

# **THE MADE WHOLE DOCTRINE IN ALL 50 STATES**

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## THE MADE-WHOLE DOCTRINE GENERALLY

The made-whole doctrine is an equitable defense to the subrogation or reimbursement rights of a subrogated insurance carrier or other party, requiring that before subrogation and/or reimbursement will be allowed, the insured must be made whole for all of its damages. Precisely what being “made whole” means varies from state to state, but the concept is nonetheless fairly similar in each state. A well-respected legal treatise defines the made-whole doctrine as follows:

*It is widely held that in the absence of contrary statutory law or valid contractual obligation to the contrary, the general rule under the doctrine of equitable subrogation is that whether an insured is entitled to receive recovery for the same loss from more than one source, e.g., the insurer and the tortfeasor, it is only after the insured has been fully compensated for all the loss that the insurer acquires a right to subrogation.*

Subrogation’s long and storied history had its common law roots in the law of equity – the courts of Chancery in England. Subrogation was established well before the law of quasi-contract at common law. This means that subrogation, even today, can arise without an insurance policy or statute giving an insurer a right of subrogation or reimbursement – so-called “equitable” or legal subrogation. Modern jurists have tortured the modern concept of subrogation and frequently overlaid the entire field of subrogation with an equitable blanket, requiring the application of equitable defense and concepts, including the made-whole doctrine. Because subrogation and reimbursement rights can arise by contract (insurance or contract policy terms) as well as by statute (workers’ compensation, Medicare, Med Pay, etc.), it is perhaps either by mistake of history or as a result of jurisprudential laziness that modern courts carry forward the antiquated and somewhat illogical premise and precedent that all subrogation is equitable and therefore subject to equitable defenses such as the made-whole doctrine. In fact, some states, assessing their state’s own workers’ compensation laws which statutory require reimbursement of the employer when there is a third party recovery, have even played the made-whole card when subrogation isn’t even involved – merely a statutory right of reimbursement.

Although equitable subrogation rights are independent of and quite different from any contractual relationship or terms between two parties, courts have blurred the distinction between the two and hampered their ability to contract freely with regard to the rights between them in accordance with the law and their intent. A growing number of states have now begun to recognize the difference between the two, holding that parties can contract around the made whole doctrine if that intent is clear from the contract.

As a result of the foregoing, states are split as to whether, when, and how to apply the made-whole doctrine generally, and whether the equitable doctrine should be applied when contractual subrogation is involved. The made-whole doctrine’s far-reaching tentacles affect virtually every line of subrogation and in a myriad of ways. Understanding a particular state’s made-whole laws is vital to a successful subrogation result. The made-whole doctrine remains the number one adversary of the subrogation industry, and no other fundamental equitable principle is as poorly understood as the inner workings and applicability of this defense to subrogation.

When an insured is not fully reimbursed for all of its losses, there is a split of authority among the various states as to whether the insurer or the insured has a superior interest in the third party recovery. Four outcomes are possible:

1. Insurer Whole Plus: The insurer is the sole beneficial owner of the claim against the third party and is entitled to the full amount recovered, whether or not it exceeds the amount paid by the insurer to the insured.
2. Insurer Whole: The insurer is to be reimbursed first out of the recovery from the third party and the insured is entitled to any remaining balance.
3. Proration: The recovery from the third person is to be prorated between the insurer and the insured in accordance with the percentage of the original loss for which the insurer paid the insured under the policy.
4. Insured Whole: Out of the recovery from the third party the insured is to be reimbursed first, for the loss not covered by insurance, and the insurer is entitled to any remaining balance, up to a sum sufficient to reimburse the insurer fully, the insured being entitled to anything beyond that amount.
5. Insured Whole Plus: The insured is the sole owner of the claim against the third party and is entitled to the full amount recovered, whether or not the total thus received from the third party and the insurer exceeds his loss.<sup>1</sup>

In general, the courts have avoided rules one and five. Also, very few courts have applied the proration formula, leaving most states falling between rule numbers two<sup>2</sup> and four.<sup>3</sup> A few states have not directly addressed or applied the traditional made whole rule or applied it to all lines of insurance subrogation.

The following is a compilation of summaries of the law in all 50 states with regard to the made-whole doctrine and its applicability to subrogation generally.

## THE MADE-WHOLE DOCTRINE IN ALL 50 STATES<sup>4</sup>

### ALABAMA

The Alabama Supreme Court first adopted the made whole doctrine in 1989 in the case of *Underwriters/Brokers, Inc. v. Liao*.<sup>5</sup> Where contractual subrogation rights existed, however, the Court said that parties are free to contract around the made whole doctrine, as long the contract

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<sup>1</sup> Robert A. Keeton, *Basic Text On Insurance Law*, § 3.10(c)(2) at 160-62 (1971).

<sup>2</sup> Alabama, Arkansas, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Jersey, North Carolina, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin are examples of states which follow rule number 2.

<sup>3</sup> California, Idaho, Nebraska, Ohio, Virginia, and Wyoming follow rule number 4.

<sup>4</sup> Notice: State law regarding the application and documentation of future credits, like any other aspect of government, can change without notice and for seemingly no reason at all. That means that this publication and its contents could become obsolete without notice to the user or the author. The contents of this publication don't constitute legal advice, which can only be dispensed within the confines of the attorney/client relationship. To verify the accuracy and applicability of any of the forms or procedures referenced herein, it is advised that you engage and consult with subrogation counsel. MWL recognizes the extensive law review article on this subject entitled, *The Made Whole Doctrine: Unraveling The Enigma Wrapped In The Mystery Of Insurance Subrogation*, authored by Professor Johnny C. Parker at the University of Tulsa College of Law, on which we relied for much of our research. Johnny Parker, *The Made Whole Doctrine: Unraveling The Enigma Wrapped In The Mystery Of Insurance Subrogation*, 70 Mo. L. Rev. 723 (2005).

<sup>5</sup> *Int'l Underwriters/Brokers, Inc. v. Liao*, 548 So.2d 163 (Ala. 1989).

“expressly provides” that the made whole doctrine will not apply. One year later, this decision was overturned when Alabama became home to one of the classic made whole decisions in all of American jurisprudence.<sup>6</sup> In *Powell v. Blue Cross*, the Alabama Supreme Court held that a health Plan was not entitled to subrogation rights until the insured had been “made whole” for all elements of damages. The made whole doctrine was applied to both rights of reimbursement and subrogation, and the court looked at whether or not the Plan beneficiary had been completely compensated for all of his damages. In 1999, this line of decisions was again affirmed by the Alabama Supreme Court.<sup>7</sup> However, the affirmation was short-lived.

In 2000, the Alabama Supreme Court flip-flopped once more, overruling this line of decisions as being unjust.<sup>8</sup> In a well-reasoned decision, the Alabama Supreme Court did what a number of states in this country are failing to do - it recognized the difference between legal/equitable subrogation and conventional/ contractual subrogation. The Court was motivated by its perception of the “inequitable consequences that can result from a strict application of the ‘made-whole’ doctrine without regard to the express desires of the insured or the type of insurance involved.”<sup>9</sup> The decision overturned *Powell* and reinstated *Liao* as the rule in Alabama. In order to prevent the tortfeasor from escaping a wrongdoing, the court held that the normal equitable rules of subrogation could be modified by contract.<sup>10</sup> In *Wolfe v. Alfa Mutual Ins. Co.*, the court discussed precisely what sort of language was sufficient to override the made whole doctrine. The Court in *Wolfe* totally rejected the idea that in order to override the made whole doctrine, the insurance contract must specifically mention “made whole” and negate it. Instead, they indicated that the policy must only provide a statutory scheme “contrary to established equitable principles.”<sup>11</sup> In *Wolfe*, the policy at issue contained the following language:

*“...if [insurer] makes a payment to its insured, and if that insured has a right to recover damages from another, [insured] shall be subrogated to that right.”*

The Court held that this language alone merely gave Alfa a subrogation right but did not rise to the level of “expressly providing” that made whole was overruled. However, the policy in *Wolfe* also contained the following language:

*“[I]f [insurer] makes a payment under this policy and [insured] recovers damages from another, [insured] shall hold in trust for [insurer] the proceeds of the recovery and shall reimburse [insurer] to the extent of [insurer’s] payment, costs and fees.”*

This language was sufficient to “expressly provide” for the abrogation of the made whole rule.<sup>12</sup> Therefore, in Alabama, equitable principles denying subrogation until the insured has been made whole apply to all instances of subrogation except those where a contract expressly provides otherwise.<sup>13</sup> Undoubtedly, the future of Alabama litigation will be fought over whether and to what extent the language “expressly provides” that the equitable made whole doctrine

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<sup>6</sup> *Powell v. BlueCross & BlueShield of Ala.*, 581 So.2d 772 (Ala. 1990).

<sup>7</sup> *Ex parte Black*, 734 So.2d 998 (Ala. 1999).

<sup>8</sup> *Ex parte State Farm Fire & Cas. Co. v. Hannig*, 764 So.2d 543 (Ala. 2000).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*; *Wolfe v. Alfa Mut. Ins. Co.*, 880 So.2d 1163 (Ala. Civ. App. 2003).

<sup>11</sup> *Id.* at 1167.

<sup>12</sup> *Id.* at 1167-68.

<sup>13</sup> *Allstate Ins. Co. v. Fugh Cole Builder, Inc.*, 772 So.2d 1145 (Ala. 2000); *Int'l Underwriters/Brokers, Inc. v. Liao*, 548 So.2d 163 (Ala. 1989); *Ex parte Cassidy*, 772 So.2d 334 (Ala. 2000).

does not apply. It should be noted that only the insured has standing to assert the made whole doctrine.<sup>14</sup> In determining whether the insured has been made whole, the court must consider every payment made to, or on behalf of, the insured which arises out of the loss sustained, but should not consider attorney's fees.<sup>15</sup>

## ALASKA

Alaska law is sparse with regard to the made whole doctrine. However, Alaska law appears to support the proposition that mere equitable subrogation will not be allowed unless an insured has been fully compensated for its loss.<sup>16</sup> Interestingly, the concept of "made whole" was first and only discussed with regard to workers' compensation subrogation which, unlike many other lines of insurance subrogation, is statutory in nature.

## ARIZONA

Arizona law does not discuss application of the made whole doctrine in the subrogation context. It does mention and apply the somewhat similar doctrine of superior equities in a suretyship situation, however.<sup>17</sup> The 9<sup>th</sup> Circuit (which includes Arizona) has adopted the made whole doctrine into federal common law as the default rule with regard to health insurance subrogation.<sup>18</sup> Therefore, under federal common law in the 9<sup>th</sup> Circuit, absent language to contrary in the Plan, a health Plan cannot enforce its subrogation rights unless the Plan beneficiary is fully compensated and made whole for his or her injuries.<sup>19</sup> Of course, that deals with federal law.

Note, however that with regard to Med Pay subrogation, § 20-259.01(J) requires an insurer to compromise its Med Pay lien in a "fair and equitable manner."

## ARKANSAS

Subrogation in Arkansas had its roots in property subrogation.<sup>20</sup> Arkansas first applied the made whole doctrine in the 1997 Arkansas Supreme Court decision of *Franklin v. Healthsource of Arkansas*.<sup>21</sup> Several years before *Franklin* extended the made-whole requirement to all personal injury cases, the court had actually cautioned against doing so.<sup>22</sup> In *American Pioneer Life Insurance Co. v. Rogers* it predicted that the made-whole requirement would rarely be met in the personal injury context. It was right.

The Arkansas Supreme Court has applied the made-whole doctrine despite the insured's express assignment of a tort recovery to insurer in an insurance policy.<sup>23</sup> It feels that any attempt to enforce the "literal language" of such an assignment "ignores the fact that this type of

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<sup>14</sup> *Nationwide Prop. & Cas. Ins. Co. v. DPF Architects, P.C.*, 792 So.2d 369 (Ala. 2000).

<sup>15</sup> *Powell v. BlueCross & BlueShield of Ala.*, 581 So.2d 772 (Ala. 1990), overruled on other grounds, *Ex parte State Farm & Cas. Co. v. Hannig*, 764 So.2d 543 (Ala. 2000).

<sup>16</sup> *McCarter v. Alaska Nat'l Ins. Co.*, 83 P.2d 986 (Alaska 1984).

<sup>17</sup> *Liberty Mutual Insurance Company v. Thunder Bank*, 555 P.2d 333 (Ariz. 1976).

<sup>18</sup> *Barnes v. Indep. Auto Dealers Ass'n of Cal. H&W Ben. Plan*, 64 F.3d 1389 (9<sup>th</sup> Cir. 1995).

<sup>19</sup> *Id.*

<sup>20</sup> *American Pioneer Life Ins. Co. v. Rogers*, 753 S.W.2d 530 (Ark. 1988).

<sup>21</sup> *Franklin v. Healthsource of Ark.*, 942 S.W.2d 837 (Ark. 1997).

<sup>22</sup> *American Pioneer Life Ins. Co. v. Rogers*, supra.

<sup>23</sup> *Id.*

contract is realistically a unilateral contract of insurance and overlooks the insured's total lack of bargaining power in negotiating the terms of these types of agreements."<sup>24</sup> Since *Franklin*, Arkansas courts have not once ruled that a personal injury victim has been made whole.<sup>25</sup> Therefore, the right to subrogation in personal injury cases in Arkansas appears to exist in name only, and insurers' attempts to assert their subrogation rights, even subrogation rights granted by statute, have been futile. The *Rogers* court stated that the types of damages suffered in personal injury cases, which can include lost wages, pain and suffering, and "intangible losses," are often "not susceptible to exact measurement." The difficulty in quantifying such losses, which are not covered by insurance, is likely the reason why no Arkansas court since *Franklin* has ruled that a personal injury victim was "made whole." Though Arkansas courts have not formally rejected subrogation in the personal injury context, the way the courts have applied the made-whole doctrine makes subrogation recoveries for insurers nearly impossible.

Arkansas' strict application of the made-whole doctrine has even led that state to apply the doctrine in the context of workers' compensation subrogation.<sup>26</sup> The test is whether the reimbursement (third party recovery plus insurance proceeds which exceed the insured's loss and collection costs).

## CALIFORNIA

The made whole doctrine has been viable in California since 1974.<sup>27</sup> In *Ingebretsen*, multiple insureds recovered insurance proceeds for damages caused to their property by the County of Los Angeles. Each policy contained a standard subrogation clause allowing the company to "require from the insured an assignment of all right of recovery against any part for loss to the extent that payment therefore is made by [the] company", as allowed by § 2071 of the California Insurance Code.<sup>28</sup> The insureds also executed a subrogation receipt or release, acknowledgment of satisfaction, agreement to immediate cancellation and assignment of subrogation document contemporaneously with receiving the insurance proceeds. After a dispute over third party proceeds, the court concluded that where the subrogation provision and subrogation assignment convey "all right of recovery against any party for loss to the extent that payment therefore is made by this company," this entitles the insurer to first and total indemnification. The insurer's priority of right however was conditioned on it having cooperated and assisted in the recovery from the third party.

The insureds in *Ingebretsen* further contended that the insurers were not entitled to recovery because it was impossible to ascertain what portion of the judgment represented damages paid for by the companies. According to the insureds, a portion of the judgment against the county was for noninsured losses, and consequently, the insurers should be denied recovery unless they could prove what portion of the judgment was attributable to covered losses. The court, again relying on the all right of recovery language contained in the subrogation clause, concluded that all claims of the insureds had been transferred to the insurers. Therefore, insurers were not required to prove what portion of the judgment was attributable to covered losses.

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<sup>24</sup> *Id.*

<sup>25</sup> Perry, *Is The Made-Whole Requirement More Than We Bargained For?*, 60 Ark. L. Rev. 295 (2007).

<sup>26</sup> *S. Cent. Ark. Elec. Coop. v. Buck*, 117 S.W.3d 591, 594-96 (Ark. 2003); *Travelers Ins. Co. v. O'Hara*, 84 S.W.3d 419, 421 (Ark. 2002).

<sup>27</sup> *Travelers Indem. Co. v. Ingebretsen*, 113 Cal. Rptr. 679 (Cal. App. 1974).

<sup>28</sup> Ann. Cal. Ins. Code § 2071 (2005).

The *Ingebretsen* rule applies only narrowly to the sort of facts contained in that case. In *Sapiano*,<sup>29</sup> the court concluded that in contrast to the policy and insurer in *Ingebretsen*, (1) the language of the subrogation clause in *Sapiano* contained general terms, and (2) the insurer did not cooperate or assist the insured in its efforts to recover from the tortfeasor. As a result, the insured retained priority of right and was entitled to be made whole before the insurer could assert its right to subrogation. Like Alabama, California adheres to the view that the parties are free to agree that the made whole rule does not apply. However, unlike Alabama, which imposes only one condition (*i.e.*, that the agreement be sufficiently specific), California imposes an additional requirement that the insurer cooperate and assist the insured in the recovery.<sup>30</sup>

California, as does Alabama, recognizes the potential harsh and one-sided effect of expanding the principle of conventional subrogation. California courts hold that, in the absence of specific language to contrary, a general provision that an insurer is subrogated to the rights of an insured does not permit the insurer to recover from third party tortfeasor until the insured has been made whole.<sup>31</sup> The court also observed that where the insured does not assist in prosecution of the claim, the insured may not be permitted to recover until insured has been made whole.

As applied in California, the made whole doctrine generally precludes an insurer from recovering *any* funds from the tortfeasor unless and until the insured has been made whole for the loss.<sup>32</sup> However, the doctrine applies only when there is no agreement to the contrary.<sup>33</sup> The applicability of the doctrine generally depends on whether the insured has been completely compensated for all elements of damages, not merely those for which the insurer has indemnified the insured.<sup>34</sup> However, one California court recently held for the first time that the doctrine applies in a personal injury (reimbursement) context under no-fault Med-Pay insurance coverage.<sup>35</sup> Even more recently, California held that in the Med-Pay context, the insured's attorney's fees should not be subtracted in order to determine if he or she was made whole.<sup>36</sup> Although California recognizes the made whole doctrine, it doesn't apply it as a blanket rule.<sup>37</sup> The made whole doctrine appears to be applied only in cases where the carrier elects not to participate in its insured's third party action. Therefore, the made whole rule is inapplicable when the insurer funds or actively participates in the prosecution of the claim against the third party.<sup>38</sup>

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<sup>29</sup> *Sapiano v. Williamsburg Nat'l Ins. Co.*, 28 Cal. App.4<sup>th</sup> 533 (1994).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Progressive West Ins. Co. v. Yolo County Superior Court*, 37 Cal.Rptr.3d 434 (Cal. App. 2005); *Barnes v. Independent Automobile Dealers of Cal.*, 64 F.3d 1389 (9<sup>th</sup> Cir. 1995).

<sup>33</sup> *Barnes*, *supra*; *Samura v. Kaiser Foundation Health Plan*, 17 Cal. App.4<sup>th</sup> 1284 (Cal. App. 1993).

<sup>34</sup> *Allstate Ins. Co. v. Superior Court*, 151 Cal.App.4<sup>th</sup> 1512 (Cal. App. 2007) (writ granted by California Supreme Court on September 25, 2007); Some jurisdictions have narrowly construed the made-whole exception as referring only to an insured being fully compensated for the covered losses; *see e.g.*, *Ludwig v. Farm Bureau Mut. Ins. Co.*, 393 N.W.2d 143 (Iowa 1986).

<sup>35</sup> *Progressive West*, *supra*.

