

Summer 2005

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Recommended Citation

Johnny C. Parker, *Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation, The*, 70 Mo. L. REV. (2005)

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The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation

*Johnny C. Parker**

Subrogation exists in the law as a mechanism for insurers to recover the costs of reimbursing injured insured parties. The right of subrogation is extremely important to insurers. The inclusion of provisions recognizing the right of insurance companies to seek subrogation or reimbursement for payments made in the event of a loss are the norm for almost every type of insurance contract. It is not uncommon for insurers to include both subrogation and reimbursement provisions in a policy. Consequently, every insurance company has established within its claims process a procedure for enforcing its interest in being repaid through both subrogation and reimbursement.

Application of the doctrine of subrogation often occurs at the expense of the insured. As a result, the common law developed the made whole doctrine, which limits the use of subrogation prior to an insured party receiving full compensation for damages. The primary purpose of this article is to explore the made whole doctrine as the principal weapon used by contemporary courts to curb the harsh effect of contractual subrogation on the rights of the insured. Section I of this article provides an overview of the expansion and use of subrogation in various types of insurance contracts. Section II examines the made whole doctrine, which has been utilized by modern courts to reign in the impact of subrogation on insured parties. This section identifies each jurisdiction that has adopted the doctrine and documents the circumstances and conditions required for its application on a state-by-state basis. While section II provides a comprehensive discussion of the made whole rule in the context of legal and conventional subrogation, a detailed discussion of the doctrine with regards to statutory subrogation on a state-by-state, statute-by-statute basis, is beyond the scope of this article. Section III attempts to catalog the various forms of the made whole doctrine and to identify the characteristics common to the respective forms. This section also associates each form with the jurisdictions that follow it.

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I. THE PRINCIPLE OF SUBROGATION

Subrogation is a creature of equity.¹ It is variously defined as the substitution of an insurer to the rights of its insured and as a normal incident of indemnity.² As such, upon payment of its insured's claim, the insurer steps into the shoes of the insured and acquires all of the rights the insured may have against a third party.³ Because an insurer's right of subrogation is purely derivative,⁴ a subrogating insurer inherits no greater rights against the tortfeasor than those possessed by the insured and is subject to the same defenses assertable against the insured.⁵ Furthermore, the party asserting subrogation

1. "The right of subrogation must be founded upon an equity just and reasonable according to general principles--an equity that will accomplish complete justice between the parties to the controversy. The one asserting the right cannot thereby profit from his own wrong; he must, himself, be without fault." *Standard Accident Ins. Co. v. Pellecchia*, 104 A.2d 288, 293 (N.J. 1954); *see also Wimberly v. Am. Cas. Co.*, 584 S.W.2d 200, 203 (Tenn. 1979).

The doctrine of subrogation in insurance does not arise from, nor is it dependent upon, statute or custom or any of the terms of the contract; it has its origin in general principles of equity and in the nature of the insurance contract as one of indemnity. The right of subrogation rests not upon a contract, but upon the principles of natural justice.

Wimberly, 584 S.W.2d at 203 (quotation omitted).

2. The purpose of insurance is to "pay back" or "indemnify" policyholders for what they have lost, or in other words, to restore the insured as far as practical to its pre-loss condition. The indemnity principle is one of the two primary rationales for subrogation. Unless the insurer is allowed subrogation from the tortfeasor the insured could potentially obtain double recovery by collecting the insurance proceeds for the loss and successfully suing the tortfeasor over the same loss. *See, e.g., Dix Mut. Ins. Co. v. LaFramboise*, 597 N.E.2d 622, 624 (Ill. 1992); *Kozlowski v. Briggs Leasing Corp.*, 408 N.Y.S.2d 1001, 1004 (N.Y. Gen. Term 1978); *Castleman Constr. Co. v. Pennington*, 432 S.W.2d 669, 674-75 (Tenn. 1968).

3. *See, e.g., LaFramboise*, 597 N.E.2d 622; *Amert v. Cont'l Cas. Co.*, 409 N.W.2d 660, 663 (S.D. 1987).

4. *See Gulf Ins. Co. v. TIG Ins. Co.*, 103 Cal. Rptr. 2d 305, 311 (Cal. Ct. App. 2001); *Fireman's Fund Ins. Co. v. Md. Cas. Co.*, 77 Cal Rptr. 2d 296, 303 (Cal. Ct. App. 1998); *Landrum v. State Farm Mut. Auto. Ins. Co.*, 527 S.E.2d 637, 638 (Ga. Ct. App. 2000); *Allied Mut. Ins. Co. v. Heiken*, 675 N.W.2d 820, 826 (Iowa 2004); *Burke v. Schroth*, 601 P.2d 1172, 1175 (Kan. Ct. App. 1979); *Hermeling v. Minn. Fire & Cas. Co.*, 534 N.W.2d 716, 718 (Minn. Ct. App. 1995), *aff'd*, 548 N.W.2d 370 (Minn. 1996), *overruled on other grounds*, *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 404 (Minn. 2000); *St. Paul Fire & Marine Ins. Co. v. Glassing*, 887 P.2d 218, 220 (Mont. 1994); *Motor Club Ins. Ass'n v. Fillman*, 568 N.W.2d 259, 264 (Neb. Ct. App. 1997); *USF&G v. Federated Rural Elec. Ins. Corp.*, 37 P.3d 828, 831 (Okla. 2001).

5. This process is described in the case law as that of "stepping into the shoes of the insured." *See Fed. Ins. Co. v. Travelers Cas. & Sur. Co.*, 843 So. 2d 140 (Ala. 2002); *Hartford Ins. Co. v. Mullinax*, 984 S.W.2d 821 (Ark. 1999); *Fireman's Fund*

bears the burden of proving the existence of the right.⁶ In the case of legal subrogation this entails demonstrating: (1) the existence of a debt or obligation for which a party, other than the subrogee, is primarily liable, which (2) the subrogee, who is neither a volunteer nor an intermeddler, pays or discharges in order to protect his own rights and interest.⁷ The proof requirement for contractual subrogation is satisfied by the expressed subrogation provision itself.⁸

Subrogation effectuates an equitable adjustment between parties by preventing unjust enrichment and furthering the principle of indemnity⁹ in two

Ins. Co., 77 Cal Rptr. 2d at 303; *Landrum*, 527 S.E.2d at 638; *Hermeling*, 534 N.W.2d at 718; *Glassing*, 887 P.2d at 221; *Fireman's Fund Am. Ins. Co. v. Phillips, Carter, Reister & Assoc., Inc.*, 546 P.2d 72, 74 (N.M. Ct. App. 1976); *Fed. Ins. Co. v. Arthur Anderson & Co.*, 552 N.E.2d 870, 872 (N.Y. 1990).

6. See *Knight v. Alefosio*, 205 Cal. Rptr. 42 (Cal. Ct. App. 1984); *First Ins. Co. of Hawaii, Ltd. v. Jackson*, 681 P.2d 569, 571 (Haw. 1984); *Aetna Cas. & Sur. Co. v. Hartford Accident & Indem. Co.*, 539 A.2d 239, 245 (Md. Ct. Spec. App. 1988); *Wolters v. Am. Republic Ins. Co.*, 827 A.2d 197, 200 (N.H. 2003); *Nationwide Mut. Fire Ins. Co. v. Gamelin*, 786 A.2d 1078, 1084 (Vt. 2001); *Yun v. Papp*, 1997 WL 811837, at *5 (Wis. Ct. App. 1997) (per curiam) (unpublished opinion).

7. See *Lawyers Title Ins. Corp. v. Edmar Constr. Co.*, 294 A.2d 865, 869 (D.C. 1972); *Sec. Ins. Co. v. Mangan*, 242 A.2d 482, 485 (Md. 1968); *Aetna Cas. & Sur. Co. v. Hartford Accident & Indem. Co.*, 539 A.2d 239 (Md. Ct. Spec. App. 1988); *Argonaut Ins. Co. v. Allstate Ins. Co.*, 869 S.W.2d 537, 542 (Tex. App. 1993); *Livingston v. Shelton*, 537 P.2d 774, 776 (Wash. 1975) (en banc); but see *Gulf Ins. Co. v. TIG Ins. Co.*, 103 Cal. Rptr. 2d 305 (Cal. Ct. App. 2001):

An insurer's cause of action for equitable subrogation contains six elements: (1) the insured has suffered a loss for which the party to be charged is liable; (2) the insurer has compensated for the loss; (3) the insured has existing, assignable causes of action against the party to be charged, which the insured could have pursued had the insurer not compensated the loss; (4) the insurer has suffered damages caused by the act or omission which triggers the liability of the party to be charged; (5) justice requires that the loss be shifted entirely from the insurer to the party to be charged; and (6) the insurer's damages are in a stated sum, which is usually the amount paid to the insured, assuming the payment was not voluntary and was reasonable.

Id. at 312. See also *Great Southwest Fire Ins. Co. v. CNA Ins. Co.*, 547 So. 2d 1339, 1347 (La. Ct. App. 1989).

Some jurisdictions express the requirements for equitable subrogation in terms of four elements. See ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW, § 96[b] (2d ed. 1996) (citing *Hampton Loan & Exch. Bank v. Lightsey*, 152 S.E. 425 (S.C. 1930)).

8. See *State Farm Fire & Cas. Co. v. Pac. Rent-All*, 978 P.2d 753 (Haw. 1999); *Dairyland Ins. Co. v. Trail*, 459 So. 2d 1368 (La. Ct. App. 1984); *Mangan*, 242 A.2d 482; *Mut. Hosp. Ins., Inc. v. MacGregor*, 368 N.E.2d 1376 (Ind. Ct. App. 1977).

9. Almost all types of insurance are designed to provide no more than reimbursement for an insured. Moreover, it is now a generally accepted fundamental tenet of insurance law that opportunities for net gain to an insured through the receipt of insurance proceeds exceeding a loss is inimical to the public interest. In other words,

ways. First, it compels payment of a debt by one who in equity ought to pay,¹⁰ i.e. the tortfeasor. Second, it achieves these objectives in the context of the insured by precluding an insured from recovering twice for the same loss.¹¹ Subrogation allows the insurer to be substituted to the rights of the insured and seek recovery for its payment to the insured directly from the third party responsible for the loss, or when the insured has recovered from the third party, to be reimbursed from that recovery.¹²

There are three types of subrogation – legal, conventional and statutory.¹³ Legal subrogation, also known as equitable or judicial subrogation, arises by operation of law.¹⁴ Conventional or contractual subrogation arises out of a contractual agreement between the insured and insurer.¹⁵ The agreement can take many forms, such as a subrogation provision in the policy or a release agreement, assignment or trust agreement. Statutory subrogation is a creature of the legislature and arises from a legislative enactment which vests

insurance arrangements are structured to provide funds to offset a loss either wholly or partly, and the payments made by an insurer generally are limited to an amount that does not exceed what is required to restore the insured to a condition relatively equivalent to that which existed before the loss occurred. The concept that insurance contracts shall confer a benefit no greater in value than the loss suffered by an insured is generally referred to as the “principle of indemnity.” R. KEETON & A. WIDISS, *INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES* § 3.1(a) (Student ed. 1988). Another rationale for subrogation is that it provides restitution to the insurer for payments made. See CHARLES MITCHELL, *THE LAW OF SUBROGATION* 8-15 (1994).

