MOVEMENT GROWS TO UNDERCUT THE MADE WHOLE DOCTRINE

Allen v. Binckett, 2009 WL 1744494, at *3 (Ohio App. 5 Dist. 2009)

By Michael R. Sinnen

The made whole doctrine's choke-hold on subrogation rights is weakening in some venues. Courts in several "made whole states" have ruled that carriers may recover part or all of their subrogation liens, despite arguments from plaintiffs' attorneys that their clients were not made whole by third-party settlements.

Specifically, subrogated carriers have gained traction in situations in which plaintiffs have settled their third-party cases for an amount less than the available third-party insurance limits. In these scenarios, subrogated carriers have posited the logical argument that plaintiffs have been made whole, since they are acknowledging, through their settlements, that their damages are reflected in the settlement dollars they receive. If the plaintiffs' cases were worth more than the settlement amount, those plaintiffs would have attempted to collect more of the available third-party insurance.

As reflected in a recent Ohio appellate case decision, courts are finding the arguments of subrogated carriers persuasive. See *Allen v. Binckett*, 2009 WL 1744494, at *3 (Ohio App. 5 Dist. 2009); quoting *Risner v. Erie Ins. Co.*, 633 N.E.2d 588, 590 (Ohio App. 3 Dist. 1993). In *Allen*, one of the plaintiffs sustained personal injuries as a result of a motor vehicle accident with an at-fault driver, and that plaintiff, along with his spouse, filed a lawsuit against the adverse driver. The case ultimately settled at mediation for $10,500 - an amount that was substantially less than the available insurance limits. State Farm sought to recoup its $4,073.85 subrogation interest, and the plaintiffs argued they were not made whole by the settlement. In siding with State Farm, the court stated, "[T]he voluntary settlement by an insured of his claims against a tortfeasor, without proof to the contrary, is persuasive evidence of the value of the insured's 'personal injury claim, and tends to prove that [the insured] was fully compensated' for his injuries."

A host of other courts have utilized the same logic as the *Allen* court. These cases include: *Thompson v. Fed. Express Corp.*, 809 F. Supp. 950, 954 (M.D. Ga. 1993); *Bell v. Fed. Kemper Ins. Co.*, 693 F. Supp. 446 (S.D. W.Va. 1988); and *Illinois Farmers Ins. Co. v. Wright*, 391 N.W.2d 519 (Minn. 1986).

The aforesaid decisions provide hope for carriers whose subrogation rights are continuously undermined by the made whole doctrine. When cases arise in states that employ the made whole doctrine, carriers are advised to aggressively pursue their subrogation interests and make the logical arguments that were successful in other jurisdictions. With the continued persistence of carriers, the line of cases that undercut the made whole doctrine should continue to expand.

For questions regarding this article or subrogating in made whole states, please contact Mike Sinnen at msinnen@mwl-law.com.

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