation or no-fault insurance; far more common are subrogation clauses in insurance policies and the courts’ application of equitable principles. “The black letter elements required for application of equitable subrogation bear restating:

- The payment must have been made by the subrogee [insurer] to protect his own interest;
- The subrogee must not have acted as a volunteer;
- The debt paid must be one for which the subrogee was not primarily liable;
- The entire debt must have been paid; and
- Subrogation must not work any injustice to the rights of others”;

as it was stated in *re Photo Mechanical Services, Inc.*, 179 B.R. 604, 618 (Bankr. D. Minn. 1995), quoting 73 AM. JUR.2D, Subrogation § 3 (1974)⁴⁵.

The very first element still causes lawsuits to be prosecuted through appeal in the United States as well as in Lithuania. Anglo American law distinguishes two ways of

⁴¹ Lietuvos Respublikos Civilinis Kodeksas//Valstybės žinios. 2000, Nr. 74-2262.

⁴² 1964 m. Lietuvos Respublikos Civilinis Kodeksas.
<http://www.infolx.lt/scripts/sarasas2.dll?Tekstas=1&Id=8&Vr=39#238str.>, date of connection: 11/20/2010.

⁴³ Veal, Gregory R.. Subrogation: the duties and obligations of the insured and rights of the insurer revisited. *Aba Tort & insurance law journal* (Fall 1992),
<http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/ttip28&div=12&id=&page=>, P. 69, date of connection: 12/09/2010.

⁴⁴ Fidelity subrogation update—updated presented by: Gregory R. Veal, esq. Bovis, Kyle & Burch, llc, P. 2.
<http://www.forcon.com/papers/ssfcc/1998/06Veal.pdf>, date of connection: 12/09/2010.

⁴⁵ *Ibid.*

implementing the subrogation law: direct determination of the right of subrogation in the insurance contract which it is called “conventional subrogation” and the “legal subrogation”. However, as observed by Supreme Court of Arkansas state, the United States of America in 1993, in the case “Higginbotham cited Shelter Mut. Ins. Co. vs. Bough”, 310 Ark. 21, 834 S.W.2d 637 (1992), as the controlling rule Id. at 205, 849 S.W.2d 464, citing Garrity v. Rural Mut. Ins. Co., 77 Wis.2d 537, 253 N.W.2d 512 (1977)⁴⁶ where the judges determined that “subrogation is recognized or denied upon equitable principles without differentiation between “legal subrogation” which arises by application of principles of equity and “conventional subrogation” arising from contract or the acts of the parties.” In this court’s unanimous decision in Bough, this court recited the following rule:

“The general rule is that an insurer is not entitled to subrogation unless the insured has been made whole for his loss, [however], the insurer should not be precluded from employing its right of subrogation when the insured has been fully compensated and is in a position where the insured will recover twice for some of his or her damages”⁴⁷.

Analysis being done concerning the continental and common law systems in different countries it can be said that there are some differences regarding the regulation of subrogation in foreign countries. An overview of the various regulatory features is important for the fact that the Lithuanian legal system regulations concerning the Institute of Subrogation is based to large extent on foreign experience in this field.

In summary it can be said that originally subrogation referred only to the loss-insurer’s ability to recover the indemnity from the loss-causer⁴⁸. The institute was developed and its basic principles concerning the Insurance Law were revealed in England and the United States of America. Can be invoked the characteristics of the institute of Subrogation which were formed in England and the United States law: “Only after payment of insurance benefits (compensation for damage), the insurer takes over the policyholder’s right to recovery. The insurer takes over only those rights of the insured that the insured person possessed against the person responsible for the damage”⁴⁹.

⁴⁶ Curtis Lee Franklin. Jr. vs. Healthsource of Arkansas (96-116. S. W. 2d)//Supreme Court of Arkansas Opinion delivered April 21, 1997, <http://caselaw.findlaw.com/ar-supreme-court/1216103.html>, date of connection: 12/09/2010.

⁴⁷ Ibid.

⁴⁸ Maher B.S. & Pathak R.A. Understanding and Problematising Contractual Tort Subrogation. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1227323, P. 54; date of connection: 11/14/2010.

⁴⁹ O’Brien J.. The origins of subrogation/O’Brien & Hennesy education series topic, www.subrogation.net/docs/edu/edu3.doc, date of connection: 11/20/2010.

1. EVALUATION OF THE SUBROGATION IN INSURANCE

2.1. The appearance of subrogation in insurance intercourse

When an insured loss occurs under circumstances that make a third person liable to reimburse the insured, there are various possible ways to “adjust the loss among the three persons involved”⁵⁰. One solution would permit the policyholder to recover both on the insurance and on the third person. A second solution would give the third person to benefit by denying recovery from him. A third solution would subrogate the insurer to the policy holder’s rights against the third person⁵¹ and this exchange could be called the “stepping into the shoes” principle.

Subrogation in property and casualty insurance occurs under “circumstances where an insurance company takes the place of an insured in bringing a liability suit against a third party who caused injury to the insured. For example, if a third party, through negligence, damages an insured's car and the insured’s insurance company pays to restore the car, the insurance company has recourse against the third party for the costs involved. The insured cannot sue the third party for damage, since if successful the insured could collect twice for the same damage”⁵².

Insurance is a contract by which the one party in consideration of a price paid to him adequate to the risk, becomes security to the other that he should not suffer loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them (*Lucena v Craufurd (1802) 2 B & P (NR) 269*)⁵³. Another case (*Prudential Insurance Co v Commissioners of Inland Revenue [1906] 2 KB 658*) determines the substance of the insurance: “Where you insure a ship or a house you cannot insure that the ship shall not be lost or the house burnt, but what you do insure is that a sum of money shall be paid upon the happening of a certain event. That is the first requirement in a contract of insurance”⁵⁴. In the case *Medical Defence Union Ltd v Department of Trade [1980] Ch 82* it was stated that “(...) there are two categories of insurance which may respectively be called indemnity insurance and contingency insurance. Indemnity insurance provides an indemnity against loss, as in fire policy or a marine policy on a vessel. Within the limits of the policy the measure of the loss is the measure of the payment. Contingency insurance provides no indemnity but instead a payment upon a contingent

⁵⁰ S.L. Kimball, D.A. Davis. The extension of insurance subrogation.// Michigan Law Review. 1962, No 7. P. 841, <http://www.jstor.org/stable/1286625>, connection date: 10/14/2010.

⁵¹ Idem. P. 841.

⁵² Business glossary, <http://www.allbusiness.com/glossaries/subrogation-property-casualty-insurance/4956031-1.html>, connection date: 11/26/2010.

⁵³ Lowry J. and Rawlings P., Insurance Law: Cases and Materials. Oxford – Portland Oregon: Hart Publishing, 2004. P. 7.

⁵⁴ Idem. P. 8.

event, as in life policy or a personal injury policy. The sum to be paid is not measured by the loss but is stated in the policy. The contractual sum is paid if the life ends or the limb is lost, irrespectively of the value of the life or the limb”⁵⁵.

The Insurance law detects common and particular provisions for different contracts of insurance, as cited by T. Kontautas: property, civil liability and life and health insurance⁵⁶. Property insurance provides protection against most risks to property, such as fire, theft and some weather damage. This includes specialized forms of insurance such as “fire insurance, marine insurance, earthquake insurance, home insurance or boiler/central heating insurance. Property is insured in two main ways - open perils and named perils”⁵⁷. Civil liability involves the responsibilities a citizen must possess⁵⁸, including that of meeting the obligations, of being part of the citizenry and upholding justice and opposing injustice. Subrogation applies to all insurance contracts which are contracts of indemnity, that is, particularly to contracts of fire, motor, property and liability insurance. It does not apply to life insurance nor *prima facie* to accident insurance⁵⁹. Subrogation arises as a consequence of indemnity principle and refers to the right of an insurer, who has paid for a loss, to pursue the wrongdoer in the name of the insured. It enables liability for loss to be fixed to the person responsible without allowing the insured to recover from both that person and the insurer, which would violate the principle of indemnity⁶⁰. However, although payments under an accident policy are usually of a fixed stated sum or according to a fixed scale, it is possible to have such policies whereby payments are made on an indemnity basis or related to specific heads of loss suffered by the insured.

Property insurance contracts include specific provision: subrogation or an institute that assures the insured’s right’s to claim the liability passes over to the insurer who has paid the insurance indemnify (Art. 6.1015, Civil Code of Lithuania)⁶¹. With regard to the development of the institute of subrogation in English case law, it should be noted that the main features of the institute of subrogation and the application of the principles and judicial precedents in the UK had developed particularly in the insurance sector (e.g. *Randall vs. Cochran, Mason vs. Stainbury, Castellon vs. Preston and others*⁶²). English jurists at that time were aware about the unjust enrichment and the concept of subrogation was considered as a measure to prevent the

⁵⁵ Lowry J. and Rawlings P., *Insurance Law: Cases and Materials*. Oxford – Portland Oregon: Hart Publishing, 2004. P. 10.

⁵⁶ Kontautas T. *Draudimo sutarčių teisė: monografija*. Vilnius: Justitia, 2007. P. 169.

⁵⁷ <http://www.answers.com/topic/property-insurance#ixzz18qfJdiOg>, date of connection 11/22/2010.

⁵⁸ http://wiki.answers.com/Q/What_are_the_characteristics_of_civil_responsibility, date of connection 11/22/2010.

⁵⁹ Birds J. and Hird N.J. *Birds’ Modern Insurance Law*. Sixth edition, London: Sweet & Maxwell, 2004. P. 296.

⁶⁰ Lowry J. and Rawlings P. *Insurance Law: Cases and Materials*. Oxford – Portland Oregon: Hart Publishing, 2004. P.587.

⁶¹ Lietuvos Respublikos Civilinis Kodeksas//Valstybės žinios. 2000, Nr. 74-2262.

⁶² Birds J. and Hird N.J. *Birds’ Modern Insurance Law*. Sixth edition. London: Sweet & Maxwell, 2004. P. 299.

unjustified enrichment of the insured to obtain insurance payment from the insurer and at the same time claiming damages from the responsible party for damage.

The insurer, which pays the insurance indemnity, on the basis of the institute of the subrogation has the right to claim damages from the liable party. Thus, it prevents from policyholders who received an insurance payment to demand in addition some compensation from the liable party, thus being deprived of their insurer to unjustified enrichment. In England's legal system the Institute of subrogation has developed upon two main directions. First, subrogation has evolved as part of the English law formed upon the doctrine of justice (called *equity*) its basis is fairness and equity. In respect of Justice (equity) the situation in which the policyholder receives an insurance payment from the insurer and at the same time can be able to claim damages from the liable party, objected the principle of the justice. The second direction of subrogation has been associated to the common law of England. It was observed in courts that each contract contained clauses which allow the insurer to switch to the policyholder's place and fulfil the entitlements in relation to a third party, whose fault occurred in an insured event, as well as at the time when a third person had no connection with the contract parties.

Meanwhile the concept of subrogation in the legal system of the United States appeared in the nineteenth century and it was essentially taken over from England as part of the system. In the colonial empire life of the United States of America the courts recognized the concept of subrogation. "Subrogation is the replacement of the policyholder by the insurer in relation to a third party. Subrogation is used in each case, when the obligation is fulfilled by one person instead of another person"⁶³.