10. See, e.g., *Dix Mut. Ins. Co. v. LaFramboise*, 597 N.E.2d 622, 624 (Ill. 1992); *Westendorf v. Stasson*, 330 N.W.2d 699, 703 (Minn. 1983); *Wolters*, 827 A.2d at 199-200; *Amert v. Cont’l Cas. Co.*, 409 N.W.2d 660, 663 (S.D. 1987); *Castleman Constr. Co. v. Pennington*, 432 S.W.2d 669, 674 (Tenn. 1968).

11. See, e.g., *Amert*, 409 N.W.2d at 663. Double or duplicative recovery by the insured is a result which the law has always looked upon with disfavor. It is contrary to the principle of indemnity and produces unjust enrichment.

12. Subrogation and reimbursement are not synonymous terms despite the fact that the primary objective of the former is to achieve the latter. See *Smith v. Manville Forest Corp.*, 521 So. 2d 772, 775 (La. Ct. App. 1988). For a detailed discussion of the distinction between subrogation and reimbursement, see *Mahler v. Szucs*, 957 P.2d 632 (Wash. 1998).

13. See *Liberty Mut. Ins. Co. v. Clark*, 299 S.E.2d 76, 77 (Ga. Ct. App. 1985); *Stancil v. Erie Ins. Co.*, 740 A.2d 46, 47 (Md. Ct. App. 1999); *Blue Cross & Blue Shield Mut. v. Hrenko*, 647 N.E.2d 1358, 1359 (Ohio 1995); *Blankenship v. Estate of Bain*, 5 S.W.3d 647, 650 (Tenn. 1999); *Texas Ass’n. of Sch. Bds., Inc. v. Ward*, 18 S.W.3d 256, 258 (Tx. Ct. App. 2000); *Houle v. Sch. Dist. of Ashland*, 671 N.W.2d 395 (Wis. Ct. App. 2003).

14. See *St. Paul Fire & Marine Ins. Co. v. Murray Guard, Inc.*, 37 S.W.3d 180, 183, 183 n.1 (Ark. 2001); *Century Indem. Co. v. London Underwriters*, 16 Cal. Rptr. 2d 393, 397 (Cal. Ct. App. 1993).

15. *State Farm Fire & Cas. Co. v. Pac. Rent-All*, 978 P.2d 753, 766 n.9 (Haw. 1999); *Hosp. Serv. Corp. of R.I. v. Pa. Ins. Co.*, 227 A.2d 105, 108-09 (R.I. 1967).

a right of subrogation in a person, entity or organization.¹⁶ The effect of statutory subrogation on legal and contractual subrogation turns upon the intent of the legislature as determined by the court utilizing the language of the statute.¹⁷

The distinction between legal, conventional and statutory subrogation does not call for a *per se* rule that equitable principles have no application in conventional and statutory subrogation cases.¹⁸ One explanation for this view is that the right of insurance companies to freely contract and limit their liability or impose conditions they deem appropriate upon their obligation to provide coverage in a contract of insurance may not be exercised in a manner inconsistent with public policy – either statutorily or judicially defined.¹⁹ Another explanation can be found in the rule that the right of subrogation is not absolute.²⁰ Consequently, courts in the context of subrogation have re-

16. See *Clark*, 299 S.E.2d 76; *Stancil*, 740 A.2d 46; *Hrenko*, 647 N.E.2d 1358; *Blankenship*, 5 S.W.3d 647; *Ward*, 18 S.W.3d 256; *Houle*, 671 N.W.2d 395.

17. See *Sol v. AIG Hawaii Ins. Co.*, 875 P.2d 921, 924 (Haw. 1994); *Podgurski v. OneBeacon Ins. Co.*, 821 A.2d 400, 405-06 (Md. Ct. App. 2003); *Aetna Cas. & Sur. Co. v. State Bd. for Prop. & Cas. Rates*, 637 P.2d 1251, 1255 (Okla. 1981); *Paulson v. Dep't of Soc. & Health Servs.*, 898 P.2d 353, 355 (Wash. Ct. App. 1995). "The specific effect that the terms of a statute may have on equitable subrogation, contractual subrogation, or both, vary considerably according to the terms of the statute." LEE R. RUSS & THOMAS F. SEGALL, *COUCH ON INSURANCE* 3D, vol. 16, § 222:45, 222-81 (2000).

18. See *Dixie Nat'l Bank v. Employers Commercial Union Ins. Co.*, 463 So. 2d 1147, 1151-52 (Fla. 1985); *Underwood v. Dep't of Health & Rehab. Servs.*, 551 So. 2d 522, 526 (Fla. Dist. Ct. App. 1989) (stating that Florida's medical assistance law, which granted the state a right of subrogation as well as lien on recovery by insured, allowed application of equitable subrogation principles); *Paulson*, 898 P.2d at 356 (stating that legislature's creation of lien against recovery by insured in addition to a right of subrogation suggest that legislature in enacted statute intended to supplant equitable subrogation principles). Many jurisdictions recognize that equitable principles apply to both legal and conventional subrogation except when modified by specific provisions in the contract. See *Allstate Ins. v. Hugh Cole Builder, Inc.*, 772 So. 2d 1145, 1146-47 (Ala. 2000); *Franklin v. Healthsource of Ark.*, 942 S.W.2d 837, 840 (Ark. 1997) (stating that subrogation does not require that a distinction be drawn between equitable and conventional subrogation); *Westendorf v. Stasson*, 330 N.W.2d 699 (Minn. 1983); *Castleman Constr. Co. v. Pennington*, 432 S.W.2d 669, 676 (Tenn. 1968) (stating that regardless of source of subrogation, right is enforceable only after consideration of the equities).

19. See, e.g., *Liggins R.V. Center v. John Deere Ins. Co.*, 575 So. 2d 567, 569 (Ala. 1991); *W. World Ins. Co. v. Branch*, 965 S.W.2d 760 (Ark. 1998); *Daun v. USAA Cas. Ins. Co.*, 23 Cal Rptr. 3d 44, 46-47 (Cal. Ct. App. 2005).

20. See *Nat'l Sec. Fire & Cas. Co. v. Mazzara*, 268 So. 2d 814, 817 (Ala. 1972); *Dixie Nat'l Bank*, 463 So. 2d at 1151; *State Farm Fire & Cas. Co. v. Pac. Rent-All, Inc.*, 978 P.2d 753, 771 (Haw. 1999); *Lawyers Title Ins. Corp. v. Capp*, 369 N.E.2d 672, 674 (Ind. Ct. App. 1977); *True v. Raines*, 99 S.W.3d 439, 446 (Ky. 2003) (stating that statutory subrogation is not absolute); *Stancil*, 740 A.2d at 47 (stating that

served the right to regulate conventional and statutory subrogation in order to maintain fairness between the parties or to serve other important policy goals.²¹ Thus, courts are undoubtedly influenced by the fact that subrogation is an equitable remedy and equitable principles control its application in determining what types of contractual and statutory subrogation arrangements are enforceable.²²

Because subrogation is designed to achieve an equitable adjustment of rights between the insured and insurer, its contours cannot always be contractually defined. In other words, whether the right of subrogation arises upon payment of proceeds does not turn upon language in the contract of insurance itself but upon the type of coverage or line of insurance involved. "Courts have tended to inquire into whether the insurance contract is one of 'indemnity'; only if it is a contract of indemnity have many courts allowed subrogation"²³ in the absence of an expressed provision or statutory authority. Thus,

equitable subrogation is not absolute); *Melick v. Stanley*, 416 A.2d 415, 418 (N.J. Super. Ct. Law Div. 1980); *Esparza v. Scott & White Health Plan*, 909 S.W.2d 548, 552 (Tex. Ct. App. 1995). Whether statutory subrogation is absolute depends upon the legislative intent and purpose of statute. *See Paulson*, 898 P.2d at 356 (stating that legislature's creation of lien against recovery by insured in addition to a right of subrogation suggest that legislature in enacted statute intended to supplant equitable subrogation principles); *Underwood*, 551 So. 2d at 526 (stating that Florida's medical assistance law, which granted the state a right of subrogation as well as lien on recovery by insured, allowed application of equitable subrogation principles); *see also Winfree v. Philadelphia Elec. Co.*, 554 A.2d 485, 487 (Pa. 1989) (finding statutory subrogation absolute).

21. *See Underwood*, 551 So. 2d at 526 (stating that Florida's medical assistance law which granted the state a right of subrogation as well as lien on recovery by insured, allowed application of equitable subrogation principles); *Dixie Nat'l Bank*, 463 So. 2d at 1151-52; *Paulson*, 898 P.2d at 355 (stating that legislature's creation of lien against recovery by insured in addition to a right of subrogation suggest that legislature in enacted statute intended to supplant equitable subrogation principles). Many jurisdictions recognize that equitable principles apply to both legal and conventional subrogation except when modified by specific provisions in the contract. *See Hugh Cole Builder, Inc.*, 772 So. 2d at 1146-47; *Franklin*, 942 S.W.2d at 840 (stating that subrogation does not require that a distinction be drawn between equitable and conventional subrogation); *Westendorf*, 330 N.W.2d at 703; *Castleman Constr. Co.*, 432 S.W.2d at 675 (stating that regardless of source of subrogation, right is enforceable only after consideration of the equities); *Lyon*, 480 P.2d at 744-45.

22. *See, e.g., Farmers Ins. Group of Cos. v. Martinez*, 752 P.2d 797, 798 (N.M. Ct. App. 1988); *see also JERRY*, *supra* note 7, § 96(a).

23. *JERRY*, *supra* note 7, § 96(c). *See also Helfend v. S. Cal. Transit*, 465 P.2d 61, 67 n.17 (Cal. 1970); *Damhesel v. Hardware Dealers Mut. Fire Ins. Co.*, 209 N.E.2d 876, 878 (Ill. 1965); *Frost v. Porter Leasing Corp.*, 436 N.E.2d 387, 390 (Mass. 1982); *Wolters v. Am. Republic Ins. Co.*, 827 A.2d 197, 200 (N.H. 2003); *Suttles v. Ry. Mail Ass'n*, 141 N.Y.S. 1024, 1026 (N.Y. App. Div. 1913); *Ridge Tool Co. v. Silva*, 515 N.E.2d 945, 946 (Ohio Ct. App. 1980); *Cunningham v. Metro. Life*, 360 N.W.2d 33, 37 (Wis. 1985).

courts have uniformly applied the principle of equitable subrogation, even in the absence of an expressed subrogation provision in the policy, to property and casualty policies.²⁴ The rationale for this view is rooted in the notion that a property insurer's sole obligation is to indemnify the insured for its actual loss.²⁵ Because the insured's actual loss is generally liquidated in the context of property insurance, any excess compensation from the combination of insurance proceeds and tort recovery can be determined with certainty. Subrogation is then used to prevent double recovery by requiring the insured to return any excess to the insurer.

Indemnity, subject to the exception for personal insurance, is the principle on which all insurance against loss is founded.²⁶ Indemnity insurance can be classified into two types. One is a true "indemnity" policy; the other provides indemnity against liability for harm caused by the insured and is commonly referred to as a liability policy. A true indemnity policy is only enforceable after the insured, as a result of an accident, has experienced an actual loss.

