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"Insured Made Whole" Doctrine

Certain exceptions may apply, and law is subject to change. Contact White and Williams LLP for additional information.

Alabama

In the absence of express terms to the contrary, the insured is entitled to be made whole before the insurer may recover any portion of the recovery from the tortfeasor. International Underwriters/Brokers, Inc. v. Liao, 548 So.2d 163 (Ala. 1989). Insurer may bring subrogation action before insured is made whole. Ex parte State Farm Fire & Cas. Co., 764 So. 2d 543 (Ala. 2000).

Alaska

No case on point. However, in *dictum*, the Supreme Court of Alaska acknowledged the general proposition that an insured must be fully compensated before subrogation may be pursued. McCarter v. Alaska Nat. Ins. Co., 883 P.2d 986 (Alaska 1994) (holding that under the workers' compensation statute, an insurance carrier is entitled to receive reimbursement from an insured who fully recovers from a third-party tortfeasor).

Arizona

No case on point.

Arkansas

The general rule is that an insurer is entitled to subrogation after the insured has been made whole for his loss. Southern Farm Bureau Cas. Ins. Co. v. Tallant, 207 S.W.3d 468 (Ark. 2005).

California

An insurer may not recover from any third party until the insured has been fully compensated for his or her injuries unless there is clear and specific contract language to the contrary. 21st Century Ins. Co. v. Superior Court, 213 P.3d 972 (Cal. 2009) (citing Sapiano v. Williamsburg Nat. Ins. Co., 33 Cal. Rptr. 2d 659 (Cal. Ct. App. 1994)).

Colorado

In UM cases, the made whole doctrine applies and a clause in an insurance policy cannot change the made whole doctrine. Kral v. Am. Hardware Mut. Ins. Co., 784 P.2d 759 (Colo. 1989). In personal injury cases, the doctrine applies, and cannot be changed by contract. Colo. Rev. Stat. § 10-1-13(3)(a)(I). In other contexts, the law is unsettled. However, in *dictum* the court in DeHerrera v. American Family Mut. Ins. Co., 219 P.3d 346 (Colo. App. 2009) stated that there is no Colorado authority holding that the insurer has no right to subrogation unless the insured was made whole by the underlying settlement. According to the court, a "made whole" policy would discourage settlements.

Connecticut

An insurer generally is entitled to recover the amount it paid to the insured only if the amount of damages awarded exceeds the difference between the amount the insurer paid and the insured's actual damages. Wasko v. Manella, 849 A.2d 777 (Conn. 2004); Fireman's Fund Ins. Co. v. TD Banknorth Ins. Agency, Inc., 72 A.3d 36 (Conn. 2013). The equitable doctrine does not, however, apply to deductibles. Fireman's Fund.

Delaware

Case law suggests that Delaware courts will apply the made whole doctrine in first-party property cases. See Phillips v. Liberty Mutual Ins. Co., 253 A.2d 502 (Del. 1969) (concluding that, because the insureds stipulated to their property damages, they had been made whole and the insurer could pursue its subrogation claim). The question of whether a property insurance policy's subrogation clause modifies the doctrine is undecided.

District of Columbia

As a default rule, an insurer cannot recover via subrogation unless the insured has been fully compensated for its loss. However, the parties may contract around the doctrine, "provided they do so with sufficient clarity." Dist. No. 1 – Pac. Coast Dist. v. Travelers Cas. and Sur. Co., 782 A.2d 269 (D.C. 2001).

Florida

The insured must be fully indemnified before an insurer may subrogate to the rights of its insured. McCabe v. Florida Power & Light Co., 68 So. 3d 995 (Fla. Dist. Ct. App. 2011). However, the doctrine should only apply in limited funds situations, where the tortfeasor lacks adequate funds or insurance. See Schonau v. GEICO Gen. Ins. Co., 903 So.2d 285 (Fla. Dist. Ct. App. 2005). The insurer is not obligated to reimburse the insured for the deductible; the insured can sue the tortfeasor independently to recover. Schonau ("Florida law does not appear to recognize an affirmative right or cause of action by an insured against its insurer to be 'made whole' beyond the payment of insurance policy proceeds.")

Georgia

Insurer may not pursue subrogation until its insured has been made whole, and an insurance policy provision requiring reimbursement without regard for whether insured is completely compensated violates public policy. Davis v. Kaiser Found. Health Plan of Ga., Inc., 521 S.E.2d 815 (Ga. 1999) (discussing medical benefits paid after an auto accident); but see Ga. Code § 33-24-56.1 (no subrogation for medical expenses in personal injury cases, but an insurer can seek reimbursement if the insured is made whole). The rule does not apply to a commercial property insurance contract that expressly authorizes an insurer to pursue its subrogation rights after compensating the insured for damage to its property. Woodcraft by MacDonald, Inc. v. Ga. Casualty & Surety Co., 743 S.E.2d 373 (Ga. 2013).

