



## UNDERSTANDING AND DEFEATING THE MADE WHOLE AND COMMON FUND DOCTRINES





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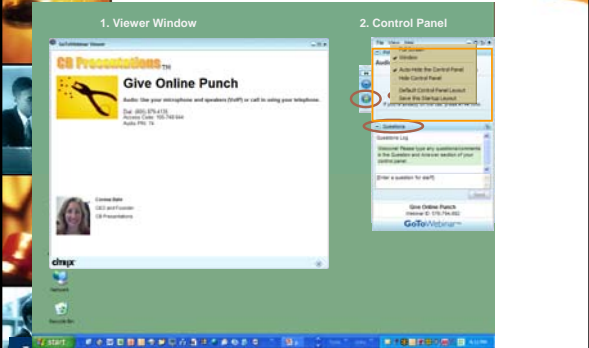
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### GOTOWEBINAR ATTENDEE INTERFACE



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## INTRODUCTION



- **Matthiesen, Wickert & Lehrer, S.C.**
- **Who Are We?**
- **What is the focus of this webinar?**
  - Non-ERISA and state law driven health subrogation.
  - Applies equally to workers' compensation in Montana, Georgia and other made whole states.
  - We'll touch on self-funded ERISA plans briefly.



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### THE CASE FOR SUBROGATION

- **Subrogation Reduces Premiums**
  - Since 2001 health insurance costs have increased 78%, compared with a 17% increase in the cost of living.
  - Revenue gained by the insurer, whether through subrogation is applied toward responding to the actual risk that is required to be paid by the insurer under the terms of the contract or policy.
  - Generally between 3% and 5% of all paid claims have subrogation potential. Occ/acc claims can be even higher!
- **Solvency and Cost Containment**
  - Catastrophic claims can raise risk modifiers and severely escalate premiums.
  - Subrogation can mitigate those increases.

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### WHAT IS THE MADE WHOLE RULE?

- **The Made Whole Doctrine**
- **What Is It?**
  - The judicial and legislative mandate that the injured claimant be fully compensated for all damages before a subrogated party may collect.
  - Essentially, it is a Rule of Priority.
  - "When the Pie Isn't Big Enough, Who Eats First?"

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### THERE ARE MANY DIFFERENT VARIANTS OF THE RULE

- Where does the rule come from?
- How big does the Pie need to be?
- How do you measure the Pie?
- Does the Made Whole Rule apply to every category of damages?
- How does the plaintiff's own contributory negligence factor in?
- Do I need to consider the plaintiff's attorney fees with regard to whether he has been made whole?
- Can a subrogation provision override the rule?

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### WHAT IS THE LEGAL AUTHORITY OR THE MAKE WHOLE RULE?

- **What Is the Legal Authority For the Rule?**
  - Statutory Law
    - Colorado. C.R.S. § 10-1-135 (2010)
    - Georgia. O.C.G.A. § 33-24-56.1 \*Permits subrogation only where the insured's recovery exceeds the sum of all categories of damages.
  - Common Law
    - Wisconsin. Rimes v. Garrity (1982)
  - Federal Common Law
    - 6<sup>th</sup>, 9<sup>th</sup> & 11<sup>th</sup> – Default Rule (applies unless there is express provision to the contrary).
    - 1<sup>st</sup>, 5<sup>th</sup>, & 8<sup>th</sup> – Reject Federal made whole as a default.

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### SUBROGATION V. REIMBURSEMENT

- Subrogation describes our effects at directly pursuing the third-party tortfeasor.
- Reimbursement describes our demand that the insured repay us after the insured makes a recovery.
- The Made Whole Doctrine has no effect where the subrogated insurer pursues its own subrogation claim and does not compete with its insured for a limited pool of funds. Averill v. Farmers Ins. Co. of Washington, 155 Wash. App. 106, 114, 229 P.3d 830, 834 (Wash. Ct. App. 2010) review denied, 169 Wash. 2d 1017, 238 P.3d 502 (2010)(distinguishing subrogation and reimbursement).

