



COLORADO AUTOMOBILE SUBROGATION: The Nuts And Bolts

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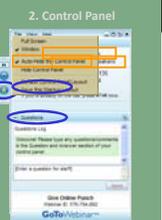


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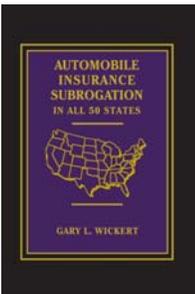
AUTOMOBILE INSURANCE SUBROGATION IN ALL 50 STATES

"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
- As of 2010, Colorado has 3,107,258 licensed drivers and 26 to 34% of them are uninsured.





PERSONAL AUTO COVERAGE

- **Liability**
 - Bodily Injury – 25/50
 - Property – 15
 - Truck Exceeding 16,000 Lbs. – 100/300/50
- **Medical Payments (Med Pay)**
 - Optional: Must Be Offered
- **Personal Injury Protection (PIP) – Repealed 2003**
- **Uninsured/Underinsured Motorist (UM/UIM)**
 - Optional: Must Be Offered
- **Collision/Comprehensive**
 - Reasonable Repair
 - Cash Value vs. Replacement Value






COLORADO SUBROGATION GENERALLY

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





MED PAY SUBROGATION

- **Policy Issued Before 1/1/09**
 - **Med Pay Subrogation Language Enforced/Allowed**
- **Policy Issued After 1/1/09**
 - **Direct Med Pay Subrogation Not Allowed**
 - § 10-4-635(3)(a) (Med Pay Coverage Statute)
 - No Direct Action Against Third Party
 - **Possible Contractual Reimbursement Claim**
 - Policy Reimbursement Language
 - Poor Statutory Language
 - Bad Faith Climate In Colorado
 - **Third Party Prohibited From Including Med Pay Payor On Check**
 - § 10-1-135(6)(b)




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PIP SUBROGATION

- **No-Fault Introduced in 1973**
 - **No Subrogation Rights**
 - Exception: Private Passenger Auto v. Non-Private
 - **Tort Threshold - \$2,500 Medical Expenses**
- **No-Fault Repealed in 2003**
 - **Med Pay Replaced PIP Benefits**
 - **Auto Premiums Dropped**




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UM/UIM SUBROGATION

- **Purpose**
 - **Hold Down Premiums**
 - **Incentive To Obtain Liability Insurance**
 - **Prevents Double Recovery**
- **Significant Changes To UIM Scheme In 2007**
 - **Amended § 10-4-609**
 - **Prior To 2007**
 - UIM Insured Required To Recover From UIM (Tortfeasor)
 - Benefit Entitlement Determined By Amount Recovered
 - **After 2007**
 - Relevant Inquiry Is Gap Between 3P Limits and Damages
 - No Need To Recover From UIM Tortfeasor
 - No Statutory Right of UIM Subrogation
 - Contractual Subrogation Allowed
 - **UM Scheme Not Affected**




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UM/UIM SUBROGATION CONT.

- **UM Subrogation Allowed**
 - **Not Prohibited By § 10-4-609**
- **Subject To Made Whole**
 - **§ 10-1-135 (Discussed Below)**
 - **Insured Must Be Made Whole**
 - Third Party Recover; and
 - UM/UIM Benefits
- **Consent-To-Settle/Substituted Payment**
 - Policy Provide Prior Written Notice of Settlement
 - Consent-To-Settle Clause
 - Substituted Payment





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COLLISION/PROPERTY SUBROGATION

- **Measure of Damages:**
 - **Difference In Market Value Before And After; or**
 - **Reasonable Cost of Repairs Plus Residual Market Value Loss**
- **Loss of Use:**
 - **Length of Time Necessary For Repairs**
 - **Not Necessary to Have Vehicle Repaired or Rent Vehicle**
 - **Must Prove Reasonable Length of Time To Repair**
 - **Net Lost Profits Also Recoverable**
 - **Reasonable Rental Value/Substitute Vehicle During The Repair**





