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## MADE WHOLE DOCTRINE IN ALL 50 STATES

### 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 insured has a superior interest in the third-party recovery. Five outcomes are possible:

1. Insurer Whole+: 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 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+: 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 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 *Liao*.<sup>5</sup> Where contractual subrogation rights existed, the Court said that parties are free to contract around the Made Whole Doctrine, as long as the contract “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. In *Powell v. Blue Cross & Blue Shield 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), 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,

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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, West Virginia, and Wisconsin are examples of states which follow Rule No. 2.

<sup>3</sup> California, Idaho, Nebraska, Ohio, Virginia, Washington, and Wyoming follow Rule No. 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 do not 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 on 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> *International Underwriters/Brokers, Inc. v. Liao*, 548 So.2d 163 (Ala. 1989).

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 in *Ex parte Black*, 734 So.2d 998 (Ala. 1999). However, in 2000, the Alabama Supreme Court flip-flopped once more, overruling this line of decisions as being unjust. *Ex parte State Farm Fire & Cas. Co. v. Hannig*, 764 So.2d 543 (Ala. 2000). 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.*” *Id.* 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. *Id.*; *Wolfe v. Alfa Mut. Ins. Co.*, 880 So.2d 1163 (Ala. Civ. App. 2003). In *Wolfe*, 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.” *Id.* at 1167. 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 deemed sufficient to “expressly provide” for the abrogation of the Made Whole Doctrine. *Id.* at 1167-68. 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. *Allstate Ins. Co. v. Fugh Cole Builder, Inc.*, 772 So.2d 1145 (Ala. 2000); *Liao, supra*; *Ex parte Cassidy*, 772 So.2d 334 (Ala. 2000). 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 does not apply. It should be noted that only the insured has standing to assert the Made Whole Doctrine. *National Prop. & Cas. Ins. Co. v. DPF Architects, P.C.*, 792 So.2d 369 (Ala. 2000). 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. *Powell, supra*.

For purposes of subrogation, the test for determining when the insured has been made whole is whether the injured plaintiff has been completely compensated for *all* of his losses. *Alfa Mut. Ins. Co. v. Head*, 655 So.2d 975 (Ala. 1995). Likewise, *all* sources of reimbursement must be considered in determining the extent to which the plaintiff has been compensated. It is only when the plaintiff’s recovery exceeds the sum total of the plaintiff’s damages that the right of subrogation arises. This test also applies to reimbursement of property damage claims. The determination of whether the insured has been made whole may be determined before the trial court in what is known as a *Powell* hearing.

If the total damages collected from the responsible tortfeasor, either through settlement or judgment, when added to the amount paid to the plaintiff by the subrogated carrier (such as reimbursement of medical expenses, lost wages, and disability), equals the amount of the plaintiff’s loss, then the plaintiff is made whole. *Powell, supra*. Calculation of the plaintiff’s loss must include such damages as property damage, medical expenses, pain and suffering, lost wages, and disability. Punitive damages are not included in the calculation because such damages are not an element of compensation. Attorney’s fees and costs are not included as part of the insured’s loss. *Id.*

To calculate the plaintiff’s recovery for purposes of the Made Whole Doctrine, every payment made to or on the plaintiff’s behalf that arises out of the damages in the plaintiff’s claim must be considered. *Id.* The Supreme Court

of Alabama has rejected the argument that just because an insured settles a third-party claim it has been made whole. *Complete Health, Inc. v. White*, 638 So.2d 784 (Ala. 1994). The burden is on the insurer to prove that the insured has been fully compensated before asserting its subrogation rights against the insured. *Id.* If plaintiff's counsel takes the position that the insurer is not entitled to any reimbursement of its subrogation claim, then he may not be entitled to reduce the amount of reimbursement by attorney fees if the insurer proves that your client is fully compensated. *CNA. Ins. Co. v. Johnson Galleries of Opelika*, 639 So.2d 1355 (Ala. 1994).

## ALASKA

Alaska law has been sparse with regard to application of the Made Whole Doctrine to auto insurance subrogation. 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. *McCarter v. Alaska National Ins. Co.*, 83 P.2d 986 (Alaska 1984). Interestingly, the concept of "made whole" was first and only discussed with regard to workers' compensation subrogation which, unlike auto insurance subrogation, is statutory in nature.

In 2009, the Alaska Supreme Court stated that the Made Whole Doctrine becomes involved in situations in which a defendant's policy would be exhausted and the injured party would be left without being fully compensated for her own loss if her insurer collected the subrogation lien before she was herself compensated for her separate damages. *O'Donnell v. Johnson*, 209 P.3d 128 (Alaska 2009).

The Alaska Supreme Court has recently said that where two parties explicitly state that their settlement does not include the insurer's subrogation claim, that insurer cannot collect its claim from the settlement. *Id.* It does appear that the Made Whole Doctrine is more readily applied in equitable subrogation cases than it perhaps is in those involving contractual subrogation. Alaska courts generally do not allow equitable subrogation until the insured has been fully compensated for its loss. *McCarter*, supra.

## 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. *Liberty Mutual Ins. Co. v. Thunder Bank*, 555 P.2d 333 (Ariz. 1976). 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. *Barnes v. Indep. Auto Dealers Ass'n of Cal. H&W Ben. Plan*, 64 F.3d 1389 (9<sup>th</sup> Cir. 1995). 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. *Id.* 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

Under Arkansas law, the Made Whole Doctrine is recognized and dictates whether an insurer has a subrogation right in settlement proceeds. An insurer's subrogation right is secondary to the right of the insured. *Green v. Ford Motor Co.* 2011 WL 2666198 (W.D. Ark. 2011). An insured should not recover more than that which fully compensates him and an insurer should not recover any payments that should rightfully go to the insured so that he is fully compensated. *Id.* The general rule in Arkansas is that an insurer is not entitled to subrogation unless the insured has been made whole for his loss. *Franklin v. Healthsource of Ark.*, 942 S.W.2d 837 (Ark. 1997); *Shelter Mutual Ins. Co. v. Bough*, 834 S.W.2d 637 (Ark. 1992); *Riley v. State Farm Mutual Auto. Ins. Co.*, 2011 WL 2410521 (Ark. 2011). Arkansas courts are permitted to determine whether an insured has been made whole based upon the facts presented and the insured and insurer are not entitled to a trial by jury on this issue. *Green*, supra.

An insurer's right to subrogation arises only in situations where the recovery by the insured exceeds his or his total amount of damages incurred. *Shelter Mut. Ins. Co. v. Kennedy*, 60 S.W.3d 458 (Ark. 2001), quoting Franklin, supra; *Riley*, supra. Arkansas applies the Made Whole Doctrine rather broadly. It follows something called the "Franklin Formula," which says that the precise measure of an insurer's reimbursement is the amount by which

the amount of the sum received by the insured from the third party, together with the insurance proceeds, exceeds the loss sustained and the expense incurred by the insured in realizing on his claim. *South Central Ark. Elec. Co-Op v. Buck*, 117 S.W.3d 591 (Ark. 2003); *Franklin*, supra.

In *Franklin*, the Arkansas Supreme Court expanded the use of the Made Whole Doctrine and held that an insurer is not entitled to subrogation unless the insured has been fully made whole, regardless of whether the insurance contract between the insurer and insured expressly gave the insurer a right of subrogation for benefits paid. *Franklin*, supra. The right of an injured party to be made whole and an insurance carrier's right to subrogation are both considered equitable principles in Arkansas. Despite the fact that its courts state that subrogation rights may also be delineated by contract, Arkansas law says that contract rights will not be enforced when this works an injustice. *Conley Transp., Inc. v. Great Am. Ins. Co.*, 849 S.W.2d 494 (Ark. 1993). In fact, the Supreme Court has held that the Made Whole Doctrine applies not only to equitable and conventional rights as well as statutory rights, but also to statutory rights of subrogation provided under workers' compensation statutes. *General Accident Ins. Co. of Am. v. Jaynes*, 33 S.W.3d 161 (Ark. 2000). It is advisable for auto carriers subrogating for property damage to intervene into their insured's third-party action, because Arkansas does not approve of splitting of causes of action. *Home Ins. Co. v. Dearing*, 452 S.W.2d 852 (Ark. 1970).

The 2011 decision of *Riley* announced new legal standards regarding when an insurance company's right of subrogation is enforceable. In *Riley*, the Arkansas Supreme Court announced that no subrogation rights arise until there is a determination by a court (or through an agreement) that the injured party has been made whole. *Riley*, supra. Prior to the *Riley* decision, it was unclear whether the insured had the burden of proving he had been made whole, or the insurer seeking subrogation had the burden of proof. *Eastwood v. S. Farm Bureau Cas. Ins. Co.*, 2012 WL 2952172 (W.D. Ark. 2012).

The *Riley* decision emphasizes the fact that simply sending notice of a subrogation interest is insufficient to create a lien or protect a carrier's subrogation interests. Subrogated carriers should seek the assistance of qualified subrogation counsel to protect their interests in Arkansas. *Riley* stands for the proposition that the burden of proof is on the insurer to either make an agreement with insured as to the made whole issue, or, failing that, to seek a judicial determination that the insured has, in fact, been made whole. *Id.* An insurer cannot modify or contract around the Made Whole Doctrine within the terms of its insurance policy. *Franklin*, supra. The right of subrogation does not accrue until there has been a legal determination by a court that the insured has been made whole. *Riley*, supra. The Made Whole Doctrine applies even in cases of statutory reimbursement rights, such as PIP benefits under § 23-89-207. *Ryder v. State Farm Mutual Auto. Ins. Co.*, 268 S.W.2d 298 (Ark. 2007). The subrogation lien cannot arise, or attach, until the insured has received the settlement proceeds or damage award and until there is a judicial determination that the insured has been made whole. *Riley*, supra.

The amount of damages necessary to make the insured whole does not have to be reduced because of the insured's contributory negligence. *Cunningham v. Loma Sys.*, 2012 WL 2569278 (E.D. Ark. 2012). In addition, the fact that a plaintiff settles his claim for less than the third-party policy limits is not relevant as to whether or not he has been made whole. *Id.*; *Southern Farm Bur. Cas. Ins. Co. v. Tallant*, 207 S.W.3d 468 (Ark. 2005). It should be noted that a federal district court in Arkansas has held that the issue of whether an insured has been made whole is not an appropriate part of a subrogation action filed by the subrogated carrier. *Eastwood*, supra. Absent an agreement with the insured, a determination as to whether he has been made whole is needed *before* an insurance company may obtain reimbursement out of a third-party recovery. *Id.* The mere act of filing a subrogation action constitutes "seeking" subrogation before such a made whole determination is made.

## CALIFORNIA

The Made Whole Doctrine has been viable in California since 1974. *Travelers Indem. Co. v. Ingebretsen*, 113 Cal. Rptr. 679 (Cal. App. 1974). In California, the rule generally precludes an insurer from recovering *any* third-party funds unless and until the insured has been made whole for the loss. *Progressive West Ins. Co. v. Yolo County Superior Ct.*, 135 Cal.App.4<sup>th</sup> 263 (Cal. App. 2005); *Barnes v. Independent Auto. Dealers of Cal., H & W Benefit Plan*,



64 F.3d 1389 (9<sup>th</sup> Cir. 1995). The Doctrine usually applies only when there is no agreement to the contrary. *Barnes, supra*; *Samura v. Kaiser Found. Health Plan*, 17 Cal.App.4<sup>th</sup> 1284 (Cal. App. 1993).

The Made Whole Doctrine was extended to Med Pay subrogation in 2005. *Progressive West, supra*. An *underinsured motorist carrier* is entitled to reimbursement from the tortfeasor without regard to whether the insured has been made whole. *Holcomb v. Hartford Cas. Ins. Co.*, 281 Cal. Rptr. 651 (Cal. App. 1991). On the other hand, an *uninsured motorist carrier* is not entitled to subrogation until the injured insured has been completely made whole. *Security Nat'l Ins. Co. v. Hand*, 31 Cal.App.3d 227 (Cal. App. 1973); *United Pacific-Reliance Ins. Cos. v. Kelly*, 140 Cal.App.3d 72 (Cal. App. 1983).