Hawaii

Injured insured must be fully compensated before an insurer may seek reimbursement of its loss. AIG Hawaii Ins. Co., Inc. v. Rutledge, 955 P.2d 1069 (Haw. Ct. App. 1998) (discussing uninsured motorist benefits).

Idaho

No case on point. However, Idaho Code § 41-1840 provides that an advance payment by the defendant or the defendant's insurer is to be credited against a later, overall settlement of all claims. The statute applies to advance settlements of subrogation claims. Schaffer v. Curtis-Perrin, 109 P.3d 1098 (Idaho 2005). It therefore effectively undercuts the insured-made-whole-first rule.

Illinois

The equitable made whole doctrine does not apply where there is a subrogation clause stating that the insured transfers its rights to the insurer to the extent of its payments. Capitol Indem. Corp. v. Strike Zone, 646 N.E.2d 310 (Ill. App. Ct. 1995). For healthcare service liens, see 770 Ill. Comp. Stat. 23/50.

Indiana

The insured must be made whole first. However, the parties may contractually agree to the contrary as long as the contractual provision is clear and unequivocal. Willard v. Automobile Underwriters, Inc., 407 N.E.2d 1192 (Ind. 1980).

Iowa

Case law suggests that Iowa courts will apply the made whole doctrine in first-party property cases. See Chickasaw County Farmers' Mut. Fire Ins. Co. v. Weller, 68 N.W. 443 (Iowa 1896) (allowing a property insurer to subrogate against an insured who had been fully compensated for the insured loss, but noting that an insured is "entitled to be fully compensated"); Ludwig v. Farm Bureau Mut. Ins. Co., 393 N.W.2d 143 (Iowa 1986) (discussing a subrogation claim for medical expense reimbursement and stating, as a general subrogation rule, that the made whole doctrine applies). The question of whether a property insurance policy's subrogation clause modifies the equitable made whole doctrine is undecided. Deductibles are recoverable in subrogation cases arising from first-party automobile damage claims on a pro rata basis. Iowa Admin. Code 191.15.43(507B).

Kansas

Though not making an explicit declaration, in Shawnee Fire Ins. Co. v. Cosgrove, 116 P. 819 (Kan. 1911), the court suggested that an insurer is only entitled to subrogate for sums in excess of the insured's loss.

Kentucky

An insurer's right of subrogation is rooted in equity, and generally only arises when the insured has been fully compensated. The priority of payments can be modified by contract provided the agreement does violate principles of equity. Wine v. Globe American Casualty Co., 917 S.W.2d 558 (Ky. 1996).

Louisiana

An insured must be made whole before the insurer can claim any portion of a recovery. La. Civ. Code Ann. art. 1826; New Orleans Assets, L.L.C. v. Woodward, 363 F.3d 372 (5th Cir. 2004).

Maine

No case on point.

Maryland

Insurer is entitled to subrogation from the tortfeasor before the insured is made whole. Stancil v. Erie Ins. Co., 740 A.2d 46 (Md. Ct. Spec. App. 1999).

Massachusetts

Unsettled. In *dictum*, the court in Apthorp v. OneBeacon Ins. Group, LLC, 935 N.E.2d 365 (Mass. App. Ct. 2010), suggests that the insurer has priority.

Michigan

Michigan is a made whole state. Washtenaw Mut. Fire Ins. Co. v. Budd, 175 N.W. 231 (Mich. 1919). The question of whether a property insurance policy's subrogation clause modifies the equitable made whole doctrine is undecided.

Minnesota

Under the "full recovery rule," subrogation may not be pursued until the insured has fully recovered, unless the contract explicitly allows for the contrary. Commercial Union Ins. Co. v. Minn. Sch. Bd. Ass'n, 600 N.W.2d 475 (Minn. Ct. App. 1999). See also MedCenters Health Care v. Ochs, 26 F.3d 865 (8th Cir. 1994) (contractual language that is sufficiently clear can overcome Minnesota's full recovery rule).

Mississippi

Insured made whole first. Hare v. State, 733 So.2d 277 (Miss. 1999).

Missouri

Unsettled. In *dictum*, the federal court in Travelers Property Casualty Co. of America v. National Union Ins. Co. of Pittsburgh, PA, 621 F.3d 697(8th Cir. 2010), suggested that Missouri would follow the made-whole rule unless the policy stated otherwise.

