

The Constnction of Subrogation System in Insurance Law
Center Around the System Choice of Legal Subrogation of Rights of Claim

论保险代位权制度 的建构

黄丽娟 著

——以权利法定代位的制度选择为中心



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内容摘要

保险代位权制度是一个致力于贯彻保险法损失补偿原则的制度,根据这一原则,被保险人应当获得充分的补偿,但绝不应获得超额补偿。这一目标指引意味着保险代位权制度的规范机制从本质上而言将是一个以防止被保险人不当得利为核心的救济制度。然而,在这一统一的主旨之下,大陆与英美两大法系却呈现出法定的债权移转与权利法定代位两种相对迥异的安排格局。基于我国以法定的债权移转来安排保险代位权制度的现状,有必要充分了解英美法系所采用的权利法定代位的制度安排,通过对两种制度从理论到规则层面的全面比较,从中寻找出一个相对理想的规范机制,并将之作为构建保险代位权制度的基础,以促进这一制度实现防止被保险人不当得利这一核心价值。

除导论之外,本书共分为六章。

第一章为导论。

第二章,讨论保险代位权制度界定的分歧。大陆法系将保险代位权制度定位为法定的债权移转,英美法系则将其定位为权利法定代位。由这一分歧所决定,两大法系在保险代位权制度的规则体系上也呈现出显著的差异。法定的债权移转具有以下特质:第一,保险人对被保险人赔付义务的履行将导致被保险人对第三人之请求权在保险赔付的范围内移转给保险人;第二,形成请求权的整体移转与部分移转两种可能的制度结果,即如果保险人的赔付能够充分补偿被保险人由保险事故所造成的实际损失,则其对第三人之请求权即整体移转给保险人,反之,则被保险人对第三人之请求权只在保险赔付的范围内移转给保险人,而被保险人则保留其剩余部分的请求权;第三,保险人能够独立于被保险人而向第三人直接主张请求权;第四,在被保险人实际获得超额补偿的结果之前即否定其重叠行使请求权的可能。权利法定代位之安排具有以下特质:第一,保险人保险赔付义务的履行并没有导致被保险人对第三人之请求权在保险赔付的范围内移转给保险人,而只是使保险人有权处于被保险人的地位向第三人主张请求权;第二,没有形成请求权的整体移转与部分移转两种可能的制度结果;第三,保险人一般不能独立于被保险人向第三人主张请求权;第四,在被保险人实际获得超额补偿的结果之前并未否定其重叠行使请求权的可能,相反,只在其实际获得这一结果之后再否定其不当得利的结果。

第三章,从理论构造的层面来评判法定的债权移转与权利法定代位两种制度安排。无论是法定的债权移转,抑或是权利法定代位,两者都存在一个共同的核心价值,那就是防止被保险人的

不当得利。然而,法定的债权移转在其理论构造方面却无法有效地实现这一价值。其第一个理论构造即不真正连带债务理论的核心价值乃是在于防止第三人不当免除责任,因而与防止被保险人不当得利的核心价值发生偏离,进而在第三人承担终局性责任这一前提假设丧失的情形下出现了解释力的匮乏,同时,这一理论还使得保险代位权制度面临着标的一致性的局限;其第二个理论构造即保证关系之清偿代位理论将保险代位权制度构造成一种以实现保险人权利为中心的制度,因而也与防止被保险人不当得利的救济本质发生偏离。与之相比,权利法定代位的理论构造则有助于克服法定的债权移转所面临的上述困局。其中,分摊原则理论能够在第三人并非承担终局性责任的情形下使保险代位权重新回归到分摊性请求权的适用框架之下;推定信托理论则能够克服不真正连带债务所面临的标的一致性的局限。另外,由于将保险代位权视为一项实现救济目标的附属性权利,分摊原则与推定信托理论也有助于克服保证关系之清偿代位理论所面临的隐没保险代位权制度之救济本质的困局。