In California, the subrogation rights and reimbursement rights of a first-party Med Pay insurer fall within the rubric of subrogation, and thus both of those rights are limited by the Made Whole Doctrine. *21<sup>st</sup> Century Ins. Co. v. Superior Ct.*, 213 P.3d 972 (Cal. 2009). California courts recognize the Made Whole Doctrine when, typically due to underinsurance, the tortfeasor could not pay his or her "entire debt" to the insured.

The applicability of the Made Whole Doctrine generally depends on whether the insured has been completely compensated for all the elements of damages, not merely those for which the insurer has indemnified the insured. *Allstate Ins. Co. v. Superior Ct.*, 151 Cal.App.4<sup>th</sup> 1512 (Cal. App. 2007) (writ granted by California Supreme Court on Sept. 25, 2007). Some jurisdictions have narrowly construed the made whole exception as referring only to an insured being fully compensated for covered losses. *Ludwig v. Farm Bur. Mut. Ins. Co.*, 393 N.W.2d 143 (Iowa 1986). California holds that insurance companies are entitled to reimbursement of payments they made under a Med Pay policy provisions even though the insured has not been reimbursed all of his attorney's fees. *21<sup>st</sup> Century Ins. Co. v. Superior Ct.*, *supra*. In other words, the Made Whole Doctrine does not include liability for all the attorney's fees the insured must pay in order to recover economic damages (including medical expenses) from a third-party tortfeasor. *Id.*

Although California recognizes the Made Whole Doctrine, it does not apply it as a blanket rule. *Chase v. National Indem. Co.*, 129 Cal.App.2d 853 (Cal. App. 1950); *Sapiano v. Williamsburg Nat'l Ins. Co.*, 28 Cal.App.4<sup>th</sup> 533 (Cal. App. 1994); *Chong v. State Farm*, 428 F. Supp.2d 1136 (S.D. Cal. 2006), *order vacated on reconsideration by, Chong v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 2175842 (S.C. Cal. 2010). It does not apply in cases where the insurance policy conveys "all right of recovery against any party for loss to the extent that payment therefore is made by this company." *Ingebretsen, supra*. It should be noted that in *Ingebretsen*, the insured and insurer executed a detailed subrogation agreement, after the loss and at the time the insurer paid the insured. The Court also noted that the insurer's priority to the recovered funds was conditioned on it having cooperated and assisted in the recovery from the third party. Even when it is not possible to determine what portion of the recovery represents the damages paid by the insurance company, the "all right of recovery" language obviated the need for the insurer to prove what portion of the judgment was attributable to the covered loss. *Id.*

The requirements necessary to eliminate the application of the Made Whole Doctrine set forth in *Ingebretsen* are strictly applied in California. Where a policy's subrogation language is general in nature and the insurer does not participate or cooperate with the insured in the third-party action, the insured retains the right of priority over any recovery. *Sapiano, supra*.

It is possible to contract around the Made Whole Doctrine. *Samura v. Kaiser Found. Health Plan, Inc.*, 17 Cal.App.4<sup>th</sup> 1284 (Cal. App. 1993). There is authority that language in an insurance policy that grants the insurance company "all rights of recovery to the extent of its payment" overrides the common law Made Whole Doctrine. *Barnes, supra*; *Progressive West Ins. Co. v. Yolo County Superior Court*, 135 Cal. App.4<sup>th</sup> 263 (Cal. App. 2005). If there is clear contractual language to the contrary, the insurer might be able to subrogate without the insured first being "made whole." *American Contractors Indem. Co. v. Saladino*, 115 Cal.App.4<sup>th</sup> 1262 (Cal. App. 2004); *Progressive West Ins. Co. v. Yolo County Superior Ct.*, 37 Cal.Rptr.3d 434 (Cal. App. 2005); *Hodge v. Kirkpatrick Dev., Inc.*, 130 Cal.App.4<sup>th</sup> 540 (Cal. App. 2005). However, unlike other states, California adds one additional requirement in order to effectively negate the Made Whole Doctrine. In addition to having the right disclaimer policy language, the carrier must cooperate and assist the insured in the recovery effort. *Sapiano, supra*.

Although California allows the parties to an insurance contract to agree that the Made Whole Doctrine does not apply, the efficacy of such an agreement appears to only apply if the contract is sufficiently specific in this regard, and if the carrier cooperates and assists the insured in the recovery. The policy language must clearly and specifically indicate the parties' intent to abrogate the Made Whole Doctrine. A provision in an automobile insurance policy stating that insurer "is entitled to all the rights of recovery that the insured person to whom payment was made has against another," is not sufficient to accomplish this. *Progressive West*, supra. Any policy language intending to do so must clearly and specifically give the insurer a priority out of proceeds from the tortfeasor regardless whether the insured was first made whole. Policy language eliminating the Made Whole Doctrine must be specific, especially when subrogating auto claims. The only way to contract around the Made Whole Doctrine is with clear language stating that the insurer's reimbursement rights are "first dollar" reimbursement rights. *Id.* Because generic subrogation language adds nothing to the right of equitable subrogation which arises by law independent of any policy language, the policy must provide that the insurer has a priority to payments made by the tortfeasor in order to overcome the Made Whole Doctrine. *Id.*; *Chong v. State Farm Mutual*, 428 F.Supp.2d 1136 (S.D. Cal. 2006).

The appellate court has held that the insured's assignment to the insurance company of "all rights" "to the extent of payment" gave the insurance company priority to any recovery obtained by the insured, overcoming the Made Whole Doctrine. *Id.* However, later case law implies that in order to overcome the Made Whole Doctrine a carrier must assist with the prosecution of the third-party case and cannot just sit back without assisting. *Sapiano*, supra. One California court recently held that the policy language must clearly and specifically give the insurer a priority out of the proceeds from the tortfeasor regardless whether the insured was first made whole. *Progressive West*, supra. Clearly, it behooves insurers to carefully draft policy language and claims handlers to engage subrogation counsel in California. *Id.*

Notwithstanding the aforementioned ability of a policy to disclaim the Made Whole Doctrine, California has ameliorated this ability by putting the Doctrine of Unconscionability into play. *Samura*, supra. Therefore, the defense of "unconscionability" is available and may require the court to look at the individual facts of each case before it disallows the Made Whole Doctrine based on policy language.

If, after a loss, an insured and insurer executes a detailed subrogation agreement which specifically negates the Made Whole Doctrine, and there is some cooperation and assistance, the insurer should be able to subrogate without regard to whether or not the insured is made whole. *Ingebretsen*, supra. The Made Whole Doctrine applies equally to both subrogation and reimbursement and reimbursement causes of action. *Progressive West*, supra. California case law specifically says that carriers which "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. *Samura*, supra. 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. *Hodge*, supra.

A carrier that has knowledge of an insured's tort action and decides not to participate in it may not seek reimbursement from a successful recovery unless the insured's tort recovery exceeds his actual loss. *Plut v. Fireman's Fund Ins. Co.*, 135 Cal.App.4th 263 (Cal. App. 2005). In California, if the Made Whole Doctrine applies, it means that an insured must reimburse its *nonparticipating* insurer for the surplus, if any, remaining after the insured satisfies "his loss in full and his reasonable expenses incurred in the recovery." *Id.* Therefore, when an insurer elects not to participate in the insured's third-party action against a tortfeasor, the insurer is entitled to subrogation only after the insured has been made whole.

Although the Made Whole Doctrine applies in the Med Pay context to reduce an insurer's reimbursement right, it does not apply to the insured's claim for attorney fees. In other words, the insured's attorney's fees are not included as part of the insured's damages for purposes of determining whether the insured has been made whole in Med Pay reimbursement cases. *21<sup>st</sup> Century Ins. Co. v. Superior Court*, 213 P.3d 972 (Cal. 2009).

In summary, the Made Whole Doctrine is alive and well in California. However, California courts recognize two exceptions to its applicability: (1) An insurer may disclaim the doctrine in an insurance contract by using clear and specific language that indicates the parties' intent to permit the insurer to seek reimbursement even if the insured has not been made whole. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 596 F. Supp.2d 1314 (C.D. Cal. 2008) *aff'd*, 598 F.3d 1115 (9<sup>th</sup> Cir. 2010); *Progressive West Ins. Co.*, *supra*; *Sapiano*, *supra*. The insurer must also cooperate with and assist the insured in the third-party litigation; and (2) the Made Whole Doctrine does not apply if the insurer prosecutes the claim against the third-party tortfeasor. *Chandler*, *supra*; *Ingebretsen*, *supra*; *Progressive West*, *supra*. The insured must attempt to recover from the tortfeasor.

A carrier may pursue reimbursement and has no obligation to make the insured whole out of reimbursement proceeds unless and until the policyholder attempts and fails to recover from the tortfeasor. *Chandler*, *supra*.

## COLORADO

The Made Whole Doctrine was first introduced and accepted in Colorado in the limited context of UM coverage in 1989. *Kral v. American Hardware Mut. Ins. Co.*, 784 P.2d 759 (Colo. 1989). In the same case, the Colorado Supreme Court answered the question of whether a conventional subrogation provision in a policy can displace 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. *Id.* For years, Colorado courts made no direct pronouncements regarding the Doctrine's application generally or to health insurance subrogation, and the legislature was reasonably quiet. That all changed with the passage of C.R.S. § 10-1-135 in 2010.

C.R.S. § 10-1-135 became effective on August 11, 2010 and is a global legislative pronouncement codifying several common law principles governing subrogation claims, including the Made Whole Doctrine. *O'Donnell v. Sullivan*, 2012 WL 3096703 (D. Colo. 2012). It applies to all cases pending recovery as of that date. *Smith v. Jeppsen*, 2012 WL 1493568 (Colo. 2012). Section 10-1-135 is meant to "ensure that each insured injured party recovers full compensation for bodily injury caused by the act or omission of a third party and that such compensation is not diminished by repayment, reimbursement, or subrogation rights of the payer of benefits." C.R.S. § 10-1-135(1)(c). Beyond the issues of full compensation, the statute is also "intended to require a payer of benefits to pay a proportionate share of the attorney fees when the payer of benefits is a beneficiary of the attorney services paid for by the injured party." C.R.S. § 10-1-135(1)(f).

This new statute limits the ability of a "payer of benefits" to subrogate or seek reimbursement of benefits in a third-party lawsuit or claim if the insured is not made whole. It applies to any insurer, HMO, health Plan or other provider of health care benefits, including an automobile insurance carrier. C.R.S. § 10-1-135(2)(c)(II) (2010).

Section 10-1-135 permits subrogation "only if the injured party has first been fully compensated for all damages arising out of the claim." The statute does not specifically clarify what is meant by "fully compensated," but it does provide us with a set of presumptions.

Section 10-1-135 not only applies the Made Whole Doctrine to all health insurance subrogation and automobile medical subrogation, but also legislates the Common Fund Doctrine by making subrogated carriers who successfully seek reimbursement responsible for a proportionate share of the insured's attorney's fees. C.R.S. § 10-1-135(1)(f) (2010). It applies to any third-party recovery by an insured, whether through settlement or judgment. C.R.S. § 10-1-135(3)(d)(I) (2010). Any provision in an insurance policy which provides contrary to this statute is void as against public policy. C.R.S. § 10-1-135(3)(a)(I) (2010).

When reimbursement or subrogation is allowed under this section, the amount recovered by the subrogated carrier cannot exceed: (1) the amount actually paid by the carrier, or (2) for benefits paid by a capitated Plan, the amount equal to 80% of the usual and customary charge for the same services provided on a non-capitated basis in the geographic region in which the services are provided. C.R.S. § 10-1-135(3)(b) (2010).

