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TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

This monthly electronic subrogation newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of nationwide subrogation have, for many lawyers and insurance professionals, made keeping current with changing subrogation law in all fifty states an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this electronic subrogation newsletter, to assist in the dissemination of new developments in subrogation law and the continuing education of recovery professionals. If anyone has co-workers or associates who wish to be placed on our e-mail mailing list, please provide their e-mail addresses to Rose Thomson at rthomson@mwl-law.com. We appreciate your friendship and your business.

****** SPECIAL SUBROGATION ALERT ******

INSURANCE SUBROGATION

MADE WHOLE DOCTRINE DEALT BLOW

Wisconsin Supreme Court Limits Application of Doctrine: *Muller v. Society Ins. Co.,* 2008 WL 2221771 (Wis. Sup. Ct., May 31, 2008).

The National Association of Subrogation Professionals ("NASP"), the subrogation industry as a whole, and Matthiesen, Wickert & Lehrer, S.C., all scored a victory on Friday, May 31, 2008. The Wisconsin Supreme Court has issued a landmark made whole doctrine decision in *Muller v. Society Ins. Co.,* a case in which Matthiesen, Wickert & Lehrer had filed an Amicus Curiae Brief on behalf of NASP. The Wisconsin Supreme Court held for the first time that the made whole doctrine has absolutely no application in situations where the insured has settled with the third-party tortfeasor and the tortfeasor's insurer for an amount less than necessary to make the insured whole, even though the tortfeasor's insurance policy limits were sufficient to cover all claims, including those of the insured and insurer. The court declared that in such circumstances, the inequitable prospect of an insurer competing with its insureds for an inadequate pool of funds is simply not present, and the equities favor the insurer. Therefore, the made whole doctrine does not apply.

This case 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, George Jerrick, whose liability carrier, United Fire & Casualty, had $1 million policy limits. The Mullers' property insurer, Society Insurance Company, paid out its policy limits of $407,378.88, leaving the Mullers with an uninsured loss of $290,602.30. The Mullers sued George Jerrick and United Fire & Casualty to recover their uninsured loss and Society entered the lawsuit and assisted, claiming subrogation rights. At mediation, Society reached a tentative settlement with Jerrick and United Fire & Casualty for $190,000, conditioned upon the Mullers settling with Jerrick or resolving the case at trial. The Mullers later settled their claim for $120,000.00, which was $170,602.70 less than their uninsured loss. The insureds clearly were not made whole.

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

Kevin Differt, a senior associate of Matthiesen, Wickert & Lehrer, S.C., filed an Amicus Curiae Brief on behalf of the National Association of Subrogation Professionals("NASP"), which was jointly submitted by James Friedman, an attorney with Godfrey & Kahn, along with Amicus Curiae Briefs by the Civil Trial Counsel of Wisconsin, Wisconsin Insurance Alliance, and Property Casualty Insurers Association of America.


Kevin M. Differt

On May 30, 2008, the Wisconsin Supreme Court affirmed the Court of Appeals' decision, for the first time, holding 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. But it gave us perhaps something even better – an argument that in every case where the third-party policy limits exceed the insured's uninsured loss and carrier's subrogation interests combined, made whole is inapplicable. The significance of the case extends far beyond Wisconsin, the state in which the made whole doctrine really got its start. Known as the "mother of all made whole states", Wisconsin has provided the template for many states who similarly adopted the equitable made whole doctrine over the years. The 1977 *Garrity v. Rural Mutual Ins. Co.* and 1982 *Rimes v. State Farm Mutual Ins.* decisions really put the "made whole doctrine" on the map and have been the most frequently cited cases in subrogation jurisprudence ever since. However, *Rimes* and *Garrity* involved situations where the insured and subrogated insurer were battling over a finite and limited pool of funds.

The *Muller* decision is significant, but it still 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, a portion of which is claimed by a subrogated insurer in satisfaction of its rights of reimbursement or subrogation. However, the *Muller* decision seems to clearly state 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 tortfeasor's liability insurer;
(3) The *pool of settlement funds available to the insured* exceeds the total claims of both the insured and subrogated insurer;
(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; and
(5) The insured/plaintiff does not agree to indemnify the tortfeasor with regard to the subrogated insurer's interest in the settlement or recovery.

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.* However, the *Muller* decision seems to indicate that, in some circumstances, 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 Supreme Court made particular note of the fact that Society had preserved its right to proceed against the tortfeasor and their carrier by not stipulating to the insured's settlement and agreeing to seek its subrogation recovery out of those funds, as was done in *Rimes.* The court also noted that personal injury claims can be stickier because the estimation of total damages is much more imprecise than in property damage cases such as Muller. The court stated that the made whole doctrine is not a "simplistic or absolute rule." Subrogation depends on the application of equitable principles to the facts of each case – principles concerned with preserving the rights of both the insured and subrogated insurer. Sometimes, the made whole doctrine simply doesn't apply.