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RELEASE OF TORTFEASOR BY INSURED

- **Tortfeasor Has No Knowledge of Subrogation Interest/Lien**
 - **Subrogation 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**
 - **When entity takes assignment from insured, and third party has notice of assignment, payment to assignor does not discharge liability to assignee.**





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ACCEPTING PARTIAL PAYMENTS

- Accord And Satisfaction – Cashing Check From Tortfeasor
 - § 4-3-311 – Liquidated vs. Unliquidated Claims
 - Claim Discharged If:
 - Unliquidated/Disputed Amount
 - Conspicuous Writing Regarding Full Satisfaction of Debt
 - Bona Fide Dispute
 - Claim Not Discharged If:
 - Debtor Didn't Know Check Tendered As Full Satisfaction
 - No "Paid In Full" Language Included




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MADE WHOLE DOCTRINE

Reimbursement or subrogation pursuant to a provision in an insurance policy, contract, or benefit plan is permitted only if the injured party has first been fully compensated for all damages arising out of the claim. Any provision in a policy, contract, or benefit plan allowing or requiring reimbursement or subrogation in circumstances in which the injured party has not been fully compensated is void as against public policy. C.R.S. § 10-1-135(3)(a)(I).




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MADE WHOLE DOCTRINE

- First introduced in Colorado for UM subrogation. *Kral v. Am. Hardware Mut. Ins. Co.*, 784 P.2d 759 (Colo. 1989).
- Prior to 2010, auto subrogation was governed by common law.
- In 2010, C.R.S. § 10-1-135 was passed.
 - Codifies Made Whole Doctrine and Common Fund Doctrine
 - Doesn't Apply To Statutory Liens
 - Medicaid
 - Workers' Compensation
- Applies to any insurer, HMO, health plan, or other provider of health care benefits.



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 **MADE WHOLE DOCTRINE**

- Applies Made Whole Doctrine To All Auto Medical Subrogation
- Applies To and Affects:
 - Injured Party (Insured)
 - Payor of Benefits (Insurer)
 - Third Party (Tortfeasor)
- Subrogation Allowed Only If Insured Is Fully Compensated
 - “Fully Compensated” Not Defined
 - Settles For Less Than Third Party Limits – Including UIM Benefits
 - Rebuttable Presumption Insured Made Whole
 - Settles For Exact Policy Limits
 - Rebuttable Presumption Insured Not Made Whole
 - Judgment – Rebuttable Presumption Insured Made Whole



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 **MADE WHOLE DOCTRINE**

- If Insured Is Made Whole, Subrogation Is Allowed
- If Insured Claims It’s Not Made Whole
 - Dispute Resolved By Arbitration
 - Insurer Must Request Arbitration Within 60 Days After Notice From Insured
 - Arbitrator Chosen By Both – If Can’t Agree, Three Arbitrators Decide
 - Third Arbitrator Chosen By First Two
- No Subrogation Directly Against Third Party
 - Exception: Within 60 Days of SOL Insured Hasn’t Pursued Claim
 - Third Party Prohibited From Including Insurer On Settlement Check
- Applies To Recoveries After August 11, 2010

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 **COMMON FUND DOCTRINE**

- C.R.S. § 10-1-135 also codifies Common Fund Doctrine.
- Insurer responsible for pro-rata share of attorney’s fees/costs.
- Subrogation Recovery Cannot Exceed:
 - Amount Paid By Carrier; or
 - If “Capitated” Plan/Policy:
 - 80% of Usual and Customary Charges
 - “Capitated” means pays specified amount regardless of medical bills.
- Federal Court decision says Common Fund can be contracted around.
 - O’Donnell v. Sullivan, 2012 WL 3096703 (D. Colo. 2012) report and recommendation adopted, 2012 WL 3079121 (D. Colo. 2012).