A "capitated" Plan pays a specified amount periodically to a health provider for a group of specified health services, regardless of quantity rendered or actual reasonable and necessary cost of medical services provided.



Section 10-1-135 does provide that if an insured settles within the available third-party liability policy limits or UM/UIM coverage limits pursuant to § 10-4-609, there is a rebuttable presumption that the insured has been made whole. C.R.S. § 10-1-135(3)(d)(1) (2010). If an insured litigates the case and receives a judgment, there is a presumption that the amount of the judgment fully compensates the insured. C.R.S. § 10-1-135(3)(d)(II) (2010).

If there are any disputes with regard to whether the insured has been made whole, they must be resolved according to the terms of § 10-1-135. If the insured feels he is not made whole, he must notify the subrogated carrier within 60 days of receipt of the recovery. C.R.S. § 10-1-135(4)(a)(II) (2010). Notice must include: (1) the total amount of recovery; (2) the coverage limits applicable to any available policy or Plan; and (3) the amount of costs charged to the insured. *Id.*

If the subrogated carrier wants to dispute that the insured has not been made whole, the dispute must be resolved by arbitration. C.R.S. § 10-1-135(4)(a)(III) (2010). The subrogated carrier or Plan must request arbitration no later than 60 days after receipt of notice from the insured. *Id.* In that event, the insured and carrier must jointly choose an arbitrator to resolve the dispute. If they cannot agree, the dispute is resolved by a panel of three arbitrators - one selected by the insured, one by the carrier, and one by the first two arbitrators.

Another troubling provision in § 10-1-135 is that a subrogated carrier is now prohibited from pursuing any subrogation directly against a third party, unless, within 60 days of the running of the applicable statute of limitations, the insured has not pursued a claim against the third party. C.R.S. § 10-1-135(6)(a)(II) (2010). A third party is also precluded from including the subrogated carrier on any settlement draft. C.R.S. § 10-1-135(6)(b)(II) (2010). Section 10-1-135 will not affect current Coordination of Benefits procedures, application of Colorado's collateral source set forth in § 13-21-111.6, or subrogation rights of a workers' compensation carrier under § 8-41-203. C.R.S. § 10-1-135(10) (2010).

Section 10-1-135 is a new statute with very little case law interpreting it. There are many questions which surround its application to automobile insurance subrogation and these questions will be addressed in time.

## CONNECTICUT

Until recently, the Made Whole Doctrine had not been applied outside the context of a bankruptcy proceeding in Connecticut. *In re DeLucia*, 261 B.R. 561 (Banc. Ct. 2001). 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 contract, which will be treated as merely a declaration of the principles of law already existing. *Wasko v. Manella*, 849 A.2d 777 (Conn. 2004). However, the discussion in *Wasko v. Manella* regarding the Made Whole Doctrine was considered *dicta* and wasn't binding. In 2013, however, the Connecticut Supreme Court broadly adopted the equitable Made Whole Doctrine for the first time. *Fireman's Fund Ins. Co. v. TD Banknorth Ins. Agency, Inc.*, 2013 WL 3818112 (Conn. 2013).

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. *Automobile Ins. Co. of Hartford v. Conlon*, 216 A.2d 828, 829 (Conn. 1966). In an 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 the insurer was entitled to recover, either on unjust enrichment theory or on theory that insured had violated his contract by refusing to cooperate with the insurer in effecting recovery. *Id.*

Recently, the Connecticut Court of Appeals, interpreting Connecticut law, has held that boilerplate subrogation language in a policy does not displace the Make Whole Doctrine in Connecticut. *Fireman's Fund Ins. Co. v. TD Banknorth Ins. Agency Inc.*, 2011 WL 1601993 (Conn. App. 2011). That Court stated that an insurer's right of equitable subrogation is subject to the Made Whole Doctrine, which provides that the insurer may enforce its subrogation rights only after the insured has been fully compensated for all of its loss. *Id.* When insurance coverage compensates a policyholder for less than the full loss, the insurer must first use any recovery from a

third-party to compensate the policyholder for the remainder of its loss before keeping anything for itself. *Id.* On a certified question from the Court of Appeals, the Connecticut Supreme Court, in a footnote, clarified that the Made Whole Doctrine is merely the default rule and that parties are free to provide differently in their insurance contract, provided they do so expressly. *Fireman's Fund Ins. Co. v. TD Banknorth Ins. Agency, Inc.*, 2013 WL 3818112 (Conn. 2013).

## 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. *Bill Gray Enter., Inc. Emp. Health & Welfare Plan v. Gourley*, 248 F.3d 206 (3<sup>rd</sup> Cir. 2001). 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. *District No. 1 - Pacific Coast Distributors v. Travelers Cas. & Surety Co.*, 782 A.2d 269 (D.C. 2001). The District of Columbia is sensible in applying the Made Whole Doctrine as a "default rule." *Id.* 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. *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).

## FLORIDA

In 1992, the Florida Supreme Court acknowledged the application of the Made Whole Doctrine stating: "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." *Insurance Co. of North Am. v. Lexow*, 602 So.2d 528 (Fla. 1992); *Florida Farm Bur. Ins. Co. v. Martin*, 377 So.2d 827 (Fla. 1979).

The Made Whole Doctrine is intended to apply only in "limited fund" scenarios. *Martin*, supra. This means it applies only when the tortfeasor lacks adequate funds or insurance coverage. *Schonau v. GEICO General Ins. Co.*, 903 So.2d 285 (Fla. App. 2005). Florida law does not appear to recognize an affirmative right or cause of action by an insured against its insurer to be "made whole" beyond the payment of insurance policy proceeds. Instead, it appears that Florida law allows the Made Whole Doctrine to be used as a defense by insureds to protect the insured's direct recovery from a tortfeasor, where the insured's own insurer makes a subrogation claim upon the insured's recovery. *Id.*

Therefore, an insurer does not have a common law right to subrogation or reimbursement against a tortfeasor unless the insured has collected all of his damages and been made whole. *Magsipock v. Larsen*, 639 So.2d 1038 (Fla. App. 1994); *Rubio v. Rubio*, 452 So.2d 130 (Fla. App. 1984). However, where a full recovery has been made by the insured, who is thus "made whole," any payments to the insured over and above his actual damages may be viewed as "double recovery," entitling the carrier to subrogation or reimbursement rights. *Humana Health Plans v. Lawton*, 675 So.2d 1382 (Fla. App. 1996).

At least one unpublished opinion seems to indicate that an insured's comparative fault should be taken into consideration when determining whether or not the insured is made whole. *Monte de Oca v. State Farm Fire & Cas. Co.*, 897 So.2d 471 (Fla. App. 2004). It should be noted that Florida case law also indicates that the Made Whole Doctrine may be overridden by contract. *Martin*, supra; *Blue Cross & Blue Shield of Fla. v. Matthews*, 498 So.2d 421, 422 (Fla. 1986). In an early Court of Appeals decision, the Court indicated that: "If the insurer pays a claim for a loss caused by the negligence of a third person and requests the insured to prosecute his claim against the tortfeasor, assists in the prosecution of the claim, and bears its share of the burden of preparing the case for trial, it is entitled, out of the judgment recovered, to the amount which it has paid on account of the loss,

*notwithstanding the judgment recovered is not, according to the insured's claim, the full value of the property destroyed."* *Morgan v. General Ins. Co. of America*, 181 So.2d 175 (Fla. App. 1965).

A Florida federal district court decision held that the Made Whole Doctrine does not authorize an insured to "freely and intentionally" breach his contractual obligations to notify the insurer of settlement proceedings or otherwise breach material provisions of the insurance policy. *Adelstein v. Unicare Life & Health Ins. Co.*, 135 F.Supp.2d 1240 (M.D. Fla. 2001). In fact, the Court said that when an insured acts without regard for the subrogation rights of the carrier by settling with the tortfeasor for less than the available policy limits, or by releasing the tortfeasor from all claims, the Made Whole Doctrine will not apply. *Id.*

## GEORGIA

Georgia adheres to the Made Whole Doctrine. In fact, in 1997, the Supreme Court articulated the rationale underlying what it refers to as the "Full Compensation" Rule, stating: "*Where the insurer or the insured must go unpaid to some extent, the loss should be borne by the insurer, since the insurer has already been paid a premium for assuming this risk and would have been obligated to pay medical expenses regardless of its insured's negligence and regardless of whether a culpable third party could have been found.*" *Duncan v. Integon Gen. Ins. Corp.*, 482 S.E.2d 325 (Ga. 1997).

This "Full Compensation" Rule was codified a year later in § 33-24-56.1. In short, this statute provides that a benefits provider (which includes an automobile insurer which pays medical expenses) may provide for in its policy language and pursue reimbursement for such medical expenses from the injured party only if the injured party has received a recovery that "*exceeds the sum of all economic and non-economic losses incurred as a result of the injury, exclusive of losses for which reimbursement may be sought under this Code section.*" O.C.G.A. § 33-24-56.1(b) (1).

To further the purposes of this rule, the legislature provided that subrogation for medical expenses and disability payments by a benefit provider directly against the tortfeasor is prohibited. O.C.G.A. § 33-24-56.1(e). Thus, an insured is not put in a position of contracting away his or her right to sue after being compensated by the insurer for medical expenses and disability payments. The Supreme Court has said that this statute renders unenforceable conventional subrogation provisions in a policy that permits reimbursement from the insured when the insured is not fully compensated. *Davis v. Kaiser Found. Health Plan*, 521 S.E.2d 815 (Ga. 1999).

It is a question of law for the trial courts only to determine whether or not an insured has been fully and completely compensated. *Liberty Mut. Ins. Co. v. Johnson*, 535 S.E.2d 511 (Ga. App. 2000). Amazingly, neither party has a right to a jury determination of whether or not the Plan beneficiary has been made whole. *Id.* At least in the 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's total economic and non-economic losses make up the full and complete compensation unreduced by such defenses under the Act. *Homebuilders Ass'n v. Morris*, 518 S.E.2d 194 (Ga. App. 1999). 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." *North Bros. Co. v. Thomas*, 513 S.E.2d 251 (Ga. App. 1999).

Despite its hostility toward subrogation, Georgia law provides us with one of the few cases which helps subrogating insurers 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. *Thompson v. Fed. Express Corp.*, 809 F. Supp. 950, 954 (M.D. Ga. 1993).

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. *Bell v. Fed. Kemper Ins. Co.*, 693 F. Supp. 446 (S.D. W.Va. 1988). 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. *Id.* A Minnesota Supreme Court has also held that once a party settles its claim, it cannot thereafter claim that it was not fully compensated. *Illinois Farmers Ins. Co. v. Wright*, 391 N.W.2d 519 (Minn. 1986). 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. *Bell, supra; United Pacific Ins. Co. v. Boyd*, 661 P.2d 987 (Wash. 1983); *Martine v. Hertz Corp.*, 103 F.3d 118 (4<sup>th</sup> Cir 1996). There is Georgia case law to the effect that the Made Whole Doctrine can be overridden by contract terms in a policy or Plan. *Duncan, supra*. In *Duncan*, the court did indicate that the policy would have to specifically reference the Made Whole Doctrine in order to be effective. However, two years later, the Georgia Supreme Court concluded that any policy provisions modifying the Made Whole Doctrine were unenforceable as a matter of public policy. *Davis, supra*. The court in *Davis*, referencing the passage of § 33-24-56.1, clarified that the "Complete Compensation" Rule is the public policy of Georgia and that any insurance policy provision which requires reimbursement or allows subrogation without regard to whether the insured is completely compensated is unenforceable because it violates public policy. *Id.*

However, where the subrogated UM insurer is exercising its subrogation rights by proceeding directly against the tortfeasor, rather than seeking reimbursement from the insured, the Made Whole Doctrine (Full Compensation Rule) in Georgia will not act to bar the insurer's subrogation rights. *Landrum v. State Farm Mut. Auto. Ins. Co.*, 527 S.E.2d 637 (Ga. App. 2000). This is because § 33-7-11(f) expressly grants the UM carrier the right to bring a subrogation claim against the tortfeasor, despite the "Full Compensation" Rule's prohibition against same. The Made Whole Doctrine is not applicable unless there is a contest between the insured and insurer which could result in the insured going unpaid to some extent. *Id.*

The Georgia Supreme Court has also made clear that the Made Whole Doctrine cannot be used by a tortfeasor as a defense to a subrogation suit filed by the insurer. *Landrum, supra*. In order for the Made Whole Doctrine to apply, there must be a contest between the insured and insurer over a limited pool of funds which could result in the insured going unpaid to some extent. *Georgia Cas. & Sur. Co. v. Woodcraft by MacDonald, Inc.*, 726 S.E.2d 793 (Ga. App. 2012).