<sup>36</sup> *Allstate Ins. Co. v. Superior Court*, *supra*.

<sup>37</sup> *Chase v. Nat'l Indem. Co.*, 129 Cal. App.2d 853 (1950); *Sapiano v. Williamsburg Nat'l Ins. Co.*, 28 Cal. App.4<sup>th</sup> 533 (1994); *Chong v. State Farm*, 428 F. Supp.2d 1136 (S.D. Cal. 2006).

<sup>38</sup> *Travelers Indem. Co. v. Ingebretsen*, 38 Cal.App.3d 858 (Cal. App. 1974); *Malibu Broadbeach, L.P. v. State Farm*, 2008 WL 588998 (Cal. App. 2008).

In *Samura v. Kaiser Foundation Health Plan*, the court responded to a concern about the one-sidedness of negotiating insurance contracts by suggesting that the doctrine of unconscionability could be used to counter this problem.<sup>39</sup> That court stated:

*In short, the third party liability provision may sometimes operate in a harsh and one-sided manner without any justification, which raises the possible application of the doctrine of unconscionability. As embodied in Civil Code section 1670.5, subdivision (a), the concept of unconscionability has both a 'procedural' and a 'substantive' element. 'The former includes (1) 'oppression,' which refers to an inequality of bargaining power resulting in no real negotiation and the absence of meaningful choice; and (2) 'surprise,' which occurs when the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms .... 'Substantive' unconscionability consists of an allocation of risks or costs which is overly harsh or one-sided and is not justified by the circumstances in which the contract is made.... Presumably both procedural and substantive unconscionability must be present before a contract will be held unenforceable. However, a relatively larger degree of one will compensate for a relatively smaller degree of the other.'*

With regard to uninsured motorist subrogation, California has indicated that the subrogee insurance company has priority of rights and is entitled to subrogation even if the insured is not made whole.<sup>40</sup>

The made whole doctrine applies equally to both subrogation and reimbursement causes of action.<sup>41</sup> California makes specific note of the fact that subrogees who “sit back without assisting” while the insured prosecutes the third party action will not be able to recover unless the insured is fully made whole.<sup>42</sup> This means that, where applicable, the made whole doctrine prohibits a carrier from subrogation or reimbursement unless there is a surplus resulting from the insured’s receipt of both insurance benefits *and* tort damages.<sup>43</sup> For years, this meant the carrier could not recover until the insured recouped his loss and some or all of his litigation expenses incurred in the lawsuit – including his attorney’s fees.<sup>44</sup> However, as of 2007, the California Court of Appeals decision in *Allstate Ins. Co. v. Superior Court*, attorney’s fees and costs are not to be deducted from the insured’s third party recovery before comparing the damages sustained by the insured and amount of the third party recovery to determine if the insured was “made whole”.<sup>45</sup>

## COLORADO

The made whole doctrine was first introduced and accepted in Colorado in the limited context of uninsured motorist coverage in 1989.<sup>46</sup> In the same case, the Colorado Supreme Court answered the question of whether a conventional subrogation provision in a policy can displace

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<sup>39</sup> *Samura v. Kaiser Foundation Health Plan, Inc.*, 17 Cal. App.4<sup>th</sup> 1284 (Cal. 1993).

<sup>40</sup> *Sapiano*, *supra*.

<sup>41</sup> *Progressive West Ins. Co. v. Yolo County Superior Court*, *supra*.

<sup>42</sup> *Samura*, *supra*.

<sup>43</sup> *Hodges v. Kirkpatrick Development, Inc.*, 130 Cal.App.4<sup>th</sup> 540 (Cal. App. 2005).

<sup>44</sup> *Id.*; *Chong v. State Farm*, 428 F. Supp.2d 1136 (S.D. Cal. 2006).

<sup>45</sup> *Allstate Ins. Co. v. Superior Court*, 151 Cal.App.4<sup>th</sup> 1512 (Cal. App. 2007), (writ granted by California Supreme Court on September 25, 2007), *rev. granted and opinion superseded by* 67 Cal.Rptr.3d 178 (Cal. 2007).

<sup>46</sup> *Kral v. American Hardware Mutual Ins. Co.*, 784 P.2d 759 (Colo. 1989).

the made whole rule. Within that limited context, the court determined that any subrogation clause was unenforceable to the extent that it would impair the ability of the insured to be made whole.<sup>47</sup> Other than that, Colorado courts have not made any direct pronouncements regarding the doctrine's application.

Up until July 1, 2003, Colorado had no-fault legislation.<sup>48</sup> For policies written on or after July 1, 2003, the no-fault law will no longer apply. Personal Injury Protection-type coverage will still be allowed, but such offerings will be governed by the specific contract terms between the parties, and not by the Colorado No-Fault Law. Until the repeal of Colorado's No-Fault Act, Colorado had held that the No-Fault Act evidenced a legislative intent "to allow an insured full tort recovery undiminished by a subrogation and arbitration right of its insurer, except in those cases where a policy would result in a double recovery to the insured."<sup>49</sup>

## CONNECTICUT

Until recently, the made whole doctrine had not been applied outside the context of a bankruptcy proceeding in Connecticut.<sup>50</sup> However, the Connecticut Supreme Court has given us a clue as to how it will treat this issue in the future. The court has held that while a right of true equitable subrogation may be provided for in a contract, the exercise of that right will have its basis in general principles in equity, rather than in the contract, which will be treated as merely a declaration of the principles of law already existing.<sup>51</sup> Nonetheless, Connecticut case law intimates that the made whole doctrine can be overridden by contract terms in a Plan or policy and the courts will allow these contract terms to override the application of this equitable doctrine.<sup>52</sup> In action for reimbursement of monies paid out on policy of collision insurance, the court held that the insurer had the burden of proving that the judgment recovered by the insured included compensation for property damage and that as a result insurer was entitled to recover, either on unjust enrichment theory or on theory that insured had violated his contract by refusing to cooperate with insurer in effecting recovery.<sup>53</sup> Other than that, Connecticut doesn't directly address the made whole doctrine.

The Connecticut Supreme Court has rejected the argument that a subrogation clause authorized by a Connecticut statute provides an insurer with "an inviolate right" to bring a subrogation action, noting that contractual terms "may be 'trumped' by principles of equity," and adding that "under traditional principles of subrogation, if an insured brings an action against a negligent party, an insurer generally is entitled to recover the amount it paid to the insured only if the amount of damages awarded exceeds the difference between the amount the insurer paid and the insured's actual damages."<sup>54</sup> The made whole doctrine applies whether the right of subrogation is contractual or equitable. Also, the legislative language creating the standard form fire insurance policy, which reads "[t]his Company may require from the insured an assignment

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<sup>47</sup> *Id.*

<sup>48</sup> C.R.S. § 10-4-701, *et seq.*

<sup>49</sup> *Marquez v. Prudential Prop. & Cas. Ins. Co.*, 620 P.2d 29 (Colo. 1980); *BlueCross of Western New York v. Bukuimez*, 736 P.2d 834 (Colo. 1987).

<sup>50</sup> *In re DeLucia*, 261 B.R. 561 (Banc. Ct. 2001).

<sup>51</sup> *Wasko v. Manella*, 849 A.2d 777 (Conn. 2004).

<sup>52</sup> *The Auto. Ins. Co. of Hartford v. Conlon*, 216 A.2d 828, 829 (Conn. 1966).

<sup>53</sup> *Id.*

<sup>54</sup> *Wasko*, *supra*.

of all right of recovery against any party for loss to the extent that payment therefore is made by this Company,”<sup>55</sup> does not create such a right in the context of fire insurance.<sup>56</sup>

## DELAWARE

The 3<sup>rd</sup> Circuit, in which Delaware sits, has been reluctant to apply the made whole doctrine, especially where the Plan language specifically and unambiguously disclaims it.<sup>57</sup> As for state law, however, Delaware contains no cases applying, extending, or explaining the application of the made whole doctrine within Delaware state courts.

## DISTRICT OF COLUMBIA

The “made whole doctrine” provides that if an insurer pays less than the insured’s total loss, the insurer cannot exercise a right of reimbursement or subrogation until the insured has been compensated for his entire loss.<sup>58</sup> The District of Columbia is sensible in applying the made whole doctrine as a “default rule.”<sup>59</sup> This means that parties to an insurance policy can “contract out of” the made whole doctrine by inserting sufficient language which clearly indicates the intent of the parties to avoid the effect of the made whole doctrine.<sup>60</sup>

## FLORIDA

The Florida Supreme Court has acknowledged the application of the made whole rule in Florida going back as far as 1979:

*“Using the common law subrogation principle, endorsed by Florida courts, the District Court reasoned that the insured was entitled to be made whole before the subrogated insurer could participate in the recovery from a tortfeasor.”<sup>61</sup>*

Court rules that equitable principles such as the “made whole” doctrine apply even when the subrogation is based on contract, except as modified by specific provisions in the contract.<sup>62</sup> “In the absence of specific terms to the contrary, the insured is entitled to be made whole before the insurer may recover any portion of the recovery” from the tortfeasor.<sup>63</sup>

## GEORGIA

The Georgia Supreme Court has held that the “made whole” rule reflects state policy that “overrides the parties’ freedom of contract” and therefore that a provision in an insurance contract that required an insured to reimburse the insurer with proceeds from a tort recovery

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<sup>55</sup> Conn. Gen. Stat. § 38a-307 (2003).

<sup>56</sup> *Wasko, supra*.

<sup>57</sup> *Bill Gray Enter., Inc. Emp. Health & Welfare Plan v. Gourley*, 248 F.3d 206 (3<sup>rd</sup> Cir. 2001).

<sup>58</sup> *District No. 1 - Pacific Coast Distributors v. Travelers Cas. & Surety Co.*, 782 A.2d 269 (D.C. 2001).

<sup>59</sup> *Id.*

<sup>60</sup> *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Riggs Nat’l Bank of Wash., D.C.*, 646 A.2d 966 (D.C. 1994).

<sup>61</sup> *Ins. Co. of N. Am. v. Lexow*, 602 So.2d 528 (Fla. 1992); see also *Florida Farm Bureau Ins. Co. v. Martin*, 377 So.2d 827 (Fla. 1979).

<sup>62</sup> *Florida Farm Bureau Ins. Co. v. Martin*, 377 So. 2d 827 (Fla. Dist. Ct. App. 1979).

<sup>63</sup> *Id.*

without regard to whether the insured had received complete compensation is unenforceable as “violative of public policy.”<sup>64</sup>

The made whole or “complete compensation rule” was applied for the first time in Georgia by the 1997 Georgia Supreme Court decision of *Duncan v. Integon General Insurance Co.*<sup>65</sup> The issue before the court in *Duncan* was whether the complete compensation or made whole rule is applicable to an insurance policy provision which requires the insured to reimburse the insurer the amounts paid under medical payments coverage. The policy provision at issue in *Duncan* provided:

*“[i]f we make a payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall: (1) [h]old in trust for us the proceeds of the recovery; and (2) reimburse us to the extent of our payment.”*

According to the court, because the policy did not expressly address whether the made whole rule would or would not operate as a limitation on the insured's right to complete compensation it must be strictly construed against the insurer. As a result of the absence of an express provision specifying that the made whole rule does not apply, the rule implicitly applies and mandates complete compensation. The court in *Duncan* relied on two rationales for its holding. First, the clear weight of authority recognizes that, in the absence of a provision to the contrary, equity dictates that the insured be fully compensated for the loss covered by the policy. Second, the court concluded that the public policy of Georgia supports the rule that an insurer may not obtain reimbursement unless and until its insured has been completely compensated. The Supreme Court noted that,

*“[t]hese considerations of public policy and equitable principals of subrogation are so strong that some jurisdictions declare that any insurance policy provision which modifies the complete compensation rule is unenforceable and void.”*

Nevertheless, because the policy at issue did not contain such a provision, the court refused to address the issue of whether a provision contravening public policy or equitable principles of subrogation would be unenforceable and void.

With regard to health insurance subrogation, Georgia has instituted the made whole doctrine through its anti-subrogation statute.<sup>66</sup> A health Plan provision which requires the Plan beneficiary to reimburse the Plan, even if the total amount collected by the Plan beneficiary is less than the actual losses from the accident, has been held by Georgia to be unenforceable as violating the public policy of the “complete compensation rule” as the made whole in Georgia has affectionately been dubbed.<sup>67</sup>

It is a question of law for the trial courts only to determine whether or not a Plan beneficiary has been fully and completely compensated.<sup>68</sup> Amazingly, neither party has a right to a jury determination of whether or not the Plan beneficiary has been made whole.<sup>69</sup> At least in the

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<sup>64</sup> *Davis v. Kaiser Found. Health Plan of Georgia, Inc.*, 521 S.E.2d 815 (Ga. 1999); see also Ga. Code § 33-24-56.1, codifying the holding in *Davis*.

<sup>65</sup> 482 S.E.2d 325 (Ga. 1997).

<sup>66</sup> O.C.G.A. § 33-24-56.1.

<sup>67</sup> *Davis v. Kaiser Found. Health Plan of Ga.*, 521 S.E.2d 815 (Ga. 1999).

<sup>68</sup> *Liberty Mut. Ins. Co. v. Johnson*, 535 S.E.2d 511 (Ga. App. 2000).

<sup>69</sup> *Id.*

context of being made whole in a workers' compensation third party action, the trial court may not consider affirmative actions of contributory/comparative negligence/ assumption of the risk (on the part of the employee in causing or contributing to his or her injury) in determining whether or not the employee has been fully and completely compensated for his injuries, because the employee total economic and non-economic losses make up the full and complete compensation unreduced by such defenses under the Act.<sup>70</sup> To show how easy it is for parties to gerrymander a settlement and avoid contractual subrogation obligations, a Georgia Court of Appeals has held that where there is no breakdown as between economic and non-economic damages in a settlement or a special verdict, it is essentially "impossible to determine if the plaintiff has been fully compensated for his losses."<sup>71</sup>

Despite its hostility toward subrogation, in a strange bit of irony, Georgia law provides us with one of the few cases which helps subrogating insurers and health Plans to combat the made whole doctrine across the country. A Plan beneficiary is presumed to be made whole if he voluntarily settles his or her case within policy limits, according to one federal district court decision.<sup>72</sup> In response to an argument by the Plan beneficiary that he had not been made whole, the court responded as follows:

*This argument is unpersuasive because it fails to account for the 'full and general release' both Mr. Thompson and his legal representative signed with the third party tortfeasor. Mr. and Mrs. Thompson executed the release of all their claims against tractor-trailer Company in exchange for the amount tendered by the company. As a result of the release and settlement agreement, Mr. Thompson's damages were fixed and fully compensated. The disputed claim was fully satisfied by the execution of the agreement.*<sup>73</sup>

A few other courts from other states have also followed suit implementing the logical conclusion that if a plaintiff settles his case, the amount of plaintiff's damages is fully fixed by the settlement agreement entered into between the plaintiff and tortfeasor.<sup>74</sup> The court may conclude that the settlement negotiations in the underlying action were conducted in an arm's length manner, and that the plaintiff willingly entered into the settlement agreement. Therefore, after a settlement a plaintiff should be precluded from arguing that he was not fully compensated, and an insurer or health Plan may assert its subrogation claim free from the constraints of the made whole doctrine.<sup>75</sup> A Minnesota Supreme Court has also held that once a party settles its claim, it cannot thereafter claim that it was not fully compensated.<sup>76</sup> Clearly, if a jury determines the money necessary to make a plaintiff whole, then that is the amount which makes him whole as a matter of law.<sup>77</sup> There is also a line of cases in Pennsylvania which provides that when an injured party settles with the tortfeasor he waives his right to a judicial determination of his losses and conclusively establishes the settlement amount as full compensation for his damages. In those situations, it has been held that the insurance company has a right of subrogation attaching to the amount of the settlement.<sup>78</sup>

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<sup>70</sup> *Homebuilders Ass'n v. Morris*, 518 S.E.2d 194 (Ga. App. 1999).

<sup>71</sup> *North Bros. Co. v. Thomas*, 513 S.E.2d 251 (Ga. App. 1999).

<sup>72</sup> *Thompson v. Fed. Express Corp.*, 809 F. Supp. 950, 954 (M.D. Ga. 1993).

<sup>73</sup> *Id.*

<sup>74</sup> *Bell v. Fed. Kemper Ins. Co.*, 693 F. Supp. 446 (S.D. W.Va. 1988).

<sup>75</sup> *Id.*

<sup>76</sup> *Illinois Farmers Ins. Co. v. Wright*, 391 N.W.2d 519 (Minn. 1986).

<sup>77</sup> *Bell v. Fed. Kemper Ins. Co.*, 693 F. Supp. 446 (S.D. W.Va. 1988); *United Pac. Ins. Co. v. Boyd*, 661 P.2d 987 (Wash. 1983); *Martine v. Hertz Corp.* 103 F.3d 118 (4<sup>th</sup> Cir 1996).

<sup>78</sup> *Illinois Auto Insurance v. Braun*, 421 A.2d 1074 (Pa. 1982).

There is Georgia case law to the effect that the made whole doctrine can be overridden by contract terms in a policy or Plan.<sup>79</sup> In *Duncan*, the court did indicate that the policy would have to specifically reference the made whole doctrine in order to be effective. Two (2) years later, however, the Georgia Supreme Court concluded that any policy provisions modifying the made whole rule were unenforceable as a matter of public policy.<sup>80</sup>

In *Davis*,<sup>81</sup> the court resolved the issue of whether a policy containing an express provision modifying the made whole rule was unenforceable and void as a matter of public policy. The policy provision in question provided in pertinent part:

*“[e]ven if the total amount you collect is less than your actual losses from the accident, you must pay us.”*

The court in *Davis*, relying upon its earlier decision in *Duncan* and § 33-24-56(1) of the Georgia Code, concluded that the public policy of Georgia:

*“...will not permit insurers to require an insured to agree to a provision that permits the insurer, at the expense of the insured, to avoid the risk for which the insurer has been paid by requiring the insured to reimburse the insurer whether or not the insured was completely compensated for the covered loss.”*

Therefore, the court concluded, policy provisions modifying the made whole rule are unenforceable as violative of public policy. This same public policy rationale is reflected in Georgia’s workers’ compensation laws.<sup>82</sup> Consequently, workers’ compensation carriers are not entitled to assert their statutory subrogation liens until the claimant has been completely compensated.

## HAWAII

Hawai’i requires an insured be “made whole” before an uninsured motorist carrier may require the insurer to reimburse the uninsured motorist carrier after receiving a tort recovery from an uninsured motorist or party jointly liable with the uninsured tortfeasor.<sup>83</sup> However, Hawaii has not specifically applied the made whole doctrine in a traditional subrogation case. In Hawaii, the right to contractual subrogation, as opposed to equitable subrogation, does not depend on principles of equity. Therefore, when subrogation claimed by an insurer is based on a contract, the policy’s subrogation provisions seem to constitute the sole measure of its rights.<sup>84</sup>

## IDAHO

There are no reported state court cases in which Idaho adopts the made whole doctrine. In the health insurance context, the 9<sup>th</sup> Circuit, however, has adopted the made whole doctrine into federal common law as a default rule.<sup>85</sup> The court in *Barnes* held that, unless the Plan language specifically disclaimed the made whole doctrine, the health Plan could not enforce its

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<sup>79</sup> *Duncan v. Integon General Ins. Co.*, 482 S.E.2d 325, 326 (Ga. 1997).