In the E. Saukalas article "Practical aspects of use of the property insurance causation rules in case law" he makes a conclusion that "the issue of causation is a cornerstone of the property insurance contract"⁶⁴. Any coverage provided by the policy relates to existence of a causal connection between the loss and the peril covered. Frequently cases of loss of property involve more than one peril that may be considered legally significant. If one of the causes (perils) falls within the coverage grant, disputes over coverage can arise. The Lithuanian law and doctrine is silent regarding the question which causation rules could be applicable in multiple causation cases⁶⁵. Therefore the Lithuanian case law and the most significant foreign cases are analysed in order to determine how this issue is solved by the courts. E. Saukalas in his article reveals that in the field of property insurance, the insurers and the insured are not concerned with

⁶³ O' Brien J. J. The origins of subrogation//O'Brien & Hennesy education series topic // www.subrogation.net/docs/edu/edu3.doc; date of connection 20/11/2010.

⁶⁴ Saukalas E. Practical aspects of use of the property insurance causation rules in case law// Social Sciences Studies. Mykolo Romerio universitetas. 2009. www.mruni.eu/lt/mokslo_darbai/sms/archyvas/dwn.php?id..., P.297, date of connection: 21/11/2010.

⁶⁵Ibid.

the question whether the insured are liable for the damages to others; their only concern lies with the nature of the damage and how it was inflicted. The above mentioned article's author reveals that Lithuanian judges do not always understand this difference. Further more, our thesis reveals that Lithuanian judges seem to not always perceive the difference between the institutes of subrogation and recourse and are sometimes confused regarding the concept of the subrogation itself.

According to "Bird's Modern Insurance Law"⁶⁶, there are two aspects of Subrogation:

- The first aspect of subrogation is that "the insured cannot make a profit from his loss and that for any profit he does make he is accountable in equity to his insurer".
- The second aspect is related to the right of the "insurer who has indemnified his insured to step into the shoes of the insured ... and in his name pursue any right of action available to the insured which may diminish the loss insured against".

Typically, the insured's right will be to "sue a third party liable to pay damages in tort or for breach of contract or under a statutory right or liable to provide an indemnity to the insured, the third party's liability being in respect of the event for which the insured has recovered from his insurer"⁶⁷.

Insured can not violate the rights of the insurer as a result of the subrogation basis. Thus the insurer may not refuse or otherwise limit the rights of the person responsible for the damage. An insurer may not be invoked for profit basis. This means that the insurer's claim must be of the same magnitude as the insurer paid the amount of insurance benefits⁶⁸. "Subrogation does more than protect against the unjust enrichment of a particular loss-causer. Its second policy objective is to deter future socially undesirable loss-causing conduct. If potential loss-victims are completely indemnified, subrogation will be of primary means by which a loss-causing person will be held accountable"⁶⁹. Thus subrogation supplies a function of prevention.

In order to illustrate the subrogation in the case law the author proposes to highlight some principles of subrogation. The author analysed Supreme Court's decision in a civil case *AB „Lietuvos draudimas“ vs. UAB „ERGO Lietuva“, UAB „Ritranspeda“* Nr. 3K-3-503/2005⁷⁰ as of October 24, 2005. In this case the main idea of subrogation was explained as AB „Lietuvos draudimas“ had paid damages incurred during transportation of the cargo and claimed the

⁶⁶ Birds J. and Hird N.J. *Birds' Modern Insurance Law*. Sixth edition. London: Sweet & Maxwell, 2004. P. 298.

⁶⁷ *Idem*. P. 299.

⁶⁸ O'Brien J.J. *The origins of subrogation*/O'Brien & Hennesy education series topic // www.subrogation.net/docs/edu/edu3.doc; date of connection 11/20/2010.

⁶⁹ Maher B.S. & Pathak R.A. *Understanding and Problematising Contractual Tort Subrogation*. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1227323, P. 56; date of connection 11/14/2010.

⁷⁰ LAT Civilinių bylų skyriaus teisėjų kolegijos 2005 m. spalio 24 d. nutartis c.b. AB „Lietuvos draudimas“ vs. UAB „ERGO Lietuva“, UAB „Ritranspeda“ Nr. 3K-3-503/2005.

indemnity from the companies UAB „Littranspeda“ and UAB „ERGO Lietuva“, the claim was rejected notifying that subrogation can not be applied in civil liability (CC Art. 6.1015). The Supreme Court of Lithuania decided to give its opinion regarding the question of subrogation's implementation in the case of civil liability insurance. The judicial bench decided that this case was essential for determining the subrogation's sense (*latin subrogare* - change, elect instead of another), content, objectives and application rules. In order to decide on this concept, it is important to clarify the legal and other categories related to the requirements coming from the claim's cession and transfer to other persons. Various articles of the CC 2000 (sixth book) present different concepts: “creditor's right to transfer the claim” (*from latin cessio*) (Art. 6.101 of CC), “recourse” (*latin for regression-backward movement of return*) (Art. 6.114 of CC), “subrogation” (Art. 6.1015 of CC). All of them are associated with the transfer of a right in legal liability for another person; hence it is necessary to clarify the relation between these concepts. The Court of Appeal of Republic of Lithuania indicated in that case that the par. 4 Art. 6.101 of the CC compete with the par. 1 Art. 6.1015 of the CC (general law as well as special law) and in the case of civil liability the special provision of the par. 1 Art. 6.1015 of the CC is valid prohibiting the subrogation under the social liability insurance⁷¹.

The Supreme Court expressed its opinion that the concept of subrogation as determined in Art. 6.1015 of the CC should be interpreted and applied regarding the objectives of subrogation. The court has stated that the purpose of subrogation is to set an exception to the general rule of the law that the fulfilment of an obligation will cause its expiration⁷². Exemptions should be determined in order to retain all of the former creditor's rights, because by fulfilling an obligation according to the general rule, the liability is supposed to come to an end and the creditor would lose the advantages of the old obligation. In addition, one of the objectives of the subrogation is to prevent unjust enrichment. Therefore the Art. 6.1015 of the CC should be interpreted and applied in accordance to this principle.

Subrogation can not be equated with the recourse provided for legal insurance intercourse (p. 5, par. 1, Art. 6.114 of CC; par. 1, Art. 96 of the Insurance Law of the Republic of Lithuania, Art. 22 of the TPVCADI / *The Law of the Republic of Lithuania on Compulsory Insurance Against Civil Liability in Respect of the Use of Motor Vehicles*), because it focuses on the possible regression (recourse) of the insurer against the policyholder. In addition, the court noted that the decision that the subrogation is not to be applied when the expeditor and the carrier have been separately insured their civil liability is incompatible with legal certainty,

⁷¹ LAT Civilinių bylų skyriaus teisėjų kolegijos 2005 m. spalio 24 d. nutartis c.b. AB „Lietuvos draudimas“ vs. UAB „ERGO Lietuva“, UAB „Littranspeda“ Nr. 3K-3-503/2005.

⁷² Ibid.

fairness, justice and full compensation law⁷³. Therefore, the Court of Cassation rejected the lower court's decision finding that the insurer who has the civil liability insurance has no right to claim against the thirds if these persons have insured their civil liability. The judicial bench has emphasised that "in the case of civil liability insurance the following two options are possible:

- (i) Where the insured person and the person liable for damages is one and the same person or where insurance covers indirect civil liability, the insurance protection will inure to the interest covered under insurance contract.

Accordingly, the insured person insures himself against damages inflicted to third parties, in order to not suffer losses upon occurrence of an insured event. Thus, the right of recourse of the insurer who has paid an indemnity in respect of the insured person or the persons covered by him would make the civil liability insurance meaningless. Consequently, the rules for impossibility of subrogation in the case of civil liability insurance are applicable only to subrogation claims of insurance companies which have paid indemnities under civil liability insurance against the insured person (beneficiary);

- (ii) A different situation is in the cases where a civil liability insured and the person liable for damages are different persons, the insured person has insured only his own civil liability and has not insured the civil liability of the person liable for damages, i.e. the insurance protection will inure only to the insured person and not to the person who has inflicted damages⁷⁴.

In such cases the insurer upon compensation of damages on behalf of his insured person will acquire the claim right to the person who has inflicted damages, or, if the latter has insured his civil liability (his interest), jointly and severally to the said person and his insurer.

Thus the theoretical aspects of subrogation provided in law have been implemented into case law by creating a precedent. The Supreme Court of Lithuania expressed its position in the case that the decision can not be awarded on the basis of the existence of civil liability insurance, and all the circumstances have to be examined in that case i.e. who caused the damage, what was the size of damages. The Court decided that the presented proofs had not been examined before and thus the essence of the case was not revealed and has to be heard again at the first instance court.

Another illustration for subrogation can be Lithuanian Supreme Court's civil Case No. 3K-3-83/2010 as of March 2, 2010⁷⁵. The essence of the dispute is the classification of a recovery

⁷³ LAT Civilinių bylų skyriaus teisėjų kolegijos 2005 m. spalio 24 d. nutartis c.b. AB „Lietuvos draudimas“ vs. UAB „ERGO Lietuva“, UAB „Ritranspeda“ Nr. 3K-3-503/2005.

⁷⁴ Ibid.

⁷⁵ LAT Civilinių bylų skyriaus teisėjų kolegijos 2010 m. kovo 2 d. nutartis c.b. Valstybinio socialinio draudimo fondo valdybos Kauno skyrius vs. R.V., M.G. ir T.V. Nr. 3K-3-83/2010. „Teismų praktika“ (Dėl subrogacijos) Nr.33, 2010.

claim against persons who have a joint obligation to indemnify a third person, who paid for their damage. Supreme Court of Lithuania hearing the case found that the defendants committed robbery at school and injured a guard (third person). The Supreme Court of Lithuania presented its arguments and explanation; in its opinion in the case “there was no dispute about the fact of joint liability of defendants”. Supreme Court disagreed regarding the Court’s finding that the defendants had to indemnify the social security benefits that plaintiff paid to the third party (victim) jointly. The judicial bench of the Supreme Court decided that in that case there was a situation of subrogation, because ternary relations emerged: there were three persons: the victim, the damage was caused by people (plurality of debtors) and the person who indemnified a part of the victim’s damage. Subrogation objectives are threefold. Institute of subrogation assures that the person responsible for the damage could not avoid the responsibility, it also prevents undue enrichment of the victim, and undue enrichment of the person responsible for the damage. Thus, subrogation seeks to be compensatory, preventive and ensuring the integrity. As a result person who indemnified the damage shall be entitled to take over the victim’s right to compensation to the extent that payment of compensation. In the civil case No. 3K-3-83/2010 the victim’s insurer being Socialinio draudimo fondas /*Social Insurance Fund* or (*SODRA*) took over the right to claim for damages. Subrogation is a claim’s right’s legal transfer *i.e.* statutory cession (par 4 Art. 6.101 CC). That is the legal court practice in the Supreme Court of Lithuania (civil case *AB „Lietuvos draudimas“ vs. UAB ERGO Lietuva“*, *UAB „Ritranspedra“* (2005), No. 3K-3-503/2005; civil case *Valstybinio socialinio draudimo fondo valdybos Mažeikių skyrius v. AB „Lietuvos draudimas“* (2007), No 3K-7-73/2007⁷⁶).