## HAWAII

Hawaii requires that an insured be "made whole" before an UM carrier may require the insurer to reimburse the UM carrier after receiving a tort recovery from an UM or party jointly liable with the uninsured tortfeasor. *AIG Hawaii Ins. Co., Inc. v. Rutledge*, 955 P.2d 1069 (Haw. App. 1998). 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. *State Farm Fire & Cas. Co. v. Pacific Rent-All, Inc.*, 978 P.2d 753 (Haw. 1999).

## IDAHO

There are no reported state court cases in which Idaho adopts the Made Whole Doctrine as it would be applicable to automobile insurance subrogation. The 9<sup>th</sup> Circuit has adopted the Made Whole Doctrine into federal common law as a default rule, but only as to ERISA health insurance subrogation. *Barnes v. Indep. Auto Dealers Ass'n of Cal. H&W Benefit Plan*, 64 F.3d 1389 (9<sup>th</sup> Cir. 1995). The Court in *Barnes* held that, unless the Plan language specifically disclaims the Made Whole Doctrine, a health Plan may not enforce its subrogation rights until the Plan beneficiary has recovered all of his damages and has been made whole.

## ILLINOIS

Illinois does not apply the Made Whole Doctrine as a blanket rule, and it does not recognize the Made Whole Rule the way other states do. *In re Estate of Scott*, 567 N.E.2d 605 (Ill. App. 1991). Illinois recognizes the validity of subrogation clauses in insurance policies and enforces them. *Principal Mut. Life Ins. Co. v. Baron*, 964 F. Supp. 1221 (N.D. Ill. 1997). In Illinois, the effect of a subrogation clause is identical to that of a reimbursement clause. *Id.* Illinois state courts will enforce contractual subrogation rights even if the insured is not fully compensated for all of his or her injuries. *Id.*; *Capitol Indem. Corp. v. Strikezone*, 646 N.E.2d 310 (Ill. App. 1995); *Eddy v. Sybert*, 783 N.E.2d 106 (Ill. App. 2003). However, Illinois still encourages the use of the Made Whole Doctrine in “appropriate circumstances.” *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 terms of subrogation contained in policy specifically provided that insurer was to be subrogated to insured’s right of recovery for loss and, under the Wrongful Death Act, the insured decedent has no right to recover for his own death). 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. *In re Scott*, *supra*. Case law in Illinois indicates that the Made Whole Doctrine can be overridden by contract terms in a policy or Plan. *Hardware Dealers Mut. Fire Ins. Co. v. Ross*, 262 N.E.2d 618 (Ill. 1970). Such a clause in a policy need not be specific, but must be enforceable. *Strikezone*, *supra*; *Eddy v. Sybert*, 783 N.E.2d 106 (Ill. App. 2003).

A new twist on the Made Whole Doctrine was passed by the Illinois Legislature on August 21, 2012 and became effective on January 1, 2013. Effective January 1, 2013, the Health Care Services Lien Act (HCSLA) was amended to add a new § 23/50. 2012 Ill. Legis. Serv. P.A. 97-1042 (H.B. 5823) (Eff. Jan. 1, 2013). This amendment codifies the Made Whole Doctrine in subrogation cases and other reimbursement actions by proportionately reducing such claims by the plaintiff/insured’s comparative fault or by proportionately reducing such claims in the amount in which a claim is deemed to be uncollectible due to limited liability insurance. 770 I.L.C.S. § 23/50.

## INDIANA

Indiana recognizes the Made Whole Doctrine through case law and even applies a version of it by statute. *Capps v. Klegs*, 382 N.E.2d 947 (Ind. Ct. App. 1978); I.C. § 34-51-2-19 (1999). There is Indiana case law to the effect that the Made Whole Doctrine can be overridden by contract terms in a policy or Plan. *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). Generally, the contract terms overriding the Made Whole Doctrine must be “clear, unequivocal and so certain as to admit no doubt on the question.” *Capps*, *supra*. 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. *Id.*; *Willard*, *supra*. It is important to also note that the language of the Plan’s subrogation provision will play a role in determining whether 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 against a third party, this clause establishes the insurer’s right to subrogation against the proceeds of a settlement. *Mut. Hosp. Ins., Inc. v. MacGregor*, 368 N.E.2d 1376 (Ind. App. 1977). The settlement recovered by the beneficiary must also contain the elements of damage, which represent the payments made by the Plan. *Id.*

Indiana also has a Lien Reduction Statute in § 34-51-2-19 which for years has reduced insurance carriers’ subrogation interests among all lines of insurance. I.C. § 34-51-2-19 (1999). Plaintiffs and defendants now use this statute to urge the court to do the following when there is a subrogation interest: (1) determine the full value of the case based on the Movant’s assertion in its Petition; (2) determine the settlement amount; (3) calculate a percentage that the settlement amount bears to the plaintiffs prayer for damages in its Petition; and (4) reduce the subrogation interest by that percentage.

As you can see, by coupling this lien reduction scenario with alleged claims that the plaintiff had to settle for less than he would have liked to because of limited insurance or liability problems, the plaintiff will try to reduce or eliminate your lien. However, the Lien Reduction Statute should only come into play when the worker’s recovery



is reduced because of comparative fault or uncollectibility. *Barclay v. Universal Underwriters*, 703 N.E.2d 169 (Ind. App. 1999); *Allstate Ins. Co. v. Smith*, 656 N.E.2d 1156 (Ind. App. 1995). Where comparative fault is not an issue in the plaintiff's settlement and nothing indicates the plaintiff did not collect the full amount of the settlement upon which he and the tortfeasor had agreed, the Lien Reduction Statute will not apply. *Barclay*, *supra*; *Smith v. Gary Public Transp. Corp.*, 893 N.E.2d 1137 (Ind. App. 2008).

Assuming your subrogation is in the amount of \$10,000 or more, and the third party recovers only \$25,000, it is easy to understand why there is a concerted effort to eliminate the carrier's subrogation interest by all parties involved. The Indiana Lien Reduction Statute, like some similar statutes around the country, is being interpreted as a license to reduce the carrier's \$10,000 lien in the above scenario based on the comparative fault of the claimant. If the case is tried and the jury decides that the plaintiff is 40% at fault, it is argued that the lien should likewise be reduced by 40%. If the case settles and there is no finding by a judge or jury of comparative fault, the matter is submitted to the trial court for determination of exactly what percentage of fault the plaintiff is to bear for the accident. The problem with this is that once the matter has been settled, the plaintiff's main interest would be to show himself as much at fault as possible, in order to reduce or eliminate the subrogation interest. "Falling on the sword" becomes common place in these situations.

Assume that, in the above scenario, the \$25,000 recovery is a recovery of policy limits from the third-party tortfeasor, despite the fact that the claim has a value of \$100,000. Under this scenario, all parties will argue that your lien should be reduced by 75% because the plaintiff's claim was reduced by 75%. Again, the trial court will be called upon to determine the actual value of the claim in order to decide how much the lien should be reduced. Unfortunately, there is not much Indiana case law or case law anywhere throughout the country, interpreting these relatively new statutes and their effect on subrogation interests. Parties even attempt to argue that the "uncollectability of the full value of the claim" language also means that in addition to reducing your subrogation interest for comparative fault, the lien should be reduced further based on the fact that the plaintiff had to "settle for less" than he would have liked.

It is the exception rather than the rule for a state to apply these Lien Reduction Statutes to workers' compensation scenarios. Your best line of defense is active and aggressive participation in third-party litigation and zealous representation of your subrogation interests therein. Usually, proceedings to reduce a subrogation lien often take the form of a declaratory judgment action, but they can also be litigated through motions ancillary to the underlying lawsuit. *Principal Life Ins. Co. v. Meedler*, 816 N.E.2d 499 (Ind. App. 2004); *Guardianship of Wade*, 711 N.E.2d 851 (Ind. App. 1999) (trial court can rule based on motion to reduce lien).

It should also be noted that the Lien Reduction Statute is found in Indiana's Comparative Fault Act. Therefore, when Indiana law is applied to recoveries in other states via their conflict of laws rules, the Lien Reduction Statute doesn't necessarily get applied as well. *Lane v. Celadon Trucking, Inc.*, 543 F.3d 1005 (8<sup>th</sup> Cir. 2007). There is some indication in Indiana that if an insured settles his claim with a tortfeasor and gives a release, he cannot later claim to not be made whole. *Wirth v. American Family Mut. Ins. Co.*, 2011 WL 2150192 (Ind. App. 2011).

## IOWA

Iowa recognizes the Made Whole Doctrine but refers to it as the "Full Recovery Rule". *Continental Western Ins. Co. v. Krebill*, 492 N.W.2d 405 (Iowa 1992). 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. *Brandon v. West Bend Mut. Ins. Co.*, 681 N.W.2d 633 (Iowa 2004). 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. *Allied Mut. Ins. Co. v. Heiken*, 675 N.W.2d 820 (Iowa 2004).

Notwithstanding the above, there has been some ambiguity in Iowa as to the application of the Made Whole Doctrine. In *Iowa American Ins. Co. v. Piphos*, 456 N.W.2d 228 (Iowa App. 1990), 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. Piphos's past medical expenses were approximately \$19,000, of which \$11,778.67 was paid by the health Plan. After trial, a

court assessed Piphos 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 tortfeasors \$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 Piphos for pain and suffering, lost wages, or impairment of future earning capacity. A denial of the health insurers 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 insureds cause of action are not fully satisfied. *Id.* 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. *Id.*

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. *Ludwig v. Farm Bureau Mut. Ins. Co.*, 393 N.W.2d 143 (Iowa 1986). This decision disagrees completely with the *Rimes* decision by the Wisconsin Supreme Court, which has been the paradigm of made whole issues in so many states. *Rimes v. State Farm Mutual Auto. Ins. Co.*, 316 N.W.2d 348 (Wis. 1982). 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. *Ludwig*, *supra*; *Kapadia v. Preferred Risk Mut. Ins. Co.*, 418 N.W.2d 848 (Iowa 1988) (citing 73 Am. Jur.2d *Subrogation* § 2 at 599 (1974)).

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 insureds recovery from a third party and the insurance companys 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. *Ludwig*, *supra*.

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*, 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. *Id.* 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 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 *Ludwig* holding is consistent with policy language, the court didnt accord it any weight in its analysis. Rather, it relied on the fact that the insureds medical expenses, lost wages, hired help expense 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 the insurer had paid for was subject to the latter's subrogation claim, regardless of whether the insured had been compensated for all damages. According to the court, any other rule would make insurers indemnitors of losses not covered in the policy and operate as a windfall to the insured who hadnt paid for such

coverage. While the settlement attributed a specific amount to medical expenses, the court noted if the amount attributed to the subrogated claim cannot be determined by other means, a mini-trial may 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. Kan. Admin. Regs. § 40-1-20 (1987). 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. *Gillespie v. Seymour*, 823 P.2d 782 (Kan. 1991).