Indemnity against liability, in contrast, is triggered when a third-party asserts that the insured is legally liable to it for injury caused. The legal liability of the insured to the third-party determines the enforceability of the latter type of indemnity policy.²⁷ Liability insurance is also generally viewed as an indemnity contract.²⁸ Because liability insurance is a species of indemnity contract, the principle of equitable subrogation has been applied to it under the same circumstances as it has in the context of property insurance.²⁹

The principle of indemnity increasingly weakens as the line of insurance proceeds from property/casualty and liability to life, health and medical insurance. This line of progression is generally used to describe the transforma-

24. See, e.g., *Damhesel*, 209 N.E.2d 876; *Frost*, 436 N.E.2d 387; *Wolters*, 827 A.2d 197; *Perreira v. Rediger*, 778 A.2d 429, 437 (N.J. 2001); *Suttles*, 141 N.Y.S. 1024; *Ridge Tool Co.*, 515 N.E.2d at 946; but see *Gatzweiler v. Milwaukee Elec. Ry. & Light Co.*, 116 N.W. 633 (Wis. 1908).

25. See, e.g., *Damhesel*, 209 N.E.2d 876; *Frost*, 436 N.E.2d 387; *Perreira*, 778 A.2d 429; *Suttles*, 141 N.Y.S. 1024; *Ridge Tool Co.*, 515 N.E.2d 945; but see *Gatzweiler*, 116 N.W. 633.

26. 1 ROWLAND H. LONG, *THE LAW OF LIABILITY INSURANCE* § 1.03[4], 1-12 (Matthew Bender 1991).

27. Usually, if the policy indemnifying the insured against loss by reason of liability imposed by law contains the familiar provisions for notice of the accident and assumption of the investigation and defense by the insurer and provides that no action shall lie against the insurer unless loss has been established by judgment against the insured, then the policy will be considered a contract against liability to pay damages rather than a mere contract of indemnity. LONG, *supra* note 26, § 1.03[4], 1-13.

28. See, e.g., *Sec. Ins. Co. v. Mangan*, 242 A.2d 482 (Md. 1968). *Ocean Accident & Guarantee Corp. v. Hooker Electrochemical Co.*, 147 N.E. 351 (N.Y.Ct. App. 1925); *Lawyers Title Guar. Funds v. Sanders*, 571 P.2d 454 (Okla. 1977).

29. See KEETON & WIDISS, *supra* note 9, § 3.10(3).

tion of insurance policies from those of indemnity to those of investment or personal contracts.

Personal insurance is distinguishable from indemnity insurance such as property/casualty and liability in that it is insurance upon the person of an individual or group of individuals. Insurance, other than personal insurance, "in some way involves a *res* different from the person of the policyholder. In personal insurance, however, that is the sole object of concern, and liability of the insurer arises, ordinarily, upon the insured's death or, perhaps, disability resulting from accident or illness."³⁰

Life insurance is generally viewed as an investment contract to which the principle of subrogation is rarely, if ever, applied.³¹ The rationale for this view was succinctly stated by the court in *City of Birmingham v. Walker*:³²

The doctrine of subrogation applied in indemnity insurance, by which insurer is entitled to recover in the name or right of insured against a wrongdoer who has caused the destruction of the property covered by the policy, has no application to life insurance, for the reason that there is no right of action for causing the death of a per-

30. J. APPLEMAN & J. APPLEMAN, *INSURANCE LAW AND PRACTICE*, § 1, at 3 (1981).

31. JERRY, *supra* note 7, § 96(c). It has been suggested that the judicial refusal to apply implied subrogation and reluctance to interpret expressed subrogation provisions expansively in life and accident insurance can be explained on the basis of any one or a combination of differences between life/accident and property insurance.

First, the amount of economic damage is not as readily evaluated in regard to loss of a life or an accidental injury to a person as it is in property losses. Placing a monetary value on a person's life, the loss of a limb, or a personal injury is, at best, far more of an approximation than determining the market value or replacement cost of a building.

Second, life and accident insurance policies are seldom in amounts that are sufficient to provide full indemnity; property insurance often does so.

Third, many types of life insurance are approximately viewed as an "investment" as well as an "indemnity" contract. When an insurance arrangement involves an investment component, courts have been inclined to minimize the importance of indemnity principles. R. KEETON & WIDISS, *supra* note 9, § 3.10(6). See also *Exch. Bank v. Loh*, 31 S.E. 459, 468 (Ga. 1898) ("The weight of authority is that life insurance is not a contract of indemnity.") (Little, J., concurring specially).

The indemnity/investment dichotomy has been severely criticized by at least one commentator. Accordingly,

the crucial distinction is not between indemnity and investment but between a policy that merely makes the policyholder whole and one that pays a specified sum on the happening of the event insured against; i.e. [life insurance] is a 'valued' policy that is to be regarded as an 'investment' or 'non-indemnity' contract, for purposes of subrogation.

Spencer L. Kimball & Don A. Davis, *The Extension of Insurance Subrogation*, 60 MICH. L. REV. 841, 851 (1962).

32. 101 So. 2d 250 (Ala. 1958).

son except as such remedy is given by statute, and for the further reason that life insurance is not a contract of indemnity; and, accordingly, subrogation not contracted for is not given insurer in case of death.³³

The phrase "subrogation not contracted for is not given insurer in case of death" does not alter the reality that courts are uniformly opposed to extending the principles of subrogation to cover life insurance.³⁴ For example, in *Continental Casualty Co. v. Estate of Stanley*³⁵ the court was asked to enforce a subrogation provision in favor of an insurer whereby the insurer reserved in the policy "the right to recover any payments we have made from anyone who may be responsible for the insured's loss."³⁶ Following the death of its insured in an airplane crash attributed to Valujet, Continental Casualty Company paid the proceeds of the policy and sought to protect its subrogation interest by intervening in the wrongful death actions filed by the estate of the insured.³⁷ The court in *Continental Casualty* merely classified the policy in dispute as a valued policy in which the subject of the insurance was life and death, to which the principle of subrogation, "whether contractual or equitable," does not apply.³⁸

A similar rationale was applied by the Supreme Court of South Dakota in *Le Mars Mutual Insurance Co. v. Prehn*.³⁹ Therein, the court addressing the subrogation rights of an insurer under an accidental death coverage contained in an automobile insurance policy distinguished indemnity contracts from life insurance policies.⁴⁰ Employing a statutory analysis the court concluded that subrogation is inimical to accidental death coverage.⁴¹

Policies providing benefits for medical or hospital expenses are generally viewed by courts as contracts for personal insurance.⁴² The overwhelming majority of jurisdictions that have addressed the issue of whether equitable subrogation applies to personal insurance contracts have concluded that such

33. *Id.* at 253 (citation omitted).

34. The cases in which courts have specifically addressed the application of subrogation principles to life insurance are extremely rare. This fact, along with dicta from other insurance cases, has been construed as evidence in support of the proposition that neither legal nor conventional subrogation has application in the context of life insurance. See Kimball & Davis, *supra* note 31, at 844.

35. 721 So. 2d 431 (Fla. Dist. Ct. App. 1998).

36. *Id.* at 432.

37. *Id.*

38. *Id.* at 433.

39. 238 N.W.2d 274 (S.D. 1975).

40. *Id.* at 276-77.

41. *Id.* at 277.

42. See *Cunningham v. Metro. Life Ins. Co.*, 360 N.W.2d 33, 37-39 (Wis. 1985).

an insurer has no right to subrogation absent an expressed provision in the policy.⁴³

The rationale underlying the prohibition against applying equitable subrogation in the personal contract context was succinctly stated by the court in *Perreira v. Rediger*.⁴⁴ Therein the court observed:

Subrogation rights are common under policies of property or casualty insurance, wherein the insured sustains a fixed financial loss, and the purpose is to place that loss ultimately on the wrongdoer. To permit the insured in such instances to recover from both the

43. See *Ala. Farm Bureau Mut. Cas. Ins. Co. v. Anderson*, 263 So. 2d 149, 151-54 (Ala. Ct. App. 1972); *Am. Pioneer Life Ins. Co. v. Rogers*, 753 S.W.2d 530, 530-33 (Ark. 1988); *Lee v. State Farm Mut. Auto. Ins., Co.*, 129 Cal. Rptr. 2d 271, 274-76 (Cal. Ct. App. 1976); *W. Cas. & Sur. Co. v. Bowling*, 565 P.2d 970, 971-72 (Colo. Ct. App. 1977); *Higgins v. Allied Am. Mut. Fire Ins. Co.*, 237 A.2d 471, 471-72 (D.C. 1968); *DeCespedes v. Prudence Mut. Cas. Co.*, 193 So. 2d 224, 225 (Fla. Dist. Ct. App. 1966); *GEICO v. Hirsh*, 439 S.E.2d 59, 60 (Ga. Ct. App. 1993) (holding subrogation provision void because it constitutes an assignment in violation of Georgia statute), *but see Shook v. Pilot Life Ins. Co.*, 373 S.E.2d 813, 814-15 (Ga. Ct. App. 1988) (holding subrogation provision valid because it does not constitute an assignment in violation of the Georgia statute); *Rinehart v. Farm Bureau Mut. Ins. Co.*, 524 P.2d 1343, 1344-46 (Idaho 1974); *Schultz v. Gotlund*, 561 N.E.2d 652, 654 (Ill. 1990); *Spirek v. State Farm Mut. Auto. Ins. Co.*, 382 N.E.2d 111, 117-18 (Ill. App. Ct. 1978), *overruled on other grounds*, *Miner v. Gillette Co.*, 428 N.E.2d 478, 481-82 (Ill. 1981); *Imel v. Travelers Indem. Co.*, 281 N.E.2d 919, 920-21 (Ind. Ct. App. 1972); *S. Farm Bureau Cas. Ins. Co. v. Sonnier*, 406 So. 2d 178, 179 (La. 1981); *McCain Foods, Inc. v. Gerard*, 489 A.2d 503, 504-05 (Me. 1985); *Frost v. Porter Leasing Corp.*, 436 N.E.2d 387, 389-91 (Mass. 1982); *Mich. Med. Serv. v. Sharpe*, 64 N.W.2d 713, 714-15 (Mich. 1954) (en banc); *Travelers Indem. Co. v. Vaccari*, 245 N.W.2d 844, 846 (Minn. 1976) (en banc); *Milbank Ins. Co. v. Henry*, 441 N.W.2d 143, 145 (Neb. 1989); *Wolters v. Am. Republic Ins. Co.*, 827 A.2d 197, 200-02 (N.H. 2003); *Perreira v. Rediger*, 778 A.2d 429, 437-38 (N.J. 2001); *Carver v. Mills*, 207 S.E.2d 394, 396 (N.C. Ct. App. 1974); *Ridge Tool Co. v. Silva*, 515 N.E.2d 945, 946-47 (Ohio Ct. App. 1986) (per curiam); *Smith v. Travelers Ins. Co.*, 362 N.E.2d 264 (Ohio 1977) (per curiam); *Am. Med. Sec. v. Josephson*, 15 P.3d 976, 978 (Okla. Civ. App. 2000); *Geertz v. State Farm Fire & Cas.*, 451 P.2d 860, 861-63 (Ore. 1969); *Demmery v. Nat'l Union Fire Ins. Co.*, 232 A.2d 21, 24-26 (Pa. Super. Ct. 1967); *Hamrick v. Hosp. Serv. Corp.*, 296 A.2d 15 (R.I. 1972); *Shumpert v. Time Ins. Co.*, 496 S.E.2d 653, 656-58 (S.C. Ct. App. 1998); *Schuldt v. State Farm Mut. Auto. Ins. Co.*, 238 N.W.2d 270, 271-72 (S.D. 1975); *Wilson v. Tenn. Farmers Mut. Ins. Co.*, 411 S.W.2d 699, 701-02 (Tenn. 1966); *Found. Reserve Ins. Co. v. Cody*, 458 S.W.2d 214, 215-16 (Tex. Civ. App. 1970); *State Farm Mut. Ins. Co. v. Farmers Ins. Exch.*, 450 P.2d 458, 458-59 (Utah 1969); *Collins v. Blue Cross*, 193 S.E.2d 782, 785 (Va. 1973), *supereded by statute*, VA. CODE ANN. § 38.2-3405(A) (Michie 2004) (prohibiting subrogation provisions in insurance contracts providing hospital and medical benefits); *Travelers Indem. Co. v. Rader*, 166 S.E.2d 157, 161 (W. Va. 1969); *Cunningham*, 360 N.W.2d at 37-38.

