


TEXAS AUTOMOBILE SUBROGATION


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Presented By:
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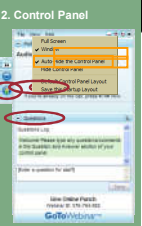


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STATE OF SUBROGATION IN TEXAS

- Good Auto Subrogation State
- 17,099,304 Licensed Drivers (14.1% Uninsured)
- Equitable and Legal Subrogation
- Favorable Med Pay Subrogation
- Add-On PIP State
- Right of Reimbursement Allowed
- Can Contract Around Made Whole Doctrine
- 254 Counties/Choice of Venue
- Fairly Plaintiff-Friendly

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TEXAS AUTOMOBILE LIABILITY INSURANCE

- Pays for damages to person and property of victim of accident for which insured (or any driver covered in the policy) is responsible.
- Medical/Funeral Costs
- Lost Wages
- Pain and Suffering
- Car Repair/Other Property Damage
- Auto Rental/Loss of Use
- Punitive Damages





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TEXAS AUTOMOBILE LIABILITY LIMITS



- Personal: \$30,000/\$60,000/\$25,000
- Commercial Trucking: 49 C.F.R. 387.7
 - 10,000 lbs.: \$750,000
 - 10,000 lbs. (haz.): \$1 Million
 - 3,500 Gallon Tanker: \$5 Million
- Interstate Motor Carrier – Passengers
 - 16 + Passengers: \$5 Million
 - 15 - Passengers: \$1.5 Million
 - Not School Buses
- Commercial Endorsements
 - MCS-90
 - BMC-91
 - BMC-91X
- Other



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PERSONAL INJURY PROTECTION (PIP)

- **Required (Can Be Rejected In Writing)**
- **No-Fault**
- **Medical and Funeral Bills**
 - Insured, Family, Passengers
 - \$2,500 Minimum Must Be Offered
 - Medical Expenses
 - 80% Lost Wages
 - Cost of Caregiver
- **No Tort Limitations**

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UNINSURED/UNDERINSURED (UM/UIM) MOTORIST

- **Required (Can Be Rejected In Writing)**
- **Protects From UM/UIM or Hit and Run**
- **Same Minimum Limits as Liability**
- **Bodily Injury/Property Damage**
- **Automatic \$250 Deductible**
- **Covers Insured, Family, Passengers, Others**

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TYPICAL UM/ UIM POLICY TERMS

We will pay damages, which a covered person is legally entitled to recover from the owner or operator of an uninsured vehicle because of bodily injury sustained by a covered person, or property damage, caused by an accident.




- **Must arise out of the ownership, maintenance, or use of the uninsured vehicle.**

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 **MEDICAL PAYMENTS (MED PAY) COVERAGE**

- **Optional**
- **No-Fault**
- **Cheaper But PIP Better Deal (Lost Wages)**
- **Medical and Funeral Bills**
- **\$500, \$1,000, \$2,000 (Any Amount)**
- **Covers Insured, Family, Passengers**



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 **COLLISION/COMPREHENSIVE COVERAGE**

- **Collision Coverage**
 - Repair or Replace Vehicle After Collision
 - Without Regard to Fault or Driver
 - Actual Cash Value or Cost of Repairs
 - Cost of Rental Cars
- **Comprehensive Coverage**
 - Repair or Replace Vehicle After Damage
 - **Theft, Fire, Vandalism, Etc.**
 - **Cost of Rental Car**
 - Actual Cash Value or Cost of Repairs



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 **PERSONAL INJURY PROTECTION (PIP) SUBROGATION**


- **Tex. Ins. Code § 1952.155**
 - No Subrogation Allowed
 - Exception: Uninsured Motorist
 - BUT: Always Consider Potential for Conflict-of-Law



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UNINSURED/UNDERINSURED (UM/UIM) MOTORIST SUBROGATION

An insurer that makes a (UM/UIM) payment is entitled to the proceeds of any settlement or judgment resulting from the exercise of any right of recovery of the person to whom the payment is made against any person or organization legally responsible for the bodily injury. *Tex. Ins. Code § 1952.108*