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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"
- Negligent Misrepresentation
- Product Liability Action Against Manufacturer
 - Minority Rule Applies in Colorado





DEDUCTIBLE REIMBURSEMENT

No applicable statute, Administrative Code provision or case law exists in Colorado. Colorado's Department of Insurance advises orally that the standard practice is to reimburse an insured for its deductible on a comparative negligence basis. While not specifically mandated by law, a common sense procedure for reimbursement of deductibles would be on a pro-rata basis.





COLLATERAL SOURCE RULE

- Common Law: Exclude from evidence at trial the amounts paid by a collateral source to cover plaintiff's medical bills.
- C.R.S. § 13-21-111.6 – Enacted In 2010
 - Modifies common law rule to limit circumstances under which a plaintiff may receive double compensation for an injury.
 - Requires reduction of tort damages awards by the amount a plaintiff "has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company, or fund in relation to the injury, damage, or death sustained...."
 - Contract Exception: Verdict not reduced by amount paid as a result of a contract entered into and paid for by plaintiff.




COMPARATIVE FAULT

- **Modified Comparative Fault**
- **50% Bar Rule: One of 11 States**
 - **Example:** Plaintiff 30% at fault and has \$10,000 damages = Recovers \$7,000.
 - **Example:** Plaintiff 50% at fault and has \$10,000 damages = Recovers \$0.



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SUDDEN EMERGENCY DOCTRINE

- Defendant confronted with sudden emergency, through no fault of his own, is not chargeable with negligence if he exercises a standard of care reasonable 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

- **Seat Belt Use Required By Law – C.R.S. § 42-4-237**
- **Failure to use seat belt is admissible to mitigate damages.**
- **Limited To Awards For Pain And Suffering**
- **May not be used for limiting recovery of economic loss and medical payments.**



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 **GUEST STATUTE/FAMILY PURPOSE DOCTRINE**

- Guest Statute Repealed In 1975
- Family Purpose Doctrine (a/k/a Family Car Doctrine)
 - Head of household with control over vehicle vicariously liable if:
 - owner of vehicle was head of household;
 - had control of vehicle;
 - vehicle used by member of household;
 - with express/implied permission;
 - member of household negligent in operation; and
 - this negligence causes damage.



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 **DRAM SHOP LIABILITY**

- C.R.S. § 12-47-801
- Generally recognizes that in certain situations, it's the consumption of alcohol, not the serving of it, that is the proximate cause of injury.
- Person selling liquor to "habitual drunkard" can be liable only if person is first put on written notice not to sell to drunkard.
- Social host liability only if willful and knowing service to person under age 21.



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 **STATUTES OF LIMITATIONS**

- Personal Injury: 2 Years
 - If Auto Is Involved: 3 Years
- Property Damage: 2 Years
- Uninsured Motorist Subrogation: 3 Years From Settlement or Judgment Between Insured and Underinsured Motorist
- Uninsured Motorist Subrogation: 3 Years From Date of UM Payment
- Product Liability: 2 Years



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RECOVERY OF COSTS/ ATTORNEY'S FEES

- **C.R.S. § 13-17-202 (Offer of Settlement)**
 - If more than 14 days before trial, plaintiff makes settlement demand on defendant and offer isn't accepted within 14 days, and if plaintiff recovers a more favorable amount at trial, then plaintiff is awarded actual costs that accrued after the date of the settlement offer.
 - Filing fees, subpoena fees, reasonable expert fees, copying costs, court reporter fees, reasonable investigative expenses and fees, reasonable travel expenses, exhibit or visual aid preparation or presentation expenses, legal research expenses, etc.
 - No Attorneys' Fees






CONFLICTS OF LAWS

- State having the "most significant relationship" to the accident.
- Principles set forth in *Restatement (Second) §§ 6 and 188* are to be taken into account:
 - The needs of the interstate and international systems;
 - The relevant policies of the forum;
 - The relevant policies of other interested states;
 - The relative interests of those states in the determination of the particular issue;
 - The protection of justified expectations;
 - The basic policies underlying the particular field of law;
 - The certainty, predictability, and uniformity of result; and
 - The ease in the determination and application of the law to be applied.






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