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### WHAT ELEMENTS OF DAMAGES DOES THE MADE-WHOLE RULE APPLY?

- On the one hand, a court might insist that “the test of wholeness depends upon whether the insured has been completely compensated for all the elements of damages, not merely those damages for which the insurer has indemnified the insured.” Rimes v. State Farm Mut. Auto Ins. Co., 316 N.W.2d 348, 355 (Wis.1982).
- On the other hand, a court might conclude that the insured is “made whole” once it is compensated for the element of damages that is covered by the insurance policy and that is thus the subject of the insurer's subrogation claim. Ludwig v. Farm Bureau Mut. Ins. Co., 393 N.W.2d 143, 145 (Iowa 1986).

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**ERISA PLANS CAN DISCLAIM THE DOCTRINE**

- “Applying federal common law to override the Plan’s controlling language, which expressly provides for reimbursement regardless of whether O’Hara was made whole by his third-party recovery, would frustrate, rather than effectuate, ERISA’s “repeatedly emphasized purpose to protect contractually defined benefits.” Zurich Am. Ins. Co. v. O’Hara, 604 F.3d 1232, 1237 (11<sup>th</sup> Cir. 2010) cert. denied, 131 S. Ct. 943, 178 L. Ed. 2d 755 (U.S. 2011).
- “That regardless of whether a covered person has been fully compensated or made whole, the Plan may collect from covered persons the proceeds of any full or partial recovery that a covered person or his or her legal representative obtain, whether in the form of a settlement ... or judgment. The proceeds available for collection shall include, but not be limited to, any and all amounts earmarked as noneconomic damage settlement or judgment.”



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**SOME STATES ALLOW INSURERS TO CONTRACT AROUND THE MADE WHOLE DOCTRINE.**

- On the one hand, a rule could provide that parties cannot contract around the “Made Whole” Rule. Franklin v. Healthsource of Ark., 942 S.W.2d 837, 840 (Ark. 1997).
- On the other hand, a court could allow insurer and insured to contract around this rule and thereby give effect to the “insurer priority” principle. See, Peterson v. Ohio Farmers Ins. Co., 191 N.E.2d 157, 159 (Ohio 1963); Contractually disclaim made whole if policy contains clear language. Fortis Benefits v. Cantu, 234 S.W.3d 642 (Tex. 2007).
- Good Policy language. “First priority notwithstanding whether the covered person was fully compensated.”



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**A SETTLEMENT OR VERDICT DEFEATS MADE WHOLE**

- Some courts have held that any settlement and release of all claims presumptively makes the insured whole. Wirth v. Am. Family Mut. Ins., 950 N.E.2d 1214, 1216 (Ind. Ct. App. 2011).
- Other courts require that the settlement must be within the tortfeasor’s policy limits in order to be presumptive. Allen v. Binckett, 2009 WL 1744494 (Ohio App. 2009); Bell v. Fed. Kemper Ins. Co., 693 F. Supp. 446 (S.D. W.Va. 1988); Thompson v. Fed. Express Corp., 809 F. Supp. 950, 954 (M.D. Ga. 1993); C.R.S. § 10-1-135 (2010) (“rebuttable presumption”).
- A jury verdict constitutes a full recovery for the purposes of the Made Whole Doctrine. See Tampa Port Auth. v. M/V Duchess, 65 F.Supp.2d 1299, 1301-02 (M.D. Fla. 1997); Bartunek v. Geo. A. Hormel & Co., 2 Neb. App. 598, 513 N.W.2d 545, 554 (1994); United Pac. Ins. Co. v. Boyd, 34 Wash. App. 372, 661 P.2d 987, 990 (1983). State Farm Mut. Auto. Ins. Co. v. Perkins, 216 S.W.3d 396, 403 (Tex. App. 2006).

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### CALCULATING MADE WHOLE AT A DAMAGES TRIAL

- Whether an insured has been made whole is a matter of fact, which, if disputed requires a trial.
- **Health Cost Controls, Inc. v. Gifford, 239 S.W.3d 728, 729 (Tenn. 2007).**
  - “In this case, Gifford received \$37,795.08 in benefits from Prudential, \$7,358.95 from BMC, and a settlement from his mother’s insurer of \$100,000, for a total recovery of \$145,154.03.”
  - Court adds the subro claims onto the third-party recovery.
  - On remand, Giffords would have to prove that his total damages exceed \$145,154.03.