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. *Shawnee Fire Ins. Co. v. Cosgrove*, 116 P. 819 (Kan. 1911). 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. *Unified School District No. 259 v. Sloan*, 871 P.2d 861, 865 (Kan. 1994).

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 own terms. *Alves v. Silverado Foods, Inc.*, 6 Fed. Appx. 694 (10<sup>th</sup> Cir. 2001). There is authority in Kansas to the effect that the Made Whole Doctrine can be overridden by contract terms in a Plan or policy. *Unified School Dist. No. 259 v. Sloan*, 871 P.2d 861, 865 (Kan. 1994).

## KENTUCKY

Kentucky does not differentiate between equitable subrogation and contractual subrogation with regard to the application of equity. *Wine v. Globe American Cas. Co.*, 917 S.W.2d 558 (Ky. 1996). 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. *Id.* However, the Made Whole Doctrine will not apply if disclaimed by either statutory law or the language of the contract. *Id.* 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. *Id.* 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. *Id.*

The Kentucky Supreme Court has held that subrogation rights may be modified by contract only if violence is not done to established equitable principles. *Id.* 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. *Id.*

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. *Id.* 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. *Id.*

With regard to no-fault subrogation, if the tortfeasor's liability limits are exhausted, the no-fault lien is automatically extinguished because the injured insured is given priority of recovery over the no-fault carrier. K.R.S. § 304.39-070(4) read together with K.R.S. § 304.39-140(3); *State Auto Mut. Ins. Co. v. Empire Fire & Marine Ins. Co.*, 808 S.W.2d 805 (Ky. 1991); *Fireman's Fund v. Geico*, 635 S.W.2d 475 (Ky. 1982). On the other hand, if there are liability limits sufficient to satisfy both the insured's judgment against the tortfeasor and the subrogation interest of the no-fault automobile carrier, the no-fault automobile carrier is entitled to be reimbursed in full, and the reimbursement is not to be prorated between the carrier and the injured plaintiff. *Shelter Mut. Ins. Co. v. McCarthy*, 896 S.W.2d 17 (Ky. App. 1995).

## LOUISIANA

Louisiana refers to the Made Whole Doctrine as the "Full Compensation Rule" and requires an insured to be fully compensated before an insurer/Plan may exercise its subrogation rights. *Southern Farm Bureau Cas. Ins. Co. v. Sonnier*, 406 So.2d 178 (La. 1981); *Carter v. Bordelon*, 370 So.2d 113 (La. App. 1979). Unlike a majority of states, Louisiana does place the burden of proving full compensation on the insured/Plan beneficiary, as opposed to requiring the Plan/insurer to prove it. *Wallace v. Aetna Life & Cas. Ins. Co.*, 499 So.2d 577 (La. App. 1986).

The Louisiana Court of Appeals has indicated that the Made Whole Doctrine is considered a rule of interpretation or gap filler which becomes significant only when a contract or Plan fails to clearly address the issue. *Nat'l Emp. Benefit Trust of the Associated Gen. Contractors of Am. v. Sullivan*, 940 F. Supp. 956 (W.D. La. 1996); *Roberts v. Richard*, 743 So.2d 731 (La. App. 1999). 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. *Sonnier*, *supra*; *Brister v. Blue Cross and Blue Shield of Fla., 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."). However, in *American Postal Workers Union v. Tippitt*, 82 So.3d 379 (La. App. 2011), the Court of Appeals ruled that when a beneficiary/insured settles a case with knowledge of his obligation to reimburse the Plan, he cannot claim he wasn't made whole.

## 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. Me. Rev. Stat. Ann. Tit. 24-A, § 2836 (1976). 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. *Wescott v. Allstate Ins. Co.*, 397 A.2d 156 (Me. 1979).

## MARYLAND

Not only does Maryland not adopt the Made Whole Doctrine, it specifically disclaims it. *Stancil v. Erie Ins. Co.*, 740 A.2d 46 (Md. App. 1999). 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. *Id.* 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. *Id.* 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. *Id.* It should be noted that while the court's decision in *Stancil* is favorable and makes subrogation sense, the 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. Id. at 48.*

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. *Id.* 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. Frost v. Porter Leasing Corp., 436 N.E.2d 387 (Mass. 1982); 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).*

However, at least one Massachusetts case does appear to hold that without evidence of duplicative recovery by the insured as a result of the specific elements of damages recovered in a third-party case, a carrier will not be allowed to subrogate. *Blue Cross & Blue Shield of Mass., Inc. v. Trull*, 1995 WL 419946 (Mass. Super. 1995); *Frost*, supra. Thus, it is important for subrogated carriers to see to it that recoveries are allocated among the various elements of damages being recovered. While not specifically adopting the Made Whole Doctrine, *per se*, this case does state that subrogation clauses are void to the extent they allow the insurer to recover benefits paid where the insured has not been fully compensated. *Id.*

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. *Harris v. Harvard Pilgrim Healthcare, Inc.*, 208 F.3d 274 (1<sup>st</sup> Cir. 2000). In Massachusetts, the Made Whole Doctrine is merely considered a "gap filler" which comes into play when contracts fail to address the issue clearly and, which, of course, the insured may sign away the right to be made whole. *Rogers Street L.L.C.*, supra; 4 Richard H. Long, *The Law of Liability Insurance*, § 23.02(2)(a) (2004).

## 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. *Washtenaw Mut. Fire Ins. Co. v. Budd*, 175 N.W. 231 (Mich. 1919). This



decision 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 of the value of the loss. *Id.*

There doesn't 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.*, 245 N.W. 563 (Mich. 1932), the Michigan Supreme Court considered a purely equitable subrogation case, and didn't make any mention of a contractual right of subrogation, or 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. *Id.*; *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's fees).

## MINNESOTA

The general rule in Minnesota is that subrogation may be denied unless the insured is made whole. *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). Minnesota employs the Made Whole Doctrine, but they refer to it as the “Full Recovery Rule.” *Id.* Unfortunately, Minnesota applies the Full Recovery Rule regardless of whether or not the subrogation rights at issue arise from equity or contract. *Id.*; *Medica, Inc. v. Atlantic Mut. Ins. Co.*, 566 N.W.2d 74, 77 (Minn. 1997); *Hershey*, supra. However, a case appears to open the door to avoiding the Full Recovery Rule where the Plan's expressed terms provide to the contrary. *Id.*; *Medica, Inc.*, supra. 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.*”

They expressly refuse to follow those cases that a subrogation clause *ipso facto* authorizes first priority recovery by the insurer. *Id.* 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. *Medica, Inc.*, supra; *Westendorf*, supra. 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.*” *Westendorf*, supra. 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. *Maday v. Yellow Taxi Co.*, 311 N.W.2d 849 (Minn. 1981); *Preferred Risk Mut. Ins. Co v. Pagel*, 439 N.W.2d 755 (Minn. App. 1989). 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. *MedCenters Health Care v. Ochs*, 26 F.3d 865 (8<sup>th</sup> Cir. 1994).

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. *Westendorf*, supra.

## MISSISSIPPI

The Made Whole Doctrine is the general principle that an insurer is not entitled to equitable subrogation until the insured has been fully compensated. *Hare v. State*, 733 So.2d 277 (Miss. 1999). In *Hare*, the court adopted the “Made Whole” Rule and held that: “*It is not to be overridden by contract language, because the intent of subrogation is to prevent a double recovery by the insured, especially here as expressly stated in the State Health Plan. Until the insured has been fully compensated, there cannot be a double recovery. Otherwise, to allow the literal language of an insurance contract to destroy an insured's equitable right to subrogation 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."* *United Services Auto. Ass'n v. Stewart*, 919 So.2d 24 (Miss. 2005).

The Made Whole Doctrine requires that a plaintiff be made whole, and to recover all his damages before an insurer is allowed to enforce its contractual right to subrogation. *Federated Mut. Ins. Co. v. McNeal*, 943 So.2d 658 (Miss. 2006). 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. *Hare, supra*. Therefore, an insurer will not be able to subrogate until its insured has been made whole. *Id.*

When the insured's damages have been determined by a jury in the underlying tort case, the jury's assessment of damages determines the amount of damages recoverable by the insured, and the insured is both made whole as a matter of law and collaterally estopped from arguing that he has not been made whole. *Armstrong v. Mississippi Farm Bureau Cas. Ins. Co.*, 2011 WL 71453 (Miss. App. 2011). The Made Whole Doctrine does not apply to UM/UIM subrogation. *Stewart, supra*.

The Mississippi Supreme Court has issued an opinion in a case involving an ERISA-covered Plan. *Yerby v. United Healthcare Ins. Co.*, 846 So.2d 179 (Miss. 2002). In that case, Mississippi again confirmed that the Made Whole Doctrine was adopted by Mississippi in the *Hare* case, even though that case dealt with a state-sponsored insurance Plan and not one operating under the constraints of ERISA. *Id.* Unlike some states, Mississippi does not allow the terms of a contract to nullify the Made Whole Doctrine. *Hare, supra*.

The Mississippi Supreme Court has adopted the Made Whole Doctrine 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. *Id.* 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."

## MISSOURI

No Missouri state court has directly addressed the respective rights, as between an insurer and its insured, as to a third-party recovery, in the context of a conventional subrogation dispute. There is virtually no Missouri law on the Made Whole Doctrine. In addition, Missouri courts expressly distinguish between contractual subrogation and equitable subrogation and have held that equitable principles (such as the Made Whole Doctrine) simply do not apply to contractual subrogation rights. *Aetna Cas. & Sur. Co. v. Lindell Trust Co.*, 348 S.W.2d 558 (Mo. App. 1961); *Messner v. Am. Union Ins. Co.*, 119 S.W.3d 642 (Mo. App. 2003). However, in *St. Louis Federal Savings & Loan Ass'n v. Fidelity and Deposit Company of Maryland*, 654 F.Supp. 314 (E.D. 1987), the court specifically rejected the Made Whole Doctrine in the context of a surety bond, although it did not refer to the doctrine by name. That court stated:

*The Association has cited no authority, however, indicating that under Missouri law the insured's release of the tortfeasor does not impair the insurer's right of subrogation unless the insured has been fully reimbursed for his loss. This Court does not believe that Missouri law would support such a result, and the Association's argument on this point must thus be rejected.*

Some have cited the 2002 Missouri Supreme Court decision in *Keisker v. Farmer*, 90 S.W.3d 71 (Mo. 2002) for the proposition that an insured may keep any subrogation recovery which does not unjustly enrich the insured, and that the insurer cannot recover subrogation proceeds for the amount of its payment where the insured had uninsured damages. Neither is true. The court in *Keisker* merely found that the insurer could not obtain subrogation proceeds over and above the amount of its insurance payment for its insured's lost business income by asserting unjust enrichment.

Missouri case law also seemingly contradicts the "Made Whole" Doctrine by holding that an insured can assign an entire cause of action to an insurer even if the insured has recovered less than the full amount of the loss. *Steele*

*v. Goosen*, 329 S.W.2d 703 (Mo. 1959); *Ewing v. Pugh*, 420 S.W.2d 14 (Mo. App. 1967); *Gen. Exch. Ins. Corp. v. Young*, 212 S.W.2d 396 (Mo. 1948); *Hoorman v. White*, 349 S.W.2d 379 (Mo. App. 1961).

