


STATE OF WASHINGTON *PIP and Med Pay Subrogation*


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NO-FAULT, PIP, AND MED PAY

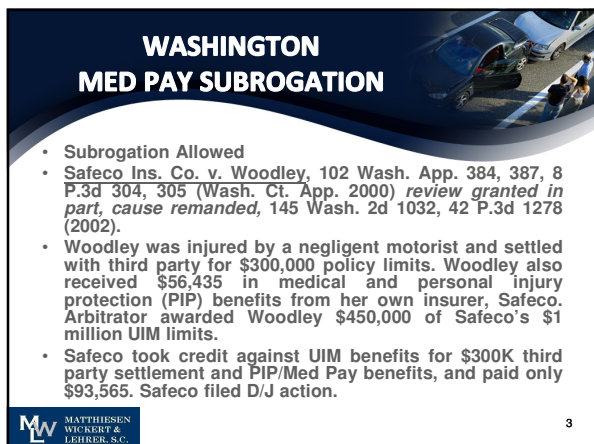
History and Background

- **No-Fault Auto Insurance**
 - Compulsory First Party Benefits
 - Limited Third Party Tort Liability
 - Medical Expenses
- **PIP Benefits**
 - Required in AR, DE, FL, HI, KS, KY, MD, MA, MI, MN, NJ, NY, ND, OR, PA, and UT.
 - Covers medical expenses and lost wages of insured and passengers.
- **Some States Offer One But Not The Other**



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WASHINGTON MED PAY SUBROGATION

- Subrogation Allowed
- *Safeco Ins. Co. v. Woodley*, 102 Wash. App. 384, 387, 8 P.3d 304, 305 (Wash. Ct. App. 2000) *review granted in part, cause remanded*, 145 Wash. 2d 1032, 42 P.3d 1278 (2002).
- Woodley was injured by a negligent motorist and settled with third party for \$300,000 policy limits. Woodley also received \$56,435 in medical and personal injury protection (PIP) benefits from her own insurer, Safeco. Arbitrator awarded Woodley \$450,000 of Safeco's \$1 million UIM limits.
- Safeco took credit against UIM benefits for \$300K third party settlement and PIP/Med Pay benefits, and paid only \$93,565. Safeco filed D/J action.

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WASHINGTON MED PAY SUBROGATION ...

- Safeco didn't try to recover PIP/Med Pay from 3P recovery – waived it. Instead, it tried to offset against UIM benefits.
- Court of Appeals: Offset against UIM benefits allowed. Subrogation against 3P recovery is *implied* by court.
- On review in *Safeco Ins. Co. v. Woodley*, 150 Wash.2d 765, 82 P.3d 660 (Wash. 2004), the Washington Supreme Court held that even if recovering PIP/Med Pay via offset in UIM case rather than vs. 3P, insurer still must pay pro rata legal expenses insured incurs in underlying recovery vs. 3P.
- *Hamm v. State Farm*, 151 Wash.2d 303, 88 P.3d 395 (Wash. 2004) holds that insurer must also pay pro rata legal expenses insured incurs in arbitrating UIM claim.



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WASHINGTON PIP SUBROGATION

- Subrogation Allowed
- *Mahler v. Szucs*, 957 P.2d 632 (Wash. 1998).
- State Farm sought PIP reimbursement from insureds' recoveries from tortfeasors without paying attorneys' fees. In highly anticipated ruling that included review of numerous amicus briefs, Washington Supreme Court responded with wide-ranging ruling on Washington PIP reimbursement generally.
- PIP carrier entitled to reimbursement subject to made whole rule.



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WASHINGTON PIP SUBROGATION...

- PIP carrier entitled to subrogation right when insured does not pursue third party.
- PIP carrier's subrogation rights subject to Common Fund Doctrine.
- Efforts to override Common Fund Doctrine with policy terms void.
- PIP carrier can also recover from UIM benefits.
 - Usually, UIM carrier and insured agree that PIP carrier will only pay common fund attorney's fees.