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UM/UIM SUBROGATION

- **Consent to Settle**
 - Insured Must Get Carrier’s Consent to Settle
 - 30-Day Deadline Normal
 - Settlement Without Consent
 - No Coverage
 - Actual Prejudice Needed
 - Third-Party Assets
 - Doesn’t Apply to Non-Motorist Tortfeasor




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COLLISION/PROPERTY SUBROGATION


- **Subrogation Allowed**
 - *American General v. Fort Worth Transit* (Tex. App. 1947).
- **Plaintiff Elects Between Two Measures of Damages**
 - Difference in Market Value
 - Reasonable Repair Costs
 - If Reasonable
- **Loss of Use**
 - *Luna v. North Star Dodge* (Tex. 1984).
 - Reasonable Rental Value
 - No Need to Rent Vehicle
 - Can Recover If Total Loss
- **Must Affirmatively Assert in Bodily Injury Lawsuit**






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 **MADE WHOLE DOCTRINE**


- *Ortiz v. Great Southern Fire & Casualty Ins. Co.* (1980).
- **Fire Insurance Subrogation Case**
 - No Contents Coverage
 - \$4,000 Repairs/\$11,614 Contents/\$10,000 Third-Party Limits
- **Involved Equitable Subrogation – No Subrogation Policy Language**
- **Insurer is not entitled to subrogation if the insured's loss is in excess of the amounts recovered from the insurer and the third party causing the loss.**



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 **FORTIS BENEFITS V. CANTU (2007)**


- **Health Insurer Subrogated Automobile Accident**
- **Policy Had Basic Subrogation Language**
- **Ct. Appeals: No Subrogation (*Ortiz*)**
- **Sup. Ct.: Subrogation Allowed**
 - Where a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates the positive law or offends public policy.
- **Rule: If Policy Has Subrogation Language – Made Whole Doctrine Doesn't Apply**



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 **COMMON FUND DOCTRINE**

- **One Who Benefits From Creation of a Fund Should Bear Fair Share of Cost**
 - Equitable Doctrine
 - Litigation Costs and Attorney's Fees
- **Applied In Texas**
 - *Knebel v. Capital National Bank* (Tex. 1974).
- **Exceptions**
 - If Carrier Contributes or Assists With Recovery
 - Extent of Contribution a Fact Question
 - Even Simple Demand Raises Fact Question




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SUGGESTIONS FOR AVOIDING COMMON FUND FEES

- **Send Notice to Third-Party Carrier**
 - Don't Settle Without You
 - Going to Pursue Subrogation Alone
 - Send Copies of Medicals/Specials
 - Ask to Send Subrogation Directly to You
- **Send Notice to Insured's Counsel**
 - Don't Settle Without You
 - Going to Pursue Subrogation Alone
 - Not Authorized to Collect For You
- **Ethical Considerations if P's Attorney Represents You**

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RELEASE OF TORTFEASOR BY INSURED

- **Insured Who Settles With Tortfeasor (With Knowledge of Subro)**
 - Can Still Pursue Tortfeasor
- **Policy Prohibits Post-Loss Actions Jeopardizing Subrogation**
- **If Settlement Prior to Payment Under Policy**
 - May Jeopardize Benefits Under Policy
- **Always Put All Potential Tortfeasors On Notice**
- **CMRRR or Regular U.S. Mail**





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ACCEPTING PARTIAL PAYMENTS

- **Example:** Third-party carrier sends you check ("payment in full") for 75% of subrogation. You endorse and cash check and then make demand on tortfeasor for remaining 25% of subrogation.
 - Accord and Satisfaction
 - Parties Must Agree That Amount Paid Is Full Satisfaction
 - Must Be Unmistakable Communication That Acceptance Is Complete Satisfaction
 - Must Be Clear, Full, and Explicit That It Is Not Susceptible of Any Other Interpretation