<sup>80</sup> *Davis v. Kaiser Found. Health Plan of Ga.*, 521 S.E.2d 815 (Ga. 1999).

<sup>81</sup> *Id.*

<sup>82</sup> Ga. Code Ann. § 34-9-11.1(b); *Bartow County Bd. of Ed. v. Ray*, 494 S.E.2d 29 (Ga. App. 1997).

<sup>83</sup> *AIG Hawaii Ins. Co., Inc. v. Rutledge*, 955 P.2d 1069 (Haw. App. 1998).

<sup>84</sup> *State Farm Fire & Cas. Co. v. Pacific Rent-All, Inc.*, 978 P.2d 753 (Haw. 1999).

<sup>85</sup> *Barnes v. Indep. Auto Dealers Ass’n of Cal. H&W Benefit Plan*, 64 F.3d 1389 (9<sup>th</sup> Cir. 1995).

subrogation rights until the Plan beneficiary had recovered all of his damages and had been made whole. Idaho appears to be in the minority in holding that the insurance company is entitled to be reimbursed and “made whole” first as a general rule.<sup>86</sup>

## ILLINOIS

Illinois does not apply the blanket rule of the made whole doctrine. It does not recognize the made whole rule the way other states do.<sup>87</sup> Illinois recognizes the validity of medical subrogation clauses in insurance contracts and enforces them.<sup>88</sup> In Illinois, the effect of a subrogation clause is identical to that of a reimbursement clause.<sup>89</sup> Illinois state courts will enforce contractual subrogation rights even if the insured is not fully compensated for all of his or her injuries.<sup>90</sup> However, Illinois still encourages the use of the made whole doctrine in “appropriate circumstances.”<sup>91</sup> In Illinois, the doctrine of subrogation will be applied according to the dictates of “equity, good conscience, and public policy considerations” whenever a contractual subrogation provision is not present.<sup>92</sup>

Furthermore, case law in Illinois indicates that the made whole doctrine can be overridden by contract terms in a policy or Plan.<sup>93</sup> Such a clause in a policy need not be specific, but must be enforceable.<sup>94</sup> Court holds that where an insurance contract gives the insurer the right to subrogate to the extent of its payment, the contract will be enforced as written even if the insured's losses exceed the amount it recovers from the tortfeasor and the insurer.<sup>95</sup>

## INDIANA

Indiana recognizes the made whole doctrine through case law<sup>96</sup> and by statute.<sup>97</sup> There is Indiana case law, however, to the effect that the made whole doctrine can be overridden by contract terms in a policy or Plan.<sup>98</sup> Generally, the contract terms overriding the made whole doctrine must be “clear, unequivocal and so certain as to admit no doubt on the question.”<sup>99</sup> To date, no case has clearly provided guidance or defined exactly what it is that this means. It is clear, however, that the standard subrogation language found in a policy is insufficient to accomplish this overriding of the made whole doctrine.<sup>100</sup> It is important to also note that the language of an insurance policy’s subrogation provision will play a role in determining whether

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<sup>86</sup> *Cedarholm v. State Farm Mut. Ins. Co.*, 338 P.2d 93 (Idaho 1959).

<sup>87</sup> *In re Estate of Scott*, 567 N.E.2d 605 (Ill. App. 1991).

<sup>88</sup> *Principal Mut. Life Ins. Co. v. Baron*, 964 F. Supp. 1221 (N.D. Ill. 1997).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*; *Capitol Indem. Corp. v. Strikezone*, 646 N.E.2d 310 (Ill. App. 1995).

<sup>91</sup> *In re Estate of Scott*, *supra.*; *In re Estate of Schmidt*, 398 N.E.2d 589 (Ill. App. 1979) (Insurer had no right to be subrogated to insured’s widow’s right of recovery and wrongful death action where subrogation policy terms specifically provided that insurer was to be subrogated to “insured’s” right of recovery for loss and, under Wrongful Death Act, the insured decedent has no right to recover for his own death).

<sup>92</sup> *In re Scott*, *supra.*

<sup>93</sup> *Hardware Dealers Mut. Fire Ins. Co. v. Ross*, 262 N.E.2d 618 (Ill. 1970).

<sup>94</sup> *Strikezone*, *supra.*

<sup>95</sup> *Capitol Indem. Corp. v. Strike Zone, S.S.B. & B. Corp.*, 646 N.E.2d 310 (1995).

<sup>96</sup> *Capps v. Clegs*, 382 N.E.2d 947 (Ind. Ct. App. 1978).

<sup>97</sup> I.C. § 34-51-2-19 (1999).

<sup>98</sup> *Erie Ins. Co. v. George*, 681 N.E.2d 183, 188 (Ind. 1997); *Willard v. Auto Underwriters, Inc.*, 407 N.E.2d 1192 (Ind. App. 1980).

<sup>99</sup> *Capps*, *supra.*

<sup>100</sup> *Id.*; *Willard*, *supra.*

or not a plan beneficiary has been made whole. For instance, where the subrogation clause of the plan indicates the plan is subrogated to all rights of recovery arising out of any claim or cause of action has against a third party, this clause establishes the insurer's right to subrogation against the proceeds of a settlement.<sup>101</sup> The settlement recovered by the beneficiary must also contain the elements of damage, which represent the payments made by the plan.<sup>102</sup>

Indiana courts have held that the "made whole" doctrine applies to contractual as well as equitable subrogation.<sup>103</sup> A contract may not avoid application of the doctrine unless it is "clear, unequivocal and so certain as to admit no doubt on the question to avoid application of the before the debt is satisfied."<sup>104</sup>

Although parties to an insurance contract may contractually agree that the made-whole rule will not have application, the contractual provision, to be enforceable, "must be clear, unequivocal and so certain as to admit no doubt on the question."<sup>105</sup> This standard has been applied in the context of the uninsured motorist act.<sup>106</sup> Despite the fact that no Indiana court has defined what is meant by "clear and unequivocal," the standardized language commonly found in subrogation provisions clearly does not satisfy the standard.<sup>107</sup>

The language used in the subrogation provision is also an important consideration in determining whether a settlement with the tortfeasor constitutes complete compensation. In this context, where the provision provides for the right to be subrogated to all rights of recovery arising out of any claim or cause of action it establishes the insurer's right to subrogation against the proceeds of a settlement.<sup>108</sup> In addition to the language, however, the settlement must have included compensation for losses covered under the policy.<sup>109</sup>

## IOWA

Iowa recognizes the made whole doctrine but refers to it as the "full recovery rule".<sup>110</sup> The full recovery rule requires that an insurance company's claim for reimbursement or subrogation is not effective until the insured has been fully compensated for his damages.<sup>111</sup> In general, Iowa recognizes that the resolution of subrogation issues is guided by the equitable principle that an injured party is entitled to be made whole.<sup>112</sup>

Notwithstanding the above, there has been some ambiguity in Iowa as to the application of the made whole doctrine rule. In *Pipho*,<sup>113</sup> an injured automobile passenger settled her claim with the driver's insurer, and the passenger's health insurer thereafter filed a subrogation claim seeking reimbursement from the settlement proceeds for medical benefit payments it had made.

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<sup>101</sup> *Mutual Hosp. Ins., Inc. v. MacGregor*, 368 N.E.2d 1376 (Ind. App. 1977).

<sup>102</sup> *Id.*

<sup>103</sup> *Willard v. Auto. Underwriters, Inc.*, 407 N.E.2d 1192 (Ind. Ct. App. 1980).

<sup>104</sup> *Id.*

<sup>105</sup> *Willard, supra.*; *Capps, supra.*

<sup>106</sup> *Capps, supra.*

<sup>107</sup> *Willard, supra.*; *Capps, supra.*

<sup>108</sup> *Mut. Hosp. Ins. Inc. v. MacGregor*, 368 N.E.2d 1376 (Ind. App. 1977).

<sup>109</sup> *Id.*

<sup>110</sup> *Continental Western Ins. Co. v. Krebill*, 492 N.W.2d 405 (Iowa 1992).

<sup>111</sup> *Brandon v. West Bend Mut. Ins. Co.*, 681 N.W.2d 633 (Iowa 2004).

<sup>112</sup> *Allied Mut. Ins. Co. v. Heiken*, 675 N.W.2d 820 (Iowa 2004).

<sup>113</sup> *Pipho, supra.*

Pipho's past medical expenses were approximately \$19,000, of which \$11,778.67 was paid by the health Plan. After trial, a court assessed Pipho's total damages, including loss of future earnings and a past and future pain and suffering, in excess of \$400,000. The insured settled for the tortfeasor's \$25,000 policy limits, and the settlement agreement did not allocate any particular share of the settlement amount as medical expenses. The health Plan filed a subrogation claim, seeking reimbursement from the settlement proceeds for \$11,778.67 in benefits it had paid. The insured claimed that she was not made whole. The court refused to apply the made whole doctrine, logically concluding that the health Plan had not undertaken to insure Pipho for pain and suffering, lost wages, or impairment of future earning capacity. A denial of the health insurer's subrogation claim on the grounds that the insured did not recover these uninsured elements of damages, had the effect of making the health Plan an insurer against those losses as well. The Court of Appeals ruled that if settlement funds can be allocated into specific elements of a claim, the medical expenses portion of that settlement should be subrogable for the health insurer even if other elements of the insured's cause of action are not fully satisfied.<sup>114</sup> If the amount of settlement funds which are attributable to medical expense cannot be identified, the court held that a "mini-trial" should be conducted in order to make such a determination.<sup>115</sup>

The Iowa Supreme Court has held that an insured need not be paid in full for pain and suffering and disability prior to allowing subrogation for medical expenses.<sup>116</sup> This decision disagrees completely with the *Rimes v. State Farm Mut. Auto. Ins. Co.* decision by the Wisconsin Supreme Court, which has been the paradigm of made whole issues in so many states.<sup>117</sup> However, there is some authority in Iowa to the effect that the made whole doctrine can be overridden by the contract terms of a Plan or policy.<sup>118</sup>

With regard to the ability of a policy to override the made-whole doctrine, the Iowa Supreme Court has adopted the rule that "when the total of the insured's recovery from a third party and the insurance company's payments under the policy still are less than the loss sustained, the insured has not been made whole, and the insurer may not recover against him." The Supreme Court also held that insurer may obtain reimbursement if insured is "made whole" with respect the elements of damages covered by insurance; courts need not take into account other elements of damages (such as pain and suffering) in determining whether insured was "made whole" by tort recovery.<sup>119</sup>

Application of the made-whole doctrine in Iowa is complicated somewhat by Iowa's procedure for determining whether an insured has been made whole. For example, in *Ludwig v. Farm Bureau Mutual Insurance Co.*, the court was asked to resolve whether an insured who had settled her action against the third party had received full compensation for purposes of the made whole doctrine.<sup>120</sup> The insurer in Ludwig argued that when a settlement is made without the involvement of the company, the insured is presumed to be made whole. The insured, on the other hand, contended that because she had not received compensation for her pain and

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<sup>114</sup> *Iowa American Ins. Co. v. Pipho*, 456 N.W.2d 228 (Iowa App. 1990).

<sup>115</sup> *Id.*

<sup>116</sup> *Ludwig v. Farm Bureau Mut. Ins. Co.*, 393 N.W.2d 143 (Iowa 1986).

<sup>117</sup> *Rimes v. State Farm Mutual Auto. Ins. Co.*, 316 N.W.2d 348 (Wis. 1982).

<sup>118</sup> *Ludwig*, *supra*; see also *Kapadia v. Preferred Risk Mut. Ins. Co.*, 418 N.W.2d 848 (Iowa 1988) (citing 73 Am.Jur.2d *Subrogation* § 2 at 599 (1974)).

<sup>119</sup> *Ludwig*, *supra*.

<sup>120</sup> *Id.*

suffering in the settlement she had not been fully compensated. The subrogation provision of the policy provided:

*Upon payment under part II of this policy [the “medical protection” provision] the Company shall be subrogated to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery which the injured person or anyone receiving such payment may have against any person or organization and such person shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. Such person shall do nothing after loss to prejudice such rights.*

Though the holding in *Ludwig* is consistent with the policy language, the court didn't accord it any weight in its analysis. Rather, it relied on the fact that the insured's medical expenses, lost wages, expense of hired help and car damage were established and each attributed specific dollar amounts in the settlement. Because the amount recovered from the third party could be attributed to separate and specific elements of damages, any money identified with covered losses which the insurer had paid for was subject to the latter's subrogation claim, regardless of whether the insured had been compensated for all of its damages. According to the court, any other rule would make insurance companies indemnitors of losses not covered in the policy and operate as a windfall to the insured who had not paid for such coverage. While the settlement in *Ludwig* attributed a specific amount to medical expenses, the court noted that when the amount attributed to the subrogated claim cannot be determined by other means, a mini-trial might be required.

## KANSAS

The made whole doctrine in Kansas will be largely inapplicable in the area of health insurance subrogation due to the strong anti-subrogation statute in that state.<sup>121</sup> However, if a Plan or policy is exempt from the anti-subrogation statute or the Plan or policy is “issued” in another state, the anti-subrogation statute may not be applicable and the issue of whether or not a Plan can subrogate when its Plan beneficiary is “made whole” may arise. There is little case law in Kansas to guide us. However, the Kansas Supreme Court has indicated that it is within the discretion of the trial court to apply equitable standards in assessing damages in order that the plaintiff may be made whole.<sup>122</sup>

Another Kansas Supreme Court decision, speaking about the duty of an insured to hold any third party recovery *in trust* for the subrogated insurer, refers to a recovery “in excess of the amount of the balance of his loss and expenses of suit”, intimating that if pressed, Kansas would apply the made whole doctrine.<sup>123</sup> This may be the case law from which future made whole decisions arise. There is authority for the proposition that a carrier may expand its equitable subrogation rights by contract, specifically negating the application of the made whole doctrine in its policy's terms.<sup>124</sup>

With regard to ERISA Plans, the 10<sup>th</sup> Circuit has held that the made whole rule is the default rule which is preempted when the Plan language specifically negates the made whole doctrine by its

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<sup>121</sup> Kan. Admin. Regs. § 40-1-20 (1987).

<sup>122</sup> *Gillespie v. Seymour*, 823 P.2d 782 (Kan. 1991).

<sup>123</sup> *Shawnee Fire Ins. Co. v. Cosgrove*, 116 P. 819 (Kan. 1911).

<sup>124</sup> *Unified School District No. 259 v. Sloan*, 871 P.2d 861, 865 (Kan. 1994).

own terms.<sup>125</sup> See the next chapter dealing with ERISA Plans if you are dealing with an ERISA-covered Plan (whether self-funded or fully-insured). There is authority in Kansas to the effect that the made whole doctrine can be overridden by contract terms in a Plan or policy.<sup>126</sup>

## KENTUCKY

Kentucky does not differentiate between equitable subrogation and contractual subrogation with regard to the application of equity.<sup>127</sup> Therefore, applying general principles of equity, Kentucky holds that an insured must be fully compensated for his injuries or losses before the insurer's subrogation rights arise.<sup>128</sup> However, the made whole doctrine will not apply if disclaimed by either statutory law or the language of the contract.<sup>129</sup> Therefore, Kentucky joins a minority of states which allow a contractual disclaimer of the made whole doctrine under state law and within the terms of its Plan language.<sup>130</sup> The analysis a court must go through to determine whether a plan's language successfully disclaims the made whole doctrine, however, is somewhat more complex. This is because Kentucky considers all agreements and communication between an insurer and its insured – settlement agreements, policy and plan language, releases, trust agreements, etc. – in determining the parties' intent with regard to waiving the made whole doctrine.<sup>131</sup>

The Kentucky Supreme Court has held that subrogation rights may be modified by contract only if violence is not done to established equitable principles.<sup>132</sup> The Supreme Court held that principles of equity did not require insured to be "made whole" before carrier was entitled to subrogation where (1) insurance language clearly and explicitly provided insurer with the right of subrogation and subordinated insured's interests in any recovery in favor of insurer until insurer was reimbursed, and (2) at time of claim, each party was represented by counsel and enjoyed a parity in bargaining position, and (3) insured's losses had already been sustained and were fully known and appreciated.<sup>133</sup>

The analysis for determining whether a contract alters the common law priority of right rule between the insurer and its insured is more complex. This complexity results from the fact that all agreements between the parties (i.e. policy language, releases, trust agreements, etc.) are relevant in determining whether the parties intended to modify the common law rule.<sup>134</sup> In order to effectively shift the priority of right of the insured to the insurer, the language must clearly and explicitly document the intent of the parties to: (1) provide the insurer with a right of subrogation; (2) permit that right to arise immediately; and (3) subordinate the insured's interest in further recovery to that of the insurer to subrogation.<sup>135</sup>

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<sup>125</sup> *Alves v. Silverado Foods, Inc.*, 6 Fed. Appx. 694 (10<sup>th</sup> Cir. 2001).

<sup>126</sup> *Unified School Dist. No. 259 v. Sloan*, 871 P.2d 861, 865 (Kan. 1994).

<sup>127</sup> *Wine v. Globe American Cas. Co.*, 917 S.W.2d 558 (Ky. 1996).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

## LOUISIANA

Louisiana refers to the made whole doctrine as the “full compensation rule.” It requires an insured to be fully compensated before an insurer or Plan may exercise its subrogation rights.<sup>136</sup> Unlike the case in a majority of states, Louisiana does place the burden of proving full compensation on the insured/Plan beneficiary, as opposed to requiring the Plan or insurer to prove it.<sup>137</sup>

The Louisiana Court of Appeals has indicated that the made whole doctrine is considered a rule of interpretation or a gap filler which becomes significant only when a contract or Plan fails to clearly address the issue.<sup>138</sup> The Louisiana Supreme Court has held that despite a subrogation clause, if the insured is less than fully compensated by tort recovery, the insurer is only partially subrogated, and the insured has complete priority in receiving payment.<sup>139</sup>

## MAINE

In addition to the limits on priority liens mandated of health insurers in § 2729-A, which applies generally to health insurance policies, similar limitations apply in another statute which applies to group or blanket policies.<sup>140</sup> Maine does not appear to have any case law which discusses application of the made whole doctrine, except for an allusion to the fact that with regard to uninsured motorist subrogation, Maine favors full satisfaction by the insured victim of his damages to which he is legally entitled to recover from the owners or operators of the uninsured vehicle before the right of subrogation attaches.<sup>141</sup>

## MARYLAND

Not only does Maryland not adopt the made whole doctrine, it specifically disclaims it.<sup>142</sup> In *Stancil*, the homeowner’s insurer that paid policy limits for fire destroying a home as a result of an automobile accident was entitled to subrogation from the tortfeasor before the insured was made whole.<sup>143</sup> The fact that the insured failed to properly insure his property created no responsibility by the insurer, and the principles of equity did not apply.<sup>144</sup> What is interesting about Maryland subrogation is that in order to waive or contract around the made whole doctrine, it is not necessary to show intent of the parties through contract language or otherwise. All that is needed is a right of subrogation expressed in the contract or Plan.<sup>145</sup> It should be noted that while the court’s decision in *Stancil* is favorable and makes subrogation sense, the

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<sup>136</sup> *Southern Farm Bureau Cas. Ins. Co. v. Sonnier*, 406 So.2d 178 (La. 1981); *Carter v. Bordelon*, 370 So.2d 113 (La. App. 1979).

<sup>137</sup> *Wallace v. Aetna Life & Cas. Ins. Co.*, 499 So.2d 577 (La. App. 1986).