第四章,从规则安排的层面来评价法定的债权移转与权利法定代位两种制度安排。法定的债权移转导致保险代位权制度面临着以下制度困境:第一,保险代位权的客体过于狭隘,即其客体一般限制于被保险人对第三人所享有的“因保险标的受损或灭失而直接产生之请求权”;第二,双重法律关系之纠结,即在保险代位权纠纷的审理中,法院除了审查被保险人与第三人之间的请求权关系之外,还往往倾向于审查保险合同关系,从而对保险代位权的行使造成了巨大的成本与障碍。与之相比,权利法定代位之安排则有助于克服法定的债权移转所面临的上述困境:第一,其将一切有助于防止被保险人不当得利的权利及利益都纳入保险

代位权的客体范围,从而能够克服保险代位权客体狭隘的局限;第二,其维持了保险人与被保险人以及被保险人与第三人之双重法律关系的相互独立,从而有效地避免了双重法律关系纠结的障碍。

第五章,讨论权利法定代位安排下的保险代位权制度的建构。前述理论与规则方面的比较说明,以权利法定代位来安排保险代位权制度将是一个相对理想的选择,因此,当下的任务应当是研究如何在权利法定代位的安排下来建构保险代位权制度。首先,在保险代位权制度之前提条件方面,应当确保以下条件的实现:第一,保险合同属于补偿性保险合同;第二,被保险人的投保损失获得充分补偿;第三,被保险人享有有助于减少投保损失进而防止不当得利的请求权及利益。其次,在保险人的权利方面,应当确保保险人之代位请求权能与超额补偿利益之补偿权能的实现。其中,代位请求权能意味着保险人有权处于被保险人之地位向第三人主张请求权,超额补偿利益之补偿权能则包括保险人在保险赔付时的扣除权能以及保险赔付之后的补偿权能。再次,在被保险人的义务方面,应当确保被保险人履行两个方面的义务,即保护保险人之代位请求地位的义务以及以超额补偿利益对保险人进行补偿的义务。复次,在第三人的抗辩方面,应当确保第三人能够从实体与程序两方面展开抗辩,从而保证其利益不因保险代位权制度的实施而受到影响。其中,实体抗辩包括保险利益条款的抗辩、和解及责任免除之抗辩、事实抗辩,以及一般债权债务关系之抗辩等内容;程序方面的抗辩则包括已做判决或诉讼中止之抗辩、诉讼时效之抗辩以及仲裁条款之抗辩等内容。最后,在约定代位权制度方面,应当确保这一构架主要围绕扩展保险代位权以及强化被保险人义务两个方面展开。其中,扩展

保险代位权主要包括改变被保险人优先受偿模式、赋予保险人对代位求偿的控制权等内容;强化被保险人的义务则主要包括合理速办条款以及为确保被保险人清楚知晓而对其既有义务进行明确约定等内容。

第六章,讨论我国以权利法定代位来建构保险代位权制度的症结与对策。从我国现行的制度背景来看,当下的症结主要存在于理论与制度两个层面。理论层面的症结主要在于权利法定代位的两个主要的理论构造,即分摊原则与推定信托理论在我国目前保险代位权制度的理论体系中尚未得到确立。制度层面的症结主要包括:第一,“补偿性/非补偿性”保险合同的核心判准尚未确立;第二,我国保险代位权的限制尚未周全;第三,我国尚缺乏有效的保险代位仲裁机制;第四,我国的约定代位权制度尚处于缺失状态。因此,首先有必要确立分摊原则与推定信托两个主要的理论构造。其次,有必要在制度层面采取相应措施,为权利法定代位的制度安排构建初始条件,这些措施包括:第一,将“补偿性/非补偿性”保险合同的分类确立为保险代位权制度适用与否的核心判准;第二,细化并修正保险代位权的限制;第三,建立保险代位仲裁机制;第四,从扩展保险代位权以及强化被保险人义务两个方面来构建约定代位权制度。

综上所述,本书的主要创新之处在于:第一,将保险代位权制度两种不同的体系安排即法定的债权移转与权利法定代位的比较提升到防止被保险人不当得利这一价值原点的高度,从而克服既有的对法定的债权移转的批判过于散乱且缺乏统一价值引领的根本缺陷;第二,从理论到规则层面全面展开对法定的债权移转与权利法定代位的比较,并在此基础上确立应当以权利法定代位来建构保险代位权制度的基本观点,从而突破既往对两种制度