This case illustrates another principle of subrogation: “step into the shoes” that is indispensable in the subrogation. Unlike in the case of recourse, in the case of subrogation don’t appear any new obligations and further, the existing obligation does not terminate it remains and the new creditor retains all of the former creditor’s rights and benefits. This means that the Social security fund, which paid social security benefits, becomes a creditor and this principle is called “step into the shoes”. *SODRA* substitutes the creditor in the delictual obligation to indemnify the victim in the tort liability (par 1 Art. 6.280 Civil Code; par. 3 Art. 6.290; Art.18 Law of the National Social Security). Debtor’s position in this case does not change. The third party who compensated the damage did not make any violation of law and does no harm it substitutes the insured person in insurance intercourse with the person reliable for the damage.

⁷⁶ LAT Civilinių bylų skyriaus teisėjų kolegijos 2007 m. vasario 19 d. nutartis c.b. Valstybinis socialinis draudimo fondas valdybos Mažeikių skyrius vs. AB „Lietuvos draudimas“ Nr. 3K-7-73/2007.

Summarising it can be said that subrogation can be implemented when a person is insured, he undergoes a loss and an insurer indemnifies him; afterwards the insurer acquires the right to sue the tortfeasor on the basis of subrogation doctrine. Subrogation accompanies payment. Payment discharges the obligation, but the fiction of subrogation operates to continue the existence of the rights, privileges, and powers of the former creditor, the subrogor, in favour of the subrogee⁷⁷. In the case of subrogation don't appear any new obligations and further, the existing obligation does not terminate it remains and the new creditor retains all of the former creditor's rights and benefits.

2.2. The “step into the shoes” principle (the insurer steps into the shoes of the insured)

Subrogation is often defined as a doctrine that allows one party to “step into the shoes” of another or “stand in the shoes” as it is said in American authors' articles, for the purpose of recovering money that the former has paid to the latter⁷⁸. Courts and scholars have tried to supply their own definitions as well but this determination is the most successful. Originally, subrogation referred only to the loss-insurer's ability to recover the indemnity from the loss-causer⁷⁹. Once stepped in the insured's shoes a question arises in whose name the remedy must be claimed. “A party who seeks the remedy of subrogation to a creditor's extinguished rights can proceed in his own name. There is no requirement that he must proceed in the name of the discharged creditor. In this respect, his claim differs fundamentally from an insurer's subrogated claim. Proceedings from the latter kind must be brought in the name of the insured, and the insurer must not appear as a party to the action. This rule in England was generalised by the House of Lords in *Eso Petroleum Co Ltd v Hall Russel & Co Ltd* (1989) AC 643⁸⁰.

The article “A new trend in Subrogation” in “The Georgetown law Journal”⁸¹ presents the *Darrell* case as an example of “step into the shoes” in which a situation was described “where the lessee, bound by contract to make repairs, complied with such provision. After compensation was paid by the insurance company to the lessor, the insurer, upon learning of the previous recovery by the insured, sued and recovered the money. The court said: “The doctrine is

⁷⁷ The Role of Subrogation by Operation of Law and Related Problems in the Insurance Field// Louisiana law review. Vol. XXII, 1961. P. 226.

⁷⁸ Maher B.S. & Pathak R.A. Understanding and Problematizing Contractual Tort Subrogation. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1227323, P. 52; date of connection 11/14/2010.

⁷⁹ Idem. P. 54.

⁸⁰ Mitchell Ch., Watterson S.. Subrogation: Law and practice. United states, New York, Oxford University Press inc., 2007. P. 256.

⁸¹ A new trend in Subrogation// The Georgetown law Journal. Vol. 38, 1950. P. 648. Citation: 38 Geo. L. J. 646 1949-1950.

well established that where something is insured against loss either in a marine or fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject matter insured, and with regard to every contract which touches the subject matter insured (....)⁸².” The importance of the compensation is stressed in this case as well as particular insurance contracts (marine and fire contract) in which the exchange of participants can be achieved.

Many decisions can be cited to illustrate the principle of “step into the shoes”: the Civil Case No. 3K-3-83/2010⁸³ as of 02 March, 2010, *Valstybinio socialinio draudimo fondo valdybos Kauno skyrius vs. R. V., M. G. ir T. V.* as mentioned here above where a dispute arose regarding the classification of a recovery claim against persons who have a joint obligation to indemnify a third person. The defendants committed robbery at school and injured a guard (third person) and as the claimant paid the social security insurance benefit he sues the defendants to jointly indemnify benefits that plaintiff (SODRA) paid to the third party. The person who fully indemnified the damages shall be entitled to take over the insured’s right to compensation to the extent equal to the payment of compensation and thus appears Socialinio Draudimo Fondas (*the Social Insurance Fund or SODRA*) instead of the insured and this principle is called “step into the shoes”.

One more case could be presented to illustrate the principle of stepping into the shoes by analysing the civil case No. 2A-699-159/2009, of September 23, 2009⁸⁴ where the Motor Insurers’ Bureau of the Republic of Lithuania claimed to indemnify damages as well as the interests in the way of recourse; the court noted that: “(...) in the legal insurance intercourse the only participants are the insurer and the insured person and the Motor Insurers’ Bureau of the Republic of Lithuania can not sign any insurance contracts nor is an insurer, it is a professional union of insurers, allowed to explore the insurance business in this country, established according to the United Nations organisation (...)”. The legal insurance’s participants can only be the insurer and the insured, and when the principle “step into the shoes” occurs the intercourse is between the insurer acting instead of the insured and the third person and there appears legal insurance intercourse but delictual liability intercourse.

In the article “The extension of insurance subrogation” S.L. Kimball, D.A. Davis present the situation in the United States of America saying that “Cases in accident insurance are few apart from special situations, are uniform in result. Subrogation against the tortfeasor is

⁸² A new trend in Subrogation// The Georgetown law Journal. Vol. 38, 1950. P. 648. Citation: 38 Geo. L. J. 646 1949-1950.

⁸³ LAT Civilinių bylų skyriaus teisėjų kolegijos 2010 m. kovo 2 d. nutartis c.b. Valstybinio socialinio draudimo fondo valdybos Kauno skyrius vs. R. V., M. G. ir T. V. Nr. 3K-3-83/2010.

⁸⁴ Klaipėdos apygardos teismo Civilinių bylų skyriaus 2009 m. rugsėjo mėn. 23 d. nutartis civilinėje byloje Nr. 2A-699-159/2009, <http://www.infollex.lt/tp/135189>, connection date: 11/22/2010.

denied, the courts usually emphasising that accident insurance is analogous to the life insurance”⁸⁵. The regulation in Lithuania deals with the same problem regarding the basis of par. 1 Art. 6.1015 of the Civil Code prohibiting the subrogation in case of insurance against accidents. An interesting opinion related to the “step into the shoes” is expressed in R. Hasson’s article “Subrogation in Insurance Law – a Critical Evaluation”⁸⁶ saying, that “to many lawyers, nothing could be more beneficial than that an insurer should penalize the wrongdoer and hold the recoveries in trust for the benefit of “innocent” policyholders” meaning that insurers get profit while “step into the shoes” of the injured. The author says trying to prove and achieve the abolishment of subrogation in most areas of insurance. When describing the subrogation itself it is said that its principle is to “allow the insured to recover from his/her own insurer but also to allow the insurer to use the insured’s name to recover such payout from the tortfeasor or contract breaker”⁸⁷ i.e. “step into the shoes” principle. But in the field of “personal injury because life insurance and accident insurance are (strangely) not thought to be contracts of indemnity, the insured person is allowed to accumulate recoveries”⁸⁸.

Author agrees with R. Hasson regarding the confusing character of subrogation and its closeness to the recourse doctrine, as it is surely complicated for jurists and lawyers to deal with specific provisions regarding insurance in one or another type of intercourse. On the other hand one needs special knowledge in any field and as the term of subrogation is quite new in Lithuania (introduced to the Civil Code as a special article only in 2000) the confusion is supposed to disappear as precedents for future case law are being created.

Summarising all being said it is obvious that it is necessary for the insurer to “step into the shoes” of the insured (policyholder) in order to receive the compensation from the tortfeasor for the sums he had already paid to the insured to indemnify the loss. When an insured suffers a loss which is covered by an insurance policy but which is due to the wrongful act of another person, the insurer is subrogated to the rights of the insured against the wrongdoer.

⁸⁵ S.L. Kimball, D.A. Davis. The extension of insurance subrogation.// Michigan Law Review. 1962, No 7. P. 845. <http://www.jstor.org/stable/1286625>, connection date: 14/10/2010.

⁸⁶ Hasson R. Subrogation in Insurance Law – a Critical Evaluation//Oxford Journals. Oxford University Press. 1985. No 3. P. 417.

⁸⁷ Ibid.

⁸⁸ Ibid.

2.3. The indemnity principle (full compensation)

Theoretically subrogation doesn't appear until the insured is fully indemnified or "once the insurers have met their full liability under the policy in respect of the relevant incident"⁸⁹ and this is the core point when hearing a case at the court. S.L. Kimball and D.A. Davis in "Michigan Law review"⁹⁰ in 1962 named essential notion of subrogation: "the most insurance contracts are in their nature contracts of indemnity". In 1993 an article was edited by R. Harris named "Insurance subrogation" in Canadian Business Law Journal where the indemnity principle was explained as follows: "The funds must be distributed to the individual insureds before the insurers had any rights to recover their losses, and such rights were enforceable only by common law actions for moneys had and received."⁹¹ The notion of the indemnity principle is one of the most important these days as well. The insurer has to fully indemnify the insured in order to respect the main principles of subrogation and to get the right to sue the third party. The insured can not make profit from his loss. It remained the same principle as in 1962, as the courts adopted the rule that "the insured shall be entitled to only one full indemnity for the injury sustained, and from this the doctrine of subrogation has risen"⁹². In the case *Castellain v Preston* (1883) 1 QBO 380⁹³ which created precedent [Fabula being as follows: The vendor of a house contracted for its sale. The house was insured and the sale contract contained no reference to insurance. Between the date of the contract and completion the house was damaged by fire and the insurers paid the vendor for the loss. The purchase was then completed and the vendor received the full price agreed in the contract. It was held that the insurers were not entitled to recover the amount of their payment to the vendor.]. It was held that the vendor was therefore bound to account to his insurer for the money the latter had paid⁹⁴. The decision was assuring the essential principle for the future subrogation concept - full indemnity but never more than full indemnity and "in favour of the underwriters or insures in order to prevent the assured from recovering more than a full indemnity"⁹⁵. The subrogation was adopted as a solution for the main principle of insurance to prevent the assured from recovering more than a full indemnity; it was

⁸⁹ Lowry J. and Rawlings P. *Insurance Law: Cases and Materials*. Oxford – Portland Oregon: Hart Publishing, 2004, P. 595.

⁹⁰ S.L. Kimball, D.A. Davis. The extension of insurance subrogation.// *Michigan Law Review*. 1962, No 7. P. 842, <http://www.jstor.org/stable/1286625>, connection date: 10/14/2010.

⁹¹ R. Harris. *Insurance subrogation*//*Canadian Business Law Journal*, Vol. 22. 1993. P. 310.

⁹² *Ibid*.

⁹³ Lowry J. and Rawlings P. *Insurance Law: Cases and Materials*. Oxford – Portland Oregon: Hart Publishing, 2004, P. 587.

⁹⁴ Birds J. and Hird N.J., *Birds' Modern Insurance Law*, sixth edition, London, Sweet & Maxwell, 2004, pg. 299.