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MADE WHOLE DOCTRINE

- Thiringer v. American Motorist Co., 588 P.2d 191 (Wash. 1978).
- Henry Thiringer, insured by American Motorist, was injured in accident caused by 3P. Settled for \$15,000 liability limits and then sought PIP benefits arguing that he had not been fully compensated by liability limits. No 3P assets.
- Policy had subrogation language, so American Motorist denied benefits. Thiringer filed D/J action.
- Insurer can only subrogate when insured is fully compensated for all of his damages.



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MADE WHOLE DOCTRINE...

- Insured receives full compensation before PIP carrier reimbursed.
- "Full compensation" means actual losses sustained by insured regardless of comparative fault. See Sherry v. Financial Indemnity Co., 160 P.3d 31 (2007).
- Court noted that "*We find nothing in the language of the policy to indicate that the parties agreed that a different principle would apply to this contract.*" If it did, they said it would be unfair.
- Overriding Made Whole Doctrine by contract. (Mahler declines to rule on this but affirms that Washington's public policy is "full compensation of insureds.")



» MADE WHOLE FORMULA

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PIP SUBROGATION EXAMPLE 1

- PIP Pays \$10,000
- Health Insurance Pays \$5,000
- Liability Pays \$25,000 Policy Limits
- UIM Arbitration Determines Total Damage At \$40,000
- UIM Pays \$15,000

In this scenario, the total recovery from all sources is \$55,000.

Total damages are \$40,000. Thus, \$15,000 is subject to potential reimbursement claims.




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PIP SUBROGATION EXAMPLE 2

- PIP Pays \$10,000
- Health Insurance Pays \$5,000
- Liability Pays \$25,000 Policy Limits
- UIM Arbitration Determines Total Damage At \$75,000
- UIM Pays \$25,000

In this scenario, the total recovery from all sources is \$65,000.

Total damages are \$75,000. Because total damages exceed the sum of all recoveries, no funds are subject to PIP subrogation rights.


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PIP SUBROGATION EXAMPLE 3

- PIP Pays \$10,000
- Health Insurance Pays \$5,000
- Liability Pays \$25,000 Policy Limits
- UIM Arbitration Determines Total Damage At \$60,000
- UIM pays \$25,000


In this scenario, the total recovery from all sources is \$65,000.

Total damages are \$60,000. Thus, \$5,000 is subject to PIP subrogation rights.

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OTHER THIRINGER ISSUES

- Who determines value of third party case?
- What if insured settles BI case for less than policy limits?
- Are the insured's attorney's fees figured into the recovery?
- What if insured is made whole, but only by a little?
- What if there are more than one subrogated party?
- Burden Of Proof
- Common Fund Doctrine – Attorney's Fees
- When *Thiringer* Does Not Apply
- When *Thiringer* Does Apply
- Comparative Fault
- Settlements Vs. Judgments/Arbitration Decisions

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TIPS FOR WASHINGTON SUBROGATION

- An insured may be penalized for improperly prejudicing the insurer's right to subrogation after being "made whole". In Elovich v. Nationwide Ins. Co., 104 Wn.2d 543, 707 P.2d 1319 (1985), the court held that insured's release of 3P tortfeasor may prejudice insurer's subrogation right and affect enforceability of UIM claim.
- A release between an insured and a tortfeasor can not extinguish subrogation rights if both parties to release know of subrogating insurer's payments and the settlement does not exhaust tortfeasor's assets. Leader National Ins. V. Torres, 779 P.2d 722 (1989).



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TIPS FOR WASHINGTON SUBROGATION...


- Remember that exhaustion of policy limits does not mean exhaustion of tortfeasor's assets. Insured cannot release tortfeasor from subrogation without subrogating insurer's consent.
- Mahler allows an insurer to bring an independent action to recover PIP when an insured does not seek BI recovery. Action may be via inter-company arbitration or litigation. If a civil suit is filed, insurer should notify insured of litigation and give every opportunity to join.


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