<sup>138</sup> *Nat’l Emp. Benefit Trust of the Associated Gen. Contractors of America v. Sullivan*, 940 F. Supp. 956 (W.D. La. 1996); *Roberts v. Richard*, 743 So.2d 731 (La. App. 1999).

<sup>139</sup> *S. Farm Bureau Cas. Ins. Co. v. Sonnier*, 406 So. 2d 178 (La. 1981); see also *Brister v. Blue Cross and Blue Shield of Florida, Inc.*, 562 So.2d 1040,1044 (La. Ct. App. 1990) (“What the Supreme Court held in *Sonnier* was that since the survivors had not been fully compensated, the subrogated insurer could not collect from the survivors the amount the insurer had paid them.”).

<sup>140</sup> Me. Rev. Stat. Ann. Tit. 24-A, § 2836 (1976).

<sup>141</sup> *Wescott v. Allstate Insurance Co.*, 397 A.2d 156 (Me. 1979).

<sup>142</sup> *Stancil v. Erie Ins. Co.*, 740 A.2d 46 (Md. App. 1999).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

court in that decision distinguished between the property insurance policy at issue in that case and generic health insurance policies or Plans:

*Health insurance policies differ from the policy involved sub judice which has a precise policy limit, a maximum amount that the insurer is required to pay. Health insurance policies do not require the insured to select a maximum overall limit. The limits are set by the company depending on the medical service provided. Here, Stancil decided on the limit and chose one that was less than the real value of his property.*<sup>146</sup>

Whether and to what extent this health insurance/property insurance distinction affected the court's decision and will affect the decisions of future appellate courts hearing similar matters involving health insurance subrogation is not certain at this point.

Maryland courts have held that, in the context of homeowner's insurance policy in which insured elected not to fully insure his property, principles of equity did not require insured to be made whole before insurer was entitled to subrogation.<sup>147</sup> The court distinguished *Stancil* from those cases involving health care claims, recognizing that the principles of equity might demand that the insured be made whole before insurer would be entitled to subrogation in the context of health care claims.

## MASSACHUSETTS

It does not appear that Massachusetts adheres to or applies the made whole doctrine. In a concurring opinion, the Massachusetts Supreme Court stated as follows:

*Subrogation is a reasonable method of assisting and holding down the costs of health insurance. It prevents an undeserved windfall to the insured. It is appropriate to consider the matter of medical expenses apart from other aspects of the insured person's claim. Whenever uncertainty may exist with respect to other elements of damages, the amount paid under the medical insurance policy can be ascertained and dealt with independently. I see no justification for denying subrogation as the court seems to suggest, because, in settling a case, the claimant may not be made whole on all elements of his damages. The claimant can be and is made whole on his medical costs, to the extent of his coverage. A health insurer should not be obliged to forego asserting subrogation rights in order to assist in making a claimant whole on some other aspect of his damages, such as lost wages and pain and suffering, for which the insured has not purchased coverage from the health insurer.*<sup>148</sup>

Speaking specifically with regard to a health insurance Plan's right of reimbursement, the 1<sup>st</sup> Circuit, applying Massachusetts' law, has held the made whole doctrine will not prevent a health insurance Plan from subrogating where, despite the fact that the insured is not made whole, the Plan gives itself such a right according to its terms.<sup>149</sup> In Massachusetts, the made whole doctrine is merely considered a "gap filler" which comes into play when contracts fail to address

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<sup>146</sup> *Id.* at 48.

<sup>147</sup> *Id.*

<sup>148</sup> *Frost v. Porter Leasing Corp.*, 436 N.E.2d 387 (Mass. 1982); see also, *Rogers Street, L.L.C. v. Am. Ins. Co.*, 2004 WL 2425042 (Mass. Super. 2004) (*unreported decision*); *Liberty Mut. Ins. Co. v. Nat'l Consol. Warehouses, Inc.*, 34 Mass. App. Ct. 293 (Mass. App. 1993) (which, according to the decision in *Rogers Street, L.L.C.*, did not adopt the made whole doctrine).

<sup>149</sup> *Harris v. Harvard Pilgrim Healthcare, Inc.*, 208 F.3d 274 (1<sup>st</sup> Cir. 2000).

the issue clearly and, which, of course, the insured may sign away the right to be made whole.<sup>150</sup>

## MICHIGAN

Since 1919, Michigan has adhered to the made whole doctrine and provided that an insurer has no right of subrogation where the insured's loss exceeds his recoveries from his insurer and the one causing the fire, after deducting attorney's fees and costs.<sup>151</sup> The 1919 decision of *Washtenaw Mutual Fire Insurance Co. v. Budd*, notes that the insured was not invited to take part in the action against the third party, and the policy involved was a "valued policy" which paid only two-thirds (2/3) of the value of the loss.<sup>152</sup>

There does not appear to be any authority indicating that a Plan/Insurer can contract around the made whole rule – but there likewise is no authority indicating that they cannot. In *Union Ins. Soc. of Canton v. Consolidated Ice Co.*,<sup>153</sup> the Michigan Supreme Court considered a purely equitable subrogation case, and didn't make any mention of a contractual right of subrogation, or even whether there was a subrogation provision in the subject policy. Nonetheless, the Court seemed to hold that an insurer is not entitled to subrogation against an insured for a judgment recovered against the wrongdoer if the total amount received by insured, after deducting attorney's fees and costs, does not fully compensate insured.<sup>154</sup>

## MINNESOTA

The general rule in Minnesota is that subrogation may be denied unless the insured is made whole.<sup>155</sup> Minnesota employs the made whole doctrine, but they refer to it as the "full recovery rule."<sup>156</sup> Unfortunately, Minnesota applies the full recovery rule regardless of whether or not the subrogation rights at issue arise from equity or contract.<sup>157</sup> However, a case appears to open the door to avoiding the full recovery rule where the Plan's expressed terms provide to the contrary.<sup>158</sup>

The Minnesota Supreme Court, referring to the full recovery rule stated:

*"...absent express contract terms to the contrary, subrogation will not be allowed where the insured's total recovery is less than the insured's actual loss."*

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<sup>150</sup> *Rogers Street L.L.C.*, supra; 4 Richard H. Long, *The Law of Liability Insurance*, § 23.02(2)(a) (2004).

<sup>151</sup> *Washtenaw Mut. Fire Ins. Co. v. Budd*, 175 N.W. 231 (Mich. 1919).

<sup>152</sup> Id.

<sup>153</sup> *Union Ins. Soc. of Canton v. Consolidated Ice Co.*, 245 N.W. 563 (Mich. 1932).

<sup>154</sup> Id.; see also *Mich. Mut. Ins. Co. v. Shaheen*, 300 N.W.2d 599 (Mich. Ct. App. 1980) (holding that agreement providing that insured would hold, for the benefit of insurer, all rights and claims which he had against any other parties involved in the action should be interpreted to compel insured to reimburse insurer only for that amount of insured's recovery which exceeds damages defendant has suffered, including costs and attorney fees).

<sup>155</sup> *Hershey v. Physicians Health Plan of Minn., Inc.*, 498 N.W.2d 519 (Minn. 1993); *Westendorf by Westendorf v. Stasson*, 330 N.W.2d 699 (Minn. 1983).

<sup>156</sup> Id.

<sup>157</sup> Id.; *Medica, Inc. v. Atlantic Mutual Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1997); *Hershey*, supra.

<sup>158</sup> Id.; *Medica, Inc.*, supra.

They expressly refuse to follow those cases that a subrogation clause *ipso facto* authorizes first priority recovery by the insurer.<sup>159</sup> A Minnesota Supreme Court later held that because the doctrine of subrogation is equitable in origin, even when the right to subrogation is contractual, the carrier's subrogation rights will be governed by equitable principles, unless the contract clearly and explicitly provides to the contrary.<sup>160</sup> First, you must determine if the insured is made whole. Then, if the answer is "no", you must look to see if the agreement "supersedes the general rules of equity by stating that [the insurer] is to be reimbursed even if its member recovers less than full compensation."<sup>161</sup> It is not clear to what extent magic words are needed to accomplish this. At a minimum, however, it would seem that language which clearly and unequivocally demonstrate that the intent of the parties is to waive the made whole doctrine, must be used.<sup>162</sup> The 8<sup>th</sup> Circuit has also weighed in on the issue, agreeing with the Minnesota Supreme Court that the full compensation rule can be waived in the plan or policy.<sup>163</sup>

The Minnesota Supreme Court in *Westendorf* applied made-whole doctrine despite a contract provision giving the HMO provider a right to reimbursement to extent of damages recovered, noting that equitable principles apply to all instances of subrogation unless modified by specific provisions in the contract.<sup>164</sup>

## MISSISSIPPI

Unfortunately, Mississippi doesn't differentiate between equitable subrogation and contractual subrogation with regard to the application of equitable subrogation defenses, such as the made whole doctrine.<sup>165</sup> Therefore, a health insurer will not be able to subrogate until its insured or Plan beneficiary has been made whole.<sup>166</sup>

The Mississippi Supreme Court has issued an opinion in a case involving an ERISA-covered Plan.<sup>167</sup> In that case, Mississippi again confirmed that the made whole doctrine was adopted by Mississippi in the *Hare v. State* case, even though that case dealt with a state-sponsored insurance Plan and not one operating under the constraints of ERISA.<sup>168</sup> Unlike some states, Mississippi does not allow the terms of a contract to nullify the made whole doctrine.<sup>169</sup>

The Mississippi Supreme Court has adopted the "made whole" rule, rejecting an insurer's argument that it was entitled to reimbursement of "all sums recovered ... by settlement" for hospital, medical or related services under the terms of the insurance plan.<sup>170</sup> The Court explained that allowing the literal language of an insurance contract to destroy an insured's equitable rights "ignores the fact that this type of contract is realistically a unilateral contract of insurance and overlooks the insured's total lack of bargaining power in negotiating the terms of these types of agreements."

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<sup>159</sup> *Id.*

<sup>160</sup> *Medica, Inc., supra.; Westendorf, supra.*

<sup>161</sup> *Westendorf by Westendorf v. Stasson*, 330 N.W.2d 699 (Minn. 1983).

<sup>162</sup> *Maday v. Yellow Taxi Co.*, 311 N.W.2d 849 (Minn. 1981); *Preferred Risk Mutual Ins. Co v. Pagel*, 439 N.W.2d 755 (Minn. App. 1989).

<sup>163</sup> *MedCenters Health Care v. Ochs*, 26 F.3d 865 (8<sup>th</sup> Cir. 1994).

<sup>164</sup> *Westendorf, supra.*

<sup>165</sup> *Hare v. State*, 733 So.2d 277 (Miss. 1999).

<sup>166</sup> *Id.*

<sup>167</sup> *Yerby v. United Healthcare Ins. Co.*, 846 So.2d 179 (Miss. 2002).

<sup>168</sup> *Id.*

<sup>169</sup> *Hare, supra.*

<sup>170</sup> *Id.*

## MISSOURI

No Missouri court has expressly addressed the issue of priority of rights as between an insurer and its insured in the context of a conventional subrogation dispute. However, in *Hayde v. Womach*, the court in the context of the No Fault Act concluded that the dual objectives of subrogation precluded a no fault carrier from asserting a subrogation claim where its insured has not obtained full recovery.<sup>171</sup>

## MONTANA

Montana is an anti-subrogation state with regard to medical payment benefits made under an automobile insurance policy.<sup>172</sup> Where subrogation is allowed, however, an insured must be totally reimbursed for all losses, as well as costs, including attorney's fees, involving recovering those losses before the insurer can exercise any right of subrogation, regardless of contract language to the contrary.<sup>173</sup> In *Skauge*, the court held that:

*When the sum recovered by the insured from the tortfeasor is less than the total loss and thus either the insured or the insurer must to some extent go unpaid, the loss should be borne by the insurer for that is a risk the insured has paid it to assume.*<sup>174</sup>

The made whole doctrine, as established in *Skauge* in 1977, requires that an insured be "made whole" before an insurer can assert its subrogation rights. This meant that, not only must the insured recover all of her losses but also all costs of recovery as well, such as attorneys' fees and costs of litigation. In other words, the insured must be "totally reimbursed for all losses as well as costs, including attorney fees."<sup>175</sup>

Most recently, the Montana Supreme Court, in a 2008 decision, expanded the made whole doctrine to place a duty on a subrogating insurer to affirmatively determine whether the insured has been made whole before it subrogates.<sup>176</sup> In that case, Ferguson was in an automobile accident, and her insurer, Safeco, paid for the total loss of the vehicle, less the deductible, but did not pay for several other losses Ferguson had sustained. Safeco never provided her with any notice that it would seek subrogation; never investigated, inquired or made a determination as to whether Ferguson was made whole for her losses; and never reimbursed Ferguson for her uncovered losses including her deductible, unpaid rental car expenses, and attorneys' fees. Based on those egregious facts, the Supreme Court erroneously interpreted *Swanson* to establish a duty on the part of a subrogating carrier to determine if the insured was made whole before it subrogated. Ferguson sued Safeco and certified a class action lawsuit, claiming Safeco engaged in "a common scheme of deceptive conduct," by taking subrogation recoveries without an investigation into and determination of whether the insureds have been made whole. That

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<sup>171</sup> 707 S.W.2d 839 (Mo. App. 1986).

<sup>172</sup> *Youngblood v. American States Ins. Co.*, 866 P.2d 203 (Mont. 1993).

<sup>173</sup> *Skauge v. Mountain States Tel. & Tel. Co.*, 565 P.2d 628 (Mont. 1977); *Swanson v. Hartford Ins. Co. of Midwest*, 46 P.3d 584 (Mont. 2002); Mont. Code Ann. § 33-23-203(2) (1997) (held unconstitutional to the extent that it allowed automobile insurer to charge premiums for non-existent UIM coverage); *Hardy v. Progressive Specialty Ins. Co.*, 67 P.3d 892 (Mont. 2003).

<sup>174</sup> *Skauge*, 565 P.2d at 632.

<sup>175</sup> *Id.*

<sup>176</sup> *Ferguson v. Safeco Ins. Co. of Am.*, 2008 WL 854841 (Mont. 2008).

class action suit was pending as of the date of this publication. A health service corporation's<sup>177</sup> right of subrogation may not be enforced until the injured party has been made whole.<sup>178</sup>

The Montana Supreme Court has rejected an argument that contract language can override equitable made whole doctrine, and reaffirms that the public policy in Montana requires that an insured must be totally reimbursed for all losses as well as costs, including attorney fees, involved in recovering those losses before the insurer can exercise any right of subrogation, regardless of any contract language providing to the contrary.<sup>179</sup>

## NEBRASKA

Nebraska adheres to the made whole doctrine and believes that where an insurer seeks subrogation and the insured has not been made whole, equitable principles necessitate disallowing the insurer to assert subrogation rights.<sup>180</sup> Any contractual subrogation provisions which attempt to negate the made whole doctrine are deemed unenforceable as being in direct opposition to the equitable principles of subrogation.<sup>181</sup> When a health insurer subrogates, whether or not its subrogation rights can be enforced against the Plan beneficiary requires resolution of factual issues, such as the amount of medical costs incurred by the Plan beneficiary and the extent of other damages sustained by her.<sup>182</sup> Nebraska adheres to the made whole doctrine and an insurer will only be able to subrogate when its insured has obtained an amount which exceeds the insured's total damages or loss.<sup>183</sup> In fact, a contractual subrogation provision which entitles the Plan to recover, regardless of whether the insured is made whole, is unenforceable as being in direct opposition to the equitable principles of subrogation.<sup>184</sup>

In *Shelter Insurance Companies v. Frohlich*,<sup>185</sup> the Nebraska Supreme Court addressed the issue of whether a grant of a summary judgment motion to an insurer was proper where the insured had not been fully compensated for her loss. In resolving this issue, the court recognized that general subrogation clauses, while typically valid and enforceable, rarely define the precise nature and extent of an insurer's subrogation interest or right. Consequently, the common law rule that subrogation is unavailable until the subrogor has been paid in full is applicable unless the contract provides for subrogation on payment of less than full recovery. In other words, "unless a contract provides otherwise, equitable principles apply even when a subrogation right is based on contract." It is not enough that the contractual rights merely provide for or recognize the insurer's right of subrogation.

Full compensation, in the absence of a contract or statutory provision to the contrary, is a prerequisite to subrogation.<sup>186</sup> The rationale for this rule is that the insurance policy contains a basic promise to pay which should be subordinated to the insured's right to complete

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<sup>177</sup> As seen, this includes only non-profit corporations and would not include a traditional health insurer.

<sup>178</sup> Mont. Code Ann. § 33-30-1102 (1987).

<sup>179</sup> *Swanson v. Hartford Ins. Co. of Midwest*, 46 P.3d 584 (Mont. 2002); see also *Youngblood v. Am. States Ins. Co.*, 866 P.2d 203 (Mont. 1993) (observing that "subrogation of medical payment benefits in Montana is void as against public policy.").

<sup>180</sup> *BlueCross & BlueShield of Neb., Inc. v. Dailey*, 687 N.W.2d 689 (Neb. 2004).

<sup>181</sup> *Id.*

<sup>182</sup> *Bartunek v. George A. Hormel Co.*, 513 N.W.2d 545 (Neb. App. 1994); *Skauge v. Mountain States Tel. & Tel. Co.*, 565 P.2d 628 (Neb. 1977).

<sup>183</sup> *Bartunek*, supra; *Shelter Ins. Co. v. Frohlich*, 498 N.W.2d 74 (Neb. 1993).

<sup>184</sup> *Dailey*, supra.

<sup>185</sup> *Frohlich*, supra.

<sup>186</sup> *Id.*

compensation. Thus, if anyone is to go unpaid it should be the insurer. Because the subrogation provision at issue in *Frohlich* was insufficient to modify the common law made whole rule, the court reversed the grant of summary judgment in favor of the insurer and remanded the case back to the trial court for purposes of determining what amount would constitute full compensation of the insured.

In *Blue Cross & Blue Shield, Inc. v. Dailey*,<sup>187</sup> the Supreme Court of Nebraska recommitted itself to the common law made whole rule by overruling *Frohlich* to the extent that it could be construed to permit conventional subrogation when the insured has not been fully compensated. In other words, the court in *Dailey* made it clear that the parties may not contract out of the made whole rule.

There is no precise formula for determining whether an insured has been made whole in Nebraska. The issue is generally treated as a question of fact. However, medical expenses and other damages suffered by the insured are to be considered.<sup>188</sup> Factors affecting the enforceability of a subrogation right such as the tortfeasor's ability to pay beyond the amount of the subrogor's settlement and whether the settling parties have stipulated that the settlement satisfies all damages sustained by the insured are also relevant. Jury verdicts, however, are presumptively conclusive of the amount that would completely compensate the insured.<sup>189</sup>

While there is some authority in Nebraska for the proposition the made whole doctrine may be overridden by specific contract terms in a Plan or policy, the case law which suggests this dealt with § 44-3,128.01, the Nebraska statute which allows an automobile liability policy to contain a provision permitting pro rata subrogation in the situation where the insured did not fully recover his or her loss, and probably isn't germane to regular subrogation matters.<sup>190</sup> However, case law also says that "if a contractual right of subrogation is merely the usual equitable right which would have existed in any event in the absence of a contract, equitable principles control subrogation."<sup>191</sup> This leaves open the argument that if the terms of the policy or insurance contract provide for something different from common law equitable subrogation (such as reimbursement provisions, etc.), an argument might be successfully made that the contract can overrule the equitable made whole doctrine.

