


CALIFORNIA REPUBLIC

CALIFORNIA AUTOMOBILE SUBROGATION: The Nuts And Bolts

Presented By:
Gary L. Wickert
Matthiesen, Wickert & Lehrer, S.C.

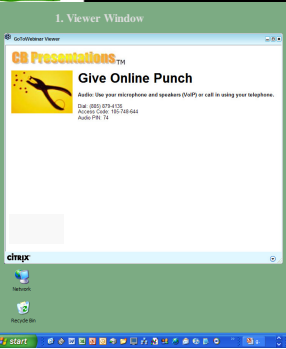


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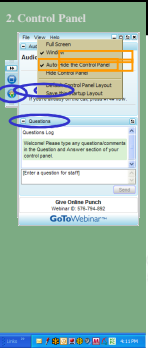


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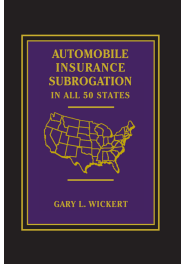
 **AUTOMOBILE INSURANCE SUBROGATION IN ALL 50 STATES**

"This book is the 'bible' on auto subrogation. Any insurance company with an auto line - personal or commercial - needs this book." *Jacqueline Guffin, MOTORS INSURANCE COMPANY, Subrogation Manager, Atlanta, Georgia.*

"An indispensable guide to some of the most complicated legal issues plaguing Subrogation today." *Megan Alois, FLEET RESPONSE, Auto Subrogation Supervisor, Cleveland, Ohio*

"Automobile Insurance Subrogation In All 50 States is like every subrogation or insurance-related resource I've ever wanted, tediously compiled, organized, and explained, in one convenient place." *Jon Coscia, Latitude Subrogation Services, Chief Operating Officer, Bloomfield Hills, Michigan.*

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 **EFFECTIVE AUTO SUBROGATION IS CRITICAL BECAUSE.....**

- 275 Million Cars In The U.S. (More Than Any Other Country)
- 22,657,288 Licensed Drivers (25% Uninsured)
- More Than 7 Million Auto Accidents In U.S. Annually
- Financial Toll: \$300 Billion
- People Injured: 3 Million
- People Killed: 45,000 (115 Per Day)
- 10 Will Die During This Webinar
- Auto Property Damage Annually: \$35 Billion
- Passenger Auto Liability Claims Annually: \$70 Billion
- Passenger Auto Collision Claims Annually: \$40 Billion
- For Every 100 Insured Cars In 2010, There Were 5.67 Collision Claims And 2.61 Comprehensive Claims



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 **PERSONAL AUTO COVERAGE**

- Liability
 - Bodily Injury
 - Property
- "Direct Action State" And "Proposition 213"
- Medical Payments (Med Pay)
- Personal Injury Protection (PIP)
- Uninsured/Underinsured Motorist (UM/UIM)
- Collision/Comprehensive
 - Reasonable Repair
 - Cash Value vs. Replacement Value

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 **CALIFORNIA SUBROGATION GENERALLY**


- Equitable Subrogation
- Contractual Subrogation
- Statutory Subrogation
- Purposes Of Subrogation
 - Holds Tortfeasor Responsible
 - Prevents Double Recovery
 - Holds Down Insurance Premiums



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 **CALIFORNIA SUBROGATION GENERALLY**

- If Insured Made Whole
 - Insurer Becomes Real Party In Interest
 - Insurer May Sue Third Party Directly
- If Insured Not Made Whole (Partial Payment)
 - Both Parties Have Cause Of Action
 - Insured: Uninsured Losses
 - Insurer: Claim Payment
 - Insured Retains Right To Sue Third Party
 - Carrier Retains Right To Sue Independently
 - Rule Against Splitting Cause Of Action
 - Waived By Third Party With Knowledge Of Subrogation




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 **CALIFORNIA SUBROGATION GENERALLY**

- Carrier May Be Limited If Made Whole Doctrine Applies
- Carrier And Insured Should Sue Third Party Together
 - Avoids Res Judicata Defense
 - Avoids Splitting Cause of Action Defense
 - Three Options For Enforcing Subrogation Rights:
 - File Subrogation Suit Independently
 - Intervene Into Insured's Action (Or Vice-Versa)
 - Made Whole Doctrine Might Not Apply
 - Enforce Lien On Tort Recovery
 - Made Whole Doctrine Applies




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 **CALIFORNIA SUBROGATION GENERALLY**



- **Doctrine of Superior Equities**
 - **Applies When Subrogating Against Other Than Primary Tortfeasor**
 - **E.g., Suit Against Apartment Owner For Failing To Provide Place For Tenant To Discard Hot Ashes**
 - **Carrier Can Subrogate Only If Its Equities Superior To Third Parties Equities**


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 **MED PAY SUBROGATION**



- **Assignment Of A Cause Of Action For Personal Injuries Is Void**
 - **Subrogation Of Med Pay Prohibited**
- **Subrogation:** Carrier steps in the shoes of the insured and asserts the insured's rights against the third party. *21st Century Ins. Co. v. Superior Court*, 213 P.3d 972 (Cal. 2009).