44. 778 A.2d 429 (N.J. 2001).

insurer and the wrongdoer would permit him to profit unduly thereby.⁴⁵

In personal insurance contracts, however, the exact loss is never capable of ascertainment. Life, death, health, physical well being, and such matters are incapable of exact financial estimation. There are, accordingly, not the same reasons militating against a double recovery. The general rule is, therefore, that the insurer is not subrogated to the insured's rights or to the beneficiary's rights under contracts of personal insurance, at least in the absence of a policy provision so providing.⁴⁶

The foregoing rule could easily be construed to mean that the principle of equitable subrogation has no application whatsoever to personal insurance coverages because the expressed provision is controlling. This construction, however, would require that the inherently equitable nature of subrogation be completely disregarded. The better construction of the majority rule is that equity will not recognize the right of an insurer to be subrogated unless the policy contains a provision so providing. The presence of an expressed subrogation provision merely creates in the insurer a right to be subrogated. However, as discussed earlier, the contours and the extent to which the insurer's subrogation rights are enforceable are still defined by equity.⁴⁷

Most insurance policies are packaged products. This merely means that most policies provide coverage for personal as well as property protection. For example, a typical homeowners policy provides for property, medical and liability coverages. The same is true for automobile insurance. A purchaser of automobile insurance, at her discretion, is free to purchase, in addition to mandatory liability coverage, medical payment, property and uninsured motorist protection. The packaged nature in which insurance is usually produced and distributed is not restricted to the individual coverages themselves.

45. *Id.* at 438.

46. *Id.* at 438. In *Am. Pioneer Life Ins. Co. v. Rogers*, 753 S.W.2d 530 (Ark. 1988), the Arkansas Supreme Court stated the rationale as follows:

[R]ecovery for medical insurance benefits and tort damages does not necessarily produce a windfall or duplicative recovery. Most always when there is tort recovery the consideration for payment by the tortfeasor includes loss of wages, loss of earning capacity, pain and suffering, permanent or temporary physical impairment, medical expenses, property damages and intangible losses which are not susceptible to exact measurement. The principles which cause us to recognize equitable subrogation in property disputes are not present in the field of medical expense payments for personal injuries.

Id. at 532-33. See also *Frost v. Porter Leasing Corp.*, 436 N.E.2d 387, 390-91 (Mass. 1982).

47. This view is supported by the primary thesis of this article. The majority of jurisdictions that have adopted the made whole doctrine in the context of conventional subrogation have done so primarily on the basis of equity.

Rather, a specific type of coverage such as medical and hospitalization insurance can contain both personal and indemnity features.⁴⁸

The requirement of an expressed subrogation provision in a personal insurance contract demonstrates that indemnity is also a feature of medical, hospital and accident insurance.⁴⁹ Consequently, even in the absence of a subrogation provision, in a personal insurance contract, the court is arguably required to examine the specific provision of the policy pursuant to which payment was made and subrogation is being sought to determine whether it is of a personal or indemnity nature.⁵⁰ The practice of examining the specific provisions of a personal insurance contract to determine its nature further supports a construction of the majority rule that recognizes the application of equitable principles to personal insurance, even where the policy contains an expressed subrogation provision. The unstated and overlooked reality in the majority of jurisdictions is that equitable principles can have application in personal insurance subrogation disputes between insurers and their insureds either in the process of (1) ascertaining the contours of an expressed subrogation provision⁵¹ or (2) determining whether the proceeds were paid and subrogation is being sought pursuant to a personal or indemnity provision of the policy.

The Pennsylvania Superior Court demonstrated a third and even more extreme illustration of the role of equity in a personal insurance subrogation dispute in *Hollaran v. Larrieu*.⁵² Therein, the court entertained the issue of whether equitable subrogation applied to a medical insurance policy which did not contain an expressed subrogation provision. The court in *Hollaran* relied upon the traditional rationales for equitable subrogation – i.e. prevent double recovery and compel discharge of an obligation by the one who in good conscience ought to pay – to conclude that the subrogee was entitled to equitably subrogate its claim even in the absence of an expressed provision. In explaining its dramatic divergence from the traditional indemnity/investment contract analysis, the court observed that “even if Pennsylvania stands alone in this regard, we would not retreat from our holding.”⁵³

The preceding discussion demonstrates that “[t]he distinction between indemnity and [personal] investment contracts for purposes of determining legal subrogation is a tenuous one, and courts have been viewed as inept in

48. See John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1501-02 (1966); Kimball & Davis, *supra* note 31, at 851-60.

49. See *Cunningham v. Metro. Life Ins. Co.*, 360 N.W.2d 33, 39 (Wis. 1985).

50. See *id.* at 34-35. The approach described in the text has only been approved in one jurisdiction. It is used merely to demonstrate the extremes to which the indemnity/personal insurance dichotomy has and can carry the court.

51. See *RUSS & SEGALL*, *supra* note 17, at § 222:22.

52. 637 A.2d 317 (Pa. Super. Ct. 1994).

53. *Id.* at 322.

applying it.”⁵⁴ Because most modern insurance policies contain indemnity and personal contract features, “the old rule that an indemnity contract gives rise to legal subrogation while a liability contract affords only conventional subrogation, can be sustained only with difficulty.”⁵⁵

A minority of jurisdictions continue to adhere to the view that neither equitable nor contractual subrogation applies to medical payment coverage.⁵⁶ These jurisdictions, like their majority counterparts, recognize that medical payment policies are personal insurance contracts. However, according to the minority view, allowing subrogation in this context would run afoul of the common law prohibitions against splitting of a personal injury cause of action and/or assigning a personal injury action.⁵⁷ Decisional law demonstrates that these two arguments serve as the favored basis for precluding the application of subrogation to medical payment policies among the jurisdictions that continue to follow the minority view.⁵⁸ Nevertheless, public policy has also been recognized as an alternative rationale for the view that medical payment subrogation clauses are invalid.⁵⁹ In *Youngblood v. American States Insurance Co.*,⁶⁰ the court observed that the public policy considerations included the facts that:

- (1) [T]he insured paid a premium for medical payment coverage;
- (2) the insured is the one likely to suffer most if medical payments received must be repaid out of a third-party recovery; and (3) the tortfeasor’s carrier may consider that the injured person has already been paid medical expenses and can make a smaller offer which allows that such payment has already been made.⁶¹

54. *Cunningham*, 360 N.W.2d at 42 (Abrahamson, J., concurring in part and dissenting in part) (citing *Kimball & Davis*, *supra* note 31, at 851-60); *see also* *Ridge Tool Co. v. Silva* 515 N.E.2d 945, 947 (Ohio Ct. App. 1986) (George, J., dissenting).

55. *Sec. Ins. Co. v. Mangan*, 242 A.2d 482, 487 (Md. 1968).

56. *See Allstate Ins. Co. v. Druke*, 576 P.2d 489, 491-92 (Ariz. 1978). *Compare GEICO v. Hirsh*, 439 S.E.2d 59 (Ga. Ct. App. 1993) (invalidating subrogation provision because it constitutes an assignment in violation of Georgia statute), *with Shook v. Pilot Life Ins. Co.*, 373 S.E.2d 813 (Ga. Ct. App. 1988) (validating subrogation provision because it does not constitute an assignment in violation of the Georgia statute). *See also Durrett v. Bryan*, 799 P.2d 110 (Kan. Ct. App. 1990) (prohibiting medical subrogation by statute); *Travelers Indem. Co. v. Chumbley*, 394 S.W.2d 418 (Mo. Ct. App. 1965); *Swanson v. Hartford Ins. Co. of the Midwest*, 46 P.3d 584 (Mont. 2002); *Youngblood v. Am. States Ins. Co.*, 866 P.2d 203, 206 (Mont. 1993); *Maxwell v. Allstate Ins. Co.*, 728 P.2d 812 (Nev. 1986) (*per curiam*).

57. *See Rinehart v. Farm Bur. Mut. Ins. Co.*, 524 P.2d 1343 (Idaho 1974); *Youngblood*, 866 P.2d at 206.

58. *See Druke*, 576 P.2d at 491; *Hirsh*, 439 S.E.2d at 60; *Chumbley*, 394 S.W.2d at 425; *Swanson*, 46 P.3d at 590.

59. *See, e.g., Youngblood*, 866 P.2d at 205, 207-08; *Maxwell*, 728 P.2d at 815.

60. 866 P.2d 203.

61. *Id.* at 207.

The minority view, unlike its majority counterparts, locks and bolts all the doors and windows through which equitable principles might seek subsequent entry into the analysis of a subrogation dispute between an insurer and its insured.

The expansion of subrogation to personal insurance can be attributed as much to industry efforts as to the common law rationales for the doctrine. First, the insurance industry, encouraged by the rule of law, moved quickly to include subrogation provisions in medical and hospital coverages, uninsured motorist coverage and medical payment coverages in automobile policies. Second, and equally effective, as insurance gained prominence as a necessity in American society, the insurance industry hailed subrogation as a chief mechanism for maintaining low insurance premiums. Thus, one proponent of the expansion of subrogation observed that:

If subrogation recovery were not available or were disregarded, the actual cost of insuring the past known risk would increase accordingly and the projected future costs would likewise have to be adjusted upward. Subrogation costs not recovered are thus reflected in and spread over future premiums among the issuing insurer and all of the insureds purchasing the same insurance. As a result, all who shared the risk during the time the claim was paid, and all who share the future risk, subsidize the payment to an insured who did not honor his or her subrogation agreement.⁶²

Despite their seemingly universal appeal, the rationales underlying subrogation have not gone unchallenged. For example, opponents of the expansion of subrogation into personal insurance contend that “[i]n most [personal injury] cases, there w[ill] not be any ‘double recovery’ for the insured if subrogation is denied.”⁶³

This [contention] is true due to the fact that the ‘exact loss’ is difficult, if not impossible to ascertain, because items such as mental anguish and physical pain are not insurable and are rarely fully recoverable from tortfeasors. . . . Second, subrogation is disruptive of the settlement process which takes place between the insured and tortfeasor. . . . Third, in situations involving multiple subrogation claims, disagreements between the insured and the insurers or disagreements between the multiple subrogees also tend to complicate and prolong the settlement process. . . . Finally, subrogation en-

62. Joseph Du Bray, *A Response to the Anti-Subrogation Argument: What Really Emerged from Pandora's Box*, 41 S.D. L. REV. 264, 274 (1996). See also Fleming, *supra* note 48; Kimball & Davis, *supra* note 31.

