



# Beardsley Jensen & VonWald

ATTORNEYS AT LAW

PROF. L.L.C.

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February 24, 2014

Email: [Gaylord.sonnenschein@state.sd.us](mailto:Gaylord.sonnenschein@state.sd.us)

Mr. Gaylord Sonnenschein  
Property & Casualty Complaint Analyst  
Division of Insurance  
Department of Commerce & Regulation  
118 W. Capitol Avenue, First Floor  
Pierre, SD 57501-2000

Re: Subrogation Rights Where Insurer Insures Both the Injured Party and the Tortfeasor.

Dear Gaylord:

Thank you for visiting with me regarding my question concerning subrogation. I am enclosing a copy of a letter written by Larry S. Johnson, General Counsel for the South Dakota Division of Insurance. The letter is dated April 24, 2001 and addresses subrogation rights for an insurer. It states, "No subrogation rights exist for an insurer who insures both the injured party and the tortfeasor because an insurer cannot subrogate against its own insured." It goes on to list further support.

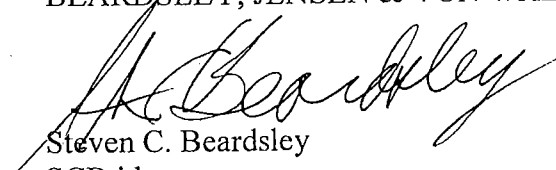
I am requesting that someone from the Department of Commerce and Regulation, Division of Insurance, advise me if that is the position of the Division of Insurance in regards to subrogation claims when the insurer insures both the injured party and the tortfeasor.

You indicated that you would be either visiting with counsel for the Division of Insurance or simply hand it off to them for them to respond to me. I would request that there be a written response so that we have that for the file. It is possible that there have been decisions confirming this since April 24, 2001. Perhaps counsel can simply send me confirmation of that.

Thank you for your assistance. I look forward to hearing from you or counsel for the Division.

Sincerely,

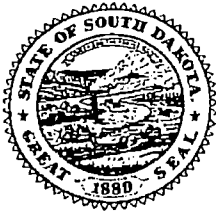
BEARDSLEY, JENSEN & VON WALD, Prof. L.L.C.

  
Steven C. Beardsley

SCB:jdy

Enclosure

Cc: Client



## DEPARTMENT OF COMMERCE AND REGULATION

118 W. Capitol Avenue, First Floor • Pierre, South Dakota 57501-2000

Division of Insurance • Phone: (605) 773-3563  
Continuing Education • (605) 773-3946  
Fax: (605) 773-5369 • [www.state.sd.us/insurance](http://www.state.sd.us/insurance)  
Agent Licensing • Phone: (605) 773-3513

April 24, 2001

Jay R. Gellhaus  
Gellhaus & Gellhaus  
PO Box 73  
Aberdeen, SD 57402-0073

RECEIVED APR 24 2001

RE: Subrogation Rights Where Insurer Insures Both the Injured Party and the Tortfeasor.

Dear Mr. Gellhaus:

Thank you for your letter dated April 17, 2001, and attached case authority, in the above matter. I have been asked to respond on behalf of the Division.

No subrogation rights exist for an insurer who insures both the injured party and the tortfeasor because an insurer cannot subrogate against its own insured. This is because the purpose of subrogation is to allow an insurer to go against a third party whose debt it assumed. In the matter before us, there is no "third party". There are only "insureds" of the insurer.

This position is supported by the definitions of subrogation in Blacks Law Dictionary and the Glossary of Insurance Terms, and by the case you sent with your letter (Stetina v. State Farm Mutual Automobile Insurance Company, 243 N.W.2d 341 (1976)).

Sincerely,

Larry S. Johnson, General Counsel  
SD Division of Insurance

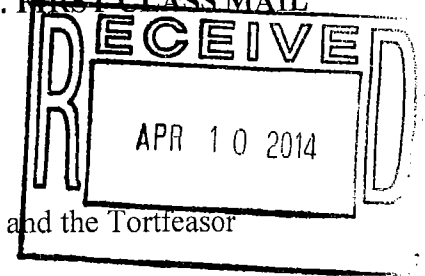


Division of Insurance  
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www.dlr.sd.gov/insurance

April 8, 2014

Steven Beardsley  
Beardsley Jensen & Von Wald  
4200 Beach Drive  
Rapid City, SD 57709

SENT VIA U.S. FIRST CLASS MAIL



Re: Subrogation Rights Where Insurer Insures Both the Injured Party and the Tortfeasor

Mr. Beardsley,

I have reviewed your February 24, 2014 letter regarding an April 24, 2001 letter from Larry S. Johnson, former Insurance Division General Counsel. The subject concerns the ability of an insurance company to subrogate when the injured party and the tortfeasor are insured by the same insurance company. Mr. Johnson's 2001 letter stated that an insurance company could not subrogate in that situation, citing *Stetina v. State Farm Mutual Automobile Insurance Company*, 243 N.W.2d 341 (Neb., 1976), as well as other sources.

The *Stetina* case appears to be good law, supported in part by *American Family Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 757 N.W.2d 584, 588 (S.D., 2008), which states that in the situation where a tenant is found to be a co-insured under a landlord's insurance policy, no subrogation rights exist to pursue action against the tenant for causing the damage "because the right of subrogation cannot arise in favor of an insurer against its own insured."

Please be aware that the Division cannot offer legal advice to the public. The above is offered for informational purposes only and is not legal advice, which should be sought from an attorney licensed to practice in South Dakota and experienced in this area of the law.

If you have further questions or concerns, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Frank A. Marnell'. The signature is written in a cursive style.

Frank A. Marnell  
*Insurance Division Senior Legal Counsel*  
*South Dakota Department of Labor and Regulation*