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 **MED PAY REIMBURSEMENT**



- **Reimbursement Of Med Pay Allowed**
- **Reimbursement:** Carrier has right to seek repayment back out of any third-party recovery received by the insured. *21st Century Ins. Co. v. Superior Court*, 213 P.3d 972 (Cal. 2009).

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 **MED PAY REIMBURSEMENT**

- **Must Be Reimbursement Policy Language**
 - Subject To Made Whole Doctrine
 - **Two Options For Enforcing Subrogation Rights:**
 - **Intervene Into Insured's Action**
 - Made Whole Doctrine Might Not Apply
 - **Enforce Lien On Tort Recovery**
 - Made Whole Doctrine Applies



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 **MED PAY REIMBURSEMENT**


- **Sample Policy Reimbursement Language**

Upon payment under [Med Pay] of this policy 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....have against any person or organization.


 

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 **PIP SUBROGATION**

- **No No-Fault Insurance In California**
- **No Cases Discussing PIP Subrogation In California**
- **Out-Of-State Policies**
- **Conflict-Of-Law Rules (Below)**



 

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 **UM/UIM SUBROGATION**

- History
- Purpose
 - Holds Down Premiums
 - Incentive To Obtain Liability Insurance
 - Prevents Double Recovery
- Subrogation Of UM Benefits Allowed
- Reimbursement Of UIM Benefits Allowed

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 **UM/UIM SUBROGATION**

- Cal. Ins. Code § 11580.2(g)

(g) The insurer paying a claim under an uninsured motorist endorsement or coverage shall be entitled to be subrogated to the rights of the insured to whom the claim was paid against any person legally liable for the injury or death to the extent that payment was made. The action may be brought within three years from the date that payment was made hereunder.



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 **UM/UIM SUBROGATION**


- Cal. Ins. Code § 11580.2(p)(5)

(5) The insurer paying a claim under this subdivision shall, to the extent of the payment, be entitled to reimbursement or credit in the amount received by the insured from the owner or operator of the underinsured motor vehicle or the insurer of the owner or operator.



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 **UM/UIM SUBROGATION**


- Cal. Ins. Code § 11580.2(c)(3)

(3) To bodily injury of the insured with respect to which the insured or his or her representative shall, without the written consent of the insurer, make any settlement with or prosecute to judgment any action against any person who may be legally liable therefor.






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 **UM/UIM SUBROGATION**

- “Uninsured Motor Vehicle” Includes:
 - Vehicles With No BI Liability Insurance
 - Vehicles Where Liability Coverage Denied
 - Underinsured Vehicles
 - Hit And Run Drivers
- UM: Subrogation Allowed
- UIM: Reimbursement Or Credit Only
 - UIM Coverage Applies Only When 3P Limits Exhausted
 - Insured Must Exhaust 3P Liability To Effect UIM Coverage





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 **UM/UIM SUBROGATION**

- UIM Substituted Payment
 - Doesn’t Occur In California
 - No Assignment Of BI Actions
 - UIM Carrier Only Pays When Third-Party Limits Exhausted
 - Policy Requires Consent To Settle With Third Party
 - But UIM Carrier Has No Subrogation Rights
 - Gets Dollar-For-Dollar Credit Instead
- UM Subrogation
 - No UM Coverage If Settle With 3P Without Consent
 - “Unconsented Judgment Exclusion”
 - UM Carrier Can’t Arbitrarily Withhold Consent
 - No Consent Required If UM Carrier Intervenes
 - SOL Is 3 Years From The Date Of UM Payment



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 **COLLISION/PROPERTY SUBROGATION**

- Collision Subrogation Allowed
- Typical Language:

Transfer of Rights of Recovery Against Others to Us: If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after "accident" or "loss" to impair them.