⁹⁵ Lowry J. and Rawlings P. *Insurance Law: Cases and Materials*. Oxford – Portland Oregon: Hart Publishing, 2004, P. 587.

adopted solely for that reason.⁹⁶ Subrogation clauses written into policies often give the insurer subrogation rights “before or after” payment under the policy⁹⁷. The law does not give an insurer the right to bring subrogated proceedings in the insured’s name “until after the insured has been fully indemnified in accordance with the terms of the policy” according to the decision taken in the *Dickenson v Jardine* [1868]”⁹⁸. The insurer subrogation right does not arise by operation of law at any earlier time, for example, when the insured makes his claim, or when the insurer agrees to pay (*Primetrade AG v Ythan* [2005])⁹⁹.

Another example of full indemnity principle is the decision taken in *Somersall v Friedman* (2002) 215 DLR (4th) 577 (Supreme Court of Canada): “... it is important to keep in mind the underlying objectives of the doctrine of subrogation which is to ensure (i) that the insured receives no more and no less than a full indemnity, and (ii) that the loss falls on the person who is legally responsible for causing it...The doctrine of subrogation operates to ensure that the insured received only a just indemnity and does not profit from the insurance: see *Castellain v Preston* (1883) 1 QBO 380¹⁰⁰.

Regarding Lithuania’s court practice author analysed ten civil cases and all the cases could be recited as an example of indemnity principle as the subrogation right arises only after insurer has met his full liability under the policy in respect of the particular event. In the civil case *AB „Lietuvos draudimas“ vs. UAB „ERGO Lietuva“, UAB „Ritranspeda“ Nr. 3K-3-503/2005*¹⁰¹ as of October 24, 2005 the claimant had paid 17 459,12 Lit as an insurance benefit and thus acquired the right to subrogation.

Another example could be the analysed civil case *UAB „PZU Lietuva“ vs. AB „Lietuvos draudimas“ Nr. 3K-3-76/2008*¹⁰² as of February 12, 2008 the claimant had paid 9 061,95 Lit as an insurance benefit and thus acquired the right to subrogation after full compensation to the insured person.

Regarding the full compensation in subrogation one more example could be presented; the decision of the Supreme Court of Lithuania in the Civil Case No. 3K-3-83/2010¹⁰³ as of 02 March, 2010, mentioned here above in the chapter 2. In a case where a part of indemnity is paid

⁹⁶ Lowry J. and Rawlings P. Insurance Law: Cases and Materials. Oxford – Portland Oregon: Hart Publishing, 2004, P. 587.

⁹⁷ Ch. Mitchell, S. Watterson. Subrogation: Law and practice. United states, New York, Oxford university press inc., 2007. P. 326.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Lowry J. and Rawlings P. Insurance Law: Cases and Materials. Oxford – Portland Oregon: Hart Publishing, 2004, P. 590.

¹⁰¹ LAT Civilinių bylų skyriaus teisėjų kolegijos 2005 m. spalio 24 d. nutartis c.b. AB „Lietuvos draudimas“ vs. UAB „ERGO Lietuva“, UAB „Ritranspeda“ Nr. 3K-3-503/2005.

¹⁰² LAT Civilinių bylų skyriaus teisėjų kolegijos 2008 m. vasario 12 d. nutartis c.b. „PZU Lietuva“ vs. AB „Lietuvos draudimas“ Nr. 3K-3-76/2008.

¹⁰³ LAT Civilinių bylų skyriaus teisėjų kolegijos 2010 m. kovo 02 d. nutartis c.b. Valstybinio socialinio draudimo fondo valdybos Kauno skyrius vs. R. V., M. G. ir T. V. Nr. 3K-3-83/2010.

by the Sodra (*Social Security Fund*) the subrogation has to be applied, as ternary relations arise when there are three persons: the victim, the wrongdoer and the person who indemnified the damage.

Analysing the principle of indemnity in subrogation doctrine three objectives which has to be achieved by the subrogation should be emphasized:

1. assure that the person responsible for the damage could not avoid the responsibility;
2. prevent undue enrichment of the victim;
3. prevent undue enrichment of the person responsible for the damage;

Therefore, subrogation's nature is compensatory, preventive and ensuring the honesty¹⁰⁴.

The person who indemnified the damages shall be entitled to take over the insured's right to compensation to the extent equal to the payment of compensation. Thus instead of the victim's tort liability for damages appears Socialinio Draudimo Fondas (*the Social Insurance Fund or SODRA*). This means that the Socialinio Draudimo Fondas, which paid social security benefits becomes a creditor in the tort liability (par. 1 Art. 6.280; par. 3 Art. 6.290; Civil Code, Art.18 of the LR Valstybinio socialinio draudimo įstatymas /Law on the National Social Liability/) and this principle is called "step into the shoes". Debtor's position in this case does not change. The insurance company which has compensated damages to the policyholder gains the subrogation right which is not violating the law and does no harm for the insured, so the obligation to pay the compensation has to be fulfilled.

It is interesting to note that in German terminology it is customary to divide insurance into "damage" and "personal" insurance¹⁰⁵. Accident insurance is given special attention in the German Insurance Contract Law. In general, the subrogation provision is not applicable to accident insurance but there certain appearances of provisions that are treated as damage insurance with the consequence that subrogation is available¹⁰⁶.

H.R. Finns summarises the core points on subrogation in the case comments saying: "Subrogation, a civil law concept, was originally adopted by equity to benefit the surety who was compelled to pay the debt of his principal. Its purpose is threefold: it prevents unjust enrichment by preventing a creditor from collecting both from his surety and the principal; it provides for reimbursement of the surety; and it prevents a wrongdoer from escaping the responsibility of bearing the loss and thus obtaining a windfall benefit. Subrogation accomplishes its purposes by giving the one who has paid the debt of another all the rights and remedies of the one whose debt

¹⁰⁴ LAT Civilinių bylų skyriaus teisėjų kolegijos 2010 m. kovo 02 d. nutartis c.b. Valstybinio socialinio draudimo fondo valdybos Kauno skyrius vs. R. V., M. G. ir T. V. Nr. 3K-3-83/2010..

¹⁰⁵ S.L. Kimball, D.A. Davis. The extension of insurance subrogation.// Michigan Law Review. 1962, No 7. P. 850. <http://www.jstor.org/stable/1286625>, connection date: 10/14/2010.

¹⁰⁶ Idem. P. 854.

was paid¹⁰⁷. In Lithuanian case practice the subrogation is implemented in order to achieve the same goals: to implement the full indemnity principle and to prevent unjust enrichment.

In order to summarise the indemnity principle's essential point it could be said that the subrogation seeks to assure that the person responsible for the damages could not avoid the responsibility, to prevent undue enrichment of the victim as well as undue enrichment of the person responsible for the damages and thus the subrogation's nature is compensatory, preventive and ensuring the honesty. Person who has more than one claim to indemnity is not entitled to be paid more than once. The person who has been paid is entitled to be subrogated to the rights against the other person liable.

2.4. Statutory limitations period

Regarding statutory limitations in Lithuania the "Draudimo sutarčių teisė"¹⁰⁸ is one of the very few ones concerning subrogation. T. Kontautas presents the insurance statutory limitation periods comparing with other civil contracts and points the reader's attention to the fact that the period of statutory limitations regarding obligations arising from the insurance contracts legal intercourse is very short and equals to one year (par.7 Art. 1.125 of Civil Code).

Obligations arising from the insurance contracts include insured's claim to pay back a part of amounts paid due to abolishment of a contract, insured's or policyholder's claim for the benefit or claims or other requirements out from other insured, policy holder or the person gaining benefits regarding the insurer violating the contract or other precontractual engagements.

It is important to notice that statutory limitations period differs for claims arising from the insurance contracts and other claims though apparently these claims are very closely related meanwhile these obligations are never identical. In the case where a victim (insured) presents a direct claim for the third party such right is supposed to arise from the tort liability thus the statutory limitations period is three years. In the case where subrogation (Art. 6.1015 of Civil Code) is involved, the insurer acquires all the insured's rights had by him against the person reliable for damages according to the tort liability. It should be emphasized that contractual intercourse between insurer and insured stops existing after insurer indemnifies the policyholder and acquires the right to claim against the tortfeasor. Thus the statutory limitations period

¹⁰⁷ H.R. Flinn. Case comments. Subrogation – Insured Must Be paid In Full For Loss Before Insurer Is Entitled To Subrogation Against Tortfeasor//Memphis state university review. Vol. 10, 1979. P. 161. www.heinonline.org, connection date: 20/11/2010.

¹⁰⁸ Kontautas T. Draudimo sutarčių teisė: monografija. Vilnius: Justitia, 2007. P. 164-165.

regarding the loss-causer is three years and not one year (emerging from contractual intercourse) as in general provision.

In the case where the insurer had indemnified the insured and the loss-causer had indemnified him before or in other cases where the insurer had no obligation to indemnify the policyholder the problem of “unjust enrichment” arises and there can arise legal intercourse related to unjust enrichment (Art. 6.237- 6.242 of Civil Code). In such a case common statutory limitations period of ten years is applied regarding the insurer’s right to recover the benefits paid in surplus. As a result person who indemnified the damage shall be entitled to take over the victim’s right to compensation to the extent of the payment of compensation.

Regarding the statutory limitations period arising from the insurance contracts legal intercourse T. Kontautas presents an interpretational argumentation for such a short term; in his opinion our state might have imposed “such a short term seeking to encourage the insured person to save time and to protect his own legal rights and in order to let to remember all the circumstances and consequences regarding the action insured as it is more difficult to do much later”¹⁰⁹. T. Kontautas underlined one interesting aspect in addition: shorter terms are applied for protection of so called “weaker” person (insured’s) in legal intercourse and it is unreasonable because it contradicts with the principle of weaker party protection.

In the case of subrogation the statutory limitations period do not expire due to exchange of participants. The insurer has to respect the statutory limitations period applied to the insured’s claim to indemnify the loss he suffered because of the fault of the third party. Thus the insured’s substitution by the insurer in legal intercourse does not impact the statutory limitations period¹¹⁰.

Author analysed a civil case Nr. 3K-3-300/2006, *UAB DK „Baltic Polis“ vs. B. K., G. K.*,¹¹¹ held at Supreme Court of Lithuania as of 26 April 2006 regarding the insurer’s right to claim the incident causing person’s inheritors concerning the benefit paid and the causes for not respect of limitations period and a possibility to extend the terms it was notified that it is necessary to identify the nature of litigation and the claim’s character in order to determine the requirement’s potentiality and the statutory limitations period and the legal significance of the non-compliance with the limitation periods, if appeared, regarding the potentiality of renewal of such periods. In order to file a claim it is necessary to identify the nature of litigation regarding the claim: where the insurance law or delictual law has to be applied.

¹⁰⁹ Kontautas T. *Draudimo sutarčių teisė: monografija*. Vilnius: Justitia, 2007. P. 165.

¹¹⁰ *Idem.* P. 180.

¹¹¹ Lietuvos Aukščiausiojo Teismo Civilinių bylų skyriaus teisėjų kolegijos 2006 m. balandžio 26 d. nutartis, priimta civilinėje byloje *UAB DK „Baltic Polis“ v. B. K., G. K.*, Nr. 3K-3-300/2006.