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ECONOMIC LOSS DOCTRINE

- **Example:** 2004 Ford F-150 starts on fire and burns up in driveway. Faulty alternator is cause. You look to Ford for recovery of comprehensive loss (product liability).
 - Rule: Where defective product causes damage only to product itself, cannot recover in tort (strict liability or negligence) for purely economic damages.
 - Exceptions
 - Damage to "Other Property"
 - Warranty or "Contract-Based" Statutory Remedies
 - Express or Implied Warranties
 - Non-Integrated "Component Parts"
 - Negligent Misrepresentation/Fraud


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REIMBURSEMENT OF DEDUCTIBLE

- **Texas Insurance Code § 542.204**
 - If Third Party "May" Be Liable, The Insurer Shall:
 - "Take Action" to Recover Deductible One Year After Claim Paid
 - Pay Deductible to the Insured, or
 - Within One Year (No Later Than 90 Days Before SOL)
 - Notify Insured No Intent to Subrogate
 - Authorize Insured to Take Collection Action
 - Applies Only to Personal Automobile Policies
 - "Take Action" Means Reasonable Collection Efforts, Mediation, Arbitration, and Litigation
 - Note: Doesn't Specify Reimbursement Percentage
 - Pro Rata Recommended - Be Consistent





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COLLATERAL SOURCE RULE

- Defendant Cannot Mention Collateral Sources (Insurance, Health, Etc.)
- Recovery Not Reduced By This Amount
- **H.B. 4: § 41.0105**
 - Plaintiff Cannot Recover Medical Expenses "Adjusted Down" By Carrier
 - Dispute - Does This Mean:
 - Only Discounted Medical Admitted, or
 - Admit Full Medical Expenses But Recovery Reduced

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**CONTRIBUTORY NEGLIGENCE/
COMPARATIVE FAULT**

- **Modified Comparative Fault**
- **Plaintiff Can Recover Provided Plaintiff is 50% or Less At Fault**
 - Plaintiff's Recovery Reduced By Percentage of Fault
- **Examples:**
 - \$10,000 Damages. P 40% At Fault. P Recovers \$6,000.
 - \$10,000 Damages. P 60% At Fault. P Recovers \$0.




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**SUDDEN EMERGENCY
DOCTRINE**

- **Elements**
 - Emergency Situation Arises Suddenly/Unexpectedly
 - Not Proximately Caused By Defendant
 - Defendant Acts As Ordinary, Prudent Person Under Same Circumstances
- **Distinguish: Unavoidable Accident**
- **Example: Defendant Loses Consciousness/Heart Attack While Driving**
 - Foreseeability
 - Timing
 - Movement of Vehicle
 - Condition After Accident




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SEAT BELT DEFENSE

- **Seatbelts Mandated Since 1985**
- **Traffic Violation Not to Wear Seatbelt**
- **§ 545.413(g) Used to Read:**
 - Use Or Non-use Of Safety Belt Is Not Admissible Evidence In Civil Trial
 - On July 1, 2003, Repealed Subsection (g)
 - Use or Non-Use of Seatbelt Is Now admissible In Texas Courts







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 **BAILMENT**

- **Bailor: Owner of Property**
- **Bailee: Holds Property In Trust For Purpose**
- **Elements:**
 - Delivery of Personal Property To Another For Specific Purpose
 - Acceptance of Such Delivery
 - Express/Implied Contract
 - Understanding Property Will Be Returned
- **Presumption That Bailee Is Negligent**
 - Bailee Must Prove His/Her Own Non-Negligence
- **Examples: Parking Lot, Dealership, Repair Shop, Etc.**



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 **NEGLIGENT ENTRUSTMENT**

- **Elements**
 - Owner Entrusts Vehicle To Driver
 - Driver Unlicensed, Incompetent, Reckless Driver
 - Owner Knew This
 - Driver Negligent On This Occasion
 - Driver's Negligence Proximately Causes Accident/Damages
- **Opportunity To Get Driver's Driving Record Into Evidence**






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 **GUEST STATUTE**

- **Prohibits Suits By Driver/Family Member Against Driver**
- **Unconstitutional. *Whitworth v. Bynum* (Tex. 1985).**



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FAMILY PURPOSE DOCTRINE

- A vicarious liability rule that holds the owner of an automobile liable for damages to others while a member of the family is driving the vehicle.
 - Texas Does Not Recognize
 - Must Prove Independent Negligence On Part Of Owner
 - Negligent Entrustment
 - Sponsorship Liability Under Driver’s License Laws, Etc.