The Nebraska Supreme Court has declared that contractual language that attempts to allow an insurer to recover regardless of whether insured is fully compensated is unenforceable.<sup>192</sup> It explained that insurance terms which purport to place burden of loss on the insured despite the fact that the insured has paid the insurer to bear the risk are "in direct opposition to the equitable principles upon which subrogation is allowed."<sup>193</sup>

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<sup>187</sup> *Dailey, supra*.

<sup>188</sup> *Frohlich, supra*.

<sup>189</sup> *Bartunek v. Hormel*, 513 N.W.2d 545 (Neb. 1994); see also *Pleon v. Union Ins. Co.*, 573 N.W.2d 436 (Neb. 1998) (holding statute providing that settlement or judgment less than the policy limit of any applicable automobile liability insurance policy constitutes complete recovery of actual economic loss to be constitutional).

<sup>190</sup> *Pleon v. Union Ins. Co.*, 573 N.W.2d 436, 443 (Neb. 1998).

<sup>191</sup> *BlueCross & BlueShield of Neb., Inc. v. Dailey*, 687 N.W.2d 689 (Neb. 2004).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

## NEVADA

Until recently, Nevada had not addressed the application of the made whole doctrine. In previous decisions, the court seemed to discount the application of a made whole doctrine in the context of an ERISA subrogation action.<sup>194</sup> However, in 2005, the Supreme Court of Nevada declared that the made whole doctrine was a general equitable principle of insurance law that prevented an insurance company from enforcing its subrogation rights before the insured had been fully reimbursed for their losses.<sup>195</sup> However, the court went on to say that if a contract exclusively excludes the made whole doctrine, the doctrine will not apply to limit an insurance company's subrogation rights.<sup>196</sup>

## NEW HAMPSHIRE

The made whole doctrine has at least been applied to health insurance subrogation. Health insurers may not subrogate where the Plan beneficiary is not made whole from the third party recovery.<sup>197</sup> It should also be noted that where there is a valid subrogation clause in an insurance policy involving an injured minor and a parent, the health insurer is subrogated to the parent's right to recover medical expenses.<sup>198</sup> Where there is a reduced recovery, such as a policy limits third party settlement, the respective shares allocated to the parent and the minor should bear the same proportions to the total settlement that the full loss of each would have borne to a complete recovery.<sup>199</sup> There is no justification for treating a settlement within policy limits, however, as a reduced recovery. When the enforceability of the settlement is not in question, there is no reason to assume that a plaintiff who settles for less than the defendant's policy limits has acted irrationally in choosing not to test the value of his claim by litigating his case to a verdict.<sup>200</sup>

## NEW JERSEY

New Jersey has adopted the made whole doctrine.<sup>201</sup> A health insurer who is entitled to subrogate may not do so if the Plan beneficiary has not been made whole.<sup>202</sup> Of course, this decision came down before the appellate court in *Perreira*,<sup>203</sup> which held that the collateral source rule in New Jersey did *not* bar a health insurer from subrogating, and was reversed by the New Jersey Supreme Court.<sup>204</sup> New Jersey adheres to the made whole doctrine with regard to health insurance subrogation, even though health insurance subrogation is not allowed.

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<sup>194</sup> *Trustee of Hosp. Employees & Restaurant Employees Int'l Union Welfare Fund v. Kirby*, 890 F. Supp. 939 (D. Nev. 1995).

<sup>195</sup> *Canfora v. Coast Hotels and Casinos, Inc.*, 121 P.3d 599 (Nev. 2005).

<sup>196</sup> *Id.*

<sup>197</sup> *Dimick v. Lewis*, 497 A.2d 1221 (N.H. 1985).

<sup>198</sup> *BlueCross & BlueShield of New Hampshire-Vermont v. St. Cyr*, 459 A.2d 226 (N.H. 1983).

<sup>199</sup> *Dimick*, *supra*.

<sup>200</sup> *Roy v. Ducmuigeem*, 532 A.2d 1388 (N.H. 1987).

<sup>201</sup> *O'Brien v. Two West Hannover Co.*, 795 A.2d 907 (N.J. Super. 2002); *McShane v. N.J. Mfrs. Ins. Co.*, 375 N.J. Super. 305, 312 (App.Div.2005); *In Re Complaint of Weeks Marine*, 2006 WL 1843130 (D.N.J. 2006).

<sup>202</sup> *Werner v. Latham*, 752 A.2d 832 (N.J. Super. 2000).

<sup>203</sup> *Perreira v. Rediger*, 750 A.2d 126 (N.J. App. 2000).

<sup>204</sup> *Id.*

However, there is authority in New Jersey to the effect that the made whole doctrine may be overridden by specific contract terms in a Plan or policy.<sup>205</sup> In *Hogges*, the court explained that:

*In the absence of express terms in the contract to the contrary, [the insured] must be made or kept whole before the insurer may recover anything from him or from a third party under its right of subrogation. Against the insured, as well as against third parties, there may be recovery by the insurer (again, subject to the express terms of the contract) only if the cause is just and enforcement is consonant with reason and justice.*<sup>206</sup>

The New Jersey Supreme Court has observed that the made-whole doctrine applies to contractual as well as equitable subrogation.<sup>207</sup> An insurer may not avoid application of make whole doctrine unless the insurance contract is sufficiently specific and honors reasonable expectations of the parties. In this context the relevant subrogation clause and agreements are to be evaluated. If the subrogation clause or contract is sufficiently specific to alter the common law made whole doctrine neither can be disregarded unless it fails to honor the reasonable expectation of the parties is unconscionable, and violative of public policy. Under this approach the issue of whether the insured has been made whole or fully compensated is a question of law for the court.<sup>208</sup>

## NEW MEXICO

New Mexico, while not adopting the traditional made whole doctrine as most other states do, has come up with a hybrid version of the made whole doctrine. Noting that one persistent criticism of subrogation is that subrogated insurers will seek reimbursement even when the insured tort victim has not been fully compensated for all damages, including pain and suffering, New Mexico recognizes that many states have applied the made whole doctrine, which allows reimbursement only when the insured has been fully compensated.<sup>209</sup> However, New Mexico has enacted something referred to as the “doctrine of equitable apportionment.”<sup>210</sup> The doctrine of equitable apportionment reduces the amount reimbursed to the subrogated insurer when the insurer’s recovery represents only a portion of the actual damages. Instead of the “all or nothing” effect of the made whole doctrine, a doctrine of equitable apportionment results in a fairer result where the subrogation interest is reduced proportionately to the reduction of the insured’s total claim.<sup>211</sup>

## NEW YORK

New York has applied and adheres to the existence of the made whole doctrine.<sup>212</sup> An insurer has no right of subrogation against its insured when the insured’s actual loss exceeds the amount it has recovered from both the insurer and the third party.<sup>213</sup> Where there are multiple

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<sup>205</sup> *Providence Wash. Ins. Co. v. Hogges*, 171 A.2d 120, 124 (N.J. 1961); *Culver v. Ins. Co. of North Am.*, 559 A.2d 400 (N.J. 1989).

<sup>206</sup> *Providence Wash. Ins. Co. v. Hogges*, 171 A.2d 120, 124 (N.J. 1961).

<sup>207</sup> *Culver v. Ins. Co. of N. Am.*, 559 A. 2d 400 (N.J. 1989).

<sup>208</sup> *Werner*, *supra*.

<sup>209</sup> *Amica Mut. Ins. Co. v. Maloney*, 903 P.2d 834 (N.M. 1995).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Winkelman v. Excelsior Ins. Co.*, 626 N.Y.S.2d 994 (1995); *U.S. Fid. & Guar. Co. v. Maggiore*, 749 N.Y.S.2d 555 (2002).

<sup>213</sup> *Id.*

plaintiffs, each insurer needs only to establish that its individual insured has been made whole before subrogation is allowed.<sup>214</sup> It seems, however, that the made whole doctrine is applicable only to situations in which the insured makes a recovery and the subrogated insurer is seeking reimbursement from the insured and out of that recovery. An insurer's action based on partial subrogation through its insured will not necessarily interfere with the insured's right to be made whole by the tortfeasor and the insurer need not delay its subrogation claim against the third party to avoid impairing the insured's rights.<sup>215</sup>

The court in *Winkelman* introduced the made whole doctrine to New York in the context of equitable subrogation, and the court in *Maggiore* extended the doctrine to contractual subrogation as well. It therefore appears that the equitable considerations, not the intent of the parties as evidenced by the terms of the policy, will govern in New York.

Court applies “make whole” rule despite a subrogation clause to the contrary, noting that allowing subrogation where insured is not fully compensated would be “contrary to the principal purpose of an insurance contract: to protect an insured from loss, thereby placing the risk of loss on the insurer [though] the insurer has accepted payments from the insured to assume this risk of loss.”<sup>216</sup>

## NORTH CAROLINA

North Carolina has discussed the made whole doctrine once, in the case of *St. Paul Fire & Marine Ins. Co. v. W.P. Rose Supply Co.*<sup>217</sup> In that case, the court held that:

*The great weight of authority is ... that, when the loss exceeds the insurance, as the cause of action is indivisible and the right of the insurer is not because of any interest in the property destroyed or damaged, and is enforced upon the equitable principle of subrogation, the action must be brought by and in the name of the owner of the property, and that he is entitled to recover the entire damages, without diminution on account of the insurance, And that he holds the recovery first to make good his own loss, and then in trust for the insurer ...*<sup>218</sup>

Ironically, North Carolina does not mention the subject again or give us any guidance as to how it is to be applied, if at all. *W.P. Rose* is a purely equitable subrogation case with no contractual analysis in its opinion. When the sum recovered by the insured is less than the total loss, the loss should be borne by the insurer.<sup>219</sup>

## NORTH DAKOTA

North Dakota has not adopted the made whole doctrine either for subrogation generally or with respect to the subrogation rights of health insurers and health Plans.

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<sup>214</sup> *Maggiore, supra.*

<sup>215</sup> *Id.*

<sup>216</sup> *Maggiore, supra.* (quoting 16 *Couch, Insurance* 3d, § 223:136, at 152-153).

<sup>217</sup> *St. Paul Fire & Marine Ins. Co. v. W.P. Rose Supply Co.*, 198 S.E.2d 482 N.C. App. 1973).

<sup>218</sup> *Id.* at 485 (citing *Powell & Powell v. Wake Water Co.*, 88 S.E.2d 426 (N.C. 1916)).

<sup>219</sup> *St. Paul Fire & Marine Ins. Co. v. W. P. Rose Supply Co.*, 198 S.E.2d 482 (N.C. Ct. App. 1973); see also 11 N.C.A.C. 12.0319 (prohibiting subrogation clause in life, accident and health insurance policies).

## OHIO

Ohio courts enforce the made whole doctrine.<sup>220</sup> An insurer's subrogation interest will not be given priority where doing so will result in less than a full recovery to the insured.<sup>221</sup> However, the made whole doctrine in Ohio may be disclaimed by the policy or Plan language.<sup>222</sup> Sometimes known as the "full compensation rule," Ohio has followed the more logical although minority approach among states, and held that cases of contractual interpretation should not be decided on the basis of what is just or equitable, even where a party has made a bad bargain, contracted away all of his rights, or has been left in the position of doing the work while another may benefit from the work.<sup>223</sup> Ohio bases this position on the Federal Made Whole Doctrine, quoted extensively in the following chapter. The Federal Made Whole Doctrine is based upon "general equitable principles of insurance law that, absent an agreement to the contrary, an insurance company may not enforce a right to subrogation unless the insured has been fully compensated for his or her injuries, that is, has been made whole."<sup>224</sup>

In *Peterson v. Ohio Farmers Insurance Co.*,<sup>225</sup> the Ohio Supreme Court considered a subrogation dispute which arose out of fire damage to the insured's barn. The insurance company, Ohio Farmers, paid the insured \$7,814 on a real and personal property claim stipulated to be in excess of \$17,629. The insureds, upon receipt of the proceeds, signed a proof-of-loss and executed the insurer's standard subrogation receipt. Thereafter, both jointly filed a petition against the third party claiming that the insured's loss was \$17,629.56. A joint verdict in favor of both parties against the tortfeasor was subsequently returned in the amount of \$11,514 and judgment was entered. Thereafter, a dispute arose between the insured and insurer as to the division of the proceeds of the judgment. The Supreme Court determined that the key to resolving the dispute was to be found in the language of the subrogation provision of the policy and the subrogation receipt signed by the insured. According to the court the language providing that the insured "hereby subrogates said Insurance Company, to all of the rights, claims and interest which the undersigned may have" conveyed every bit of the insured's rights of recovery up to \$7,814. Therefore, the insurer being the owner of all the rights of the insured "must have priority in payment out of the funds recovered." Ultimately the court concluded that an insurer who has cooperated and assisted against the tortfeasor is entitled to be compensated first out of the proceeds of any recovery where the subrogation provision or receipt conveys all of the rights of recovery to the extent of payment by the insurer.

Three decades later, the Ohio Supreme Court revisited the issue of priority of rights in the context of health insurance in *Blue Cross & Blue Shield Mutual of Ohio v. Hrenko*.<sup>226</sup> The court reiterated its position that the dispositive consideration was the language of the policy or subrogation receipts. While the court found the language of the policy to be clear, unambiguous and enforceable, it was also influenced by the fact that the insured had received the full benefits

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<sup>220</sup> *Huron County Bd. of Comm'rs v. Sounders*, 775 N.E.2d 892 (Ohio App. 2002).

<sup>221</sup> *Porter v. Tabern*, 1999 WL 812357 (Ohio App. 1999) (*unreported decision*).

<sup>222</sup> *N. Buckeye Educ. Council Group Health Benefits Plan v. Lawson*, 798 N.E.2d 667 (Ohio App. 2003), motion to certify allowed by, *N. Buckeye Educ. Council Group Health Benefits Plan v. Lawson*, 800 N.E.2d 749 (Ohio 2003), judgment aff'd by, *N. Buckeye Educ. Council Group Health Benefits Plan v. Lawson*, 814 N.E.2d 1210 (2004), reconsideration denied by, *N. Buckeye Educ. Council Group Health Benefits Plan v. Lawson*, 818 N.E.2d 712 (Ohio 2004).

<sup>223</sup> *Ervin v. Garner*, 267 N.E.2d 769 (Ohio 1971).

<sup>224</sup> *Barnes v. Indep. Auto. Dealers of California*, 64 F.3d 1389 (9<sup>th</sup> Cir. 1995); *Galusha v. Pass*, 2003 WL 859083 (Ohio App. 2003) (*unreported decision*).

<sup>225</sup> 191 N.E.2d 157 (Ohio 1963).

<sup>226</sup> 647 N.E.2d 1358 (Ohio 1995).

of his bargain. Consequently, the court concluded that pursuant to the terms of the policy, an insurer who has paid benefits to its insured and has been subrogated to the rights of its insured may enforce that right after the insured receives full compensation.

In subsequent opinions involving health insurance subrogation disputes courts of appeals have construed the relevant analysis to turn on an examination of the policy language and a consideration of whether the insured had been made whole. Whether the insured had received complete compensation however, ultimately was accorded greater weight in the analysis and became the dispositive consideration.<sup>227</sup>

The court explained the critical nature of the requirement that the insured be made whole before the insurer can assert its subrogation right in *Central Reserve Life Insurance Co. v. Hartzell*.<sup>228</sup> In *Central Reserve*, the Court of Appeals went further than any court before and declared that any attempt by the insurer to claim priority over a partially compensated insured via a subrogation clause was “unenforceable and contrary to public policy.” Thus, the court concluded that it is contrary to the public policy of Ohio to allow an insurer to contractually establish priority over an insured’s claim before the latter has been made whole.

In 2006, the Ohio Court of Appeals confirmed the made whole doctrine was a defense to subrogation which could only be asserted by the insured, and only in certain situations.<sup>229</sup> The “make-whole” doctrine provides that “unless the terms of a subrogation agreement clearly and unambiguously provide otherwise, a health insurer’s subrogation interests will not be given priority where doing so will result in less than a full recovery *to the insured*.”<sup>230</sup> In *Wilson v. Sanson*, a health plan paid \$141,000 in benefits to two plan beneficiaries injured in an automobile accident. The third party tortfeasor carried only \$100,000 in liability policy limits, so the plan beneficiaries’ underinsured motorist carrier made substitute payments for the \$100,000 limits and preserved its right of subrogation against the third party. However, the UIM carrier was not aware of the health plan’s lien, and later argued that the lien should not be repaid out of the \$100,000 third party limits because the plan beneficiaries were not “made whole.” The Ohio Court of Appeals stated that the made whole doctrine only applies to an “insured” that has not been made whole. It does not apply to an insurance company. Thus, the UIM carrier did not have any standing to assert this claim. The Court also noted that the plan beneficiaries’ claims against the third party was settled and dismissed with prejudice. The third party also signed a release with the UIM carrier. Thus, there was some evidence tending to prove that the Wilsons were fully compensated for their injuries.<sup>231</sup> Interestingly, the Court found that both the UIM carrier and the health plan had equal subrogation rights to the \$100,000 third party proceeds. The UIM carrier had subrogation rights under the Ohio UM statute.<sup>232</sup> The fully insured health plan had subrogation language which read as follows:

*“To the extent we provide or pay benefits for covered Medical Services, your legal rights to claim or receive compensation damages or other payment for that same illness or injury is transferred to us.”*

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<sup>227</sup> *Huron County Bd. of Comm'rs v. Saunders*, 775 N.E.2d 892, 897 (Ohio Ct. App. 2002); *Grine v. Payne*, No. WD-00-044, 2001 Ohio App. LEXIS 1342, at \*8 (Ohio Ct. App. 2001); *Cent. Reserve Life Ins. Co. v. Hartzell*, No. 94AP120094, 1995 Ohio App. LEXIS 6027, at \*5 (Ohio Ct. App. 1995).

<sup>228</sup> 1995 Ohio App. LEXIS 6027, at \*7.

<sup>229</sup> *Wilson v. Sanson*, 2006 WL 3446213 (Ohio App. 2006).

<sup>230</sup> *Lawson*, *supra*.

<sup>231</sup> *Id.*

<sup>232</sup> R.C. §3937.18(J).

The Federal Made Whole Doctrine says that when the language of an ERISA Plan is silent or ambiguous as to subrogation or reimbursement rights, Federal Common Law requires that the insured be made whole before the insurer can recover.<sup>233</sup> Therefore, Ohio has borrowed from the Federal Made Whole Doctrine to craft the Ohio made whole rule, which is that the health insurer can opt out of this “default” made whole doctrine by using specific and clear language in its Plan that establishes both a priority to recovered funds and a right to full or partial recovery.<sup>234</sup> Language providing a health insurer with a right to the proceeds of “any recovery” from a third party has been held to be sufficient to overcome the made whole doctrine.<sup>235</sup> Likewise, if the Plan provides for an apportionment scheme in the event that the third party tortfeasor has insufficient insurance or means to satisfy a judgment for all of the damages suffered by the insured, then these contract provisions will govern and the recovery will be apportioned.<sup>236</sup> In addition, if the insured has interfered with the insurer’s subrogation rights, then the “make whole” doctrine does not apply.<sup>237</sup>

The Ohio Supreme Court has clearly indicated that clear and unambiguous language allows subrogation even where the insured is not fully compensated.<sup>238</sup>

## OKLAHOMA

Oklahoma first considered application of the made whole doctrine in 1996 and with regard to an ERISA Plan.<sup>239</sup> Where the ERISA Plan’s subrogation or reimbursement terms neither expressly set a priority for repayment of benefits, nor otherwise give the right to subrogation or reimbursement before any funds are paid to the beneficiary, the made whole doctrine will apply.<sup>240</sup>

In 2000, an Oklahoma Court of Appeals applied the made whole doctrine for the first time to a non-ERISA Plan.<sup>241</sup> It declared that the reimbursement and subrogation provisions of a group health Plan were unenforceable unless the Plan beneficiary was fully compensated by the tortfeasor.<sup>242</sup> The court did give some wiggle room, however, and implied that if there was a “priority-of-payment provision,” the result might be different.<sup>243</sup>

The made whole doctrine in Oklahoma has been described as prohibiting an insurer from recouping anything by way of subrogation or reimbursement until the insured has been made entirely whole for recovery of all compensatory damages to which he is entitled.<sup>244</sup> When there is a settlement, evidence must be proffered by the insurer as to the elements of damages recovered in and represented by the settlement funds. Where the record before the trial court contains no such evidence, it is not possible to determine whether or not the Plan beneficiary has been made whole.<sup>245</sup>

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<sup>233</sup> *Copeland Oaks v. Haupt*, 209 F.3d 811 (6<sup>th</sup> Cir. 2000).