## MONTANA

Montana remains one of the toughest states to subrogate in as a result of its strict made whole policy. It's the public policy in Montana that an insured must be totally reimbursed for all losses as well as costs, including attorney's fees involved in recovering those losses, before the insurer can exercise any right of subrogation, regardless of contract language to the contrary. *Ferguson v. Safeco Ins. Co. of Am.*, 180 P.3d 1164 (Mont. 2008); *Swanson v. Hartford Ins. Co. of Midwest*, 46 P.3d 584 (Mont. 2002); *Skauge v. Mountain States Tel. & Tel. Co.*, 565 P.2d 628 (Mont. 1977); Mont. Code Ann. § 33-23-203(2) (1997) (held unconstitutional to the extent that it allowed auto insurer to charge premiums for non-existent UIM coverage); *Hardy v. Progressive Specialty Ins. Co.*, 67 P.3d 892 (Mont. 2003); *Oberson v. Federated Mut. Ins. Co.*, 126 P.3d 459 (Mont. 2005); *Blue Cross & Blue Shield of Montana, Inc. v. Montana State Auditor*, 218 P.3d 475 (Mont. 2009). In fact, courts have held that an insurer may not collect subrogation without first determining that its insurer has been made whole. *Ferguson*, supra. 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." *Skauge*, 565 P.2d at 632; Mont. Code Ann. § 33-30-1102(4) (1987).

The Made Whole Doctrine, as established in *Skauge* 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 attorney's fees and costs of litigation. When the sum recovered by the insured from the tortfeasor is less than the total loss sustained by the insured, and thus either the insured or 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. *Swanson*, supra.

Montana courts have even ruled that an insurer is precluded from bringing a subrogation action when the insured has independently negotiated a settlement agreement with a tortfeasor for less than the insured's total loss. *Id.* In *Swanson*, the court ruled that the subrogated insurer had no subrogation rights, even though the third-party liability insurance limits exceeded the amount of the settlement reached between the insured and third party. Unfortunately, this ruling allows an insured to negotiate a settlement with a tortfeasor without regard to the carrier's subrogation rights. By agreeing to settle for an amount less than the total amount of damages sustained by the insured, the tortfeasor insulates itself from further subrogation liability. *Id.*

Montana is an anti-subrogation state with regard to Med Pay benefits made under an auto insurance policy. *Youngblood v. American States Ins. Co.*, 866 P.2d 203 (Mont. 1993). The Montana Supreme Court has 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. *Ferguson*, supra; *Poppleton v. United Services Automobile Ass'n*, 2011 Mont. Dist. LEXIS 52 (18<sup>th</sup> Dist. 2011). In that case, Ferguson was in an auto 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 class action suit was pending as of the date of this publication. A health service corporation's right of subrogation may not be enforced until the injured party has been made whole. Mont. Code Ann. § 33-30-1102 (1987). As seen, this includes only non-profit corporations and would not include a traditional health insurer.

## NEBRASKA

Nebraska adheres to the Made Whole Doctrine and believes that where an insurer seeks subrogation and the insurer has not been made whole, equitable principles necessitate disallowing the insurer to assert subrogation rights. *BlueCross & BlueShield of Neb., Inc. v. Dailey*, 687 N.W.2d 689 (Neb. 2004). In general, 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. *Id.* 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. *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). 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. *Bartunek, supra*; *Shelter Ins. Co. v. Frohlich*, 498 N.W.2d 74 (Neb. 1993).

In *Frohlich*, 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. *Frohlich, supra*. 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. 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. *Id.* 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 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 Doctrine, 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 *Dailey*, the Supreme Court of Nebraska recommitted itself to the common law Made Whole Doctrine by overruling *Frohlich* to the extent that it could be construed to permit conventional subrogation when the insured has not been fully compensated. *Dailey, supra*. In other words, the court in *Dailey* made it clear that the parties may not contract out of the Made Whole Doctrine.

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. *Frohlich, supra*. 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. *Bartunek, supra*; *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 auto liability insurance policy constitutes complete recovery of actual economic loss to be constitutional).

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 auto 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. *Pleon, supra*. 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." *Daily, supra*. 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.

## 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. *Trustee of Hosp. Employees & Restaurant Employees Int'l Union Welfare Fund v. Kirby*, 890 F. Supp. 939 (D. Nev. 1995). 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. *Canfora v. Coast Hotels and Casinos, Inc.*, 121 P.3d 599 (Nev. 2005). 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. *Id.*

## 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. *Dimick v. Lewis*, 497 A.2d 1221 (N.H. 1985). 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. *BlueCross & BlueShield of New Hampshire-Vermont v. St. Cyr*, 459 A.2d 226 (N.H. 1983). 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. *Dimick, supra*. 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. *Roy v. Ducmuigeem*, 532 A.2d 1388 (N.H. 1987). Such a settlement within policy limits is presumed to cover the insured's medical expenses. *Id.*

## NEW JERSEY

New Jersey has adopted the Made Whole Doctrine. *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). An insurer who is entitled to subrogate may not do so if the insured has not been made whole. *Werner v. Latham*, 752 A.2d 832 (N.J. Super. 2000). New Jersey adheres to the Made Whole Doctrine with regard to automobile insurance subrogation, even though direct automobile insurance medical subrogation is not allowed, and health insurance subrogation, even though health insurance subrogation is not allowed. 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. *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). 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. Hogges, supra.*

The Made Whole Doctrine should not take precedence over UM/UIM subrogation rights. *Nikiper v. Motor Club of America Co.*, 557 A.2d 332 (N.J. Super. 1989). The Made Whole Doctrine also should not affect PIP recovery rights, but because such rights are limited to the third-party liability policy limits, there is often a race to recover these policy limits. *Fernandez v. Nationwide Mut. Fire Ins. Co.*, 821 A.2d 564 (N.J. Super. 2008).

The New Jersey Supreme Court has observed that the Made Whole Doctrine applies to contractual as well as equitable subrogation. *Culver, supra*. An insurer may not avoid application of Made 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. *Werner, supra*.

## NEW MEXICO

New Mexico, while not adopting the traditional Made Whole Doctrine as most other states, 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. *Amica Mut. Ins. Co. v. Maloney*, 903 P.2d 834 (N.M. 1995). However, New Mexico has enacted something referred to as the “Doctrine of Equitable Apportionment.” *Id.* 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. *Id.*

## NEW YORK

New York has applied and adheres to the existence of the Made Whole Doctrine. *Winkelmann 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). 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. *Id.* Where there are multiple plaintiffs, each insurer needs only to establish that its individual insured has been made whole before subrogation is allowed. *Maggiore, supra*. 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. *Id.*

The court in *Winkelmann* 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.” *Maggiore, supra*, (quoting 16 *Couch, Insurance 3d*, § 223:136, at 152-153).

## 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.*, 198 S.E.2d 482 N.C. App. 1973). 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 ...” Id. at 485 (citing *Powell & Powell v. Wake Water Co*, 88 S.E.2d 426 (N.C. 1916)).*

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 Supply Co.* 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. *W. P. Rose Supply Co.*, supra; 11 N.C.A.C. § 12.0319 (prohibiting subrogation clause in life, accident and health insurance policies).

## 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.

## OHIO

Ohio courts enforce the Made Whole Doctrine. *Huron County Bd. of Comm'rs v. Sounders*, 775 N.E.2d 892 (Ohio App. 2002). An insurer's subrogation interest will not be given priority where doing so will result in less than a full recovery to the insured. *Porter v. Tabern*, 1999 WL 812357 (Ohio App. 1999) (*unreported decision*). However, the Made Whole Doctrine in Ohio may be disclaimed by the policy or Plan language. *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). 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. *Ervin v. Garner*, 267 N.E.2d 769 (Ohio 1971). 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.*" *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*).

In *Peterson v. Ohio Farmers Ins. Co.*, 191 N.E.2d 157 (Ohio 1963), 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 held 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 Mut. of Ohio v. Hrenko*, 647 N.E.2d 1358 (Ohio 1995). 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 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. *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); *Central Reserve Life Ins. Co. v. Hartzell*, No. 94AP120094, 1995 Ohio App. LEXIS 6027, at \*5 (Ohio Ct. App. 1995).

The Court explained the critical nature of the requirement that the insured be made whole before the insurer can assert its subrogation right in *Hartzell*. *Hartzell*, 1995 Ohio App. LEXIS 6027, at \*7. In *Hartzell*, 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. *Wilson v. Sanson*, 2006 WL 3446213 (Ohio App. 2006). 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.” *Lawson*, *supra*. 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. *Id.* 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. R.C. §3937.18(J). 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.”*

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. *Copeland Oaks v. Haupt*, 209 F.3d 811 (6<sup>th</sup> Cir. 2000). 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. *Hiney Printing Co. v. Brantner*, 243 F.3d 956 (6<sup>th</sup> Cir. 2001). 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. *Risner v. Erie Ins. Co.*, 633 N.E.2d 588 (Ohio App. 1993). 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. *Aetna Life Ins. Co. v. Martinez*, 454 N.E.2d 1338 (Ohio App. 1982). In addition, if the insured has interfered with the insurer’s subrogation rights,

then the “Make Whole” Doctrine does not apply. *Acuff v. Motorists Mut. Ins. Co.*, 2007 WL 661561 (Ohio App. 2007).

The Ohio Supreme Court has clearly indicated that clear and unambiguous language allows subrogation even where the insured is not fully compensated. *Lawson, supra*.

## OKLAHOMA

Oklahoma first considered application of the Made Whole Doctrine in 1996 and with regard to an ERISA Plan. *Equity Fire & Cas. Co. v. Youngblood*, 927 P.2d 572 (Okla. 1996). 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. *Id; Reeds v. Walker*, 2006 WL 1686739 (Okla. 2006).

In 2000, an Oklahoma Court of Appeals applied the Made Whole Doctrine for the first time to a non-ERISA Plan. *American Medical Sec. v. Josephson*, 15 P.3d 976 (Okla. Civ. App. 2000). 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. *Id*. The court did give some wiggle room, however, and implied that if there was a “priority-of-payment provision,” the result might be different. *Id*.

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

Unlike the case in Georgia (*Thompson v. Fed. Express Corp.*, 809 F. Supp. 950 (M.D. Ga. 1993), 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. *Id*. A settlement in Oklahoma does not necessarily represent an injured party’s actual or total compensatory damages. *Price v. Southwestern Bell Tel. Co.*, 812 P.2d 1355 (Okla. 1991). 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. *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). The Oklahoma Supreme Court indicated in *Reeds* 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.*

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. *Reeds, supra*.

Addressing the enforceability of subrogation provisions in an ERISA claim context, the Oklahoma Supreme Court held if the plan doesn’t specifically provide that the insurer is entitled to priority of payment, doesn’t expressly give its managers the right to resolve ambiguities, and the facts do not clearly show the beneficiary’s settlement included reimbursement for medical expenses, the plan won’t be allowed to recover unless the insured is made whole. *Equity Fire and Cas. Co. v. Youngblood*, 927 P.2d 572 (Okla. 1996); *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).

## 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. *Koch v. Spann*, 92 P.3d 146 (Or. App. 2004). 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 before an insurer may proceed with subrogation. *Id.* Until they specifically adopt the Made Whole Doctrine, however, you should maintain that such a Doctrine does not exist under Oregon law.

With regard to PIP subrogation and reimbursement in Oregon, O.R.S. § 742.544 (1993) 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 O.R.S. § 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 O.R.S. § 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.*

## PENNSYLVANIA

Pennsylvania recognizes and applies the Made Whole Doctrine, although not very aggressively. *Nationwide Mut. Ins. Co. v. DiTomo*, 478 A.2d 1381 (Pa. Super. 1984). The Doctrine states that an insurer cannot enforce its right to subrogate an insured's recovery from a third party unless that recovery is for the full amount of an insured's damages. Accordingly, an insurer is generally not entitled to exercise a right to subrogation until its insured has been fully compensated for the insured's injuries. *Lexington Ins. Co. v. Q-E Mfg. Co., Inc.*, 2006 WL 2136244 (M.D. Pa. 2006) (*unreported decision*). However, there do not appear to be many cases which apply the Made Whole Doctrine to health insurance subrogation cases. *Watson v. Allstate Ins. Co.*, 28 F.2d 942 (M.D. Pa. 1998); *DiTomo, supra*.

