

## MADE WHOLE DOCTRINE IRRELEVANT IN DEDUCTIBLE REIMBURSEMENT ISSUES IN PENNSYLVANIA

**Jones v. Nationwide Prop. and Cas. Ins. Co.,  
2010 WL 2030301 (Pa. Super. 2010)**

**By Gary L. Wickert**



In the world of subrogation, the issue of how much of an insured's deductible must be reimbursed to the insured after a carrier makes a successful subrogation recovery, remains a perplexing and confusing issue for subrogation professionals. It rivals ERISA preemption in health insurance subrogation and the no-fault laws of certain states and remains the most confusing and least understood area of subrogation. Even experienced subrogation professionals and lawyers get it wrong when it comes to understanding and employing the laws surrounding the obligation of a subrogated carrier to reimburse an insured a deductible. On May 24, 2010, the Pennsylvania Superior Court – one of two intermediate appellate courts in that state – rejected another baseless class action suit aimed at the insurance industry's practice of prorating deductible reimbursements in Pennsylvania.



On December 10, 2005, Brenda Jones was involved in an auto accident with another driver. Jones held collision insurance, issued by Nationwide, with a \$500 deductible. Nationwide paid the Appellant the amount of her loss, minus the \$500 deductible. Nationwide then pursued a subrogation action against the other driver. Nationwide received an amount greater than \$500, but less than the amount Nationwide had already paid to Jones.

Pursuant to Insurance Department regulations, 31 Pa. Code § 146.8(c) (see [Deductible Reimbursement Laws Chart](#) on MWL's website at [www.mwl-law.com](http://www.mwl-law.com)), Nationwide did not reimburse the Appellant the full amount of her deductible, but rather, only a *pro rata* share. In this case, the amount the Appellant received was \$450.

Amazingly, Jones filed a class action complaint, alleging that Nationwide's policy and practice of reimbursing only a *pro rata* share of the deductible constituted breach of contract, bad faith, conversion, and unjust enrichment and she sought an injunction to stop the practice.

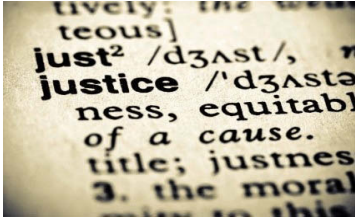
Nationwide filed preliminary objections in the nature of a demurrer and argued that the complaint failed to state a claim because Nationwide's reimbursement scheme was consistent with the language of the Appellant's policy, and with Pennsylvania law; most specifically, § 146.8(c), which read as follows:

*"Insurers shall, upon request of claimant, include first-party claimant's deductible, if any, in subrogation demands. Subrogation recoveries shall be shared on a proportionate basis with first-party claimant, unless deductible amount has been otherwise recovered. A deduction for expenses cannot be made from the deductible recovery unless outside attorney is retained to collect recovery. The deduction may then be for only pro rata share of allocated loss adjustment expense."*



In response, Appellant argued that § 146.8(c) is void because the Insurance Department had no authority to promulgate it. On October 17, 2008, the trial court granted Nationwide's preliminary objections without issuing an opinion. The appeal followed.

The Pennsylvania Superior Court made short work of the trial court's order, concluding that § 146.8(c) "fits squarely within the scope of authority delegated [to the Insurance Department] by the General Assembly." The Court concluded that "the behavior complained of by the plaintiffs, which is specifically permitted by Pennsylvania's insurance regulations, cannot violate the common law 'Made Whole' Doctrine even assuming that the doctrine would in fact support a claim like that of these plaintiffs." The Court reasoned that "[b]ecause the behavior does not violate the 'Made Whole' Doctrine, the plaintiffs have failed to state a basis on which the Court could find a breach of the parties' contract."



The Court rejected the plaintiff's remaining claims, declaring that Nationwide's behavior does not stand as an act of bad faith because the defendant acted in reasonable reliance on a valid state insurance regulation. Under the terms of § 146.8(c), the plaintiffs were not legally entitled to a full recovery of their insurance deductible. The court said Jones was entitled by law only to a prorated amount of the deductible. In short, the defendant's behavior as alleged was permissible under Pennsylvania law.

Subrogation professionals often assume that if a state employs or recognizes the "Made Whole Doctrine", then the insured must be totally reimbursed for its out-of-pocket deductible and any uninsured losses, before a carrier can subrogate. Unfortunately, this over-simplistic view and application of the Made Whole Doctrine is not only erroneous, but also results in reduced subrogation recoveries for carriers across the country. Surprisingly, the obligation of an insurer to reimburse some or all of its insured's deductible has very little to do with the Made Whole Doctrine in most states. It is now clear that it has nothing to do with deductible reimbursement in Pennsylvania.

---

**This article is intended for the clients and friends of Matthiesen, Wickert & Lehrer, S.C. It is designed to keep our clients generally informed about developments in the law relating to this firm's areas of practice and should not be construed as legal advice concerning any factual situation. Representation of insurance companies and/or individuals by Matthiesen, Wickert & Lehrer, S.C. is based only on specific facts disclosed within the attorney/client relationship. This article is not to be used in lieu thereof in any way.**