Author analysed an appeal claim regarding decision in case No. 2-44-750/2009 regarding the decision in the civil case No. 2A-699-159/2009¹¹², as of September 23, 2009, mentioned above, where the Motor Insurers' Bureau of the Republic of Lithuania sues a person G. P. in order to indemnify damages and interests in the way of recourse; the court noted that: "There is a consensus that reduced one-year limitation period can not be applied in the case of subrogation when the insurer seeks to be indemnified by the liable person, because the par. 2 Art. 6.1015 of the Civil Code provides that the right of requirement transferred to the insurer has to be assured in accordance with implementing rules between the policyholder (beneficiary) and the liable party intercourse, but these provisions are apparently contradicted by the provisions of par. 1 Art. 6.1015 of the CC; the subrogation does not apply in insurance against accidents, sickness insurance, liability insurance, as well as in other cases provided by law. It is clear that this civil case does concern an intercourse related to the civil liability insurance and that clearly should be applicable one year statutory limitations period in application of the provisions."¹¹³ The author suggests this case to be an illustration of confusion and misunderstanding of the principle of subrogation and the liability periods pending. At this situation the subrogation does not apply since subrogation is not applied to insurance against accidents, sickness insurance, civil liability insurance, as well as in some other cases provided by law. In above analysed case the court applies for the statutory limitations period of three years on the bases of legal recourse.

Another case of confusing decisions and misunderstanding of the principle of subrogation can be cited as follows. Kaunas District Court in the civil case "*Lietuvos Respublikos transporto priemonių draudikų biuras*" vs. M. S. ir V. M., as of July 7, 2010 No. 2A-789-109/2010¹¹⁴ noted that the claimant where the Motor Insurers' Bureau of the Republic of Lithuania sues two persons M. S. ir V. M. as it paid insurance benefit and seeks for recovery from persons M. S. ir V. M. as being responsible for the damage. The court expressed its opinion regarding the statutory limitations period to be applied and decided that in this case there was a fact of causing damages that involved the right to recourse and not the legal liability intercourse thus the statutory limitations period to be applied is three years and not one year as it would be in a case of civil liability intercourse¹¹⁵.

The author analysed another civil case, held at the Supreme Court of Lithuania in February 23, 2010 where the claimant was AAS "Gjensidige Baltic" and the defendant being

¹¹² Klaipėdos apygardos teismo Civilinių bylų skyriaus 2009 m. rugsėjo mėn. 23 d. nutartis c. b. "*Lietuvos Respublikos transporto priemonių draudikų biuras*" vs. G. P. Nr. 2A-699-159/2009.

¹¹³ Ibid.

¹¹⁴ Kauno apygardos teismo Civilinių bylų skyriaus 2010 m. liepos mėn. 7 d. nutartis c. b. "*Lietuvos Respublikos transporto priemonių draudikų biuras*" vs. M. S. Nr. 2A-789-109/2010.

¹¹⁵ Ibid.

G.B.¹¹⁶. A person G. B. committed an accident and three vehicles were damaged; a person M. M.'s car was damaged and his/her insurer paid a 10 000 Litass benefit amount according to presented service station's offer and some negotiations. The Vilnius District Court's decision was to apply the Art. 6.1015 of CC as in case of subrogation. The Supreme Court of Lithuania expressed its opinion concerning the concepts of recourse and subrogation and noted that the Special Law i.e. TPSVSADI (*The Law of the Republic of Lithuania on Compulsory Insurance Against Civil Liability in Respect of the Use of Motor Vehicles*) was to be applied and not the provision for subrogation (Art. 6.1015 of the CC). In the case *inter allia* some questions regarding the recourse and subrogation arose and consequently the questions concerning the statutory limitations period. In the Supreme Court's opinion subrogation is not possible in the case of civil liability insurance. But subrogation is not to be confused with recourse as the latter is regulated by Art. 6.114 of the CC by Civil Code of Lithuania (p. 5 par. 1 Art. 6.114 of CC). The provisions of the articles mentioned above can not be considered as subrogation. In this case the damage was indemnified by the insurer and the right to claim arose to the insurer. There is one more aspect to be mentioned reciting this case that delictual legal intercourse expires when the damage is fully identified (according to par 1 Art. 6.123 of CC) except the cases where the insurance benefit doesn't fully indemnify the damage.

Statutory limitations period is different in various countries, but they are longer in many European countries: in Germany the limitations period for intercourse arising from insurance contract is 2 years, the limitations under life insurance is 5 years and 10 years under civil liability insurance. Consequently France applies 2 years limitations period arising from insurance contract intercourse, 10 years under life insurance and 30 years under civil liability insurance. The United Kingdom applies 6 years limitations period related to damages under insurance contract and 3 years period under the same contract but in relation with a person's injury¹¹⁷.

Summarising it has to be emphasized that in the case of subrogation the statutory limitations period do not expire due to exchange of participants. The insurer has to respect the statutory limitations period applied to the insured's claim to indemnify the loss he suffered because of the fault of the third party meaning that on the basis of the tort law three year statutory limitations period has to be applied.

¹¹⁶ LAT Civilinių bylų skyriaus teisėjų kolegijos 2010 m. vasario 23 d. nutartis c.b. AAS "Gjensidige Baltic" vs. G. B. Nr. 3K-3-78/2010.

¹¹⁷ Kontautas T. Draudimo sutarčių teisė: monografija, Justitia, 2007. P. 165.

2.5. Legal and conventional subrogation

According to J. Lowry and P. Rawlings subrogation is “either legal or conventional, i.e. it is either the creation of the law (or more accurately of equity) or it is the product of an agreement by the parties. In either case the subrogation solution rests mainly on two notions”¹¹⁸. “Subrogation is routinely divided into two types” that was the conclusion at the case *Welsh Foods, Inc vs. Chicago Title Insurance Company* 17 SW3d 467 (Supreme Court of Arkansas, 2000)¹¹⁹. The distinction relates to the facts “giving rise to the substitution of rights. Conventional subrogation, as the term implies, is founded upon some understanding or agreement, express or implied, and without which there is no “convention” *Courtney v Birdsong* 246 Ark 162, 437 SW2d 238 (1969). “Legal or equitable subrogation is a creature of equity and not dependant upon contract, but rather dependent upon equities of the parties. It arises by operation of law”¹²⁰.

In the United States of America in modern days it is said subrogation can be of three types¹²¹:

1. Made by the owner of a thing of his own free will, for example when he voluntarily assigns it.
2. That arises in consequence of the law, even without the content of the owner. For example, when a man pays a debt which could not be properly called his own, but which nevertheless was his interest to pay or which he might have been compelled to pay for another, the law subrogates him to the rights of the creditor.
3. That arises by the act of law joined to the act of the debtor; as the debtor borrows money expressly to pay his debt and with the intention of substituting the lender in the place of the old creditor.

Author analysed a civil case No 3K-7-73/2007, held at the Supreme Court of Lithuania in February 19, 2007 where the claimant was Valstybinio socialinio draudimo fondo valdybos Mažeikių skyrius the defendant being AB “Lietuvos draudimas”¹²² [a person acting as a AB “Lietuvos draudimas” policyholder committed an accident and two persons were injured, so Valstybinio socialinio draudimo fondo valdybos Mažeikių skyrius paid out the social benefit for two persons being victims and thus sues the insurance company AB “Lietuvos draudimas” to recover the sums paid out as full indemnity having in mind that the person reliable for the

¹¹⁸ S.L. Kimball, D.A. Davis. The extension of insurance subrogation.// Michigan Law Review. 1962, No 7. P. 841, <http://www.jstor.org/stable/1286625>, connection date: 10/14/2010.

¹¹⁹ Lowry J. and Rawlings P. Insurance Law: Cases and Materials. Oxford – Portland Oregon: Hart Publishing, 2004, P. 590.

¹²⁰ Idem. P. 591.

¹²¹ <http://www.lectlaw.com/def2/s084.htm>, date of connection: 11/20/2010.

¹²² LAT Civilinių bylų skyriaus teisėjų kolegijos 2007 m. vasario 19 d. nutartis c.b. Valstybinio socialinio draudimo fondo valdybos Mažeikių skyrius vs. AB “Lietuvos draudimas” Nr. 3K-7-73/2007.

damage had civil liability car insurance]. Regarding the court argumentation it was said that “in that case the liability of the insure was to be set not in order to respect delictual civil liability but in order to respect conventional legal insurance intercourse and the statutory limitations period of one year should be applied. In respect of the circumstances that “there are no legal liability intercourse between the insured (beneficiary) and the person reliable for the damage” the insurer undertakes the claim right towards the person reliable for the injury (subrogation). It has to be noted that subrogation, according to the provisions of Art. 6.1015 of CC is not a recourse claim, as it was decided in the First Instance Court, but the legal cession as set in the par. 4 Art. 6.101 of CC (lot. Cession- the creditor’s right to subrogate the requirement) i.e. the Art. 6.1015 of CC is the solely article where it is held to be legal cession in the insurance intercourse¹²³. In this particular case the legal subrogation doctrine appears. It should be also mentioned that all cases of subrogation by operation of law are enumerated in the Article 6.114 of Civil Code of Republic of Lithuania.

Author underlines that conventional subrogation practice is apparently widely applied in United States of America and “the USA courts tend to be more explicit in their pursuit of policy goals in this area than the English courts¹²⁴”, but the main goals remain the same: the wrongdoer should bear the loss and the insurer should not be able to recover twice. In Lithuania the legal subrogation is widely applied while dealing with insurance cases regarding insurer’s right to claim for the compensation from the third party although T. Kontautas reveals that “An insurance contract can prohibit the subrogation (e.g. it can be prohibited to apply subrogation right against the family members of the insured), except the case of damages caused by deliberate actions”¹²⁵.

In Lithuania the recourse can be conventional or legal in respect to the chapter VII Art. 6.111, but the comments presented in the “Lietuvos Respublikos civilinio kodekso komentaras“ (*Comments on Civil Code*)¹²⁶ regarding the conventional recourse include a mention about conventional subrogation: “the legal subrogation is normally implemented by law but it can be implemented on the basis of contract as well; e.g. to a person who fulfilled a debtor’s right against his creditor (Art. 6.50-6.51 of CC) or under a contract that a creditor signs with a person, taking over another person’s debt (Art. 6.115 of CC)”¹²⁷. . It should be also indicated that all

¹²³ LAT Civilinių bylų skyriaus teisėjų kolegijos 2007 m. vasario 19 d. nutartis c.b. Valstybinio socialinio draudimo fondo valdybos Mažeikių skyrius vs. AB “Lietuvos draudimas” Nr. 3K-7-73/2007.

¹²⁴ Lowry J. and Rawlings P. *Insurance Law: Cases and Materials*. Oxford – Portland Oregon: Hart Publishing, 2004, P. 591.

¹²⁵ Kontautas T. *Draudimo sutarčių teisė: monografija*, Justitia, 2007. P. 181.

¹²⁶ Mikelėnas V., Bakanas A., Bartkus G. ir kiti. *Lietuvos Respublikos civilinio kodekso komentaras. Šeštoji knyga. Prievolių teisė*. Vilnius: Justitia, 2003. P.153.

¹²⁷ *Idem*. P.153.

cases of subrogation by operation of law are enumerated in the Article 6.114 of Civil Code of Republic of Lithuania.