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 **COLLISION/PROPERTY SUBROGATION**


- Measure Of Damages Is Lesser Of:
 - Difference In The Market Value Of The Vehicle Before And After Accident; Or
 - Reasonable Repair Costs (No Need To Prove Actual Repair)
- Diminution In Value After Repairs Also Recoverable
 - Total Damages Can't Exceed Difference In Market Value
- Loss Of Use Recoverable Where Vehicle Damaged Or Destroyed
 - Measured By Rental Value Of Similar Vehicle
 - Recoverable Even If No Rental Car Obtained

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 **COLLISION/PROPERTY SUBROGATION**

- Three Options For Protecting Subrogation Rights:
 - File Separate Lawsuit (Property Only)
 - Personal injury and property damage, each caused by a single act, are separate causes of action and may be pursued separately.
 - Intervene Into Third-Party Suit
 - Seek Reimbursement Directly From Insured



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RELEASE OF TORTFEASOR BY INSURED

- Tortfeasor Has No Knowledge of Subrogation Interest/Lien
 - Settlement Destroyed By Settlement
 - Settlement Must Be In Good Faith
- Tortfeasor Has Knowledge Of Subrogation Interest/Lien
 - Subrogation Intact
 - Duty To Place Lienholder's Name On Check
- Res Judicata (Judgment) Bars Subrogation
 - Judgment By Insured In Small Claims Court
 - Can't Split Cause Of Action
 - Even If Different Damages
 - Even If Defendant Knows Of Subrogation





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ACCEPTING PARTIAL PAYMENTS

- Accord And Satisfaction – Cashing Check From Tortfeasor
 - Two Parties Agree To Discharge Liability
 - Check Says “For Total Loss To Your Vehicle”
 - Conflict In California Law
 - Cal. Civil Code § 1526: Can Strike Out “Payment In Full”
 - U.C.C. § 3311: “Full Satisfaction” Language Effective
 - Sup. Ct.: U.C.C. § 3311 Supersedes Cal. Civil Code § 1526







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MADE WHOLE DOCTRINE

The Made Whole Doctrine prevents an insurer from recovering any third-party funds paid to the insured until the insured has been “fully compensated for his or her injuries”, *i.e.*, **MADE WHOLE**. *21st Century Ins. Co. v. Superior Court*, 213 P.3d 972 (Cal. 2009).







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 **MADE WHOLE DOCTRINE**

- Made Whole Doctrine Extended To Med Pay Subrogation In 2005
- Insured Must Be Compensated For All Damages
 - Not Just Those Paid By Insurer
- Applies To Subrogation And Reimbursement
- Add Insurance Benefits And Tort Recovery

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 **EXCEPTIONS TO MADE WHOLE DOCTRINE**

- Prosecution Of Tort Case By Carrier
 - Plaintiff Can't Sit By And Watch Carrier Do The Work
- Policy Disclaims Made Whole Doctrine
 - Must Be Specific – Reimbursement Even If Not Made Whole
 - Carrier Must Participate In Third-Party Case


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 **EXCEPTIONS TO MADE WHOLE DOCTRINE**


- Does Not Apply To Attorney's Fees
 - Example

Carrier pays insured \$1,000 in Med Pay. Third-party recovery is \$6,000 – her total damages. Insured's attorney's fee is \$2,000, leaving a net recovery of \$4,000. Carrier seeks reimbursement of \$1,000. Insured argues her damages, including attorney's fees, are \$8,000, and her recovery is only \$6,000, therefore not made whole. Fees not included as part of insured's damages. Insured is made whole.





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 **EXCEPTIONS TO MADE WHOLE DOCTRINE**

- Made Whole Doctrine To Uninsured Motorist Subrogation
 - *Security Nat'l Ins. Co. v. Hand*, 31 Cal.App.3d 227 (Cal. App. 1973).
- Made Whole Doctrine Does Not Apply To Underinsured Motorist Subrogation
 - *Holcomb v. Hartford Cas. Ins. Co.*, 281 Cal.Rptr. 651 (Cal. App. 1991).



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 **COMMON FUND DOCTRINE**


- A/K/A The "Pro-Rata Rule"

When multiple persons are entitled in to a specific fund created by an action brought by a plaintiff such plaintiff or plaintiffs may be awarded attorney's fees out of the fund from those who benefit.



 

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 **COMMON FUND DOCTRINE**

- Carrier And Insured Each Bear Attorney's Fees In Proportion To Its Share Of The Recovery
- Rewards Active Litigant Who Benefits Passive Beneficiary
- Does Not Apply Where Subrogated Carrier Retains Separate Counsel To Participate

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 **ECONOMIC LOSS DOCTRINE**

Rule: A party suffering only property damage to a vehicle as a result of a defect or failure of the vehicle may recover damages for that harm from the manufacturer based only upon a contractual claim and not on a tort theory, such as negligence or product liability.