63. R. Barron, *Subrogation: Pandora's Box Awaiting Closure*, 41 S.D. L. REV. 237, 242 (1996).

courages delay in the payment of first party benefits because the first party insurer has a motive to deny payment, hoping that the insured will first obtain a recovery from the tortfeasor.⁶⁴

A number of courts have criticized the “double recovery” rationale to the point of recognizing that it is the insurer who is unjustly enriched and gains a windfall if allowed both subrogation and retention of the premiums paid by the insured.⁶⁵ Furthermore, subrogation has not led to lower premium costs for the insured.⁶⁶

The preceding discussion demonstrates the complexity of and confusion surrounding the application of subrogation. The doctrine, now a cornerstone of the insurance industry, has become a double edged sword used primarily to the detriment of insurance consumers. Contemporary courts have sought to ameliorate the harsh effect of subrogation in the context of personal insurance by re-emphasizing its inherently equitable purpose and nature. Thus, courts have increasingly employed the equitable made whole doctrine to counterbalance the harsh result that would otherwise befall an insured who is forced to waive her right to complete compensation to her competing insurer.

II. THE MADE WHOLE DOCTRINE

The common law made whole doctrine is an equitable principle which generally limits the ability of an insurer to exercise its right of subrogation until the insured has been fully compensated or made whole. Under this conceptualization, in the event of a subrogation dispute between the insurer and its insured, the insured has priority of rights to collect from the responsible third party. Thus, where the insured’s recovery from both the insurer and tortfeasor is less than or equal to its loss the insurer forfeits its right to subrogation.

64. *Id.* at 245-46.

65. *See, e.g.*, *Allstate Ins. Co. v. Druke*, 576 P.2d 489 (Ariz. 1978); *Allstate Ins. Co. v. Reitler*, 628 P.2d 667 (Mont. 1981); *Maxwell v. Allstate Ins. Co.*, 728 P.2d 812 (Nev. 1986); *DeCespedes v. Prudence Mut. Cas. Co.*, 193 So. 2d 224 (Fla. Dist. Ct. App. 1966).

66. *See, e.g.*, *Cooper v. Argonaut Ins. Cos.*, 556 P.2d 525, 527 n.9 (Alaska 1976); *Druke*, 576 P.2d 489, 492 (Ariz. 1978) (en banc); *Travelers Indem. Co. v. Chumbley*, 394 S.W.2d 418, 425 (Mo. Ct. App. 1965); *DeCespedes*, 193 So. 2d at 227-28. *See also* EDWIN W. PATTERSON, *ESSENTIALS OF INSURANCE LAW* 151-52 (2d ed. 1957); *Barron, supra* note 63, at 242; *Rimes v. State Farm Mut. Auto. Ins. Co.*, 316 N.W.2d 348, 355 n.4 (Wis. 1982); *Shelter Ins. Co. v. Frohlich*, 498 N.W.2d 74, 82 (Neb. 1993), *overruled on other grounds by Blue Cross & Blue Shield v. Dailey*, 687 N.W.2d 689 (Neb. 2004); JOHN F. DOBBYN, *INSURANCE LAW IN A NUTSHELL* 234 (2d ed. West 1989).

Alabama

Alabama first adopted the made whole rule in *International Underwriters/Brokers, Inc. v. Liao*.⁶⁷ The court in *Liao* recognized that subrogation, whether legal or conventional, is governed by equitable principles such as the made whole doctrine.⁶⁸ However, in the context of conventional subrogation the parties are free to contractually modify the doctrine even where the insured's recovery from the insurer and tortfeasor did not equal complete compensation for the loss.⁶⁹ According to the *Liao* court, the agreement, in order to effectively preclude application of the made whole rule, must "expressly provide" that the made whole doctrine will not apply.⁷⁰ "In other words, the made-whole doctrine . . . appl[ies] in all subrogation cases unless the contract 'expressly provides' that it does not apply."⁷¹

The *Liao* opinion was short lived. Less than a year later, the court reversed *Liao* in *Powell v. Blue Cross & Blue Shield of Alabama*.⁷² In *Powell*, a plurality of the court agreed that the right of subrogation, whether equitable or contractual, does not arise until the insured has been fully compensated or made whole for the loss.⁷³ *Powell* effectively ruled that the parties to the policy could not contract out of the equitable made whole principle.⁷⁴

Nearly a decade after the *Powell* decision the Alabama Supreme Court revisited the made whole doctrine in *Ex parte State Farm Fire & Casualty Co. v. Hannig*.⁷⁵ Therein, the court, motivated by its perception of the "inequitable consequences that can result from a strict, across-the-board, application of the 'made-whole' rule without regard to the express desires of the insured or the type of insurance involved," overturned *Powell* and reinstated *Liao* as the law in Alabama.⁷⁶

Accordingly, the made whole doctrine again became a default rule applicable only where the contract did not "expressly provide" otherwise. An Alabama court first addressed what the *Liao* court meant when it observed that a contract must "expressly provide" that the made whole doctrine will not apply in *Wolfe v. Alfa Mutual Insurance Co.*⁷⁷ In *Wolfe*, a consolidated case,

67. 548 So. 2d 163 (Ala. 1989), *overruled by Powell v. Blue Cross & Blue Shield*, 581 So. 2d 772 (Ala. 1990) (per curiam), *reinstated by Ex parte State Farm Fire & Cas. Co.*, 764 So. 2d 543 (Ala. 2000).

68. *Id.* at 165.

69. *See id.*

70. *Id.*

71. *Wolfe v. Alfa Mut. Ins. Co.*, 880 So. 2d 1163, 1166 (Ala. Civ. App. 2003).

72. 581 So. 2d 772 (Ala. 1990) (per curiam), *overruled by Ex parte State Farm Fire & Cas. Co.*, 764 So. 2d 543.

73. *Id.* at 773.

74. *Id.* at 777.

75. 764 So. 2d 543 (Ala. 2000).

76. *Id.* at 545-46 (citation omitted).

77. 880 So. 2d 1163 (Ala. Civ. App. 2003).

two insureds argued that they had not been made whole and that language contained in Alfa Mutual's medical payment coverage of their automobile insurance policy was not specific enough to preclude application of the complete compensation rule.⁷⁸

The court totally rejected the notion that in order to "expressly provide" otherwise the provision must use the "magic words" made whole.⁷⁹ Instead, the court found that the pertinent provision need only provide a scheme "contrary to established equitable principles."⁸⁰ This determination, whether the provision provides a scheme "contrary to established equitable principles," is made on the basis of the language used.⁸¹ The first of the two paragraphs at issue stated that "if Alfa makes a payment to its insured, and if that insured has a right to recover damages from another, [Alfa] shall be subrogated to that right."⁸² This language, according to the court, simply gave Alfa a right of subrogation and such "general" subrogation language is "not sufficient to modify the applicability of the made-whole doctrine."⁸³

The second paragraph stated that "[I]f [Alfa] make[s] a payment under this policy and [the insured] recovers damages from another, [the insured] shall hold in trust for [Alfa] the proceeds of the recovery and shall reimburse [Alfa] to the extent of [Alfa's] payment, costs and fees."⁸⁴ According to the court, this language was sufficiently specific to abrogate application of the default rule.⁸⁵

Alabama follows a narrow version of the made whole rule which is further diminished in application because only the insured has standing to assert it.⁸⁶ Furthermore, while calculation of whether an insured has been made whole "requires consideration of every payment made to, or on behalf of, the [insured] that arises out of the [loss] sustained," attorneys' fees incurred by the insured in making the recovery from the tortfeasor are not considered.⁸⁷

The potential harshness of the rule allowing the insurer to contract out of the "made-whole doctrine" has not gone unnoticed by the court. In his concurring opinion in *Ex parte State Farm Fire & Casualty Co.*, Justice Lyon proposed three options which might be employed as a solution in cases where

78. *Id.* at 1166-67.

79. *Id.* at 1167-69.

80. *Id.* at 1167 (citation omitted).

81. *Id.*

82. *Id.* at 1166 (citation omitted).

83. *Id.* at 1167.

84. *Id.* (citation omitted).

85. *Id.* at 1167-68.

86. *Nationwide Prop. & Cas. Ins. Co. v. DPF Architects, P.C.*, 792 So. 2d 369, 372-73 (Ala. 2000).

87. *Powell v. Blue Cross & Blue Shield*, 581 So. 2d 772, 781 (Ala. 1990) (per curiam), *overruled on other grounds by Ex parte State Farm Fire & Casualty Co.*, 764 So. 2d 543 (Ala. 2000); *see also CNA Ins. Cos. v. Johnson Galleries*, 639 So. 2d 1355, 1359 (Ala. 1994).

the application of the rule would lead to an intolerable conclusion: "1. To nullify or reform the contract on the basis of fraud[;] . . . 2. [t]o nullify or reform the contract so as to eliminate any unconscionable provisions[; or] . . . 3. [t]o nullify any portion of the contract that violates public policy."⁸⁸

Arkansas

In *Shelter Mutual Insurance Co. v. Bough*,⁸⁹ the Supreme Court of Arkansas addressed the issues of whether: (1) an insurer had properly made underinsured motorists benefits available to its insured; and (2) the insurer was prejudiced by the insured's release of the third-party tortfeasor.⁹⁰ In addressing these issues the court observed:

Although we have no criticism of the cases cited by Bough, the rule limiting the insurer's right to subrogation in those cases is not applicable to the facts here. The equitable nature of subrogation is granted an insurer to prevent the insured from receiving a double recovery. Thus, while the general rule is that an insurer is not entitled to subrogation unless the insured has been made whole for his loss, the insurer should not be precluded from employing its right of subrogation when the insured has been fully compensated and is in a position where the insured will recover twice for some of his or her damages. That is the situation here.⁹¹

The court, less than a year later, in *Higginbotham v. Arkansas Blue Cross & Blue Shield*,⁹² addressed for the first time the specific issue of whether an insurer's expressed right of subrogation takes priority over the insured's equitable right to be made whole. The court began its analysis by resolving that "the excerpt from *Bough* was dictum" and therefore of no precedential value.⁹³ According to the court in *Higginbotham*, equitable principles such as the made whole rule may be appropriate to the doctrine of legal or equitable subrogation, but not to subrogation rights which arise out of an expressed agreement between the insured and insurer.⁹⁴ Thus, the court concluded that the parties are free to contract that the made whole rule does not apply.⁹⁵

88. 764 So. 2d 543, 547 (Ala. 2000) (Lyons, J., concurring specially).

89. 834 S.W.2d 637 (Ark. 1992).

90. *Id.* at 639-40.

91. *Id.* at 641.

92. 849 S.W.2d 464 (Ark. 1993), *overruled by* Franklin v. Healthsource of Arkansas, 942 S.W.2d 837 (Ark. 1997).

93. *Id.* at 466.