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### FINAL THOUGHTS ON MADE WHOLE...

- Know Your Jurisdiction.
- Pick Your Battles.
- Bad Facts Will Make Even Worse Law.



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### What is the Common Fund Doctrine?

- The Common Fund Doctrine is an equitable doctrine that is designed to prevent unjust enrichment. See Knebel v. Capital Nat'l Bank in Austin, 518 S.W.2d 795, 799 (Tex. 1974). It's founded on the principle that “one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses, including a reasonable attorney’s fee; and that the most equitable way of securing such contribution is to make such expenses a charge on the fund so protected or recovered.” *Id.*
- The Common Fund Doctrine is an exception to the American Rule that each side pay its own attorney fees.
- “Notice to the insurer is necessary before it is required to pay a proportionate share of the attorney fees in order to give the insurer the right to join the action and choose its own legal counsel, if it so elects.” Seiniger Law Office, P.A. v. N. Pac. Ins. Co., 145 Idaho 241, 248, 178 P.3d 606, 613 (2008).

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**ERISA PLANS CAN DISCLAIM THE DOCTRINE**

- Accordingly, we conclude that the Plan in this case controls the relationship between Varco and the Committee, and because it does not authorize the payment of her attorney's fees, we do not possess the authority to rewrite the Plan in her benefit. Admin. Comm. of Wal-Mart Stores, Inc. Associates' Health & Welfare Plan v. Varco, 338 F.3d 680, 692 (7<sup>th</sup> Cir. 2003).
- The Plan in Varco provided that it "does not pay for nor is responsible for the participant's attorney's fees. Attorney's fees are to be paid solely by the participant."

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**"ACTIVE PARTICIPATION" DEFENSE:  
DEFEATING THE DOCTRINE BY RETAINING  
SUBROGATION COUNSEL**

- "[I]n order for the insurer to claim active participation in a settlement, it must demonstrate that it participated in the settlement negotiations with the insured for the *entire* settlement and substantially contributed to that *total* settlement award. Similarly, to show active participation in a judgment against the tortfeasor, the insurer must show that it intervened in the suit and participated in the case ... or at the very least demonstrate that it significantly contributed to discovery." Gov't Employees Ins. Co. v. Capulli, 859 So. 2d 1115 (Ala. Civ. App. 2002).
- "Before applying the doctrine, the court should examine all of the circumstances of the case, including the nature and extent of the subrogee's activities." Guil v. Allstate Ins. Co., 170 Vt. 464, 470, 756 A.2d 777, 781 (2000) (intercompany arbitration filing did not defeat common fund claim).

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**"ACTIVE PARTICIPATION" DEFENSE:  
DEFEATING THE DOCTRINE BY  
RETAINING SUBROGATION COUNSEL**

- Intervention can, in some cases, defeat its application. See Oakley v. Wis. Fireman's Fund Ins., 470 N.W.2d 882 (Wis. 1991)(Subrogated insurer participated in the action and was represented by its own counsel).
- There is even authority that activity before litigation can destroy the doctrine. Allstate Ins. Co. v. Edminster, 224 S.W.3d 456 (Tex. App. 2007) (Allstate notified the tortfeasor of its subrogation claim, stated it was pursuing the subrogation claim independently of any claim by its insured, asked the tortfeasor to issue a separate check in the amount of the subrogation claim with Allstate as the sole payee, notified the insureds' attorney not to take any action to collect Allstate's subrogation claim, and submitted insureds' medical bills to tortfeasor to support its subrogation claim).
- Doctrine will not apply where the plaintiff's attorney tries to defeat the lien. Lyons v. GEICO Ins. Co., 689 So. 2d 182, 184 (Ala. Civ. App. 1997).