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MULTIPLE CLAIMS IN EXCESS OF LIABILITY




- **Example:** You have a small subrogation lien and there are many larger claims vying for the minimum insurance limits.
 - A third-party liability carrier may settle with one of several claimants for policy limits, provided the settlement is prudent and reasonable when considering solely the merits of that claim.
 - *Texas Farmers Co. v. Soriano*, 881 S.W.2d 312 (Tex. 1994).
 - First-Come, First-Serve
 - No Duty of Good Faith and Fair Dealing Requiring Pro Rata Sharing of Limits

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STATUTE OF LIMITATIONS

- **Med Pay/PIP/UM/UIM**
 - Subrogation Cause of Action Accrues On Date of Accident
 - Personal Injury/Wrongful Death/Property Damage
 - 2 Years – TCPRC § 16.003
 - Breach of Contract Actions
 - 4 Years – TCPRC § 16.004
 - Statute of Repose
 - 10 Years After Substantial Completion

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OFFER OF SETTLEMENT


- **Plaintiff Can Make Offer of Settlement For Specified Sum**
 - Only After Settlement Offer By Defendant
 - If Defendant Rejects Plaintiff's Offer
 - And Obtains 120% of the Rejected Counter-Offer
 - Can Recover Post-Offer Litigation Costs
 - TCPRC § 42.003
 - Must Be In Writing and Clearly State Terms and Deadline
 - Must Be Served On All Parties




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SUBROGATION RESOURCES

The following slides contain subrogation resources that can found on our website at www.mwl-law.com that are available to you at no cost. We invite you to take advantage of them.



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MWL 50-STATE REFERENCE CHARTS




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 **MWL 50-STATE REFERENCE CHARTS**


AUTOMOBILE INSURANCE SUBROGATION CHARTS

- Automobile Total Loss Thresholds
- Deductible Reimbursement
- Diminution In Value Law
- Funeral Procession Laws
- Imputing Contributory Negligence of Driver to Vehicle Owner
- Keep Right Traffic Laws
- Using Cell Phones/Headphones/Texting While Driving Laws
- Med Pay/PIP Subrogation
- No Pay, No Play Laws Owner Liability For Stolen Vehicles
- Pedestrian and Crosswalk Laws
- Recovery of Sales Tax After Vehicle Total Loss Seat Belt Defenses
- Sudden Medical Emergencies While Driving
- Suspension of Drivers' Licenses
- Use of Non-Original Equipment Manufacturer (OEM) Laws and Regulations


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 **MWL 50-STATE REFERENCE CHARTS**

SUBROGATION GENERALLY CHARTS


- Anti-Subrogation Rule
- Exculpatory Agreements and Liability Waivers
- Made Whole Doctrine
- Medical Expenses, Insurance Write-Offs, and Collateral Source Rule
- Subrogation Of Criminal Restitution


PROPERTY SUBROGATION CHARTS

- Condominium/Co-Op Waiver of Subrogation Laws
- Damage To Property Without Market Value
- Landlord/Tenant Subrogation


WORKERS' COMPENSATION SUBROGATION CHARTS

- Documenting Workers' Compensation Statutory Future Credits
- Employee Leasing Subrogation Laws
- Workers' Compensation Claims By Undocumented Employees
- Workers' Compensation Subrogation


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 **MWL 50-STATE REFERENCE CHARTS**


FEDERAL, STATE AND LOCAL GOVERNMENTAL ENTITIES CHARTS

- Federal Government Liability And Tort Claims
- Municipal/County/Local Governmental Immunity and Tort Liability
- State Sovereign Immunity And Tort Liability

GENERAL TORT LAWS/STATUTES CHARTS

- Anti-Indemnity Statutes
- Contribution Laws
- Contributory Negligence/Comparative Fault Laws
- Dog Bite Laws
- Economic Loss Doctrine
- Parental Responsibility Laws
- Spoliation Laws
- Statute of Limitations In All 50 States


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