UM subrogation is allowed only upon the insurer's showing that the sum of the insured's recovery from the insurer and from persons legally responsible for the injury exceeds the insured's loss. *Id.* The insurance policy may not renounce the right of the insured to be made whole. *DeSantis v. American Mut. Liability Ins. Co.*, 53 Pa. D & C.2d 595 (Pa. 1969).

The Made Whole Doctrine in Pennsylvania is an equitable doctrine. *DiTomo, supra*; *Watson, supra*. When a subrogation claim arises out of a contract, equitable principles continue to apply. *Valora v. Pennsylvania Employee's Benefit Trust Fund*, 939 A.2d 312 (Pa. S. Ct. 2007). However, if an insured settles his claim with the third party he is made whole as a matter of law. *Associated Hosp. Service of Philadelphia v. Pustilnik*, 396 A.2d 1332 (1979), *vacated on other grounds*, 439 A.2d 1149 (Pa. 1981). 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. *Illinois Auto Ins. Co. v. Braun*, 421 A.2d 1074 (Pa. 1982).



In Pennsylvania, an insurer's subrogation rights are not superior to the insured's rights because subrogation does not arise until the insured has been made whole. *DiTomo*, supra. This rule of law has been sporadically applied by Pennsylvania courts to both equitable and contractual subrogation. *Gallop v. Rose*, 616 A.2d 1027 (Pa. Super. Ct. 1992). The Made Whole Doctrine is also applicable to statutory subrogation disputes in the absence of a legislative intent to displace the rule. *City of Meadville v. Workers' Comp. Appeal Bd.*, 810 A.2d 703, 706 (Pa. Commw. Ct. 2001). 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. *Nationwide Mut. Ins. Co. v. Butler*, 28 Pa. D. & C.3d 627, 630 (Pa. Com. Pl. 1983). 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. *Nationwide Mut. Ins. Co. v. Kintz*, 27 Pa. D. & C.3d 164 (Pa. Com. Pl. 1983); *Pustilnik*, supra.

## RHODE ISLAND

The Made Whole Doctrine was first applied in Rhode Island in 1981 in the context of auto insurers' claims for a share in the proceeds of a safety responsibility bond obtained by the uninsured motorist tortfeasor. *Lombardi v. Merchants Mut. Ins. Co.*, 429 A.2d 1290 (R.I. 1981); *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). In *Lombardi*, 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*. 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. Lombardi, supra.*

Although the Supreme Court in *Lombardi* applied the Made Whole Doctrine and rejected the auto 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 whole debt or it is otherwise satisfied. *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.)). 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 where the insured has not recovered the amount of his/her actual loss. *DiTata v. Aetna Cas. and Sur. Co.*, 542 A.2d 245 (R.I. 1988).

## 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 S.C. St. § 38-71-190. 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.*” *Id.* 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. This statute also contains a catch all that if the director, 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. S.C. St. § 38-71-190. Director is 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.*” 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, South Carolina doesn’t 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. *Westfield Ins. Co., Inc. v. Rowe*, 631 N.W.2d 175 (S.D. 2001). 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. *Id.* In *Rowe*, the Supreme Court noted 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. *Westfield, supra*. Therefore, it appears that South Dakota meekly applies the Made Whole Doctrine, but it can be overcome by simple subrogation policy language which does not require application of the Made Whole Doctrine. *Id.*; *Julson v. Federated Mut. Ins. Co.*, 562 N.W.2d 117 (S.D. 1997).

In *Julson*, a property insurer paid property damages to its insured and then settled a subrogation suit with the tortfeasor without the insured having been made whole. *Julson, supra*. 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.

A property insurer which pays policy limits does not act in bad faith by pursuing and settling its subrogation action against the tortfeasor, even though the insurer reaches its settlement before the insured is made whole. *Id.* In *Julson*, the carrier notified the insured of its intention to settle and provided for the insured’s ability to seek damages from the tortfeasors, and nothing indicated that the insurer consciously disregarded the insured’s rights under the policy. *Id.*

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 adheres and subscribes to the Made Whole Doctrine. *Wimberly v. American 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). An insurer’s contractual right to subrogation and reimbursement are both subject to the Made Whole Doctrine. *York, supra*. 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.” *Id.* 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. *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). 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. *Doss v. Tenn. Farmers Mut. Ins. Co.*, No. M2000-01971-COA-R3-CV, 2001 Tenn. App. LEXIS 906, at \*10-11 (Dec. 10, 2001).

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. *Hamrick’s, Inc. v. Roy*, 115 S.W.3d 468 (Tenn. App. 2002); *Nelson v. Innovative Recovery Services, Inc.*, 2001 WL 1480515 (Tenn. App. 2001) (*unreported decision*); *Abbott*, *supra*. 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. *Healthcost Controls, Inc. v. Gifford*, 108 S.W.3d 227 (Tenn. 2003). This is true regardless of the language in the insurance policy. *Id.*; *Blount*, *supra*. It is also true regardless of whether the insurer is asserting a right of subrogation or a right of reimbursement. *Simpson v. Doe*, 2006 WL 1627292 (Tenn. App. 2006). Whether an insured has been made whole is a matter of fact, upon which the insured has the burden of proof. *Gifford*, *supra*. 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. *Id.* 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. *Wimberly*, *supra.*; *Farmer*, *supra*. In the absence of a judgment or jury verdict establishing a 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. *Farmer*, *supra*. Ordinarily, the injured party may make such determination by settlement. Failing that, it may be made by the jury or by the judge. *Id.* In extraordinary circumstances, equity may intervene and make such a determination. *Id.*

In the absence of a judgment or jury verdict establishing a 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. *Id.* Ordinarily, the injured party may make such determination by settlement. Failing that, it may be made by the jury or by the judge. *Id.* In extraordinary circumstances, equity may intervene and make such a determination. *Id.*

The Made Whole Doctrine applies in both legal and conventional subrogation or reimbursement disputes between insurers and their insureds. *Gifford*, *supra.*; *York*, *supra.*; *Wimberly*, *supra*. 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. *Blankenship v. Estate of Joshua*, 5 S.W.3d 647, 651 (Tenn. 1999); *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). Under 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.” *Blankenship*, *supra*. This

method is based on the idea “that subrogation is founded upon principles of equity and ‘not dependent upon statute or custom or ... contract.’” *Wimberly*, supra. 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. *Castleman*, supra; *Graves*, supra.

In *Abbott*, the Tennessee Supreme Court determined that insurers may not bind the insured’s 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.” *Abbott*, supra.

## TEXAS

In *Ortiz v. Great Southern Fire & Cas. Ins. Co.*, 597 S.W.2d 342 (Tex.1980), 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. *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.*, 2008 WL 1753553 (Tex. Civ. App. – Austin, 2008). 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. *Osborne*, supra. 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. *Veazey v. Allstate Texas Lloyds*, 2007 WL 29239 (N.D. Tex. 2007). 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. *Ortiz*, supra. 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. *Id.* Because the record in *Ortiz* did not reflect how much 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 Mut. Ins. Co.*, 253 N.W.2d at 514 (Wis. 1977), which says that an insurer may not subrogate at all if the insured is not made whole for all of its losses. *Veazey*, supra. 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. *Id.* 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. *Id.* 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. *Phillips Petroleum Co. v. Brantley*, 2003 WL 22923413 (Tex. App. - El Paso 2003) (*unreported decision*). On the other hand, in *Veazey*, 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. *Veazey*, supra. 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*, the Texas Supreme Court specifically and forcefully acknowledged that the Made Whole Doctrine does not apply to contractual subrogation claims. *Fortis Benefits*, supra. Effectively overruling *Esparza*, 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. *Esparza*, supra. 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.*" *Fortis Benefits*, supra.

The Texas Supreme Court cited the U.S. Supreme Court decision in *Sereboff* as standing for the proposition that the equitable Made Whole Doctrine should not apply when the Plan specifies to the contrary. *Sereboff*, supra. 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.'*" *Fortis Benefits*, supra.

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. *Rosa's Café, Inc., v. Wilkerson*, 183 S.W.3d 483, 488 (Tex. App. - Eastland 2005, *no pet.*). 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. *State Farm Mut. Auto Ins. Co. v. Perkins*, 2006 Tex. App. Lexis 6030 (Tex. App. - Eastland, 2006).

Not long after *Fortis Benefits*, the Texas Legislature passed a law which made several changes to health insurance subrogation and which was touted as a "legislative compromise" between the *Fortis Benefits* case and the Made Whole Doctrine. 2013 Texas Senate Bill No. 1339, Texas Eighty-Third Legislature, 2013 Texas Senate Bill No. 1339, Texas Eighty-Third Legislature. This bill created a new Chapter 140 in the Texas Civil Practice and Remedies Code. Section 140.004 changes the effect of *Fortis Benefits* by confirming that a policy or plan may still contractually provide for rights of subrogation and reimbursement. However, new § 140.005 creates a formula for calculating health subrogation recoveries:

**§ 140.005. PAYORS' RECOVERY LIMITED.**

*(a) If an injured covered individual is entitled by law to seek a recovery from the third-party tortfeasor for benefits paid or provided by a subrogee as described by Section 140.004, then all payors are entitled to recover as provided by Subsection (b) or (c).*



(b) This subsection applies when a covered individual is not represented by an attorney in obtaining a recovery. All payors' share under Subsection (a) of a covered individual's recovery is an amount that is equal to the lesser of:

(1) One-half (1/2) of the covered individual's gross recovery; or

(2) The total cost of benefits paid, provided, or assumed by the payor as a direct result of the tortious conduct of the third party.

(c) This subsection applies when a covered individual is represented by an attorney in obtaining a recovery. All payors' share under Subsection (a) of a covered individual's recovery is an amount that is equal to the lesser of:

(1) One-half (1/2) of the covered individual's gross recovery less attorney's fees and procurement costs as provided by Section 140.007; or

(2) The total cost of benefits paid, provided, or assumed by the payor as a direct result of the tortious conduct of the third party less attorney's fees and procurement costs as provided by Section 140.007.

(d) A common law doctrine that requires an injured party to be made whole before a subrogee makes a recovery does not apply to the recovery of a payor under this section.

The key to effective and complete subrogation under this new statute is now whether or not the subrogated carrier/plan engages subrogation counsel to enforce its subrogation rights or merely relies on the plaintiff's attorney to do the heavy lifting. The carrier/plan is now limited to the lesser of half of the gross third-party recovery or the amount of its subrogation interest, whichever is less.

It is important to note that the new Chapter 140 does not destroy the holding in *Fortis Benefits*. The statute was definitely enacted in response to the Supreme Court's decision in that case, but it states that the carrier can still contract for a better subrogation right that existed under the Made Whole Doctrine prior to *Fortis Benefits*. Even after the enactment of the new statute, the carrier needs a good subrogation clause in its policy/plan in order to avoid the harsh effects of the common law Made Whole Doctrine. *Fortis Benefits* still provides guidance on that issue. Also, the new statute applies only to policies/plans providing health benefits, so the *Fortis Benefits* opinion is untouched as to other types of subrogation, most notably property damage claims.

Applicability of New Statute to Med Pay Subrogation. It is likely that the new statute applies to other policies, such as automobile insurance policies which provide Med Pay benefits. This is not clear from the statute, but you can bet your first-born child that it will be argued by trial lawyers to be applied as broadly as possible.

## UTAH

Utah first adopted the Made Whole Doctrine in 1988. *Hill v. State Farm Mut. Auto Ins. Co.*, 765 P.2d 864 (Utah 1988). The Court in *Hill* 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. *State Farm Auto. Ins. Co. v. Green*, 89 P.3d 97, 105 (Utah 2003). 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. *Id.*

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. *Anderson v. United Parcel Serv.*, 96 P.3d 903, 907 (Utah 2004). 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. *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. *Id.* 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. *Id.* 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. *Id.*; *Birch v. Fire Ins. Exch.*, 122 P.3d 696 (Utah App. 2005); *Hill*, *supra*. 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. *Trans American Ins. Co. v. Barnes*, 505 P.2d 783 (Utah 1973).