<sup>234</sup> *Hiney Printing Co. v. Brantner*, 243 F.3d 956 (6<sup>th</sup> Cir. 2001).

<sup>235</sup> *Risner v. Erie Ins. Co.*, 633 N.E.2d 588 (Ohio App. 1993).

<sup>236</sup> *Aetna Life Ins. Co. v. Martinez*, 454 N.E.2d 1338 (Ohio App. 1982).

<sup>237</sup> *Acuff v. Motorists Mut. Ins. Co.*, 2007 WL 661561 (Ohio App. 2007).

<sup>238</sup> *Lawson*, *supra*.

<sup>239</sup> *Equity Fire & Cas. Co. v. Youngblood*, 927 P.2d 572 (Okla. 1996).

<sup>240</sup> *Id.*; *Reeds v. Walker*, 2006 WL 1686739 (Okla. 2006).

<sup>241</sup> *American Medical Sec. v. Josephson*, 15 P.3d 976 (Okla. Civ. App. 2000).

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Sunbeam-Oster Co., Inc. Group Ben. Plan v. Whitehurst*, 102 F.3d 1368 (5<sup>th</sup> Cir. 1996).

<sup>245</sup> *Josephson*, *supra*.

Unlike the case in Georgia,<sup>246</sup> simply because a Plan beneficiary settles and executes a release in Oklahoma, doesn't mean that he has been "fully compensated" or "made whole" as a matter of law.<sup>247</sup> A settlement in Oklahoma does not necessarily represent an injured party's actual or total compensatory damages.<sup>248</sup> There is still ample authority in Oklahoma to the effect that the made whole doctrine may be overridden by specific contract terms in a policy or Plan.<sup>249</sup> The Oklahoma Supreme Court has indicated that the following plan reimbursement language was not sufficient to overcome the made whole doctrine:

*When We pay benefits under the Plan and it is determined that a third party is liable for the same expenses, We have the right to subrogate from the monies payable from the third party equal to the amount We have paid for such benefits. You must reimburse Us from any monies recovered form (sic) a third party as a result of a judgment against or settlement with or otherwise paid by the third party. You must take action against the third party, furnish all the information and provide assistance to Us regarding the action taken, and execute and deliver all documents and information necessary for Us to enforce Our rights of subrogation.*<sup>250</sup>

The court in *Reeds* set a new priority-of-payments standard. An insurance contract stands subject to the make-whole rule unless it contains an unequivocal, express statement that the insured does not have to be made whole before the insurer is entitled to recoup its payments.<sup>251</sup>

Addressing the enforceability of subrogation provisions in the context of an ERISA claim, the Oklahoma Supreme Court has held that where the plan does not specifically provide that insurer is entitled to priority of payment and does not expressly give its managers the right to resolve ambiguities, and where the facts do not clearly show that the beneficiary's settlement included reimbursement for medical expenses, the plan will not be allowed to recover unless insured is made whole.<sup>252</sup>

## OREGON

Oregon has not yet adopted the made whole doctrine. On June 9, 2004, an Oregon Court of Appeals held that subrogation is an equitable doctrine which is based on a theory of restitution and unjust enrichment, and enables a secondarily liable party who has been compelled to pay a debt to be *made whole* by collecting that debt from the primarily liable party, who, in good conscience, should be required to pay it.<sup>253</sup> This case, however, doesn't go quite as far as establishing the made whole doctrine in Oregon or requiring that the insured be made whole before subrogation can be effected. Although not specifically identifying the made whole doctrine by name, one might argue that Oregon implies that an insured must be made whole

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<sup>246</sup> *Thompson v. Fed. Express Corp.*, 809 F. Supp. 950 (M.D. Ga. 1993).

<sup>247</sup> *Id.*

<sup>248</sup> *Price v. Southwestern Bell Tel. Co.*, 812 P.2d 1355 (Okla. 1991).

<sup>249</sup> *Williams & Miller Gin Co. v. Baker Cotton Oil Co.*, 235 P. 185, 187 (Okla. 1925); *Reeds v. Walker*, 2006 WL 1686739 (Okla. 2006); *Fields v. Farmers Ins. Co.*, 18 F.3d 831 (10<sup>th</sup> Cir. 1994) (applying Oklahoma law).

<sup>250</sup> *Reeds v. Walker*, 2006 WL 1686739 (Okla. 2006).

<sup>251</sup> *Id.*

<sup>252</sup> *Equity Fire and Cas. Co. v. Youngblood*, 927 P.2d 572 (Okla. 1996); *see also American Med. Sec. v. Josephson*, 15 P.3d 976 (Okla. Civ. App. 2000) (holding that, in the absence of a priority-of-payment provision, subrogation clause is unenforceable unless insured has been fully compensated).

<sup>253</sup> *Koch v. Spann*, 92 P.3d 146 (Or. App. 2004).

before an insurer may proceed with subrogation.<sup>254</sup> Until they specifically adopt the doctrine, however, you should maintain that such a doctrine does not exist under Oregon law.

With regard to PIP subrogation and reimbursement in Oregon, § 742.544 provides for a statutory form of the made-whole rule:

*(1) A provider of personal injury protection benefits shall be reimbursed for personal injury protection payments made on behalf of any person only to the extent that the total amount of benefits paid exceeds the economic damages as defined in ORS 31.710 suffered by that person. As used in this section, "total amount of benefits" means the amount of money recovered by a person from:*

- (a) Applicable underinsured motorist benefits described in ORS 742.502 (2);*
  - (b) Liability insurance coverage available to the person receiving the personal injury protection benefits from other parties to the accident;*
  - (c) Personal injury protection payments; and*
  - (d) Any other payments by or on behalf of the party whose fault caused the damages.*
- (2) Nothing in this section requires a person to repay more than the amount of personal injury protection benefits actually received.*<sup>255</sup>

## PENNSYLVANIA

Pennsylvania recognizes and applies the made whole doctrine, although not very aggressively.<sup>256</sup> Nevertheless, an insurer is generally not entitled to exercise a right to subrogation until its insured has been fully compensated for the insured's injuries.<sup>257</sup> However, there do not appear to be any cases which apply the made whole doctrine to health insurance subrogation cases.<sup>258</sup> In Pennsylvania, an insurer's subrogation rights are not superior to the rights of an insured because subrogation does not arise until the insured has been made whole.<sup>259</sup> This rule of law has been sporadically applied by Pennsylvania courts to both equitable and contractual subrogation.<sup>260</sup> The made whole doctrine is also applicable to statutory subrogation disputes in the absence of a legislative intent to displace the rule.<sup>261</sup> In implementing the made whole doctrine, courts allow a subrogation recovery from the insured in the amount by which the sum received by the insured from the tortfeasor, together with the insurance payments made, exceeds the loss and expense incurred by the insured in realizing the claim against the wrongdoer.<sup>262</sup> Pursuant to this measure, the expenses of making the recovery from the wrongdoer, including attorneys' fees, must be taken into account in determining whether the insured has any excess recovery to which the insurer would be entitled under the doctrine of subrogation.<sup>263</sup> However, there is authority for the proposition that when the insured settles with the tortfeasor the settlement conclusively establishes the settlement

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<sup>254</sup> *Id.*

<sup>255</sup> O.R.S. § 742.544 (1993).

<sup>256</sup> *Nationwide Mut. Ins. Co. v. DiTomo*, 478 A.2d 1381 (Pa. Super. 1984).

<sup>257</sup> *Lexington Ins. Co. v. Q-E Mfg. Co., Inc.*, 2006 WL 2136244 (M.D. Pa. 2006) (*unreported decision*).

<sup>258</sup> *Watson v. Allstate Ins. Co.*, 28 F.2d 942 (M.D. Pa. 1998); *DiTomo*, *supra*.

<sup>259</sup> *DiTomo*, *supra*.

<sup>260</sup> *Gallop v. Rose*, 616 A.2d 1027 (Pa. Super. Ct. 1992).

<sup>261</sup> *City of Meadville v. Workers' Comp. Appeal Bd.*, 810 A.2d 703, 706 (Pa. Commw. Ct. 2001).

<sup>262</sup> *Nationwide Mut. Ins. Co. v. Butler*, 28 Pa. D. & C.3d 627, 630 (Pa. Com. Pl. 1983).

<sup>263</sup> *Nationwide Mut. Ins. Co. v. Kintz*, 27 Pa. D. & C.3d 164 (Pa. Com. Pl. 1983); *Associated Hosp. Serv. v. Pustilnik*, 439 A.2d 1149 (Pa. 1981).

amount as full compensation.<sup>264</sup> There is a line of cases in Pennsylvania which provides that when an injured party settles with the tortfeasor he waives his right to a judicial determination of his losses and conclusively establishes the settlement amount as full compensation for his damages. In those situations, it has been held that the insurance company has a right of subrogation attaching to the amount of the settlement.<sup>265</sup>

Court holds that insurer's claim against insured which sought subrogation of money that the insured had received from insurer of tortfeasor involved in auto collision failed to state a claim where the insured had not been made whole. The right to subrogation does not even arise until the insured has been made whole.<sup>266</sup>

## RHODE ISLAND

The made-whole doctrine was first applied in Rhode Island in 1981 in the context of automobile insurers' claims for a share in the proceeds of a safety responsibility bond obtained by the uninsured motorist tortfeasor.<sup>267</sup> In *Lombardi v. Merchants Mutual Insurance Co.*, the Supreme Court of Rhode Island concluded that the right of subrogation did not arise until the insured had received full compensation. *Lombardi*, however, was subsequently distinguished by the lower state court in *Ditomasso v. Ocean State Physicians Health Plan, Inc.* Therein the court found an unambiguous subrogation provision which displaced the made whole rule enforceable. According to the court in *Ditomasso*:

*Lombardi is inapplicable to and distinguishable from the case at bar. First, Lombardi addressed the issue of subrogation rights as applicable to general liability insurers. Here, the defendant is a health insurer. Second, the Court in Lombardi held that the defendant insurance companies subrogation rights did not arise until the plaintiffs had received full satisfaction of the judgment against the uninsured. Plaintiff in the instant matter has not received a judgment from any court but rather has been paid \$ 25,000 (the policy limit) from her uninsured motorist coverage.*<sup>268</sup>

Although the Supreme Court in *Lombardi* applied the made-whole doctrine and rejected the automobile insurers' claims for a share in the proceeds of a safety responsibility bond obtained by the uninsured motorist tortfeasor unless the insureds' loss (stated in their judgment against the tortfeasor), was fully paid, the application of the made-whole doctrine in that case appears to be limited to motor vehicle accidents and common law principles of surety. The victim in *Lombardi* obtained a \$32,000 judgment against the wrongdoer. Two insurance companies had each paid the victim \$10,000. The companies sought recovery of the funds they had advanced out of a \$10,000 bond posted by the wrongdoer to secure the judgment. The court, citing Justice Cardozo, reiterated the principle that a surety is liable only for part of the debt that does not become subrogated to collateral or to remedies available to the creditor unless he pays the

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<sup>264</sup> *Butler, supra.*

<sup>265</sup> *Illinois Auto Insurance v. Braun*, 421 A.2d 1074 (Pa. 1982).

<sup>266</sup> *Nationwide Mut. Ins. Co. v. DiTomo*, 478 A.2d 138 (Pa. Super. 1984).

<sup>267</sup> *Lombardi v. Merchants Mut. Ins. Co.*, 429 A.2d 1290 (R.I. 1981); but see *Ditomasso v. Ocean State Physicians Health Plan, Inc.*, No. 87-2487, 1988 WL 1016798 (R.I. Super. 1988) (distinguishing *Lombardi*, and holding that insured has enforceable right to subrogation where the language of the contract regarding subrogation is clear and unambiguous).

<sup>268</sup> *Lombardi, supra.*

whole debt or it is otherwise satisfied.<sup>269</sup> Thus, *Lombardi* concluded, the insurance company was not subrogated to the victim's right until the "total judgment was satisfied."

Rhode Island appears to disallow contractual limitations or subrogation provisions that curtail an insured's recovery in instances in which the insured has not recovered the amount of his or her actual loss.<sup>270</sup>

## SOUTH CAROLINA

South Carolina case law does not discuss application of the made whole doctrine. However, a hybrid of the made whole doctrine is enforced in South Carolina with regard to health insurance subrogation through the application of § 38-71-190.<sup>271</sup> This statute provides that a health insurer may recover no more than "the amount of insurance benefits that the insurer has paid previously in relation to the insured's injury by the liable third party."<sup>272</sup> Therefore, this statute allows for a "pro rata" subrogation right by the health insurer, instead of the more harsh application of the "all or nothing" made whole doctrine. However, this statute also contains a catch all that if the director,<sup>273</sup> or his designee, upon being petitioned by the insured, determines that the exercise of subrogation by an insurer is inequitable and commits an injustice to the insured, subrogation is not allowed.<sup>274</sup> Therefore, under the appropriate fact circumstances, the traditional effect of the made whole doctrine could be applicable in South Carolina as well. Other than the above statute, however, South Carolina does not appear to apply the made whole doctrine.

## SOUTH DAKOTA

In South Dakota the made whole doctrine is a default rule subject to the right of the parties to agree otherwise.<sup>275</sup> The agreement need not be specific or use the magical phrase "made whole." Rather, the South Dakota Supreme Court has adopted a plain meaning approach to reach the conclusion that general subrogation language is sufficient to displace the doctrine.<sup>276</sup> In *Rowe*, the Supreme Court noted that subrogation rights may arise independent of the made whole doctrine, especially where a policy or Plan specifically provides for the right of subrogation without a requirement that the insured be made whole.<sup>277</sup> Therefore, it appears that South Dakota meekly applies the made-whole doctrine, but it can be overcome by simple subrogation language in a policy which does not require application of the made-whole doctrine.<sup>278</sup>

In *Julson v. Federated Mut. Ins. Co.*, a property insurer paid property damages to its insured and then settled a subrogation suit with the tortfeasor without the insured having been made

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<sup>269</sup> *Lombardi*, 429 A.2d at 1292 (quoting *American Surety Co. v. Westinghouse Electric Mfg. Co.*, 296 U.S. 133, 137, 56 S.Ct. 9, 11, 80 L.Ed. 105 (1935) (Cardozo, J.)).

<sup>270</sup> *DiTata v. Aetna Cas. and Sur. Co.*, 542 A.2d 245 (R.I. 1988).

<sup>271</sup> S.C. St. § 38-71-190.

<sup>272</sup> *Id.*

<sup>273</sup> Defined in § 38-1-2 as "a person who is appointed by the governor upon the advise and consent of the Senate and who is responsible for the operation and management for the Department of Insurance."

<sup>274</sup> S.C. St. § 38-71-190.

<sup>275</sup> *Westfield Ins. Co., Inc. v. Rowe*, 631 N.W.2d 175 (S.D. 2001).

<sup>276</sup> *Id.*

<sup>277</sup> *Westfield*, *supra*.

<sup>278</sup> *Id.*; *Julson v. Federated Mut. Ins. Co.*, 562 N.W.2d 117 (S.D. 1997).

whole.<sup>279</sup> Significant, however, is the fact that the court noted that the pool of funds awarded from the third party tortfeasors was not shown to be inadequate to make all parties whole. However, the court also pointed out that the policy specifically provided for the carrier's right to subrogation after making full payment to Julson as required by its contract, and that there was no clause in the policy requiring the insured to be made whole before subrogation could arise or at the time any settlement is made with any third party tortfeasors.

Under the South Dakota approach, the absence of language in the policy or statute that limits the right of subrogation to instances where the insured has been made whole evidences the parties' intent to dispense with the default rule.

## TENNESSEE

Tennessee has applied the made-whole doctrine since 1979.<sup>280</sup> The Supreme Court in *Wimberly* established that the right of an insured to be made whole before subrogation rights could be enforced could not be waived or modified by the insurance policy. Whether an insurer's right of subrogation is contractual or equitable only comes into play to determine "whether there is a right of subrogation in the first instance, rather than in the enforcement of such right."<sup>281</sup>

While an insurer can not contractually modify the common law made whole rule, a failure on the part of the insured to obtain contractually required permission of the insurer to a settlement preserves the latter's subrogation rights even if the insured is not made whole.<sup>282</sup> Thus, where the insurer does not participate in the settlement negotiations between its insured and the tortfeasor or does not waive any subrogation rights, such rights must be honored and the made whole doctrine is inapplicable. This exception to the made whole rule is subject however, to a further caveat which provides that if the parties agree that the insured has not been made whole or the underlying facts make clear that the recovery is for less than full compensation, the insurer's subrogation claim is extinguished.<sup>283</sup>

The made-whole doctrine applies in both legal and conventional subrogation or reimbursement disputes between insurers and their insureds.<sup>284</sup> Thus, where the issue of whether the insured has been made whole is raised at the trial level the insurer's subrogation claim is stayed until this issue is resolved.

Tennessee recognizes two methods for determining the subrogation rights of insurers in the context of statutory subrogation disputes. The primary objective of the court under both frameworks is to identify and give effect to the intent and purpose of the legislature.<sup>285</sup> Under

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<sup>279</sup> 562 N.W.2d 117 (S.D. 1997).

<sup>280</sup> *Wimberly v. Am. Cas. Co. of Reading, Pa.*, 584 S.W.2d 200 (Tenn. 1979); *York v. Sevier County Ambulance Auth.*, 8 S.W.3d 616 (Tenn. 1999); *Abbott v. Blount County*, 207 S.W.3d 732 (Tenn. 2006).

<sup>281</sup> *Id.*

<sup>282</sup> *Eastwood v. Glens Falls Ins. Co.*, 646 S.W.2d 156, 158 (Tenn. 1983); *Rader v. Traylor*, No. 03A01-9403-CV-00079, 1994 Tenn. App. LEXIS 418, at \*4-5 (Aug. 1, 1994).

<sup>283</sup> *Doss v. Tenn. Farmers Mut. Ins. Co.*, No. M2000-01971-COA-R3-CV, 2001 Tenn. App. LEXIS 906, at \*10-11 (Dec. 10, 2001).

<sup>284</sup> *Health Cost Controls, Inc. v. Gifford*, 108 S.W.3d 227, 231 (Tenn. 2003); *York v. Sevier County Ambulance Auth.*, 8 S.W.3d 616, 621 (Tenn. 1999); *Wimberly v. Am. Cas. Co.*, 584 S.W.2d 200, 203 (Tenn. 1979).