94. *Id.*

95. *Id.*

The court's holding in *Higginbotham* was short lived. In *Franklin v. Healthsource of Arkansas*,⁹⁶ the court retreated from its previous position and concluded that as to the priority of subrogation rights of insurer versus insured, where both parties have claims against a partial settlement from a third-party, equity mandates that the insured's claim be given priority.⁹⁷ Thus, "an insurer is entitled to enforce its contractual right of subrogation after the insured has been fully compensated, or 'made whole,' for his total loss."⁹⁸ The bottom line is that "the equitable nature of subrogation requires that no distinction need be made between equitable and conventional rights of subrogation."⁹⁹

Arkansas' strict adherence to the common law made whole doctrine has led to its application to statutory subrogation rights arising out of the payment of workers' compensation benefits.¹⁰⁰ The court has, however, refused to apply the doctrine to state statutory subrogation rights that arise out of the state's administration of the federal Medicaid program.¹⁰¹

California

In *Travelers Indemnity Co. v. Ingebretsen*,¹⁰² the made whole doctrine gained perdurable recognition in the law of insurance subrogation in California. In *Travelers*, a consolidated opinion, multiple insureds recovered insurance proceeds for damages caused to their property by the County of Los Angeles.¹⁰³ Each policy contained a standard subrogation clause allowing the company to "require from the insured an assignment of all right of recovery against any part for loss to the extent that payment therefor is made by [the] company."¹⁰⁴

The insureds also executed a subrogation receipt or release, acknowledgment of satisfaction, agreement to immediate cancellation and assignment of subrogation document contemporaneously with receiving the insurance proceeds.¹⁰⁵ The respective insurance companies also hired their own attorney who collaborated and shared expenses in the lawsuit against the county.¹⁰⁶

96. 942 S.W.2d 837 (Ark. 1997).

97. *Id.* at 839-40.

98. *Id.* at 839.

99. *Id.* at 840.

100. *See, e.g.*, *S. Cent. Ark. Elec. Coop. v. Buck*, 117 S.W.3d 591, 594-96 (Ark. 2003); *Travelers Ins. Co. v. O'Hara*, 84 S.W.3d 419, 421 (Ark. 2002).

101. *Ark. Dep't of Human Serv. v. Estate of Ferrel*, 984 S.W.2d 807 (Ark. 1999).

102. 113 Cal. Rptr. 679 (Cal. Ct. App. 1974).

103. *Id.* at 682.

104. *Id.* at 681.

105. *Id.*

106. *Id.* at 681-82.

Ultimately, the insureds recovered a judgment to which the insurance companies asserted a third party claim based on the subrogation agreements.¹⁰⁷

On appeal, the insureds argued that the insurance companies should be denied any recovery until they had been made whole for the damages suffered.¹⁰⁸ The insurance companies disagreed with insureds' contention that they had not been made whole by the judgments against the county and the insurance payments.¹⁰⁹ The insurers further argued that "in any event [the insurance companies] are entitled to a priority [of payment] out of the judgment against the county."¹¹⁰

The court in *Travelers*, relying upon Section 2071 of the California Insurance Code and decisional law from Ohio, concluded that where the subrogation provision and subrogation assignment convey "all right of recovery against any party for loss to the extent that payment therefore is made by this company," entitles the insurer to first and total indemnification.¹¹¹ The insurer's priority of right however was conditioned on it having cooperated and assisted in the recovery from the third-party.¹¹²

The insureds in *Travelers* further contended that the insurers were not entitled to recovery because it was impossible to ascertain what portion of the judgment represented damages paid for by the companies.¹¹³ According to the insureds, a portion of the judgment against the county was for noninsured losses, and consequently, the insurers should be denied recovery unless they could prove what portion of the judgment was attributable to covered losses.¹¹⁴ The court, again relying on the *all right of recovery* language contained in the subrogation clause, concluded that all claims of the insureds had been transferred to the insurers.¹¹⁵ Therefore, insurers were not required to prove what portion of the judgment was attributable to covered losses.¹¹⁶

The requirements for application of the rule of *Travelers* have been strictly applied. For example, in *Sapiano v. Williamsburg National Insurance Co.*,¹¹⁷ the court concluded that in contrast to the policy and insurer in *Travelers*, (1) the language of the subrogation clause at issue contained general terms, and (2) the insurer did not cooperate or assist the insured in its efforts to recover from the tortfeasor.¹¹⁸ Because of these defects the insured retained

107. *Id.* at 682.

108. *Id.* at 682-83.

109. *Id.*

110. *Id.* at 684.

111. *Id.* at 684-85 (emphasis added).

112. *Id.*

113. *Id.* at 685.

114. *Id.*

115. *Id.* at 686-87.

116. *Id.*

117. 33 Cal. Rptr. 2d 659 (Cal. Ct. App. 1994). See also *Plut v. Fireman's Fund Ins. Co.*, 102 Cal. Rptr. 2d 36 (Cal. Ct. App. 2000).

118. *Sapiano*, 33 Cal. Rptr. 2d at 662.

priority of right and was entitled to be made whole before the insurer could assert its right to subrogation.¹¹⁹ Like Alabama, California adheres to the view that the parties are free to agree that the made whole rule does not apply. However, unlike Alabama, which imposes only one condition (i.e. that the agreement be sufficiently specific), California imposes an additional requirement that the insurer cooperate and assist the insured in the recovery. Also as in Alabama, the potential harsh and one-sided effect of expanding the principle of conventional subrogation has not gone unnoticed in California.

In *Samura v. Kaiser Foundation Health Plan*, the court responded to this concern by suggesting that the doctrine of unconscionability could be used to counter this problem.¹²⁰ Admitting that it was unaware of any cases in which the doctrine had been applied,¹²¹ the court nevertheless observed:

In short, the third party liability provision may sometimes operate in a harsh and one-sided manner without any justification, which raises the possible application of the doctrine of unconscionability. As embodied in *Civil Code section 1670.5*, subdivision (a), the concept of unconscionability has both a 'procedural' and a 'substantive' element. 'The former includes (1) 'oppression,' which refers to an inequality of bargaining power resulting in no real negotiation and the absence of meaningful choice; and (2) 'surprise,' which occurs when the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. . . . 'Substantive' unconscionability consists of an allocation of risks or costs which is overly harsh or one-sided and is not justified by the circumstances in which the contract is made. . . . Presumably both procedural and substantive unconscionability must be present before a contract will be held unenforceable. However, a relatively larger degree of one will compensate for a relatively smaller degree of the other.'¹²²

Pursuant to statutory interpretation and an assessment of legislative intent, California has adopted the common law made whole doctrine in the context of uninsured motorist coverage.¹²³ However, the insurer has priority of rights and is entitled to be subrogated from the tortfeasor prior to the insured

119. *Id.* at 660.

120. 22 Cal. Rptr. 2d 20, 27 (Cal. Ct. App. 1993).

121. See also *Ex parte State Farm Fire & Cas. Co.*, 764 So. 2d 543 (Ala. 2000) (Lyons, J., concurring) (wherein he makes same observation).

122. *Samura*, 22 Cal. Rptr. 2d at 27-28 (1993) (quoting *Dean Witter Reynolds, Inc. v. Super Ct.*, 259 Cal. Rptr. 789, 795 (Cal. Ct. App. 1993) (quotation omitted).

123. See *Sapiano v. Williamsburg Nat'l. Ins. Co.*, 33 Cal. Rptr. 2d 659, 661 (Cal. Ct. App. 1994).

being made whole in the context of underinsured motorist coverage¹²⁴ and, subject to certain exceptions, workers compensation benefits.¹²⁵

Colorado

The question of whether a conventional subrogation provision can displace the made whole rule in a subrogation dispute between an insurer and its insured was first addressed by the courts of Colorado in *Kral v. American Mutual Insurance Co.*¹²⁶ In *Kral*, the insurer attempted to rely upon a subrogation provision contained in the policy and a release-trust agreement to support its argument that it possessed a priority of right to assert its subrogation claim against the proceeds recovered from the tortfeasor, without regards to whether the insured had received full compensation.¹²⁷ *Kral*, the insured, contended that both the subrogation provision in the policy and the release-trust agreement were unenforceable because they were contrary to public policy.¹²⁸ The court, despite its rejection of *Kral's* primary contention that both the subrogation provision and the release-trust agreement were unenforceable as a matter of public policy, agreed that in the context of uninsured motorist coverage any attempt by the insurer to assert a subrogation right was unenforceable to the extent that the exercise of such right would impair the ability of the insured to be made whole for losses caused by an uninsured motorist.¹²⁹

This question was also addressed by the court in the context of statutory subrogation rights in *Marquez v. Prudential Property & Casualty Insurance Co.*¹³⁰ Therein, the court considered the issue of whether Section 10-4-713(1) of the Colorado No Fault Act gave priority of rights to the insurance provider to assert its subrogation or reimbursement right prior to the insured being made whole.¹³¹ The insurer argued that by virtue of the subrogation provision in the policy and the No Fault Act it was entitled to priority of right even if the insured had not been completely compensated.¹³² The court in *Marquez* concluded that the legislative intent and purpose of the No Fault Act was to allow an insured to be made whole before the insurer could diminish the recovery by asserting either subrogation or reimbursement.¹³³ Thus, the insured

124. See *Holcomb v. Hartford Cas. Ins. Co.*, 281 Cal. Rptr. 651, 653 (Cal. Ct. App. 1991).

125. *Gapusan v. Jay*, 78 Cal. Rptr. 2d 250, 254 n.3 (Cal. Ct. App. 1998).

126. 784 P.2d 759 (Colo. 1989) (en banc).

127. *Id.* at 761.

128. *Id.*

129. *Id.* at 765.

130. 620 P.2d 29 (Colo. 1980) (en banc).

131. *Id.*

132. *Id.* at 30.

133. *Id.* at 32.

has priority of right to the recovery, except where the amount of the recovery plus the insurance proceeds would constitute a double or excess recovery.¹³⁴

Express subrogation provisions do not violate public policy under both the No Fault Act and the Uninsured Motorist Law of Colorado. However, their enforceability under both statutes hinges on the insured first being made whole. Unlike the No Fault Act and the Uninsured Motorist Law, the language of the Workers' Compensation Act of Colorado suggests that the legislature intended that insurers be subrogated to the rights of the claimant.¹³⁵ Nevertheless, the court in *Colorado Compensation Insurance Authority v. Jorgensen*,¹³⁶ concluded that the insurer's right to subrogation was not absolute and does not extend to every right that the claimant or his dependents have against the tortfeasor.¹³⁷ According to the court, the insurer's right to seek subrogation prior to the insured receiving complete recovery is limited in two respects. First, the insurer is only subrogated to the claimant's right to recover economic damages.¹³⁸ Consequently, if the parties fail to do so in the settlement, the court has jurisdiction to apportion the proceeds between economic and noneconomic damages.¹³⁹ Second, the insurer's right of subrogation is limited solely to the claimant's right to recover economic damages.¹⁴⁰ Thus, the insurer cannot assert its subrogation right against the recovery for claims belonging to dependents.¹⁴¹ These limitations may be ignored, however, if the court finds that the insured negotiated or structured the settlement in a way that circumvents the insurer's subrogation rights.¹⁴² In such a case, the subrogation rights of the insurer can reach any portion of the recovery used to defeat said rights.¹⁴³

Connecticut

The Connecticut courts have found that the right of subrogation, whether provided for in the contract of insurance or not, is equitable.¹⁴⁴ According to this analysis a conventional subrogation provision is not the source of the right. Rather, conventional subrogation agreements merely confirm the principles of equitable subrogation which would exist even in the absence of

134. *Id.* at 31.

135. *See* COLO. REV. STAT. § 8-41-203(1) (2003).

136. 992 P.2d 1156 (Colo. 2000) (en banc).

137. *Id.* at 1165.

138. *Id.* at 1163-64.

139. *Id.* at 1160.

140. *Id.* at 1165.

141. *Id.*

142. *Id.* at 1166.