的比较主要停留于制度表层而难以充分证明权利法定代位之制度优势的局限;第三,从理论到制度层面全面展开以权利法定代位来建构保险代位权制度的研究,描绘出权利法定代位所构造的保险代位权制度的全貌,并寻找我国建构这一制度所存在的症结与对策,从而为这一安排最终落实于我国的制度土壤提供参照。

Abstract

Subrogation system in insurance law aims to carry out the principle of indemnity, according to which, the insured shall be fully indemnified, but shall never be more than fully indemnified. This objective means that the regulation mechanism of subrogation system in insurance law is essentially a remedy system that centers around the prevention of the insured's unjust enrichment. On the basis of this unified purport, however, there are two different kinds of arrangement in continental law system and common law system, namely legal assignment of rights of claim and legal subrogation of rights of claim. Due to the arrangement of legal assignment of rights of claim in China, it is necessary to fully understand the arrangement of legal subrogation of rights of

claim and make a comprehensive comparison between these two systems from theories to rules, which can help find a relatively desirable regulation system as the foundation of the construction of subrogation system in insurance law to realize its core value of preventing the insured from unjust enrichment.

Except for the introduction, this dissertation consists of five chapters.

The first chapter discusses the difference of system definition of subrogation system in insurance law. In continental law system, subrogation system in insurance law is defined as legal assignment of rights of claim, whereas in common law system, it is defined as legal subrogation of rights of claim. Because of this difference, the rules of subrogation system in insurance law are quite different in these two systems. The arrangement of legal assignment of rights of claim possesses four characteristics: first, if the insurer performs the obligation of payment of insurance claims toward the insured, the rights of claim of the insured will be transferred to the insurer; second, there are two possible results, one of which is integral transfer of the insured's rights of claim if the insurer's payment of insurance claims can fully indemnify the insured's actual loss caused by the insurance accident, and if per contra, the other of which is partial transfer; third, due to the transfer of rights of claim, the insurer is able to make claims towards the third party independent of the insured; fourth, before the insured is actually more than fully indemnified, the possibility of the insured's doubly making claims is denied. The arrangement of legal subrogation of rights of claim also

have four features: first, the insurer's performance of payment of insurance claims toward the insured does not cause the rights of claim to be transferred from the insured to the insurer, and on the contrary, it only make the insurer to stand in the shoes of the insured to make claims towards the third party; second, the two possible results, namely integral and partial transfer of the rights of claim that are caused by legal assignment of rights of claim do not occur; third, the insurer is not able to make claims towards the third party independent of the insured; fourth, the possibility of the insured's doubly making claims is permitted, and the result of unjust enrichment is finally denied until the insured is actually more than fully indemnified.

Chapter two makes a comparison between the arrangements of legal assignment of rights of claim and that of legal subrogation of rights of claim from the perspective of theory. Both of these two arrangements of subrogation system in insurance law have a core remedy value, that is prevention of the insured's unjust enrichment. However, the arrangement of legal assignment of rights of claim cannot effectively achieve this value in the aspect of theory. The first theory of the arrangement of legal assignment of rights of claim, that is the theory of unreal joint and several liabilities has deviated from the core value of prevention of the insured's unjust enrichment because it is devoted to the prevention of the third party's unjustly being exempt from liabilities, and then will lose the explanation strength when the presumption that the third party shall take the ultimate responsibility for the insured loss does not exist. Meanwhile, the theory of unreal joint and several liabilities has

encountered the limit that is resulted from the requirement of object consistency. The second theory of the arrangement of legal assignment of rights of claim, that is the theory of liquidation subrogation under the surety arrangement, has also departed from the remedy value of prevention of the insured's unjust enrichment because it has placed the realization of the insurer's rights as the dominant aim of subrogation system in insurance law. By contrast, the theory of legal subrogation of rights of claim is helpful to overcome the above difficulties. The theory of the principle of contribution can bring the right of subrogation in insurance law back to the nature and application of contribution, which puts subrogation system in insurance law into practice when the third party does not take the ultimate responsibility for the insured loss. The theory of constructive trust can smooth away the difficulty that is resulted from the requirement of object consistency. In addition, since the above two theories regard subrogation in insurance law as a subsidiary right for the realization of remedy, they can overcome the trouble of ignoring the remedy nature of subrogation system in insurance law faced with the theory of liquidation subrogation under the surety arrangement.