<sup>285</sup> *Blankenship v. Estate of Joshua*, 5 S.W.3d 647, 651 (Tenn. 1999); *see, e.g., Castleman v. Ross Eng'g, Inc.*, 958 S.W.2d 720, 724 (Tenn. 1997); *Graves v. Cocke County*, 24 S.W.3d 285, 289 (Tenn. 2000).

one analysis, if the statute merely creates a subrogation right without embracing or abandoning the made whole rule the court is prone to conclude that the legislature “intended for the statute to reflect the equitable principle that subrogation is subject to the made whole doctrine.”<sup>286</sup> This method is based on the idea “that subrogation is founded upon principles of equity and ‘not dependent upon statute or custom or ... contract.’”<sup>287</sup> The second method is used when the statute provides an insurer with a statutory lien, such as in workers’ compensation. Pursuant to this analysis, a statutory lien is not subject to the equitable requirement that the insured be made whole.<sup>288</sup>

A health insurer’s contractual right to subrogation and reimbursement are both subject to the made whole doctrine.<sup>289</sup> The argument that the insurer may contract away the need for the insured to be made whole is dispatched by the Tennessee Supreme Court as follows:

*The fallacy in this contention is that it presumes the plaintiffs had the bargaining power, leverage, or business acumen to negotiate the terms of this or any other standardized insurance contract. Moreover, it also presumes that the insured party knew or should reasonably have known of the “made whole” doctrine or this court’s prior holdings that subrogation is subject to an insured’s being made whole.*<sup>290</sup>

However, it is the insured in Tennessee who has the burden of proving that he is not made whole by a particular settlement or recovery.<sup>291</sup> An insured must be made whole for damages before an insurer is entitled to either subrogation or reimbursement, even if the insurer claims that it made a payment because it did not know of a third party’s liability.<sup>292</sup> This is true regardless of the language in the insurance policy or health Plan.<sup>293</sup> It is also true regardless of whether the Plan is asserting a right of subrogation or a right of reimbursement.<sup>294</sup> Whether an insured has been made whole is a matter of fact, upon which the insured has the burden of proof.<sup>295</sup> Furthermore, whether or not an insured has been made whole must be determined by considering all benefits and recoveries received as a result of an incident.<sup>296</sup> Basically, this case means that if the insured recovers \$100,000 and there is a lien of \$101,000, it is not presumed that the insured has not been made whole. Instead, the court would say that the plaintiff suffered a minimum of \$101,000 in damages but received \$201,000 in compensation, improving the chances of recovery in spite of the made whole argument.

It should be noted that where an insured settles directly with a tortfeasor, with full knowledge of an insurer’s subrogation rights, and that settlement, together with the benefits paid under the insurance policy, do not make the insured whole, no subrogation will be allowed because the insured was not made whole.<sup>297</sup> In the absence of a judgment or jury verdict establishing a

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<sup>286</sup> *Blankenship*, supra.

<sup>287</sup> *Wimberly*, supra.

<sup>288</sup> *Castleman*, supra.; *Graves*, supra.

<sup>289</sup> *York*, supra.

<sup>290</sup> *Id.*

<sup>291</sup> *Hamrick’s, Inc. v. Roy*, 115 S.W.3d 468 (Tenn. App. 2002); *Nelson v. Innovative Recovery Serv., Inc.*, 2001 WL 1480515 (Tenn. App. 2001) (*unreported decision*); *Abbott*, supra.

<sup>292</sup> *Healthcost Controls, Inc. v. Gifford*, 108 S.W.3d 227 (Tenn. 2003).

<sup>293</sup> *Id.*; *Blount*, supra.

<sup>294</sup> *Simpson v. Doe*, 2006 WL 1627292 (Tenn. App. 2006).

<sup>295</sup> *Healthcost Controls, Inc.*, supra.

<sup>296</sup> *Health Cost Controls, Inc. v. Gifford*, 239 S.W.3d 728 (Tenn. 2007).

<sup>297</sup> *Wimberly v. Am. Cas. Co. of Reading, Pa.*, 584 S.W.2d 200 (Tenn. 1979); *Tennessee Farmers Mut. Ins. Co. v. Farmer*, 1998 WL 695637 (Tenn. App. 1998) (*unreported decision*).

specific dollar value of each element of an injury, a court can make an equitable determination as to whether an injured party has been made whole.<sup>298</sup> Ordinarily, the injured party may make such determination by settlement. Failing that, it may be made by the jury or by the judge.<sup>299</sup> In extraordinary circumstances, equity may intervene and make such a determination.<sup>300</sup>

In *Abbott v. Blount County*, the Tennessee Supreme Court determined that insurers may not bind insureds' rights to settlements by using artful contract terms because "[c]ontract terms that require the consent of the insurer would allow the insurer to withhold consent from any settlement that does not make the insured whole and thereby compel the insured to seek a larger award at trial."<sup>301</sup>

## TEXAS

In *Ortiz v. Great Southern Fire & Casualty Ins. Co.*,<sup>302</sup> the Texas Supreme Court ingrained in Texas jurisprudence the made whole doctrine. However, the extent and breadth of that case has been grossly misunderstood, and in 2007, the Texas Supreme Court clarified that the terms of a plan or policy can negate the application of the doctrine.<sup>303</sup> If a contract provides for subrogation regardless of whether the insured is first made whole, the contract's specific language controls and the equitable defense of the "made whole" doctrine must give way.<sup>304</sup> The *Ortiz* case is one of the most misconstrued cases in Texas jurisprudence. *Ortiz* has never stood for the blanket proposition that an insurance company's right of subrogation may not be exercised unless and until the insured is made whole.<sup>305</sup> In fact, it points out that if any part of a third party settlement is intended as compensation for damages which represent the insurance payment made by a subrogating insurer, the insurer is entitled to subrogation.

In *Ortiz*, a homeowner suffered \$15,000 in damage after a negligent carpet installation started a fire. This damage included \$4,000 in damage to real property which was covered under a Great Southern policy, and \$11,000 in damage to personal property, which was not insured at all. The insured settled with the third party for \$10,000, and Great Southern asserted a \$4,000 equitable subrogation interest in the \$10,000 settlement. Neither the settlement agreement nor any proof submitted to the court indicated which portion of the damages paid by the third party tortfeasor related to or represented the benefits paid by Great Southern. The trial court and appellate court held that Great Southern was entitled to subrogation, notwithstanding the *Ortiz*' claim that they weren't made whole. The Supreme Court reversed, but did not affirmatively find that the amount recovered by an insured from his insurer and a third party tortfeasor combined must exceed the damages for the insured and uninsured property before the insurer is entitled to subrogation.<sup>306</sup> To the contrary, the Texas Supreme Court held that if any portion of a settlement is intended as compensation for damages paid by the insurer, the insurer is entitled to subrogate after paying a pro rata share of the costs of collection.<sup>307</sup> Because the record in *Ortiz* did not reflect how much

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<sup>298</sup> *Farmer*, supra.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> 207 S.W.2d 732 (Tenn. 2006).

<sup>302</sup> *Id.*

<sup>303</sup> *Fortis Benefits v. Vanessa Cantu and Ford Motor Co.*, 234 S.W.3d 642 (Tex. 2007) (Successful Amicus Curiae Brief on behalf of National Association of Subrogation Professionals ("NASP") filed by Gary L. Wickert); *Osborne v. Jauregui, Inc.*, 252 S.W.2d 70 (Tex. Civ. App. – Austin 2008).

<sup>304</sup> *Osborne*, supra.

<sup>305</sup> *Veazey v. Allstate Texas Lloyds*, 2007 WL 29239 (N.D. Tex. 2007).

<sup>306</sup> *Ortiz v. Great So. Fire & Cas. Ins. Co.*, 597 S.W.2d 342 (Tex. 1980).

<sup>307</sup> *Id.*

of a \$10,000 settlement, if any, was intended for damages to the insured's real property, equitable subrogation was not allowed based on the made whole doctrine.

Texas has specifically rejected adopting the Wisconsin holding in *Garrity v. Rural Mutual Ins. Co.*,<sup>308</sup> which says that an insurer may not subrogate at all if the insured is not made whole for all of its losses.<sup>309</sup> In Texas, the burden of proving that the insured has been made whole, or exactly what portion of a third party settlement satisfies covered as opposed to non-covered losses, is on the party filing suit.<sup>310</sup> In other words, if a subrogated carrier settles directly with a third party and the insured must file suit to seek reimbursement from the carrier, the burden is on the insured. On the other hand, if the insured settles and the carrier must file suit to seek reimbursement from the insured, the burden will be on the insurance company.<sup>311</sup> One Texas Court of Appeals decided one unreported case in which it determined that the burden of proof was on the insurer to show what amount, if any, of any third party settlement agreement is allocated to the insured's loss, in order to avoid the made whole doctrine.<sup>312</sup> On the other hand, in *Veazey v. Allstate Texas Lloyds*, a federal district court declared that there are some situations in which an insurance company can subrogate even if the insured is not made whole, and, in that case, the burden was on the insured to prove what amount, if any, of Allstate's recovery from the third party was to be allocated to the uninsured losses.<sup>313</sup> The court held that Veazey had no right to any payments made by the third party to Allstate for insured damages already covered by Allstate—only to payments for uninsured damages.

In *Fortis Benefits v. Vanessa Cantu and Ford Motor Co.*,<sup>314</sup> the Texas Supreme Court specifically and forcefully acknowledged that the made whole doctrine does not apply to contractual subrogation claims. Effectively overruling *Esparza v. Scott & White Health Plan*,<sup>315</sup> the Supreme Court confirmed that the application of the made whole doctrine can be summarily overcome by a boiler-plate provision in an insurance contract that purports to entitle the insurer to subrogation out of the first monies received by the insured. The Court stated:

*We do not disagree that equitable and contractual subrogation rest upon common principles, but contract rights generally arise from contract language; they do not derive their validity from principles of equity but directly from the parties' agreement. The policy declares the parties' rights and obligations, which are not generally supplanted by court-fashioned equitable rules that might apply, as a default gap-filler, in the absence of a valid contract. If subrogation arises independent of any contract, then an express subrogation agreement would be superfluous and serve only to acknowledge this preexisting right, a position we reject...Contractual subrogation clauses express the parties' intent that reimbursement should be controlled by agreed contract terms rather than external rules imposed by the courts.*<sup>316</sup>

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<sup>308</sup> *Garrity v. Rural Mutual Ins. Co.*, 253 N.W.2d at 514 (Wis. 1977).

<sup>309</sup> *Veazey*, *supra*.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Phillips Petroleum Co. v. Brantley*, 2003 WL 22923413 (Tex. App. - El Paso 2003) (*unreported decision*).

<sup>313</sup> *Veazey*, *supra*.

<sup>314</sup> *Fortis Benefits v. Vanessa Cantu and Ford Motor Co.*, 234 S.W.3d 642 (Tex. 2007) (Successful Amicus Curiae Brief on behalf of National Association of Subrogation Professionals ("NASP") filed by Gary L. Wickert).

<sup>315</sup> *Esparza v. Scott & White Health Plan*, 909 S.W.2d 548 (Tex. App. – Austin 1995, *writ denied*).

<sup>316</sup> *Fortis Benefits*, *supra*.

The Texas Supreme Court also cited the U.S. Supreme Court decision in *Sereboff v. Mid Atlantic Medical Services*<sup>317</sup> as standing for the proposition that the equitable made whole doctrine should not apply when the Plan specifies to the contrary. The *Fortis Benefits* decision correctly points out the clear distinction between equitable subrogation and contractual subrogation, and allows plan and/or policy language to negate its anti-subrogation effect:

*The three varieties of subrogation-equitable, contractual, and statutory-represent three separate and distinct rights that, while related, are independent of each other. Independent, however, does not mean co-equal. We generally adhere to the maxim that "equity follows the law," which requires equitable doctrines to conform to contractual and statutory mandates, not the other way around. Where a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy. This Court has "long recognized a strong public policy in favor of preserving the freedom of contract."*<sup>318</sup>

Nonetheless, there are some instances where an insured is precluded from arguing that he had not been made whole. For example, when the subrogation provision relied upon by the insurer is found in a contract executed after the payment of benefits giving rise to the subrogation claim, i.e. a settlement agreement, the parties waive the made whole doctrine.<sup>319</sup> Also, a jury verdict on the issue of damages conclusively establishes the amount necessary to make the insured whole. As a result, an insured is collaterally estopped from arguing otherwise.<sup>320</sup>

## UTAH

Utah first adopted the made-whole doctrine in 1988.<sup>321</sup> The court in *Hill v. State Farm Mutual Auto Insurance Co* also provided that the made-whole doctrine could be modified by contract. However, the modification, in order to effectively displace the doctrine, must be sufficiently clear and unambiguous as to put the insured on notice of that fact.<sup>322</sup> General subrogation language is insufficient to explicitly inform an insured that its insurer has priority of rights even though the assets of the third party are inadequate to fully compensate the former.<sup>323</sup>

The made whole doctrine's application to statutory subrogation disputes depends upon the court's determination of the legislative intent and purpose of the statute. Equitable principles are to be employed in determining how the right is to be exercised where the statute merely grants the insurance carrier the right to subrogation.<sup>324</sup> However, if the statute provides a detailed statutory scheme governing how an insurer's subrogation right may be exercised and how the proceeds from an action against the third party are to be distributed, the made-whole doctrine will not be applicable.<sup>325</sup>

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<sup>317</sup> *Sereboff v. Mid Atlantic Medical Services, Inc.* 126 S.Ct. 1869 (2006).

<sup>318</sup> *Fortis Benefits*, *supra*.

<sup>319</sup> *Rosa's Café Inc., v. Wilkerson*, 183 S.W.3d 483, 488 (Tex. App.—Eastland 2005, no pet.).

<sup>320</sup> *State Farm Mut. Auto Ins. Co. v. Perkins*, 2006 (Tex. App. Lexis 6030(Tex. App.—Eastland, 2006).

<sup>321</sup> *Hill v. State Farm Mutual Auto Insurance Co.*, 765 P.2d 864 (Utah 1988).

<sup>322</sup> *State Farm Auto. Ins. Co. v. Green*, 89 P.3d 97, 105 (Utah 2003).

<sup>323</sup> *Id.*

<sup>324</sup> *Anderson v. United Parcel Serv.*, 96 P.3d 903, 907 (Utah 2004).

<sup>325</sup> *Id.*

In the absence of express terms to the contrary, an insured must be made whole before the insurer is entitled to be reimbursed from a recovery from the third party tortfeasor.<sup>326</sup> The made-whole doctrine will be applied wherever it is not possible from the subrogation terms of the policy to ascertain the intent of the parties as to the extent of their respective rights under the subrogation clause.<sup>327</sup> This is in line with Utah's reasonable interpretation that contractual subrogation is not an equitable doctrine governed by equitable principles, and can be modified by contract.<sup>328</sup> Non-contractual subrogation rights (equitable subrogation) will only be enforced on behalf of a party maintaining a superior equitable position and the insurer's equitable position cannot be superior to the insured's unless the insured has been completely compensated.<sup>329</sup>

## VERMONT

Vermont is unique among states in that it defines "subrogation" as an equity called into existence for the purpose of enabling the insurer to be "made whole."<sup>330</sup> However, Vermont does not appear to adopt or apply the traditional made whole doctrine for which an insurer may only seek subrogation rights if the insured has been made whole.

## VIRGINIA

In *P.R.C., Inc. v. O'Bryan*,<sup>331</sup> P.R.C., Inc., sought reimbursement of certain medical and other expenses which it had paid on behalf of O'Bryan, its employee, under P.R.C.'s salary continuation and medical reimbursement Plan, when O'Bryan was injured in an automobile accident.<sup>332</sup> This self-funded Plan operates as a short-term disability policy, and P.R.C. did not purchase insurance in order to satisfy its obligations under the Plan. The Plan provided, in part:

*If you ... sustain a personal injury caused by a third party and P.R.C. pays for medical treatment related to that injury, then P.R.C. reserves the right to recover the monies it paid for such treatments and any monies paid by the third party responsible for the injury or the third party's insurance company to compensate you for the injury.*<sup>333</sup>

O'Bryan later executed a reimbursement agreement, by which he agreed to pay or caused to be paid to P.R.C. out of any such third party recovery up to the \$32,918 in short term disability benefits and medical expenses which his employer had paid under the Plan. O'Bryan filed suit and asked P.R.C. to participate with him but P.R.C. took no part in the litigation. The suit was settled for \$45,000. O'Bryan received \$27,435 in net proceeds after payment of attorney's fees and costs, and did not reimburse P.R.C. for any of the expenses P.R.C. paid pursuant to the Plan. O'Bryan claimed the reimbursement agreement was invalid under § 38.2-3405, but the court found the Virginia Anti-Subrogation Statute was not applicable in this case because the Plan was a self-funded employee benefit Plan that was regulated by ERISA.<sup>334</sup> After determining that the anti-subrogation statute did not apply and P.R.C. could pursue its subrogation and reimbursement rights, O'Bryan claimed the made whole doctrine prevented

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<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*; *Birch v. Fire Ins. Exch.*, 122 P.3d 696 (Utah App. 2005); *Hill, supra.*

<sup>329</sup> *Trans American Ins. Co. v. Barnes*, 505 P.2d 783 (Utah 1973).

<sup>330</sup> *Norfolk & Debham Fire Ins. Co. v. Aetna Cas. & Sur. Co.*, 318 A.2d 659 (Vt. 1974).

<sup>331</sup> *P.R.C., Inc. v. O'Bryan*, 1998 WL 972277 (Va. Cir. Ct. 1998) (*unpublished opinion*).

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

P.R.C. from subrogating. The court rejected this argument because P.R.C. was seeking reimbursement and not subrogation and the made whole argument because P.R.C.'s express contractual subrogation right to any monies paid to O'Bryan from any third party tortfeasor overrode the made whole doctrine. The court noted that other cases have held a reference in a subrogation clause that the insurer is subrogated to "any" or "all" rights of recovery overrides the made whole doctrine.<sup>335</sup> There is authority in the Virginia case law for the proposition that the made whole doctrine may be overridden by specific policy language to the contrary.<sup>336</sup>

## WASHINGTON

Washington adheres to the made whole doctrine.<sup>337</sup> An injured party must be made whole before the injured party's insurer may require the injured party to reimburse the insurer for a subrogation or reimbursement claim.<sup>338</sup> Known as the *Thiringer Doctrine*,<sup>339</sup> the general rule is that while an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from the tortfeasor responsible for his damage, it can recover only the excess which the insured has received from the wrongdoer, remaining after the insured is fully compensated for his loss.<sup>340</sup> However, the *Thiringer* case indicates the *Thiringer Doctrine* may be overridden by specific Plan or policy language to the contrary.<sup>341</sup>

The insurance policy in *Thiringer* reserved to the insurer a right of subrogation and provided that the insured should do nothing to prejudice such right. The Supreme Court agreed with the trial court's conclusion that in the context of a general settlement involving automobile personal injury protection the proceeds should be first applied toward the payment of the insured's general damages and then, if any excess remains, toward the payment of the special damages covered by personal injury protection insurance.

An insured may be considered fully compensated by a less-than-limits settlement with a tortfeasor, despite reduction of its final recovery by his attorney's fees, where he has settled with full knowledge of his obligation to pay fees, and thus he had an obligation to reimburse his insurer for its subrogated interest.<sup>342</sup> It also appears an insured must only be made whole for the particular category of damages being sought by the insurance company, in order to allow the insurance company's subrogation rights.<sup>343</sup> The property damage subrogation does not relate to the right of reimbursement for personal injuries under the policy.