Significantly, the *Muller* court specifically pointed out that as part of the settlement agreement, the Mullers did not indemnify the tortfeasor or its insurer against the subrogated claim, as sometimes occurs in settlements. The Supreme Court stated 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 insured is not made whole by a settlement that includes an indemnification agreement, the insured has claimed the available pool of settlement funds, and the insurer may be barred from subrogating as a result of the made whole doctrine.

Subrogating carriers must also be careful not to agree to limit the pool of available funds as part of the settlement agreement – such as a global settlement with a defendant in a mediation which does not make the insured whole. By so agreeing, the carrier will be limiting the amount of available funds and triggering the made whole doctrine as a result. If the carrier has the legal right to, and subsequently does, enter into a separate settlement with the third-party, and the total third-party insurance limits available do not create a "limited pool of settlement funds", the made whole doctrine can be avoided. As indicated earlier, this becomes more problematical in personal injury cases, where plaintiffs/insureds can inflate their damages because of their unliquidated nature.


Gary L. Wickert

In the *Muller* decision, the Supreme Court made special mention of its 2005 *Petta v. ABC Ins. Co.* decision, which was argued by Gary Wickert on behalf of the subrogated insurer. *Petta* involved the issue of whether a decedent's statutory beneficiaries in a wrongful death case could claim that an insurer seeking subrogated property damage in a personal injury case could raise the made whole doctrine even though they weren't the insured. The Supreme Court expanded the made whole doctrine in *Petta,* but the *Muller* court noted that *Petta* was premised on equitable subrogation. Society's right of subrogation in *Muller* was contractual – created by the insurance policy's subrogation/ reimbursement clauses. The Abrahamson dissent in *Muller* coined the term, "*Schulte/Petta* procedure" – a procedure to be used for determining if the made whole doctrine applies. That procedure is as follows:

(1) The insured settles with the third-party without resolving the subrogation interest;
(2) The settling parties ask the court to determine if the insured is made whole (*"Rimes"* hearing);
(3) The subrogated carrier has an opportunity to be heard in *Rimes* hearing.
(4) If court finds insured is not made whole, they have no subrogation rights.

Justice Abrahamson, in her dissent, said that the *Schulte/Petta* procedure necessarily requires that the insured settle its claim before the carrier settles its subrogation claim. Abrahamson claims that this is necessary because "the cause of action against the tortfeasor is indivisible and the owner of the policy

should be first to make good his own loss." Made whole advocates claim that subrogated carriers receive premiums for assuming the risk of loss, and therefore, should bear that risk if there is a limited pool of settlement funds being fought over. In truth, what carriers are paid to assume is the risk that they might be on the hook to pay significant claim damages where no third-party subrogation potential or right of recovery exists. What they contract for in their policy is, in those situations where a third-party might be found ultimately responsible for the loss, that they have a right of reimbursement. Nothing should prevent carriers from so contracting – a right which is *not* equitable in nature and is guaranteed to them by the U.S. Constitution. That argument was successfully made in recent years in Texas and Ohio, thanks to NASP Amicus Curiae briefs.

Society was held entitled to act on its subrogation rights so long as it recognized the priority of its insured to compete for available funds. Had there been an insufficient pool of funds, Society would have been out of luck. In language that should be quoted regularly by subrogation professionals 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 "the pie was not big enough" to make him whole".***

This should be the case rule 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*.

The four to three *Muller* decision was written by conservative Justice David Prosser and joined by fellow conservatives Ann Ziegler, Patience Roggensack and Patrick Crooks. Chief Justice Shirley Abrahamson wrote a scathing dissent, joined by fellow liberal justices Ann Bradley and Louis Butler. Abrahamson claimed that Society's subrogation recovery should have been disgorged, because Society and the Mullers were adversaries for limited funds – the total amount that the third-party carrier was prepared to pay to settle the entire case. The dissent's logic is that in every case, there is a finite sum of money that the third-party carrier is willing to pay to make the entire case go away (insured's and carrier's claims combined), and when the insured and subrogated insurer are in competition for such "limited funds", the made whole doctrine must be applied and the carrier's subrogation rights must be disallowed until the insured is made whole. Interestingly, dissenter Louis Butler – whose term is up on July 31, 2008 – lost a highly publicized campaign this spring with conservative incoming Justice Michael Gableman – a race which saw some national press. The court should tilt even further in favor of carriers' subrogation rights in the coming years – something subrogation professionals handling recovery files in this state should keep in mind.

A copy of the complete decision in *Muller v. Society Ins. Co.* is attached to the e-mail delivering this Subrogation Alert. We are very pleased with the result, even though there will continue to be questions about the extent and applicability of the made whole doctrine in Wisconsin. Our NASP Amicus Curiae Brief was submitted together with Amicus Curiae Briefs by the Property Casualty Insurers Association of America, and the Civil Trial Council of Wisconsin, in one joint brief (our court's preference) by James Friedman with Godfrey & Kahn. Please direct any questions you might have to Kevin Differt at kdiffert@mwl-law.com or Gary Wickert at gwickert@mwl-law.com.