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**PARTICIPATE**

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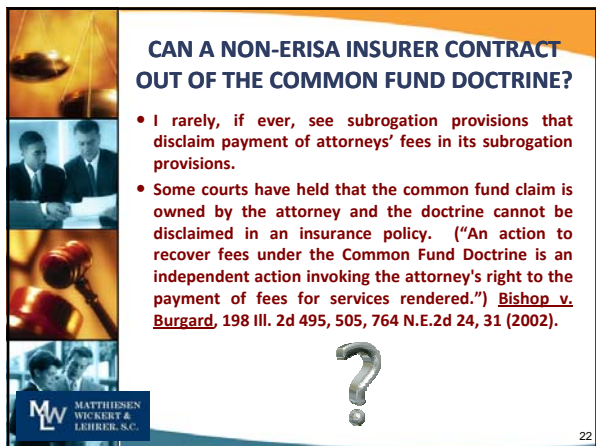
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### CAN A NON-ERISA INSURER CONTRACT OUT OF THE COMMON FUND DOCTRINE?

- I rarely, if ever, see subrogation provisions that disclaim payment of attorneys' fees in its subrogation provisions.
- Some courts have held that the common fund claim is owned by the attorney and the doctrine cannot be disclaimed in an insurance policy. ("An action to recover fees under the Common Fund Doctrine is an independent action invoking the attorney's right to the payment of fees for services rendered.") Bishop v. Burgard, 198 Ill. 2d 495, 505, 764 N.E.2d 24, 31 (2002).

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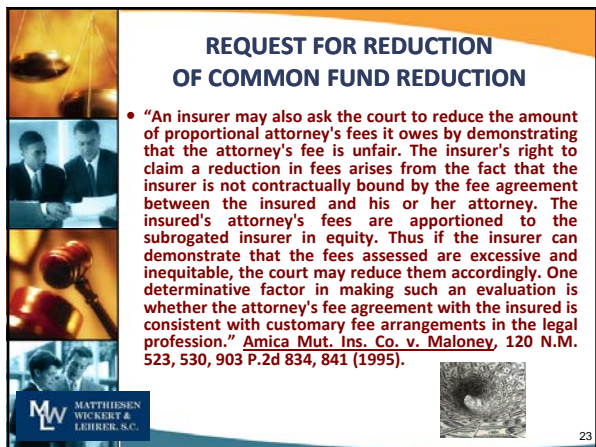
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### REQUEST FOR REDUCTION OF COMMON FUND REDUCTION

- "An insurer may also ask the court to reduce the amount of proportional attorney's fees it owes by demonstrating that the attorney's fee is unfair. The insurer's right to claim a reduction in fees arises from the fact that the insurer is not contractually bound by the fee agreement between the insured and his or her attorney. The insured's attorney's fees are apportioned to the subrogated insurer in equity. Thus if the insurer can demonstrate that the fees assessed are excessive and inequitable, the court may reduce them accordingly. One determinative factor in making such an evaluation is whether the attorney's fee agreement with the insured is consistent with customary fee arrangements in the legal profession." Amica Mut. Ins. Co. v. Maloney, 120 N.M. 523, 530, 903 P.2d 834, 841 (1995).

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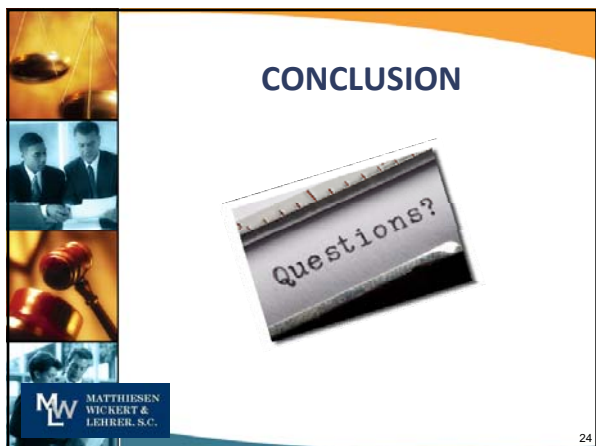
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### CONCLUSION

Questions?

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