Summarising it can be said that conventional subrogation practice is apparently widely applied in United States of America and in Lithuania the legal subrogation is widely applied while dealing with insurance cases regarding insurer's right to claim for the compensation from the third party, but the main goals remain the same: the wrongdoer should bear the loss and the insurer should not be able to recover twice. Although an insurance contract in Lithuania can prohibit the subrogation (e.g. it can be prohibited to apply subrogation right against the family members of the insured), except the case of damages caused by deliberate actions.

2.6. Distinction between subrogation and recourse institutes

Subrogation and recourse institutes are often being confused, so it is of great importance to emphasise the differences of both doctrines analyzing particular situations of legal practice.

Subrogation makes reference to the manner of change of creditors in the existing obligation because the claim right, upon passing onto the insurer, that has to be implemented complying with the rules that establish the intercourse between the insured person (beneficiary) and the person liable for damages. Subrogation may not be equalled to regress stipulated in insurance legal relations since in such case the matter would be concerned with possible regress of the insurer against the insured person.

When the insured and the person reliable for damages is one and the same person the subrogation is prohibited, the insurance protection will inure to the interest covered under insurance contract. In that case the insurance serves for interest retained in the insurance contract. The insured person insures himself against damages inflicted to third parties, in order to not suffer losses upon occurrence of an insured event¹²⁸. It is obvious that in this case the main difference regards the persons in the insurance intercourse.

There was a civil case No 3K-7-166/2006 held at Supreme Court of Lithuania as of 7 April, 2006 claimant being *Valstybinio socialinio draudimo fondo valdybos Kauno skyrius vs. defendant UAB „Klaipėdos autobusų parkas“*¹²⁹ regarding the recourse and the most important to retain is the explanation of insurance companies' rights to claim recourse towards the person reliable from the damage. The most important is the fact that the implementation of subrogation in

¹²⁸ LAT Civilinių bylų skyriaus teisėjų kolegijos 2009 m. rugsėjo 30 d. V. B. ir G. B. vs UADB „Ergo Lietuva“ Nr. Nr. 3K-3-382/2009.

¹²⁹ LAT Civilinių bylų skyriaus teisėjų kolegijos 2006 m. balandžio 7 d. nutartis c.b. Valstybinio socialinio draudimo fondo valdybos Kauno skyrius vs. UAB „Klaipėdos autobusų parkas“. Nr. 3K-7-166/2006.

the legal social liability intercourse is not possible and only the right to recourse can be applied. The case revealed in the No. 2-44-750/2009 regarding the decision in the civil case No. 2A-699-159/2009, as of September 23, 2009 concerning the statutory liability¹³⁰ can demonstrate the distinction of subrogation and recourse institutes. The claimant who paid compensation in accordance with par 1 Art.23 of *The Law of the Republic of Lithuania on Compulsory Insurance Against Civil Liability in Respect of the Use of Motor Vehicles* (TPVCAPDĮ) provisions shall be entitled to recover from the wrongdoer of the accident with whom the claimant has not legal insurance intercourse but delictual liability intercourse. There is a three year liability period for the delictual liability intercourse (par 8 Art. 1.125 of the CC). In author's opinion the above cited case statutory limitations period seems to be the same as in the case of subrogation. In the present case the question arose about subrogation's implementation (transfer of the rights of policyholders towards insurer) in the case of legal intercourse due to accidents and illness at work and the procedures of insurer regarding recourse to the liable person (par. 1 Art. 6.1015 of CC, par. 3 Art. 6.290 of CC). These substantive questions of law are essential to the uniform application of law and interpretation. Once again the judges had to present the court's explication regarding subrogation and recourse in order to create a precedent for future cases.

Another case can be recited in order to illustrate confusing character of the subrogation: a civil case, held at the Supreme Court of Lithuania in February 23, 2010 where the claimant was AAS "Gjensidige Baltic" and the defendant being G.B.¹³¹. The Vilnius District Court's decision was to apply the Art. 6.1015 of CC as in case of subrogation and the Supreme Court of Lithuania expressed its opinion concerning the concepts of recourse and subrogation and noted that the Special Law, i.e. TPSVSADĮ (*The Law of the Republic of Lithuania on Compulsory Insurance Against Civil Liability in Respect of the Use of Motor Vehicles*) was to be applied in that case but not the provision for subrogation (Art. 6.1015 of the CC).

These cases illustrate the second hypothesis of the thesis that the subrogation and recourse institutes are not clearly determined and involve misunderstanding in the decision making at the legal practice in Lithuania.

Another case of confusing decisions and misunderstanding of the principle of subrogation can be cited as follows. Kaunas District Court in the civil case of July 7, 2010 No. 2A-789-109/2010¹³² (the Motor Insurers' Bureau of the Republic of Lithuania appeal claim regarding decision in case No. 2-2053-769/2009) noted that the claimant were the Motor

¹³⁰ Klaipėdos apygardos teismo Civilinių bylų skyriaus 2009 m. rugsėjo mėn. 23 d. nutartis c. b. Lietuvos Respublikos transporto priemonių draudikų biuras" vs. M. S. ir V. M.Nr. 2A-699-159/2009.

¹³¹ LAT Civilinių bylų skyriaus teisėjų kolegijos 2010 m. vasario 23 d. nutartis c.b. AAS "Gjensidige Baltic" vs. G. B. Nr. 3K-3-78/2010.

¹³² Kauno apygardos teismo Civilinių bylų skyriaus 2010 m. liepos mėn. 7 d. nutartis c. b. "Lietuvos Respublikos transporto priemonių draudikų biuras" vs. M. S. Nr. 2A-789-109/2010.

Insurers' Bureau of the Republic of Lithuania sues two persons M. S. ir V. M. as it paid insurance benefit and claims for recovery from persons M. S. and V. M. as being responsible for the loss. In this case there was a fact of making damage that involved the right to recourse and not the legal liability intercourse thus the applied statutory limitation period was three years. In author's opinion above mentioned situation once again shows the confusion which emerges while dealing with this kind of cases. The question arises how the secondary creditor's claim in this situation should be treated as a subrogation claim or as a recourse claim. The court expressed its opinion regarding the statutory limitations period to be applied and decided that the three years statutory limitation period has to be applied on the basis of recourse institute.

Here are just few cases recited where subrogation and recourse have caused confusion and misunderstanding or a different slant or aspect and involves different periods of limitations to be implemented. In some cases the decision of the court as a whole was abolished and the case had to be proceeded or appeals were filed to higher courts and the courts of cassations or appeals or even the Supreme Court had to be involved in decision making.

Subrogation being widely analysed in the above chapters, author thinks it to be necessary to point out some features concerning the recourse, as the concepts are often confused not only by citizens but by the judges and their interpretation at the court. Regarding the recourse, a person acquires the right of recourse when he fulfils the liability of another person. In the case of the recourse there are no new participants involved in the legal liability between parties. The old liability is terminated and the new legal intercourse appears when one party fulfils the liability instead of the real debtor. Accordingly, in this case the limitation period begins to run from the moment of the fulfilment of the main liability (par 4, Art. 1127 Civil Code of Lithuania.). The legal literature highlights that the recourse can appear only in that case where three persons are involved: a creditor, a debtor and a third party¹³³. The same idea was expressed by E. A. Suchanova :”recourse becomes a new obligation or an independent liability that doesn't involve the creditor's exchange because the old liability expires together with the fulfilment of the right by the debtor, who is the future creditor in the recourse liability”¹³⁴. Due to the novelty of the recourse liability the statutory limitations for such a claim begins to run only from the moment of the fulfilment of the main liability (par. 4, Art. 1.127 Civil Code of Lithuania).

B. Askeland, in the context of joint liability of one of the debtors where the borrower pays back more than his debt and if he fulfils the claim this way he acquires the right to recourse

¹³³ Mikelėnas V., Bakanas A., Bartkus G. ir kiti. Lietuvos Respublikos civilinio kodekso komentaras. Šeštoji knyga. Prievolių teisė. Vilnius: Justitia, 2003, P. 153.

¹³⁴ Суханов Е. А. Гражданское право в 4-ох томах. Том III. Wolters Kluwer, Москва 2007, P. 36.

against another debtor¹³⁵. The author points out that such a recourse statutory limitation where the limitation period begins to run from the fulfilment of the initial obligations, is in the Law system in Scandinavian countries, the United Kingdom, Austria and Israel¹³⁶. The main liabilities and the recourse are closely related in the time, but the recourse is separate and independent, as it appears at the end of the principal obligation (as a result of its execution). It has to be noted that according to E. Beckham the common law jurisprudence states apart the subrogation as the continuation of the same legal intercourse by exchange of one of the legal intercourse parties in face of the liabilities called "indemnity" (when all the damage is transferred from the person theoretically responsible (according to the law) to the really responsible person a person who is actually responsible for the damage) and contribution (the right of a person, who have paid the full indemnity to claim the other debtor's participation in the payment or fulfil his part of liability)¹³⁷. In this case the statutory limitation is considered separate from the main obligations (i.e. tort committed), so the limitation does not begin from the initial appearance of the obligation but starts to run from the execution of the liability¹³⁸. As pointed out by B. Askeland, fulfilling an obligation instead of the debtor to a third party on the creditor's point of view can be resolved by two legal structures: the subrogation and the recourse claim¹³⁹. Thus, it can be concluded that different states chose different regulation instruments for the same legal intercourse. France, Austria and Israel are identified as the countries which recognize a subrogation right. Regarding the debtor's right to compensation for what he has paid to the creditor in discharge of an obligation for a third party in The United Kingdom and Scandinavian countries it is defined as "Claim for Contribution"¹⁴⁰. Coming back to Lithuania's legislature, the legal regulation is not definitely set yet. On one hand certain provisions of the Civil Code of Lithuania (par. 3, Art 6.90, and Art. 6280 and so on) establish the right of recourse against the real debtor or the tortfeasor but on the other hand the article Art. 6.1015 of the Civil Code of Lithuania establish the transfer of the rights of policyholders for the insurer (subrogation). As author mentioned the terms "subrogation" and "recourse" were used as synonyms in some cases of Civil Code and the jurisprudence in Lithuania.

In order to point out the differences the author proposes to compare the subrogation and recourse as follows highlighting some particularities of the two institutes, the comparison criteria

¹³⁵ Askeland B. Plurality of Liable Persons and Prescription of Recourse Actions. // Tort and Insurance Law Yearbook. European Tort Law, Koziol H., Steininger B. C. (eds.). Wien, NewYork: Springer, 2008 P. 106.

¹³⁶ *Idem.* P. 106-107.

¹³⁷ Beckham E. G. Subrogation. <http://www.beckhamlaw.com/article3.htm>. date of connection: 11/20/2010.

¹³⁸ Nowell G. W. Subrogation. <http://www.mlaus.org/article.ihtml?id=561&folder=90>. date of connection: 11/20/2010.

¹³⁹ Askeland B. Plurality of Liable Persons and Prescription of Recourse Actions. // Tort and Insurance Law Yearbook. European Tort Law, Koziol H., Steininger B. C. (eds.). Wien, NewYork: Springer, 2008 P. 106.

¹⁴⁰ *Ibid.*

being as follows: legal intercourse, who can express the claim, participants of the intercourse, statutory limitations period; expiration of the right; particularity of the right.

SUBROGATION

RECOURSE

Legal intercourse

Legal intercourse between the tortfeasor and the policyholder does not expire after the fulfilment of the claim of an obligation by the insurer, it continues further as the insurer “steps into the shoes” of the insured and all the additional, secondary liabilities (including the measures of liability guarantee)¹⁴¹ continue as well.