Chapter three compares the arrangement of legal assignment of rights of claim with that of legal subrogation of rights of claim from the angle of rules. The arrangement of legal assignment of rights of claim leads subrogation system in insurance law to be confronted with two predicaments. First, the object of subrogation in insurance law is too narrow, namely the object is generally limited within the

kind of the rights of claim that is directly caused by the damage or loss of the subject-matter insured. Second, there is the tangle between the two legal relationships, which means that in the trial of subrogation in insurance law, the court intends to review not only the legal relationship between the insured and the third party, but also the one between the insured and the insurer, which has increased great cost and obstacle for the exercise of subrogation in insurance law. On the contrary, the arrangement of legal subrogation of rights of claim can help to resolve the above problems. First, since this arrangement includes all the rights of claim and interests that are helpful for the prevention of the insured's unjust enrichment into the range of the object of the right of subrogation, it can conquer the difficulty that the object is too narrow. Second, because this arrangement maintains mutual independence between the legal relationship of the insured and the insurer and that of the insured and the third party, it can effectively avoid the the tangle between the two legal relationships.

Chapter four analyzes the construction of subrogation system in insurance law by the arrangement of legal subrogation of rights of claim. The comparison made above proves that a relatively ideal choice of subrogation system in insurance law is the arrangement of legal subrogation of rights of claim, so the present task is to study how to establish the subrogation system in insurance law under this arrangement. First, in the aspect of the preconditions of subrogation system in insurance law, the following terms should be satisfied: (1) the insurance contract is a contract of indemnity; (2) the

insured loss is fully indemnified; (3) the insured enjoys the rights or interests in diminution of the insured loss which are helpful for the prevention of the insured's unjust enrichment. Second, the insured shall be ensured to enjoy two kinds of rights: one is to be placed in the position of the insured to make claims towards the third party; the other is to claim indemnification from what the insured has been more than fully indemnified, by which the insurer is entitled to make a deduction at the moment of payment and to claim indemnification after the payment of insurance claims. Third, the insured shall undertake two kinds of obligations: one is to ensure the insurer to be placed in his or her position to make claims towards the third party; the other is to indemnify the insurer with what he or she has been more than fully indemnified. Fourth, the third party should have the right of defense from the substantive and the procedural aspects. The defenses from the substantive aspect contains benefit of insurance clauses, settlements and releases, factual defenses, the defenses of common debtor-creditor relationship and etc. The defenses from the procedural aspect include judgments and stays, delay, arbitration clauses and etc. Last, the conventional subrogation system in insurance law should be developed around two sides: one is the extension of the right of subrogation in insurance law, which includes changing the made whole doctrine, endowing the insurer the right of control of the process of exercise of subrogation and so on; the other is strengthening the insured's obligations, which includes the reasonable dispatch clause, express stipulation about the insured's existing obligations for the purpose of clear understanding, etc.

Chapter five elucidates the cruxes and countermeasures encountered in the construction of subrogation system in insurance law under the arrangement of legal subrogation of rights of claim. On the background of present situation, the cruxes mainly exist in the theoretical and institutional aspects. The major crux in the theoretical aspect is that the two main theories of the arrangement of legal subrogation of rights of claim, namely the principle of contribution and constructive trust theory have not been established in the present theoretical framework. The primary cruxes in the aspect of institution are as follows: first, the core yardstick of the contract of indemnity and non-indemnity has not been established; second, the limits of subrogation in insurance law is incomplete; third, the effective arbitration mechanism of subrogation in insurance law does not exist; fourth, the system of conventional subrogation in insurance law has not been set up. Therefore, the foremost task is to establish the principle of contribution and constructive trust theory as the main theoretical frame of subrogation system in insurance law. Furthermore, it is necessary to take some measures to build up the initial conditions for the arrangement of legal subrogation of rights of claim, which chiefly include the establishment of the classification of contract of indemnity and non-indemnity as the yardstick of judging whether to apply subrogation system in insurance law, the refinement of the limitation of subrogation in insurance law, the construction of arbitration mechanism of subrogation in insurance law and building up the system of conventional subrogation in insurance law from the perspectives of extending the insurer's subrogation rights and