Generally, the insured must be made whole before the insurer is entitled to be reimbursed from or subrogated to a third-party tortfeasor's recovery. *Lyon v. Hartford Accident & Indem. Co.*, 480 P.2d 739 (Utah 1971). 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. *Barnes*, *supra*.

## 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." *Norfolk & Debbam Fire Ins. Co. v. Aetna Cas. & Sur. Co.*, 318 A.2d 659 (Vt. 1974). 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*, 1998 WL 972277 (Va. Cir. Ct. 1998) (*unpublished opinion*), P.R.C. 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. *Id.* 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. Id.*

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. *Id.* 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 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. *Fields v. Farmers Ins. Co.*, 18 F.3d 831 (10<sup>th</sup> Cir. 1994). 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. *Geraldine Simmons Collins v. BlueCross & BlueShield of Va.*, 193 S.E.2d 782, 784-785 (Va. 1973).

## WASHINGTON

Washington adheres to the Made Whole Doctrine. *Mattson On Behalf of Mattson v. Stone*, 648 P.2d 929 (Wash. App. 1982); *Mahler v. Szucs*, 957 P.2d 632 (Wash. 1998). 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. *Skiles v. Farmers Ins. Co., Inc.*, 814 P.2d 666 (Wash. App. 1991). Known as the *Thiringer Doctrine*, 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. *Thiringer v. American Motorist Co.*, 588 P.2d 191 (Wash. 1978). However, the *Thiringer* case indicates the *Thiringer Doctrine* may be overridden by specific Plan or policy language to the contrary. *Id.* In order to determine if the insured is "made whole":

*The proceeds of the settlement should be applied first toward the payment of the insured's general damages and then, if any excess remained, toward the payment of his special damages covered by the PIP provision. The principle upon which this holding was based was that the insured was entitled to be made whole, and that only after he had made a full recovery for his damages did the insurer's right of subrogation arise.*

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. *Peterson v. Safeco Ins. Co. of Ill.*, 976 P.2d 632 (Wash. App. 1999). 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. *Mahler*, supra. 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." *Leader Nat'l Ins. Co. v. Torres*, 779 P.2d 722, 723 (Wash. 1989). 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: (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. *Torres*, supra. 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. *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). 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.... Homewood, supra.*

The holding in *Thiringer* was also construed by the Court of Appeals in *Fisher* to allow the parties to the contract to modify subrogation standards developed at common law. *Fisher v. Aldi Tire, Inc.*, 902 P.2d 166 (Wash. App. 1995). 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. *Bordeaux, Inc. v. American Safety Ins. Co.*, 186 P.3d 1188 (Wash. App. 2008). 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. *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). 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. *Bush v. Richardson*, 484 S.E.2d 490 (W.Va. 1997). West Virginia has held that parties may contract out of the Made Whole Doctrine in the terms of a policy or Plan. *Id.*; *Kanawha Valley Radiologists, Inc.*, *supra*. When a jury renders a verdict and awards damages, that award represents the amount necessary to make the insured or Plan beneficiary whole. *Bell v. Federal Kemper Ins. Co.*, 693 F. Supp. 446 (S.D. W.Va.1988). It doesn’t matter if the insured values his case more than the jury did, the jury’s finding is binding and the insured is considered to be “made whole.” *Id.* 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. *Id.*

In determining whether an insured or Plan beneficiary has been made whole, the West Virginia court should consider the following factors: (1) ability for the parties to prove liability; (2) comparative fault of the parties involved; (3) complexity of the issue; (4) future medical expenses; (5) nature of the injury; and (6) tortfeasor’s assets beyond third-party insurance coverage. *Provident Life & Acc. Ins. Co. v. Bennett*, 483 S.E.2d 819 (W.Va. 1997).

In *Kittle*, 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. *Kittle*, *supra*. DHS argued that the trial court erred when it applied the common law made whole rule instead of Section 9-5-11 (1990). W.V. Code § 9-5-11 (1990) (grants DHS subrogation rights). 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. *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). 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. *Kanawha Valley Radiologists*, *supra*. 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. *Id.* The Made Whole Doctrine limits operation of subrogation, under general principles of equity, and in the absence of statutory law or valid contractual obligations to the contrary, an insured must be fully compensated for injuries or losses sustained, or “made

whole,” before subrogation rights of an insurance carrier arise. *Porter v. McPherson*, 479 S.E.2d 668 (W.Va. 1996). The equitable principle underlying this rule is that the burden of loss should rest on the party paid to assume the risk, and not on an inadequately compensated insured, which is least able to shoulder loss. *Id.*

## WISCONSIN

The Made Whole Doctrine prevents competition between the injured party and subrogated party, and insurer, when the injured party’s damages exceed a limited pool of funds from which recovery may be had; under the Made Whole Doctrine, the injured party should be the first to tap into the limited pool of funds and recover on any loss, and when someone can not be fully paid, the loss should be borne by the subrogee, the insurer. *Fischer v. Steffen*, 2011 WL 1992003 (Wis. 2011). Wisconsin courts have sometimes referred to the Made Whole Doctrine as the “Anti-Subrogation Rule” or the “*Rimes* Made Whole Doctrine.” *Rimes v. State Farm Mut. Auto. Ins. Co.*, 316 N.W.2d 348 (Wis. 1982). The premise is that subrogation ordinarily does not arise until the underlying debt or loss has been fully paid. 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. *Id.* 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. *Valley Forge Ins. Co. v. Home Mut. Ins. Co.*, 396 N.W.2d 348 (Wis. Ct. App. 1986).

Not only has Wisconsin adopted the Made Whole Doctrine, but it is sometimes considered to be the “mother of all made whole states” because its early decisions on the Made Whole Doctrine and 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. *Garrity v. Rural Mut. Ins. Co.*, 253 N.W.2d 512 (Wis. 1977). The Made Whole Doctrine does not apply in an automobile property damage subrogation case where the insured is pursuing only personal injury damages and the property insurer is not competing with its insured for a limited pool of funds. *Paulson v. Allstate Ins. Co.*, 665 N.W.2d 744 (Wis. 2003).

In *Valley Forge Ins. Co.*, the Court of Appeals held that the insured has one cause of action, which includes both personal injury and property damage claims. It held that where the insured is not made whole for his bodily injury claim out of the tortfeasor’s bodily injury liability limits, the auto carrier cannot subrogate for property damages it paid, and the insured is entitled to the property damage liability limits, even if it means he will be paid twice for his auto collision loss. *Id.* The Court rationalized that as between the subrogated carrier and its insured, “where either the insurer or the insured 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.”

Early case 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. *Mutual Service Cas. Co. v. Am. Family Ins. Group*, 410 N.W.2d 582 (Wis. 1987); *Blue Cross & Blue Shield United of Wis. v. Firemen’s Fund Ins. Co. of Wis.*, 411 N.W.2d 133 (Wis. 1987). More recent decisions, however, have held that a subrogated carrier cannot recover its subrogated amounts when an insured settles with the defendant without involving the subrogated carrier, where the insured requests a *Rimes* hearing, the subrogated carrier has an opportunity to participate, and the court determines that the settlement did not make the insured whole. *Schulte v. Frazin*, 500 N.W.2d 305 (Wis. 1992).

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, 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 totally “made whole.” *Sorge v. National Car Rental Sys., Inc.*, 512 N.W.2d 505 (Wis. 1994); *Ives v. Coopertools*, 559 N.W.2d 571 (Wis. 1997). 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. *Drinkwater v. American Family Mut. Ins. Co.*, 714 N.W.2d 568 (Wis. 2006).



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 L. Wickert argued on behalf of the subrogated insurer. In *Petta v. ABC Ins. Co.*, 672 N.W.2d 146 (Wis. 2005), 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.

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 who reversed the Court of Appeals decision, holding that the Made Whole Doctrine did apply in wrongful death cases. *Id.* 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 Ins.*, 750 N.W.2d 1 (Wis. 2008). *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, 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, assisted and claimed subrogation rights. At mediation, Society reached a tentative settlement with Jerrick and United for \$190,000, conditioned 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* Made Whole 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), it 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 decision, holding that the \$1 million liability policy was “far more than adequate to cover all the claims.” It stated that the Mullers “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 decision, 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. This 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 indicate 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, which 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 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.*” *Id.* 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*.

Wisconsin law states that subrogation rests upon principles of equity. *Id.* The only exception to this rule is legislatively-sanctioned subrogation that overrides subrogation’s equitable foundation. *Petta, supra; Waukesha County v. Johnson*, 320 N.W.2d 1 (Wis. App. 1982). While common law subrogation requires that the insured be made whole, this is apparently not the case with statutory subrogation. Subrogation professionals are urged to argue that both UM/UIM subrogation and Med Pay subrogation are statutory rights of subrogation because they are authorized by § 632.32(4)(c), which provides as follows: “(c) *Unless an insurer waives the right to subrogation, insurers making payment under any of the coverages under this subsection [uninsured motorist, underinsured motorist, and medical payments coverages] shall, to the extent of the payment, be subrogated to the rights of their insureds.*” Wis. Stat. § 632.32(4)(c).

It is true that *Waukesha County v. Johnson* dealt with § 49.65, which provided for statutory subrogation and a lien, and read as follows: “(2) *Subrogation.* The department of health services, the department of children and families, a county, or an elected tribal governing body that provides any public assistance under this chapter or under s. 253.05 as a result of the occurrence of an injury, sickness, or death that creates a claim or cause of action, whether in tort or contract, on the part of a public assistance recipient or beneficiary or the estate of a recipient or beneficiary against a third party, including an insurer, is subrogated to the rights of the recipient, beneficiary or estate and may make a claim or maintain an action or intervene in a claim or action by the recipient, beneficiary, or estate against the third party. Subrogation under this subsection because of the provision of medical assistance under subch. IV constitutes a lien, equal to the amount of the medical assistance provided as a result of the injury, sickness, or death that gave rise to the claim. The lien is on any payment resulting from a judgment or settlement that may be due the obligor. A lien under this subsection continues until it is released and discharged by the department of health services.” Wis. Stat. § 49.89 (renumbered from § 49.65).

Nonetheless, an argument should be made that statutory subrogation is not subject to the Made Whole Doctrine, as there has been no clear expression of intent by Wisconsin courts on this subject. The application of the Collateral Source Rule, subrogation, and the “Made Whole” Doctrine depends heavily upon the facts presented. *Paulson v. Allstate Ins. Co.*, 665 N.W.2d 744 (Wis. 2003).

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

Despite the complete lack of any precedent employing the Made Whole Doctrine in Wyoming, some plaintiff’s lawyers are trying to apply the doctrine by recycling a 1981 letter written by State District Judge Terrence O’Brien (Letter dated August 31, 1981 from Wyoming District Judge Terrence O’Brien to several judges in the pending case of *Blue Cross and Blue Shield v. Rasmussen, et. al.*, Civil No. 11165), which purports to apply the Made Whole Doctrine in an unrecorded case styled *Rasmussen, et. al.*, which involved health insurance benefits provided by Blue Cross and Blue Shield pursuant to a Master Contract between the employee and employer and cited to the Washington Supreme Court opinion of *Thiringer* for the proposition that Blue Cross could not recover its \$12,000 in medical benefits because the third-party carrier had liability limits of only \$25,000 and the insured’s damages were in excess of that amount. *Thiringer v. American Motors Ins. Co.*, 588 P.2d 191 (Wash. 1978) (This case established the Made Whole Doctrine in the State of Washington.) The letter does not even constitute a trial court order and is of no precedential value in Wyoming.

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