The initial liability expires at the time of the fulfilment of the obligation due¹⁴²; the creditor’s original claim is fully satisfied and the original creditor’s legal intercourse with the wrongdoer (or the person acting for the wrongdoer) finishes existing.

Who can express the claim

The victim (insured) after being indemnified by the insurer has no right to claim damages from the wrongdoer. The insurer is entitled to claim damages from the tortfeasor only after paying the damages for the victim. Policyholder's claim against the wrongdoer for damages will be presented by the insurer, as the actual owner of the claim¹⁴³.

The claim against the person who has caused the damage is expressed in his own name and the creditor is the real holder of such a claim.

¹⁴¹ Nowell G. W. Subrogation. <http://www.mlaus.org/article.ihtml?id=561&folder=90>, date of connection: 11/20/2010.

¹⁴² Kontautas T. Draudimo sutarčių teisė. Monografija. Vilnius: Justitia, 2007. P. 181.

¹⁴³ Nowell G. W. Subrogation. <http://www.mlaus.org/article.ihtml?id=561&folder=90>, date of connection: 11/20/2010.

Participants of the intercourse	Insurer replaces the insured: the insurer “stands in the shoes” of the Insured in the legal intercourse and the participants change roles as a new party – insurer is the real creditor from now on ¹⁴⁴ .	The fulfilment of the liability (full indemnity) in the legal intercourse (if requested by the creditor) involves new secondary obligation – the recourse and in this case the intercourse is between the new creditor (third person) and the true debtor, who is known to have caused the damage.
Statutory limitations period	Statutory limitations and the calculations are not affected by the substitution of parties: the time-limit and the procedure of its calculation, unless laws provide otherwise ¹⁴⁵ .	Statutory limitations are calculated recommencing from the date of the fulfilment of the obligations by the new creditor as a new intercourse begin.
Particularity of the right	The initial claim, which is taken in the case of subrogation, is never terminated but followed on.	Recourse is treated as a separate, independent claim, and the liability arising under such an obligation is autonomous and independent regarding the initial liability, which had already expired.
Expiration of the right	Legal intercourse continues further as well as all the additional, secondary liabilities (including the measures of liability guarantee) until the full indemnity of the claim of an obligation is done to the insured.	Given the fact that the original claim is deemed to be completed, any additional benefits (guarantees) expire at the same moment as the fulfilment of the claim.

Source: Author’s conclusions analysing G .W. Nowell and T. Kontautas.

Regarding subrogation essential principles it could be said that subrogation seeks to assure that the person responsible for the damages could not avoid the responsibility, to prevent undue enrichment of the victim as well as undue enrichment of the person responsible for the damages and thus the subrogation’s nature is compensatory, preventive and ensuring the

¹⁴⁴ Nowell G. W. Subrogation. <http://www.mlaus.org/article.ihtml?id=561&folder=90>, date of connection: 11/20/2010.

¹⁴⁵ Lietuvos Respublikos civilinis kodeksas, 2000.//Valstybės žinios, 2000, Nr. 74-2262.

honesty. Person who has more than one claim to indemnity is not entitled to be paid more than once. The person who has been paid is entitled to be subrogated to the rights against the other person liable. Legal intercourse continues further until the full indemnity of the claim of an obligation is done to the policyholder.

The case practice and legal regulation analysed in the thesis illustrates that the insurer, which pays the insurance indemnity, on the basis of the institute of the subrogation has the right to claim damages from the liable party and our first *hypothesis* “the subrogation right appears only after the fulfilment of the obligation of recompensation regarding the policyholder: the subrogation is based on the indemnity principle without creating a new legal intercourse” is proved. The analysed cases recited where subrogation and recourse have caused confusion and misunderstanding or different slant or aspect involved or different periods of limitations to be had to be implemented and the decisions of the court had to be abolished in some cases, that were presented in the thesis prove our second *hypothesis* that “the subrogation and recourse institutes are not clearly determined and involve misunderstanding in the decision making in the case law of Lithuania”.

Summarising all being analysed, the author would like to note that the recourse is regulated by Civil Code of Lithuania (p. 5 par. 1 Art. 6.114), by the Insurance Law of Republic of Lithuania (par. 1 Art. 96), The Law of the Republic of Lithuania on Compulsory Insurance Against Civil Liability in Respect of the Use of Motor Vehicles (Art. 22); meanwhile there is a gap in regulation of the subrogation doctrine and only Civil Code of Lithuania as a source of legal regulation can be mentioned.

CONCLUSIONS

Considering the tasks of the thesis and accomplished analysis of subrogation doctrine on the basis of legal regulation and case law in Lithuania and foreign countries it is stated that the first thesis hypothesis that *the subrogation right appears only after the fulfilment of the obligation of compensation regarding the policyholder: the subrogation is based on the indemnity principle without creating a new legal intercourse* and the second hypothesis – *the subrogation and recourse doctrines are not clearly determined and involve misunderstanding in the decision making in the case law of Lithuania*, are proved. The author brings up the following conclusions:

1. A situation of subrogation appears when trinomial relations emerge: there are three participants: the insurer, the insured and the third party (tortfeasor). The person who indemnified the damages shall be entitled to take over (“step into the shoes” principle) the insured’s right to compensation. After the insurer fully indemnifies the victim (policyholder) the right to subrogate can be implemented and the damages which were caused by tortfeasor reimbursed.

2. The regulation regarding subrogation in Lithuania and other countries is not extensive and causes frequent complications in the courts dealing with cases with exchange of participants regarding obligations. Subrogation is often confused with other externally similar doctrines e.g. recourse. The New Civil Code of Republic of Lithuania does not provide explicit regulation of the subrogation right. The recourse is regulated by Civil Code of Lithuania (Art. 6.114), by the Insurance Law (Art. 96), The Law of the Republic of Lithuania on Compulsory Insurance Against Civil Liability in Respect of the Use of Motor Vehicles (Art. 22). Meanwhile there is a gap in regulation of the subrogation doctrine.

3. In order to determine the features influencing where an insurer’s claim to the person responsible for the damages should be treated as a subrogation claim or as recourse claim it is necessary to identify the nature of litigation regarding the claim where the insurance law or delictual law has to be applied. In the case where the victim (insured) and the tortfeasor liable for the damages is the same person the subrogation right is prohibited and in that case the insurer’s interest is protected by the insurance contract. The judges present an explication regarding subrogation and recourse in order to create a precedent for future cases. The essence of the subrogation doctrine is the transfer of the right to claim from the insured to the insurer against a third person; the core of the recourse is insurer’s right to claim for compensated damages from the person liable for the loss.

4. The person who indemnified the damages shall be entitled to take over the insured's right to compensation to the extent equal to the payment of compensation. Under applicable law the insurer subrogating the insured acquires only the right to claim the amount paid to its policyholder. An insurer may not be invoked for profit basis. This means that the insurer's claim must be of the same magnitude as the insurer paid the amount of insurance benefits. Subrogation protects the insurer and the insured from unjust enrichment. Legal intercourse between the tortfeasor and the policyholder does not expire after the fulfilment of the claim of an obligation by the insurer, it continues further as the insurer "steps into the shoes" of the insured and all the additional, secondary liabilities (including the measures of liability guarantee) continue as well.

5. The intercourse between the tortfeasor and the insured originate on the basis of tort law. The insured's right subrogated to the insurer is implemented according to the regulation of the intercourse between the insured and the tortfeasor. The insurer having the right to claim is obliged to respect the legal regulation concerning the order and conditions which are applicable to insured under his right to claim for damages.

6. In the case where subrogation (Art. 6.1015 of Civil Code) is involved, the insurer acquires all the insured's rights had by him against the person liable for damages according to the civil liability. Thus the statutory limitations period regarding the loss-causer is three years and not one year as in general provisions. The period of statutory limitations regarding obligations arising from the insurance contracts legal intercourse equals to one year (par.7 Art. 1.125 of Civil Code).

SUGGESTIONS

1. In the future court practice author proposes to expand and concretize the rules establishing the relations between the insured (the beneficiary) and the person liable for the loss consolidated in par. 2 Art. 6.1015 of Civil Code of Republic of Lithuania. Without clear understanding what are the rules establishing the relations between the insured and the person liable for the caused damages court will be confusing the alike institutes which have to be applicable in the cases where the right of subrogation claim arises.
2. Author suggests to clarify and change p. 4 par. 4 in Article 6.101 of Civil Code of Republic of Lithuania as follows: *“where insurer after indemnifying policyholder takes the place of an insured in bringing a liability suit against a third party who caused damages to the insured”*. The modification of p. 4 par. 4 in Article 6.101 of Civil Code would vouchsafe correct usage of subrogation doctrine and respective court practice in the future.
3. Author proposes to include special provision regarding statutory limitations period concerning the implementation of subrogation right into the Art. 6.1015 of Civil Code of Republic of Lithuania or to concretize the statutory limitations period in Article 1.128 of Civil Code: *“the term of prescription of subrogation claims is three years”*. This suggestion is based on the fact that the insurer has to respect the statutory limitations period applied to the policyholder’s claim to indemnify the loss caused by the third party meaning that on the basis of the tort law three year statutory limitations period has to be applied.
4. Author suggests to rename the Chapter VII of Civil Code of Republic of Lithuania named *“Transfer of a Claim to a Third Person within the Procedure of Recourse (Subrogation)”* and name it *“Transfer of a Claim to a Third Person within the Procedure of Subrogation”*, whereas recourse and subrogation doctrines can not be identified because of the distinction between implementation of these two institutes.

In author’s opinion the modifications of Civil Code of Republic of Lithuania mentioned here above would explicate the legal regulation of subrogation doctrine and would distinguish subrogation apart from institute of recourse.

REFERENCES

1. Lietuvos Respublikos Civilinio Kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas//Valstybės žinios. 2000, Nr. 74-2262.
2. Lietuvos Respublikos Civilinis Kodeksas//Valstybės žinios. 2000, Nr. 74-2262.
3. Lietuvos Respublikos Draudimo įstatymas//Valstybės žinios. 2003, Nr. 94-4246.
4. Lietuvos Respublikos Transporto priemonių valdytojų civilinės atsakomybės privalomojo draudimo įstatymas//Valstybės žinios. 2007, Nr. 61-2340.
5. 1964 m. Lietuvos Respublikos Civilinis Kodeksas. <http://www.infolex.lt/scripts/sarasas2.dll?Tekstas=1&Id=8&Vr=39#238str.>, connection date: 11/20/2010.
6. Russian Civil Code, 1994, <http://www.russian-civil-code.com/>, connection date: 12/08/2010.
7. Ambrasienė D. Asmenų pasikeitimas prievolėje (kai kurie teoriniai ir praktiniai aspektai)//Jurisprudencija, 2002, t. 28(20).
8. Ambrasienė D., Baranauskas E., Cirtautienė S. ir kiti. Civilinė teisė. Prievolių teisė: vadovėlis: ketvirtoji laida. Vilnius: Mykolo Romerio universiteto Leidybos centras, 2009.
9. Askeland B. Plurality of Liable Persons and Prescription of Recourse Actions. // Tort and Insurance Law Yearbook. European Tort Law, Koziol H., Steininger B. C. (eds.). Wien, NewYork: Springer, 2008.
10. A new trend in Subrogation// The Georgetown law Journal. Vol. 38, 1950. P. 648. Citation: 38 Geo. L. J. 646. 1949-1950.
11. Beckham E. G. Subrogation. <http://www.beckhamlaw.com/article3.htm>; date of connection: 11/20/2010.
12. Birds J. and Hird N.J. Birds' Modern Insurance Law. Sixth edition. London: Sweet & Maxwell, 2004.
13. Business glossary, <http://www.allbusiness.com/glossaries/subrogation-property-casualty-insurance/4956031-1.html>; connection date: 11/26/2010.
14. Curtis Lee Franklin Jr. vs. Healthsource of Arkansas (96-116. S. W. 2d)//Supreme Court of Arkansas Opinion delivered April 21, 1997, <http://caselaw.findlaw.com/ar-supreme-court/1216103.html>, date of connection: 12/09/2010.
15. Curzon L.B. and Richards P.H. The Longman dictionary of law (Seventh Edition). Edinburgh: Pearson Longman, 2007.