Montana

An insured must be totally reimbursed for all losses as well as costs, including attorney fees, involved in recovering those losses before the insurer can exercise any right of subrogation, regardless of contract language to the contrary. Swanson v. Hartford Ins. Co. of Midwest, 46 P.3d 584 (Mont. 2002). The insurer has a duty to first determine whether the insured has been made whole before the insurer may collect subrogation. Ferguson v. Safeco Ins. Co. of America, 180 P.3d 1164 (Mont. 2008) (citing Swanson). Montana has not specifically addressed reimbursement of deductibles, but it is likely that an insurer would have to reimburse the full amount of the insured's deductible if the issue came before a court. See State v. Sharp, 148 P.3d 625 (Mont. 2006).

Nebraska

The insured must be fully compensated for a loss before the insurer may pursue subrogation. Blue Cross and Blue Shield of Nebraska, Inc. v. Dailey, 687 N.W.2d 689 (Neb. 2004). Contractual provisions which would deny the insured complete recovery for a loss are unenforceable. Id.

Nevada

Unless it is explicitly excluded, the made-whole doctrine operates as a default rule that is read into insurance contracts. Canfora v. Coast Hotels & Casinos, Inc., 121 P.3d 599 (Nev. 2005).

New Hampshire

In *dictum*, the Supreme Court noted that the equitable principal of subrogation, "is generally not allowed where the insured's total recovery is less than the insured's actual loss." Dimick v. Lewis, 497 A.2d 1221 (N.H. 1985). The court went on to state that the made whole rule is applied, "in cases where there is a recovery in full upon a judgment and *in absence of express contract terms*," id. (emphasis added), thereby suggesting that the made whole rule can be modified by contract or policy provisions.

New Jersey

An insured must be made whole only in the absence of express terms in the insurance contract to the contrary. Culver v. Ins. Co. of North America, 559 A.2d 400 (N.J. 1989) (citing Providence Washington Ins. Co. v. Hogges, 171 A.2d 120 (N.J. Super. App. Div. 1961)).

New Mexico

Made-whole rule is not followed. The insured's and insurer's share of a recovery should instead be equitably apportioned. White v. Sutherland, 585 P.2d 331 (N.M. 1978); Quality Chiropractic, PC v. Farmers Ins. Co. of Arizona, 51 P.3d 1172 (N.M. Ct. App. 2002).

New York

An insurer does not have to wait for its insured to be made whole before it can assert a subrogation claim. Winkelmann v. Excelsior Ins. Co., 650 N.E.2d 841 (N.Y. 1995). This is true whether the tortfeasor's insurance coverage is adequate to cover both the subrogor's and subrogee's claims or even if it is inadequate. Id. However, if the tortfeasor's insurance coverage is inadequate, and the insured/subrogor recovers money from the tortfeasor, the insurer has no right to recover any of the settlement proceeds which its insured received. Winkelmann; Berry v. St. Peter's Hosp. of City of Albany, 678 N.Y.S.2d 674 (App. Div. 1998).

North Carolina

Insured made whole first. St. Paul Fire and Marine Ins. Co. v. W.P. Rose Supply Co., 198 S.E.2d 482 (N.C. Ct. App. 1973). With regard to automobile collision insurance, the insured must be made whole, except for any deductible. N.C. Auto Insur. L. § 16:2.

North Dakota

North Dakota courts have not addressed the made whole doctrine in first-party property cases.

Ohio

The insured made whole doctrine is followed but can be modified where the terms of the subrogation agreement clearly and unambiguously provide otherwise. Northern Buckeye Education Council Group Health Benefits Plan v. Lawson, 814 N.E.2d 1210 (Ohio 2004).

Oklahoma

As a default rule, an insurer cannot recover through subrogation unless the insured has been fully compensated for its loss. Reeds v. Walker, 157 P.3d 100 (Okla. 2006). However, the parties may contract around the doctrine, provided the policy "contains an unequivocal, express statement that the insured does not have to be made whole before the insurer is entitled to recoup its payments." Id.

Oregon

No case on point.

Pennsylvania

An insurance company cannot exercise its right of subrogation until the insured has been fully compensated. Nationwide Mutual Ins. co. v. DiTomo, 478 A.2d 1381 (Pa. Super. Ct. 1984). An automobile insurer shall reimburse the insured's deductible on a pro-rata basis. 31 Pa. Code § 146.8, Jones v. Nationwide Prop. & Cas. Ins. Co., 32 A.3d 1261 (Pa. 2011). Whether a policy's terms can supersede the "made whole" rule is unsettled. See Valora v. Pa. Employees Benefit Trust Fund, 939 A.2d 312 (Pa. 2007) (where the court recognized the issue but declined to address it).