143. *Id.*

144. *Wasko v. Manella*, 849 A.2d 777, 781 (Conn. 2004).

an expressed provision.¹⁴⁵ Consequently, as observed by the court in *Wasko v. Manella*:¹⁴⁶

[U]nder traditional principles of subrogation, if an insured brings an action against a negligent party, 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.¹⁴⁷

This analysis is also applicable to statutory subrogation unless the legislature provided the insurer with an inviolate statutory right of subrogation in the statute. In *Wasko*, the court found that the statutory language, providing that the employer's claim "shall take precedence over that of the injured employee in [distribution of] the proceeds of the recovery."¹⁴⁸ provided insurers an inviolate right to subrogation under the workers' compensation law.¹⁴⁹ In contrast, the legislative language creating the standard form fire insurance policy, "[t]his Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company,"¹⁵⁰ does not create such a right in the context of fire insurance.¹⁵¹

Florida

In *Florida Farm Bureau Insurance Co. v. Martin*,¹⁵² the court was asked to determine the subrogation rights of an insurer that, in the absence of a loan receipt or assignment of subrogation agreement, sought to assert a subrogation claim pursuant to an expressed provision contained in the policy.¹⁵³ In *Martin*, all parties stipulated that the insured's property damage totaled \$111,000 and that the maximum possible recovery from the tortfeasor's insurer, tortfeasor, and Farm Bureau would total only \$95,035.¹⁵⁴ Farm Bureau argued that the law announced in *Morgan v. General Insurance Co.*¹⁵⁵ controlled.¹⁵⁶ Therein, the court declared that:

145. *Id.* at 782.

146. 849 A.2d 777.

147. *Id.* at 784.

148. CONN. GEN. STAT. § 31-293(a) (2003).

149. *Wasko*, 849 A.2d at 784.

150. CONN. GEN. STAT. § 38a-307 (2003).

151. *Wasko*, 849 A.2d at 783.

152. 377 So. 2d 827 (Fla. Dist. Ct. App. 1979).

153. *Id.* at 828.

154. *Id.*

155. 181 So. 2d 175 (Fla. Dist. Ct. App. 1965).

156. *Martin*, 377 So. 2d at 828-29.

If the insurer pays a claim for a loss caused by the negligence of a third person and requests the insured to prosecute his claim against the tort-feasor, assists in the prosecution of the claim, and bears its share of the burden of preparing the case for trial, it is entitled, out of the judgment recovered, to the amount which it has paid on account of the loss, notwithstanding the judgment recovered is not, according to the insured's claim, the full value of the property destroyed.¹⁵⁷

Martin, on the other hand, argued that the case should be governed by the principles announced in *Central National Insurance Group v. Hotte*,¹⁵⁸ as quoted from 46 C.J.S. Insurance § 1209(b):

If an insured obtains satisfaction from the wrongdoer and has previously received payment of the loss from the company, he must account therefor to the company, the general rule being that the company may recover from insured only the excess, which insured has received from the wrongdoer causing the loss, remaining after insured is fully compensated for his loss and the cost and expenses of the recovery thereof.¹⁵⁹

After distinguishing the facts of the principle case from *Morgan*,¹⁶⁰ the court concluded that, in the absence of specific provisions in the policy, equitable principles controlled in subrogation disputes between insurers and their insureds even when the right of subrogation is based on an expressed provision in the contract of insurance. "In the absence of specific terms [in the policy] to the contrary, the insured is entitled to be made whole before the insurer may recover any portion" of its subrogation claim.¹⁶¹

157. *Id.* at 829 (citing *Morgan*, 181 So. 2d at 178-79).

158. 312 So. 2d 235 (Fla. Dist. Ct. App. 1975).

159. *Martin*, 377 So. 2d at 829 (quoting *Hotte*, 312 So. 2d at 237).

160. The rationale used by the court in distinguishing *Morgan* suggests that caution be used in determining the applicability of the made whole doctrine. The court, in choosing the controlling rule of law, found persuasive the facts that the insured sought the maximum amount recoverable from the tortfeasor and its insured, and the insurer, Florida Farm Bureau, did not significantly assist in the prosecution of the claim. *Martin*, 377 So. 2d at 831.

161. *Id.* at 830. Compare *Collins v. Wilcott*, 587 So. 2d 742, 744 (Fla. Dist. Ct. App. 1991) (an exception to the general rule can be created in a settlement agreement), with *Ins. Co. of N. Am. v. Lexow*, 602 So. 2d 528, 530 (Fla. Dist. Ct. App. 1992) (trial court concluded that subrogation receipt merely acknowledged insurer's common law right of subrogation was not appealed).

In the context of medical insurance, an insurer has no common law right of subrogation.¹⁶² However, where the insured has been made whole and is likely to receive a double recovery, equity recognizes the right of the insurer to seek subrogation.¹⁶³ The common law made whole rule can also be statutorily abrogated. However, as with conventional subrogation, in order to alter the common law rule the statute must be clear and express. Thus, in the context of statutory subrogation, Florida courts have found a legislative intent to modify the made whole rule with regards to both the Collateral Source of Indemnity¹⁶⁴ and Florida Medicaid Third-Party Liability¹⁶⁵ Acts.

Georgia

The made whole or complete compensation rule was adopted as a part of the insurance subrogation law of Georgia in *Duncan v. Integon General Insurance Co.*¹⁶⁶ The issue before the court in *Duncan* was whether the complete compensation or made whole rule is applicable to an insurance policy provision which requires the insured to reimburse the insurer the amounts paid under medical payments coverage.¹⁶⁷ The policy provision at issue in *Duncan* provided: “[i]f we make a payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall: 1. [h]old in trust for us the proceeds of the recovery; and 2. reimburse us to the extent of our payment.”¹⁶⁸

According to the court, because the policy did not expressly address whether the made whole rule would or would not operate as a limitation on the insured’s right to complete compensation it must be strictly construed against the insurer.¹⁶⁹ As a result of the absence of an expressed provision specifying that the made whole rule does not apply, the rule implicitly applies and mandates complete compensation.¹⁷⁰

The court in *Duncan* relied on two rationales for its holding. First, the clear weight of authority recognizes that, in the absence of a provision to the contrary, equity dictates that the insured be fully compensated for the loss covered by the policy.¹⁷¹ Second, the court concluded that the public policy of

162. *Centex-Rodgers Constr. Co. v. Herrera*, 761 So. 2d 1215, 1216 (Fla. Dist. Ct. App. 2000).

163. *Humana Health Plans v. Lawton*, 675 So. 2d 1382, 1384 (Fla. Dist. Ct. App. 1996).

164. *Magsipoc v. Larsen*, 639 So. 2d 1038, 1041-42 (Fla. Dist. Ct. App. 1994).

165. *State of Fla. Agency for Health Care Admin. v. Estabrook*, 711 So. 2d 161, 164 (Fla. Dist. Ct. App. 1998).

166. 482 S.E.2d 325 (Ga. 1997).

167. *Id.* at 353.

168. *Id.* at 326.

169. *Id.*

170. *Id.*

171. *Id.*

Georgia supports the rule that an insurer may not obtain reimbursement unless and until its insured has been completely compensated.¹⁷² As observed by the court, “[t]hese considerations of public policy and equitable principals of subrogation are so strong that some jurisdictions declare that any insurance policy provision which modifies the complete compensation rule is unenforceable and void.”¹⁷³ Nevertheless, because the policy at issue did not contain such a provision, the court refused to address the issue of whether a provision contravening public policy or equitable principles of subrogation would be unenforceable and void.¹⁷⁴

In *Davis v. Kaiser Foundation Health Plan of Georgia, Inc.*,¹⁷⁵ the court resolved the issue of whether a policy containing an express provision modifying the made whole rule was unenforceable and void as a matter of public policy.¹⁷⁶ The policy provision in question provided in pertinent part: “[e]ven if the total amount you collect is less than your actual losses from the accident, you must pay us.”¹⁷⁷ The court in *Davis*, relying upon its earlier decision in *Duncan* and Section 33-24-56(1) of the Georgia Code, concluded that the public policy of Georgia:

will not permit insurers to require an insured to agree to a provision that permits the insurer, at the expense of the insured, to avoid the risk for which the insurer has been paid by requiring the insured to reimburse the insurer whether or not the insured was completely compensated for the covered loss.¹⁷⁸

Therefore, the court concluded, policy provisions modifying the made whole rule are unenforceable as violative of public policy.¹⁷⁹ This same public policy rationale is reflected in the workers’ compensation laws of Georgia.¹⁸⁰ Consequently, workers’ compensation carriers are not entitled to assert their statutory subrogation liens until the claimant has been completely compensated.¹⁸¹

172. *Id.* at 326-27.

173. *Id.* at 327.

174. *Id.*

175. 521 S.E.2d 815 (Ga. 1999).

176. *Id.* at 816.

177. *Id.* at 817 n.1.

178. *Id.* at 818.

179. *Id.*

180. See GA. CODE ANN. § 34-9-11.1(b); *Bartow County Bd. of Ed. v. Ray*, 494 S.E.2d 29, 30-31 (Ga. Ct. App. 1997).

181. See *N. Bros. Co. v. Thomas*, 513 S.E.2d 251, 253 (Ga. Ct. App. 1999); *Canal Ins. Group v. Liberty Mut. Ins. Co.*, 570 S.E.2d 60, 66 (Ga. Ct. App. 2002).

Hawaii

The made whole rule has been endorsed in the context of uninsured motorist coverage in Hawaii. In the seminal case of *AIG Hawaii Insurance Co., Inc. v. Rutledge*, the court was asked to determine whether an insurer could enforce a policy provision requiring reimbursement of uninsured motorist benefits from its fully compensated insured.¹⁸² In addition to the reimbursement provision in the policy, the insureds executed separate Release and Trust Agreements after receiving the policy proceeds.¹⁸³ The insureds subsequently filed suit against joint tortfeasors and received an arbitration award in an amount, when added to the insurance benefits, exceeded their loss.¹⁸⁴

Because the court in *AIG* viewed the problem as one calling for statutory interpretation, it did not address the question of “whether AIG is entitled to be reimbursed under the terms of the policy.”¹⁸⁵ Though no Hawaii statute governed the subject of reimbursement of uninsured motorist benefits, the court determined that the intent and purpose of the uninsured motorist law was to effect the greatest possible recovery for the insured and prevent double recovery.¹⁸⁶ Given this intent and purpose, the court aligned itself with those jurisdictions which allowed full but not duplicative recovery.¹⁸⁷

The extent to which the common law made whole rule can be modified by a provision in the policy has not been addressed by the court. Nevertheless, the court in *State Farm Fire & Casualty Co. v. Pacific Rent-All* engaged in a detailed discussion of the rules applicable to both conventional and equitable subrogation.¹⁸⁸ However, as in *AIG*, the court resolved the dispute without expressly aligning itself with or adopting any of the competing views.¹⁸⁹ In the context of the made whole rule, Hawaii courts have adopted a transitional approach comparable to a way station on the road to unraveling the enigma trapped within a mystery.

182. 955 P.2d 1069, 1073 (Haw. Ct. App. 1998).

183. *Id.* at 1071.

184. *Id.* at 1072.

185. *Id.* at 1073. See also *supra* notes 10-17 and accompanying text.

186. *Id.* at 1076.

187. *Id.* at 1078.

188. 978 P.2d 753 (Haw. 1999).