Exceptions:

- Damage To "Other Property"
- "Component Part"
- "Special Relationship"



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 **DEDUCTIBLE REIMBURSEMENT**

Regulation § 2695.7: Every insurer that makes subrogation demand shall include in every demand first-party claimant's deductible. Every insurer shall share subrogation recoveries on proportionate basis with first-party claimant, unless first-party claimant has otherwise recovered whole deductible amount. No insurer shall deduct legal or other expenses from recovery of deductible unless insurer has retained outside attorney or collection agency to collect that recovery. The deduction may only be for pro-rata share of allocated loss adjustment expense.

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 **COLLATERAL SOURCE RULE**


- If an injured party receives benefits from an insurance policy or some other source independent of the third-party tortfeasor, such benefits received will not be deducted from the damages awarded to the plaintiff.

Exceptions:



- Governmental Entity
- Uninsured Motorists Benefits
- "Retail" vs. "Wholesale" Medical Expenses
 - Plaintiff Cannot Recover For More Than Amount Insurance Company Pays
 - Can Introduce Actual Amount Paid
 - *Howell v. Hamilton Meats & Provisions*, (Aug. 2011)
- § 3333.1 - Medical Malpractice (Settlements And Trials)
- § 3333.4 - DUI Driver Can't Recovery Non-Economic Damages

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 **COMPARATIVE FAULT**

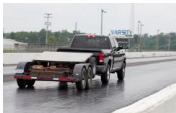

- Pure Comparative Fault
 - Only 13 States
- Plaintiff's Damages Award Will Be Reduced By The Percentage Of Fault That The Court Assigns To The Plaintiff.
 - Example: Plaintiff 75% At Fault, Recovers 25% Of Damages


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 **SUDDEN EMERGENCY DOCTRINE**



- Known As "Doctrine Of Imminent Peril"
- Person confronted with a sudden emergency is held to a lesser standard of care under the circumstances.
- Example: Wheel comes off trailer on freeway causing the car behind to swerve. Defendant must exercise judgment and prudence required of one unexpectedly confronted with imminent peril.


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 **SEAT BELT DEFENSE**

- Vehicle Code §27315: Requires Seat Belt Use
- Accident Caused By Negligent Defendant
- Injury Cause/Exacerbated By Failure To Wear Seat Belt
- "Second Collision" Within Vehicle
- Plaintiff's Failure To Use Seat Belt Can Be Considered In Determining Contributory Negligence


 


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PROPOSITION 51

- Passed In 1986. “Deep Pocket Initiative”
- Previously, Joint And Several Defendant 5% At Fault Could Owe All Damages
- Now, Joint And Several Liability Abolished For Non-Economic Damages
- Joint And Several Liability Remains For Economic Damages







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GUEST STATUTE/FAMILY PURPOSE DOCTRINE

- California Guest Statute Unconstitutional In 1973
- Family Purpose Doctrine No Longer Applicable
 - Parents Not Vicariously Liable For Acts Of Children
 - But, There Are TWO Potential Exceptions:
 - Negligent Entrustment
 - Permissive User Vicarious Liability







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PERMISSIVE USER VICARIOUS LIABILITY

- Cal. Ins. Code § 17150. Owner liable if he gives permission to driver.
- **Limits:** \$15,000 Per Person / \$30,000 Per Occurrence / \$5,000 Property
 - Unless Vicarious Liability Under Another Theory (Next Slide)
- Driver Liability Unlimited
- Both Owner And Driver Must Be Sued (Owner Gets Contribution)
- Proposition 51 Does Not Apply (No Limit To Joint And Several Liability)
- Plaintiff Has Burden To Prove “Permission” Given





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 **DRAM SHOP LIABILITY**

- No Dram Shop Liability In California
- The Negligent Consumption Of Alcohol By The Patron Is The Proximate Cause Of The Resulting Injuries, Not The Serving Of The Alcohol






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 **STATUTES OF LIMITATIONS**

- **Personal Injury: 2 Years**
 - Includes Med Pay Subrogation (Runs From Date Of Accident)
- **Property Damage: 3 Years**
- **Uninsured Motorist Subrogation: 3 Years From Date Of UM Payment**
- **Notice To Government Entities**
 - **Subrogation: Time Period Runs From Date Of Payment Of Claim**

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 **RECOVERY OF COSTS/ ATTORNEY'S FEES**

- **Offer Of Judgment. Cal. Civ. Proc. Code § 998**
 - Plaintiff Submits Written Offer No Less Than 10 Days Before Trial
 - Offer Not Accepted Within 30 Days Or Trial (Whichever Is Less)
 - Defendant Fails To Get More Favorable Verdict
 - If Verdict Is More Than Offer:
 - Court May Award Discretionary Experts' Fees/Costs
 - If Verdict Is Less Than Offer:
 - Plaintiff Can't Recover Costs
 - Plaintiff Owes Defendant's Post-Offer Costs



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