16. Fidelity subrogation update - updated, presented by: Gregory R. Veal, esq. Bovis, Kyle & Burch, llc, P. 2, <http://www.forcon.com/papers/ssfcc/1998/06veal.pdf>; date of connection: 12/09/2010.
17. Justiniano digestes, www3.mruni.eu/padaliniai/leidyba/jurisprudencija/juris25.doc; date of connection: 11/19/2010.
18. Hasson R. Subrogation in Insurance Law – a Critical Evaluation//Oxford Journals. Oxford University Press. No 3. 1985.
19. Gifis S.H. Law Dictionary (Forth Edition). New York: Barron’s legal guides, 1996.
20. Kontautas T. Draudimo sutarčių teisė: monografija. Vilnius: Justitia, 2007.
21. Lowry J. and Rawlings P., Insurance Law: Cases and Materials. Oxford – Portland Oregon: Hart Publishing, 2004.
22. Martin E.A. and Law J. A dictionary of law (Sixth Edition). New York: Oxford University Press Inc., 2006.
23. Maher B.S. & Pathak R.A. Understanding and Problematizing Contractual Tort Subrogation. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1227323; date of connection 11/14/2010.
24. Mikelėnas V., Bakanas A., Bartkus G. ir kiti. Lietuvos Respublikos civilinio kodekso komentaras. Šeštoji knyga. Prievolių teisė. Vilnius: Justitia, 2003.
25. Mitchell Ch., Watterson S. Subrogation: Law and practice. United states, New York, Oxford University Press inc., 2007.
26. Nowell G. W. Subrogation. <http://www.mlaus.org/article.ihtml?id=561&folder=90>; date of connection: 11/20/2010.
27. O’Brien J. The origins of subrogation/O’Brien & Hennesy education series topic // www.subrogation.net/docs/edu/edu3.doc; date of connection: 11/20/2010.
28. Osakwe Ch. “Russian Civil Code. Parts 1-3: text and Analysis”, <http://books.google.lt/books?id=JcanG8FDWdcC&printsec=frontcover#v=onepage&q=subrogation&f=false>, date of connection: 12/09/2010.
29. R. Harris. Insurance subrogation//Canadian Business Law Journal, Vol. 22. 1993.
30. Saukalas E. Practical aspects of use of the property insurance causation rules in case law// Social Sciences Studies. Mykolo Romerio universitetas. 2009. www.mruni.eu/lt/mokslo_darbai/sms/archyvas/dwn.php?id..., P.297, date of connection: 11/21/2010.
31. S.L. Kimball, D.A. Davis. The extension of insurance subrogation.// Michigan Law Review, No 7. 1962.

32. The Role of Subrogation by Operation of Law and Related Problems in the Insurance Field// Louisiana law review. Vol. XXII, 1961. P. 226. Vėlyvis S., Nekrošius I., Nekrošius V. Romėnų teisė. Vilnius: Justitia, 1999.
33. Vėlyvis S., Nekrošius I., Nekrošius V. Romėnų teisė. Vilnius: Justitia, 1999.
34. Veal, Gr. R. Subrogation: the duties and obligations of the insured and rights of the insurer revisited. *Aba Tort & insurance law journal* (Fall 1992), <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/ttip28&div=12&id=&page=>, date of connection: 12/09/2010.
35. Zimmermann R. The law of obligations - Roman foundations of the civilian tradition. New York: Oxford University press, 1996.
36. Zweigert K., Kotz H. *Lyginamosios teisės įvadas*. Vilnius: Eugrimas, 2001.
37. Суханов Е. А. Гражданское право в 4-ох томах. Том III. Wolters Kluwer, Москва 2007.
38. <http://www.jstor.org/stable/1286625>; connection date: 10/14/2010.
39. http://en.wikipedia.org/wiki/Ius_civile; date of connection: 11/22/2010.
40. <http://lectlaw.com/def2/s084.htm>; date of connection: 11/19/2010.
41. http://www.answers.com/topic/cession#Civil_law; date of connection 10/27/2010.
42. <http://www.encyclo.co.uk/define/subrogation>; date of connection: 11/22/2010.
43. <http://www.historyguide.org/ancient/12tables.html>; date of connection: 11/20/2010.
44. <http://www.encyclo.co.uk/define/subrogation>; date of connection: 11/22/2010.
45. <http://www.answers.com/topic/property-insurance#ixzz18qfJdiOg>; date of connection 11/22/2010.
46. http://wiki.answers.com/Q/What_are_the_characteristics_of_civil_responsibility, date of connection 11/22/2010.

Legal practice

1. LAT Civilinių bylų skyriaus teisėjų kolegijos 2005 m. spalio 24 d. nutartis c.b. AB „Lietuvos draudimas“ vs. UAB „ERGO Lietuva“, UAB „Ritranspeda“ Nr. 3K-3-503/2005.
2. LAT Civilinių bylų skyriaus teisėjų kolegijos 2006 m. balandžio 7 d. nutartis c.b. Valstybinio socialinio draudimo fondo valdybos Kauno skyrius vs. UAB „Klaipėdos autobusų parkas“. Nr. 3K-7-166/2006.
3. LAT Civilinių bylų skyriaus teisėjų kolegijos 2006 m. balandžio 26 d. nutartis, priimta civilinėje byloje UAB DK „Baltic Polis“ v. B. K., G. K., Nr. 3K-3-300/2006.

4. LAT Civilinių bylų skyriaus teisėjų kolegijos 2007 m. vasario 19 d. nutartis c.b. Valstybinis socialinis draudimo fondas valdybos Mažeikių skyrius vs. AB „Lietuvos draudimas“ Nr. 3K-7-73/2007.
5. LAT Civilinių bylų skyriaus teisėjų kolegijos 2008 m. vasario 12 d. nutartis c.b. „PZU Lietuva“ vs. AB „Lietuvos draudimas“ Nr. 3K-3-76/2008.
6. Klaipėdos apygardos teismo Civilinių bylų skyriaus 2009 m. rugsėjo mėn. 23 d. nutartis civilinėje byloje Nr. 2A-699-159/2009.
7. LAT Civilinių bylų skyriaus teisėjų kolegijos 2009 m. rugsėjo 30 d. V. B. ir G. B. vs. UADB „Ergo Lietuva“ Nr. Nr. 3K-3-382/2009.
8. LAT Civilinių bylų skyriaus teisėjų kolegijos 2010 m. vasario 23 d. nutartis c.b. AAS “Gjensidige Baltic” vs. G. B. Nr. 3K-3-78/2010.
9. LAT Civilinių bylų skyriaus teisėjų kolegijos 2010 m. kovo 02 d. nutartis c.b. Valstybinio socialinio draudimo fondo valdybos Kauno skyrius vs. R. V., M. G. ir T. V. Nr. 3K-3-83/2010.
10. Kauno apygardos teismo Civilinių bylų skyriaus 2010 m. liepos mėn. 7 d. nutartis c. b. “Lietuvos Respublikos transporto priemonių draudikų biuras“ vs. M. S. Nr. 2A-789-109/2010.

SUMMARY

Master's final thesis is devoted to the analysis of the conception of subrogation doctrine and its historical background, whereas subrogation traces its roots back to Ancient Roma legal principles. The author analyzes thoroughly the conception of subrogation in Lithuania and in foreign countries and the peculiarities of legal regulation. Forasmuch as the subrogation causes confusion in the legal practice in Lithuania, the author examined selected legal practice cases and summarizes principles and objectives of the subrogation right's implementation. The author points out that subrogation can be implemented only in a case where loss is caused by a third person; that loss implicates three players: the party that causes the initial loss, i.e., the loss-causer; the party who suffers the loss, i.e., the loss-victim; and the party who is obligated to compensate the loss-victim, i.e., insurer. Master's thesis reviews three objectives that the implementation of the right of subrogation has to assure: to prevent unjust enrichment of the loss-causer, to assure that the person responsible for the damage could not avoid the responsibility, and to prevent unjust enrichment of the loss-victim. The author researches the circumstances of acquisition of the right of subrogation. The author notes that subrogation does not create new legal intercourse and the party change neither alters the original creditor's position. The essence of subrogation is revealed in the thesis in accordance with legal system and case law. In order to improve the regulation of subrogation the author presents practical suggestions at the end of the master's thesis.

Key words: insured, policyholder, insurer, tortfeasor, subrogation, recourse, liability, statutory limitations period.

SANTRAUKA

Magistro baigiamajame darbe nagrinėjama subrogacijos instituto samprata ir jos šaknys, kurios siekia Romos teisės laikus, pateikiama subrogacijos instituto istorinio atsiradimo Senovės Romoje apžvalga. Darbe detaliam analizuojama subrogacijos samprata Lietuvoje ir užsienyje, bei teisinio reguliavimo ypatumai. Kadangi subrogacijos institutas sukelia keblumų Lietuvos teismų praktikoje, darbe autorė analizuoja pasirinktus teismų praktikos atvejus ir apibendrina subrogacijos teisės įgyvendinimo principus ir tikslus. Darbe nurodoma, kad subrogacija galima tik tuo atveju, kai žala padaroma dėl trečiosios šalies kaltės, taigi esama trišalių santykių tarp šalies, kuri padarė žalą draudėjui; nukentėjusio asmens (draudėjas) ir asmens, kuris atlygina patirtus nuostolius arba žalą (draudikas). Magistro baigiamajame darbe yra nagrinėjami trys tikslai, kuriuos siekiama įgyvendinti subrogacijos teise: užkirsti kelią nepagrįstam žala padariusio asmens praturtėjimui; užtikrinti, kad žalą padaręs asmuo neišvengtų atsakomybės ir padaryti nuostoliai būtų atlyginti; užkirsti kelią nepagrįstam nukentėjusio asmens praturtėjimui. Autorė aptaria klausimą – kada yra įgyjama subrogacijos teisė. Darbe autorė pažymi, kad subrogacija nesukuria naujų teisinių santykių, o prievolės šalies pasikeitimas nepakeičia pirminio kreditoriaus padėties. Vadovaujantis teisės aktais ir teismu praktika, darbe yra atskleidžiama subrogacijos esmė. Siekiant patobulinti subrogacijos reglamentavimą, darbo pabaigoje pateikiami pasiūlymai.

Raktiniai žodžiai: draudėjas, apdraustasis, draudikas, civilinės teisės pažeidėjas, subrogacija, regresas, prievolė, ieškinio senaties terminas.