Disputes between insureds and subrogating carriers with regard to the made-whole doctrine are resolved on a case-by-case basis upon a consideration of "the equitable factors involved, guided by the principle that a party suffering compensable injury is entitled to be made whole but should not be allowed to duplicate his recovery."<sup>344</sup> Washington law provides a number of factors to be considered when resolving a subrogation or reimbursement dispute between an insurer and its insured where the insured executes a general release with the tortfeasor:

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<sup>335</sup> *Fields v. Farmers Ins. Co.*, 18 F.3d 831 (10<sup>th</sup> Cir. 1994).

<sup>336</sup> *Geraldine Simmons Collins v. BlueCross & BlueShield of Va.*, 193 S.E.2d 782, 784-785 (Va. 1973).

<sup>337</sup> *Mattson On Behalf of Mattson v. Stone*, 648 P.2d 929 (Wash. App. 1982); *Mahler v. Szucs*, 957 P.2d 632 (Wash. 1998).

<sup>338</sup> *Skiles v. Farmers Ins. Co., Inc.*, 814 P.2d 666 (Wash. App. 1991).

<sup>339</sup> *Thiringer v. American Motorist Co.*, 588 P.2d 191 (Wash. 1978).

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Peterson v. Safeco Ins. Co. of Ill.*, 976 P.2d 632 (Wash. App. 1999).

<sup>343</sup> *Mahler*, *supra*.

<sup>344</sup> *Leader Nat'l Ins. Co. v. Torres*, 779 P.2d 722, 723 (Wash. 1989).

- (1) knowledge of insureds and tortfeasors as to outstanding subrogation claims;
- (2) extent of the prejudice to insurer's subrogation interests;
- (3) desirability of encouraging settlements;
- (4) possibility of sharp practices by tortfeasors, insureds or their insurance carriers; and
- (5) general public policy that persons suffering compensable injuries are entitled to be made whole.<sup>345</sup>

While the insured is entitled to recoup his general damages from the tortfeasor before subrogation is permitted, in doing so it may not do anything to prejudice the rights of the insurer.<sup>346</sup> As explained by the court of appeals in *British Columbia Ministry of Health v. Homewood*:

*[T]o establish prejudice [the insurer] must show (1) the percentage of negligence of [each of three tortfeasors]; (2) the total losses the plaintiff suffered; [and] (3) that the settlement as a percentage of plaintiff's total injuries was less than the percentage of the settling entities' comparative negligence. Only if the latter percentage exceeds the former will [the insurer's] subrogation rights have been prejudiced ....*<sup>347</sup>

The holding in *Thiringer* was also construed by the Court of Appeals in *Fisher v. Aldi Tire, Inc.* to allow the parties to the contract to modify subrogation standards developed at common law.<sup>348</sup> However, the language purporting to change the common law standards must be clear and unambiguous.

A self-insured retention (SIR) of \$100,000 paid by an insured under a CGL policy does not constitute "primary insurance" for purposes of subrogation, according to the Washington Court of Appeals.<sup>349</sup> Therefore, the CGL carrier was not be entitled to any portion of a third party subrogation recovery unless and until the insured was "made whole" under *Thiringer* for the SIR payment it had made.

## WEST VIRGINIA

West Virginia strongly adheres to the made whole doctrine.<sup>350</sup> Under general principles of equity, in the absence of statutory law or valid contractual obligations to the contrary, an insured must be fully compensated for injuries or losses sustained before the subrogation rights of an insurance carrier will arise.<sup>351</sup> West Virginia has held that parties may contract out of the made whole doctrine in the terms of a policy or Plan.<sup>352</sup> When a jury renders a verdict and awards damages, that award represents the amount necessary to make the insured or Plan beneficiary whole.<sup>353</sup> It doesn't matter if the insured values his case more than the jury did, the jury's finding

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<sup>345</sup> *Torres, supra.*

<sup>346</sup> *B.C. Ministry of Health v. Homewood*, 970 P.2d 381, 386 (Wash. Ct. App. 1999) (concluding that general settlement involving health insurance should be apportioned first to general damages and then any excess to special damages).

<sup>347</sup> *Homewood, supra.*

<sup>348</sup> 902 P.2d 166 (Wash. App. 1995).

<sup>349</sup> *Bordeaux, Inc. v. American Safety Ins. Co.*, 186 P.3d 1188 (Wash. App. 2008).

<sup>350</sup> *Kanawha Valley Radiologists, Inc. v. One Valley Bank*, 557 S.E.2d 277 (W.Va. 2001); *Kittle v. Icard*, 405 S.E.2d 456 (W. Va. 1991).

<sup>351</sup> *Bush v. Richardson*, 484 S.E.2d 490 (W.Va. 1997).

<sup>352</sup> *Id.*; *Kanawha Valley Radiologists, Inc.*, *supra.*

<sup>353</sup> *Bell v. Federal Kemper Ins. Co.*, 693 F. Supp. 446 (S.D.W.Va.1988).

is binding and the insured is considered to be “made whole.”<sup>354</sup> West Virginia also holds that when an insured settles a claim with the third party tortfeasor, the amount of damages necessary to make the plaintiff whole is fixed by the settlement agreement, and the insured cannot deny that he is made whole.<sup>355</sup>

In determining whether an insured or Plan beneficiary has been made whole, the West Virginia court should consider the following factors:

- (1) the ability for the parties to prove liability;
- (2) the comparative fault of the parties involved;
- (3) the complexity of the issue;
- (4) future medical expenses;
- (5) the nature of the injury; and
- (6) the tortfeasor’s assets beyond third party insurance coverage.<sup>356</sup>

In *Kittle v. Icard*, the West Virginia Supreme Court of Appeals addressed the issue of whether the West Virginia Department of Human Services (DHS) was entitled to be fully reimbursed for medical expenses paid on behalf of an insured from the amount the insured received in settlement from a tortfeasor.<sup>357</sup> DHS argued that the trial court erred when it applied the common law made whole rule instead of Section 9-5-11 (1990).<sup>358</sup> According to DHS, the statute abrogated common law equitable principles. The Supreme Court in *Kittle* agreed that the West Virginia statute was applicable. However, the court was not persuaded that the use of the term “subrogation” in the statute altered its common law meaning. According to the court, in the absence of a clearly expressed legislative intent requiring otherwise, the term subrogation is to be given its usual and ordinary meaning. Thus, the use of the term “subrogation” in a statute merely grants the insurer a right of subrogation.<sup>359</sup> The extent to which that right may be exercised, however, is to be guided by the principles of equity.

Despite the fact that *Kittle* was subsequently statutorily superseded, courts continue to apply its rationale and holding in all forms of subrogation dispute.<sup>360</sup> Thus, in the absence of clear statutory law or valid contractual arrangements to the contrary, an insured must be made whole for losses sustained before the subrogation rights of the insurer can be exercised. General subrogation language does not defeat application of the complete compensation rule. Only contractual arrangements which clearly and expressly create an agreement to the contrary have such an effect.<sup>361</sup>

## WISCONSIN

Not only has Wisconsin adopted the made whole rule, but it is sometimes considered to be the “mother of all made whole states” because its early decisions on the made whole doctrine and

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<sup>354</sup> *Id.*

<sup>355</sup> *Bell v. Federal Kemper Ins. Co.*, 693 F. Supp. 446 (S.D. W.Va. 1988).

<sup>356</sup> *Provident Life & Acc. Ins. Co. v. Bennett*, 483 S.E.2d 819 (W.Va. 1997).

<sup>357</sup> *Kittle*, *supra*.

<sup>358</sup> W.V. Code § 9-5-11 (1990) (grants Dept. of Health and Human Services subrogation rights).

<sup>359</sup> *But see Grayam v. Dep’t of Health & Human Res.*, 498 S.E.2d 12, 16 (W. Va. 1997) (construing amended statute to preclude application of made whole rule); *Cart v. Gen. Elec. Co.*, 506 S.E.2d 96, 99 (W. Va. 1998) (construing workers’ compensation statute to abrogate common law made whole rule).

<sup>360</sup> *Kanawha Valley Radiologists v. One Valley Bank, N.A.*, 557 S.E.2d 277 (W. Va. 2001).

<sup>361</sup> *Id.*

its procedures with regard to determination of how and when an insured is made whole, have been used as an example by a large number of other states. In Wisconsin, an insured must be made whole before an insurer may recover anything from the tortfeasor.<sup>362</sup>

When a made whole issue arises, Wisconsin holds a hearing referred to as a “*Rimes* hearing,” in which a mini-trial is held. In this hearing, the court determines various items of damages which a jury would have found to be sufficient to make the insured whole.<sup>363</sup> The test of being made whole depends on whether the insured has been completely compensated for all types of damages, including personal injury and property damage.<sup>364</sup> Although early decisions indicated that if an insured settled with a third party, the subrogated carrier could still proceed against a third party on its own subrogation claim,<sup>365</sup> where recent decisions have held that a subrogated health insurer cannot recover subrogated amounts when an insured or Plan beneficiary settles with the defendant without involving a subrogated carrier, but where the insured requests the *Rimes* hearing and the subrogated carrier has an opportunity to participate, and the court determines that the settlement did not make the insured whole.<sup>366</sup>

While early decisions also determined that an insured was made whole when he received compensation in a settlement agreement covering all his losses, less an amount corresponding to his contributory negligence,<sup>367</sup> a later Supreme Court decision in an unusual “tie vote,” obfuscated this result when three Justices voted in favor of granting a pro rata subrogation recovery where contributory negligence was a factor, and three Justices held no subrogation would be allowed where there was contributory negligence, because the insured could never be totaling “made whole.”<sup>368</sup> The Wisconsin Supreme Court has also indicated, contrary to the rule in the majority of other states, that the made whole doctrine can trump express plan provisions to the contrary.<sup>369</sup>

Until recently, the precise application of the made whole doctrine in death cases was still a question mark in Wisconsin. In 2005, the Wisconsin Supreme Court issued a significant “made whole” decision in which Gary Wickert argued on behalf of the subrogated insurer. In *Petta v. ABC Insurance Company*,<sup>370</sup> Dayle Petta was killed in an auto accident which totally destroyed her car. Petta was survived by her two adult children, who filed a wrongful death suit against the defendant driver. Petta had insurance through Travco Insurance Company, which paid benefits to its insured for the damages to her car, as well as medical and funeral expenses under its Med Pay provisions. Travco sought a subrogation recovery of the property damage and Med Pay benefits it had paid to Petta’s estate. The two adult Petta children settled for policy limits of \$250,000, plus an additional \$30,000 paid by the defendant personally. As part of the settlement, the Pettas agreed to indemnify the third party for any subrogation claim of Travco. Travco acknowledged that the \$280,000 did not make the Petta children “whole” for their damages, but argued that the made whole doctrine should not apply because the Petta children were not Travco “insureds.” Travco maintained that *Rimes* applied only between an insurer and its insured, and therefore didn’t apply in wrongful death cases such as this.

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<sup>362</sup> *Garrity v. Rural Mut. Ins. Co.*, 253 N.W.2d 512 (Wis. 1977).

<sup>363</sup> *Rimes v. State Farm Mut. Auto. Ins. Co.*, 316 N.W.2d 348 (Wis. 1982).

<sup>364</sup> *Valley Forge Ins. Co. v. Home Mut. Ins. Co.*, 396 N.W.2d 348 (Ct. of Appeals 1986).

<sup>365</sup> *Mutual Service Cas. Co. v. American Family Ins. Group*, 410 N.W.2d 582 (Wis. 1987); *Blue Cross & Blue Shield United of Wis. v. Fireman’s Fund Ins. Co. of Wis.*, 411 N.W.2d 133 (Wis. 1987).

<sup>366</sup> *Schulte v. Frazin*, 500 N.W.2d 305 (Wis. 1992).

<sup>367</sup> *Sorge v. Nat’l Car Rental Sys., Inc.*, 512 N.W.2d 505 (Wis. 1994).

<sup>368</sup> *Ives v. Coopertools*, 559 N.W.2d 571 (Wis. 1997).

<sup>369</sup> *Drinkwater v. American Family Mut. Ins. Co.*, 714 N.W.2d 568 (Wis. 2006).

<sup>370</sup> *Petta v. ABC Ins. Co.*, 672 N.W.2d 146 (Wis. 2005).

The Pettas brought a *Rimes* hearing and the trial court found that they had not been made whole, denying Travco's subrogation rights. Travco appealed and the Court of Appeals reversed, holding that the made whole doctrine did not apply in wrongful death cases. The Pettas appealed to the Wisconsin Supreme Court. The Supreme Court reversed the Court of Appeals, holding that the made whole doctrine did apply in wrongful death cases.<sup>371</sup> The Court held that equitable considerations controlled in subrogation situations, necessitating that wrongful death plaintiffs be made whole before the insurance company of the deceased could subrogate—even though the plaintiffs were not “insureds” of the subrogated carrier. The Supreme Court negated Travco's subrogation interest.

The Pettas also argued that they were entitled to receive the value of their mother's destroyed car, but Travco maintained that the made whole doctrine was not applicable here because the car belonged to the mother, and no estate had ever been set up for her. The Court held that § 895.04(6) empowered the Pettas to control the settlement of any claims the estate had against the defendant, and therefore, they could “waive and satisfy” the cause of action the estate had against the defendant for the value of the insured vehicle, even though they were not the “insured.”

The Court further held that the Petta children did not pay for the medical and funeral expenses (Travco did), they had no ownership rights in those damages. However, the Court also went on to declare that the claim for these damages was inseparable from the Pettas' own claims, Travco's subrogation rights in these damages was extinguished because the Pettas were not made whole.

Not all the made whole news out of Wisconsin is bad, however. In 2008, the Wisconsin Supreme Court decided the case of *Muller v. Society Insurance*.<sup>372</sup> *Muller* involved a fire which caused \$697,981.58 in damage to Bruce and Karen Muller's sporting goods store in Milltown, Wisconsin. The fire was caused by the negligence of an electrician named George Jerrick, whose liability carrier, United Fire and Casualty, had \$1 million limits. The Mullers' property insurer, Society Insurance Company, paid out its policy limits of \$407,378.88—leaving the Mullers with an uninsured loss of \$290,602.30. The Mullers sued Jerrick and United to recover this uninsured loss and Society entered the lawsuit and assisted, claimed subrogation rights. At mediation, Society reached a tentative settlement with Jerrick and United for \$190,000, condition upon the Mullers settling with Jerrick or resolving the case at trial. The Mullers later settled their claim for \$120,000—\$170,602.70 less than their uninsured loss. The insured was clearly not made whole.

The Mullers asked the court to void Society's settlement to the extent that the Mullers had not been made whole under the *Rimes* doctrine in Wisconsin—a 1982 case which provides for a hearing to determine whether an insured has been whole before a subrogation claim is allowed. The Mullers wanted to recover their \$ 170,602.70 shortfall out of the \$ 190,000 Society subrogation settlement. The trial court held that because the Mullers and Society were in competition for the “limited” pool of \$310,000 (combination of both settlements), and required Society to disgorge part of their subrogation recovery in order to make the Mullers whole. Society appealed. The Court of Appeals reversed the trial court, holding that the \$1 million liability policy was “far more than adequate to cover all the claims.” It stated that the Mullers

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<sup>371</sup> *Id.*

<sup>372</sup> *Muller v. Society Insurance*, 750 N.W.2d 1 (Wis. 2008) (Amicus Brief on behalf of the National Association of Subrogation Professionals [NASP] filed by Matthiesen, Wickert & Lehrer, S.C.).

“made a conscious choice to accept less than their losses...[that]...cannot plausibly be tied to any limited funds.” The Mullers then appealed to the Wisconsin Supreme Court. The Wisconsin Supreme Court affirmed the Court of Appeals, holding for the first time that the made whole doctrine does not apply in situations where the insured settles with the tortfeasor for an amount, which when combined with the carrier’s subrogation interests, does not exceed the limits of available third party liability limits.

Society was allowed to keep its entire subrogation recovery from the third party. The court wrote a long majority opinion, which walked through the long history of the made whole doctrine in Wisconsin. The court did not abandon the equitable basis of subrogation and did not backtrack from its position that the made whole doctrine cannot be contracted away via policy language. leaves some unanswered made whole questions. Some opponents of subrogation may argue that the case only applies to situations where the insured has settled independently of the subrogated insurer. They might argue that the made whole doctrine should still apply to a settlement made by the insured to which a subrogated insurer lays claim to a portion in satisfaction of its rights of reimbursement or subrogation. However, the *Muller* decision seems clear that, under any circumstances, the made whole doctrine will not apply if the following conditions exist:

- (1) The subrogated insurer has fully satisfied its obligations to its insured under an insurance contract;
- (2) The insured has had an opportunity to settle its claim with the tortfeasor and the tortfeasor’s liability insurer;
- (3) The *pool of settlement funds available to the insureds* exceeds the total claims of both the insureds and the subrogated insurer; and
- (4) The insured settles its claim with the tortfeasor, even though the settlement, together with the subrogated insurer’s policy claim payment, does not satisfy the insured’s total claim.

The key is the existence of competition for a limited pool of funds. We know that this decision doesn’t stand for the proposition that an insured is made whole by merely settling a case. That was made clear in *Rimes*. But the *Muller* decision seems to be indicating that where the liability limits of the tortfeasor exceed the combined claims of the insured and subrogated insurer and the insured settles for a lesser amount anyway, the made whole doctrine will not apply.

The *Muller* court also noted that as part of its settlement, the Mullers did not indemnify the tortfeasor or its insurer against the subrogated claim, as sometimes occurs in settlements. The Supreme Court did state that such an indemnification agreement “limits available funds,” because a liability carrier will always attempt to limit its exposure and will be more willing to settle with the insured if it can eliminate the subrogated carrier’s rights of recovery and/or reimbursement in the process. Therefore, if the settlement is not made whole by a settlement that includes an indemnification agreement, the insured has claimed the available pool of settlement funds, and the insurer may be barred from subrogating as a result of the made whole doctrine

Society was held entitled to act on its subrogation rights so long as it recognized the priority of its insured to compete for available funds. Had there been an insufficient pool of funds, Society would have been out of luck. In language that should be quoted by subrogation professionals regularly from now on, the court in *Muller* stated:

*Where policy limits are sufficient to cover all related claims, the insured cannot settle for less than policy limits and then argue that “the pie was not big enough” to make him whole.*<sup>373</sup>

This should be the rule of the case that subrogation professionals argue, leaving it to the other side to parse the individual facts of the case and distinguish their case from the facts in *Muller*.

## WYOMING

There are no reported decisions dealing with the made whole doctrine in the State of Wyoming. To make matters worse, the 10<sup>th</sup> Circuit, in which Wyoming sits, has yet to decide whether the 10<sup>th</sup> Circuit will adopt the made whole doctrine under federal common law for interpretation of ERISA Plans.<sup>374</sup> The 10<sup>th</sup> Circuit recognized the made whole doctrine as a creature of equitable insurance law wherein an insured is entitled to receive recovery for a loss and a subrogated carrier is not entitled to subrogate until the insured has been made whole for all of its damages, yet it failed to adopt this doctrine.<sup>375</sup>

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<sup>373</sup> Id.

<sup>374</sup> *Aives v. Silverado Foods, Inc.*, 6 Fed. Appx. 694 (10<sup>th</sup> Cir. 2001).

<sup>375</sup> Id.