Rhode Island

An insurer does not acquire subrogation rights until the insured is fully compensated. Lombardi v. Merchants Mut. Ins. Co., 429 A.2d 1290 (R.I. 1981).

South Carolina

No published case law on the made-whole doctrine. However, the party claiming the right of subrogation must establish, *inter alia*, that "no injustice will be done to the other party by the allowance of the equity." Prudential Inv. Co. v. Connor, 112 S.E. 539 (S.C. 1921).

South Dakota

Although South Dakoda implicitly recognizes the common law made whole doctrine, it also recognizes that an insurer with a subrogation clause in its contract may pursue subrogation before the insured has been made whole, once payment has been made. Westfield Ins. Co., Inc. v. Rowe ex rel. Estate of Gallant, 631 N.W.2d 175 (S.D. 2001) (UIM case); Julson v. Federated Mut. Ins. Co., 562 N.W.2d 117 (S.D. 1997).

Tennessee

The insured must be made whole before subrogation rights arise in favor of the insurers. Wimberly v. American Cas. Co. of Reading, Pa. (CNA), 584 S.W.2d 200 (Tenn. 1979). The "made whole" rule does not extend to deductibles. Copper Basin Federal Credit Union v. Fiserv Solutions, Inc., 2011 WL 4860043 (E.D. Tenn. 2011).

Texas

Insured made whole unless the insurance contract says otherwise. Fortis Benefits v. Vanessa Cantu and Ford Motor Co., 234 S.W.3d 642 (Tex. 2007).

Utah

Insured made whole doctrine followed, but can be modified by clear and unambiguous contract terms and can be trumped by contrary statutes such as the Workers' Compensation Act. Anderson v. United Parcel Service, 96 P.3d 903 (Utah 2004).

Vermont

Although older case law suggests that the insurer should be reimbursed for its subrogation interest before the insured, see Cushman & Rankin Co. v. Boston & M.R.R., 73 A. 1073 (Vt. 1909) ("the insured is entitled to the residue"), newer case law suggests that the insured should be made whole in both equitable subrogation cases and in contractual (a.k.a. conventional) subrogation cases unless the contract giving rise to the conventional subrogation claim expressly provides otherwise. See Vermont Indus. Dev. Auth. v. Setze, 600 A.2d 302 (Vt. 1991) (holding that a party secondarily liable is not subrogated unless all of the principal obligations are discharged, and citing with approval cases from other jurisdictions applying the made whole doctrine's equitable principles even in cases of conventional subrogation unless the contract specifically provides otherwise).

Virginia

In PRC, Inc. v. O'Bryan, 47 Va. Cir. 81 (Fairfax County 1998), the court suggested, but did not hold, that an insurer cannot recover via subrogation until the insured has been fully compensated for its loss, unless the terms of a contract or policy state otherwise.

Washington

Absent contract language to the contrary, an insured is entitled to recover his general damages from the tortfeasor before allowing subrogation, provided that in so doing he does not prejudice the rights of his insurer. Thiringer v. Am. Motors Ins. Co., 588 P.2d 191 (Wash. 1978). Any subrogation recoveries must first be allocated to reimburse the full amount of the insured's deductible. Wash. Admin. Code 284-30-393.

West Virginia

An insured must be fully compensated for injuries or losses sustained before the subrogation rights of an insurance carrier arise unless there is a valid contractual obligation to the contrary. Kanawha Valley Radiologists, Inc. v. One Valley Bank, N.A., 557 S.E.2d 277 (W.Va. 2001); Porter v. McPherson, 479 S.E.2d 668 (W.Va. 1996). In a personal injury case, when applying the made whole doctrine to a health insurer's claims, the court should consider: 1) the ability of parties to prove liability; 2) the comparative fault of all parties involved in the accident; 3) the complexity of the legal and medical issues; 4) future medical expenses; 5) the nature of injuries; and 6) the assets or lack of assets available above and beyond the insurance policy. Provident Life & Acc. Ins. Co. v. Bennett, 483 S.E.2d 819 (W.Va. 1997).

WISCONSIN

The insured must be made whole, meaning compensated for all elements of damages notwithstanding merely the interests insured, before the subrogee may pursue subrogation. Muller v. Society Ins., 750 N.W.2d 1 (Wis. 2008). Parties may not contract around the applicability of the made whole doctrine even by express and unambiguous language illustrating an intent to do so. Ruckel v. Gassner, 646 N.W.2d 11 (Wis. 2002).

WYOMING

No case on point.

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