189. *Id.*

Illinois

In Illinois the terms of the insurance policy determine the rights of the parties in a subrogation dispute.¹⁹⁰ The contract provision, in order to displace the equitable made whole rule, need not be specific but only enforceable.¹⁹¹ Because subrogation provisions are generally viewed as enforceable in Illinois this requirement is easily satisfied by the standardized language typically used in reimbursement and subrogation provisions. Even though the terms of the contract govern the rights of the parties to subrogation, an insurer is precluded from exercising the right of subrogation until it has paid the insured's damages pursuant to the policy creating the subrogation right.¹⁹²

Illinois courts have expressed a public policy based preference for the made whole rule in the context of subrogation disputes arising in wrongful death cases.¹⁹³ This preference is also arguably applicable where an insurer initially seeks to avoid liability on the policy and subsequently recants and pursues its subrogation rights pursuant to the terms of the same insurance policy.¹⁹⁴

Indiana

In Indiana the right of subrogation cannot be enforced until the whole debt is paid and the insured is thereby made whole.¹⁹⁵ This rule applies to contractual as well as conventional subrogation.¹⁹⁶ The parties may contractually agree that the rule will not have application.¹⁹⁷ However the contractual provision, to be enforceable, "must be clear, unequivocal and so certain as to admit no doubt on the question."¹⁹⁸ This standard has been applied in the context of both the uninsured motorist act and the workers' compensation laws of Indiana.¹⁹⁹ Despite the fact that no Indiana court has defined what is meant by "clear and unequivocal," the standardized language commonly found in subrogation provisions clearly does not satisfy the standard.²⁰⁰

190. *Capitol Indem. Corp., v. Strike Zone*, 646 N.E.2d 310, 312 (Ill. App. Ct. 1995); *In re Estate of Scott*, 567 N.E.2d 605, 606 (Ill. App. Ct. 1991).

191. *Strike Zone*, 646 N.E.2d at 311-12.

192. *Eddy v. Sybert*, 783 N.E.2d 106, 110 (Ill. App. Ct. 2003); *Benge v. State Farm Mut. Auto. Ins. Co.*, 697 N.E.2d 914, 920 (Ill. App. Ct. 1998).

193. *In re Estate of Schmidt*, 398 N.E.2d 589, 590 (Ill. App. Ct. 1979); *Nat'l. Bank v. Podgorski*, 373 N.E.2d 82, 83 (Ill. App. Ct. 1978).

194. *See Hardware Dealers Mut. Fire Ins. Co. v. Ross*, 262 N.E.2d 618, 621 (Ill. App. Ct. 1970); *see also In re Estate of Scott*, 567 N.E.2d at 607 (discussing *Ross*).

195. *See, e.g., Willard v. Auto Underwriters, Inc.*, 407 N.E.2d 1192, 1193 (Ind. Ct. App. 1980); *Capps v. Klebs*, 382 N.E.2d 947, 950 (Ind. Ct. App. 1978).

196. *Willard*, 407 N.E.2d at 1193.

197. *Id.*

198. *Id.* at 1193; *Capps*, 382 N.E.2d at 950.

199. *See, e.g., Capps*, 382 N.E.2d at 951-52.

200. *See, e.g., Willard*, 407 N.E.2d at 1193; *Capps*, 382 N.E.2d at 950.

The language used in the subrogation provision is also an important consideration in determining whether a settlement with the tortfeasor constitutes complete compensation. In this context, where the provision provides for the right to be subrogated to all rights of recovery arising out of any claim or cause of action it establishes the insurer's right to subrogation against the proceeds of a settlement.²⁰¹ In addition to the language, however, the settlement must have included compensation for losses covered under the policy.²⁰²

Iowa

Iowa law recognizes that an insurer cannot recover through subrogation unless or until its insured has been made whole.²⁰³ Application of the rule is made problematic however, by Iowa's procedure for determining whether an insured has received complete compensation. For example, in *Ludwig v. Farm Bureau Mutual Insurance Co.*, the court was asked to resolve whether an insured who had settled her action against the third party had received full compensation for purposes of the made whole doctrine.²⁰⁴ The insurer in *Ludwig* argued that when a settlement is made without the involvement of the company, the insured is presumed to be made whole.²⁰⁵ The insured, on the other hand, contended that because she had not received compensation for her pain and suffering in the settlement she had not been fully compensated.²⁰⁶ The subrogation provision of the policy provided:

Upon payment under part II of this policy [the "medical protection" provision] 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 or anyone receiving such payment may have against any person or organization and such person shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. Such person shall do nothing after loss to prejudice such rights.²⁰⁷

Though the holding in *Ludwig* is consistent with the policy language, the court did not accord it any weight in its analysis. Rather, it relied on the

201. *Mut. Hosp. Ins. Inc. v. MacGregor*, 368 N.E.2d 1376, 1380 (Ind. Ct. App. 1977).

202. *Id.* at 1381.

203. *Ludwig v. Farm Bureau Mut. Ins. Co.*, 393 N.W.2d 143, 145 (Iowa 1986); *Chickasaw County Farmers' Mut. Fire Ins. Co. v. Weller*, 68 N.W. 443, 444 (Iowa 1896).

204. 393 N.W.2d 143, 144 (Iowa 1986).

205. *Id.* at 145.

206. *Id.*

207. *Id.* at 144.

fact that the insured's medical expenses, lost wages, expense of hired help and car damage were established and each attributed specific dollar amounts in the settlement.²⁰⁸ Because the amount recovered from the third party could be attributed to separate and specific elements of damages, any money identified with covered losses which the insurer had paid for was subject to the latter's subrogation claim, regardless of whether insured had been compensated for all of its damages.²⁰⁹ According to the court, any other rule would make insurance companies indemnitors of losses not covered in the policy and operate as a windfall to the insured who had not paid for such coverage.²¹⁰ While the settlement in *Ludwig* attributed a specific amount to medical expenses, the court noted that "[w]hen the amount attributed to the subrogated claim cannot be determined by other means, a mini-trial . . . might be required."²¹¹

Kentucky

Kentucky courts have used the equitable nature of subrogation to support their adoption of the rule that, in the absence of a statute or valid contractual provision to the contrary, an insured must be fully compensated for losses sustained before the subrogation rights of an insurer arise.²¹² This rule contemplates that the common law made whole rule can be modified by statute or contract. In order for a statute to modify the rule, the statute must clearly express a preference for the insurer. The fact that a statute merely recognizes the carrier's right of subrogation is insufficient.²¹³ Application of this analysis has led courts to conclude that the made whole rule does not apply to statutory workers' compensation claims.²¹⁴

The analysis for determining whether a contract alters the common law priority of right rule between the insurer and its insured is more complex. This complexity results from the fact that all agreements between the parties (i.e. policy language, releases, trust agreements, etc.) are relevant in determining whether the parties intended to modify the common law rule.²¹⁵ In order to effectively shift the priority of right of the insured to the insurer, the language must clearly and explicitly document the intent of the parties to: (1) provide the insurer with a right of subrogation; (2) permit that right to arise

208. *Id.* at 146.

209. *Id.*

210. *Id.* at 147.

211. *Id.* at 146 n.2.

212. *Wine v. Globe Am. Cas. Co.*, 917 S.W.2d 558, 562 (Ky. 1996).

213. *Id.* at 564.

214. *AIK Selective Self Ins. Fund v. Bush*, 74 S.W.3d 251, 256 (Ky. 2002).

215. *See, e.g., Wine*, 917 S.W.2d at 565.

immediately; and (3) subordinate the insured's interest in further recovery to that of the insurer to subrogation.²¹⁶

Louisiana

Conventional subrogation agreements are enforceable in Louisiana. However, the agreement does not change the priority of right of the insured to be made whole if the insurer's payment constitutes only partial and not complete compensation for the loss.²¹⁷ Where the insurer's payment constitutes partial satisfaction for the loss it becomes only partially subrogated to the insured's claim.²¹⁸ Consequently, the insured is entitled to seek compensation for the unpaid losses from the tortfeasor before the insurer can assert its subrogation claim.²¹⁹ In essence, the equitable made whole doctrine takes precedence over the agreement between the parties.

Maryland

The law of Maryland recognizes a theoretical as well as practical distinction between legal, conventional and statutory subrogation. Conventional subrogation, to which the principles of equity is said to apply, requires proof that: (1) insured assigned its rights to the insurer; and (2) insurer paid the amount it was obligated by the policy to pay.²²⁰ Where these requirements are met, the right of the parties to contract as they please can only be restricted by public policy.²²¹

In *Stancil v. Erie Insurance Co.*, the court entertained the issue of whether a conventional subrogation provision was enforceable when the insured had not been made whole for its loss.²²² The court concluded that equity did not require that the insured experience complete compensation where the condition precedents for conventional subrogation had been satisfied.²²³

The approach adopted by the court in *Stancil* differs from that employed in jurisdictions which recognize that the parties can contractually modify the made whole rule. The *Stancil* approach does not require that the language of the contract "clearly, expressly or specifically" evidence an intent to preclude application of the made whole doctrine. Consequently, all that is required is an express agreement recognizing the right to subrogation and compliance therewith on the part of the parties.

216. *Id.*

217. *S. Farm Bureau Cas. Ins. Co. v. Sonnier*, 406 So. 2d 178, 179 (La. 1981).

218. *Id.* at 180.

219. *Id.* at 181.

220. *Stancil v. Erie Ins. Co.*, 740 A.2d 46, 46-47 (Md. Spec. Ct. App. 1999).

221. *Id.* at 47.

222. *Id.*

223. *Id.* at 49-50.

It must be noted that the court in *Stancil* recognized a distinction between a property insurance policy, which was at issue in the case, and health insurance policies.²²⁴ This indemnity/personal insurance dichotomy may have influenced the court in determining the extent to which equitable principles such as the made whole rule should have application in the case sub judice.

Michigan

The made whole doctrine has been a part of Michigan insurance law since the case of *Washtenaw Mutual Fire Insurance Co. v. Budd*.²²⁵ The insured's priority of rights extends to complete compensation after deduction for attorney's fees and costs.²²⁶ Consequently, the equation consists of adding the insurance proceeds to the recovery from the tortfeasor, less attorney's fees and costs.²²⁷

Minnesota

Contractual subrogation provisions are valid and enforceable in Minnesota. These provisions attach to the proceeds of both settlements and judgments. Nevertheless, even where the right to subrogation arises out of contract it remains an offspring of equity.²²⁸ Thus, the terms of the subrogation will be governed by equitable principles, unless the agreement clearly and explicitly provides otherwise.²²⁹ Pursuant to this rule a subrogation clause does not ipso facto grant the right of first recovery to the insurer.²³⁰ Rather, it must first be determined whether the insured has been fully compensated and then whether the agreement "supersede[s] the general rules of equity by stating that [the insurer] is to be reimbursed even if its member recovers less than full compensation."²³¹ A literal reading of the latter part of the analysis seems to require the use of magic words, or at least words which unequivocally and clearly demonstrate the intent of the parties to preclude application of the made whole doctrine. Minnesota courts have also subjected the subrogation rights of carriers under the No Fault Act and Uninsured Motorist Act to this same analysis.²³²

224. *Id.* at 48.

225. 175 N.W. 231 (Mich. 1919).

226. *Union Ins. Soc. v. Consol. Ice Co.*, 245 N.W.2d 563, 564 (Mich. 1932).

227. *See id.*

228. *Westendorf v. Stasson*, 330 N.W.2d 699, 703 (Minn. 1983).

229. *Id.*

230. *Id.* at 3.

231. *Id.* at 704. *See also* MINN. STAT. § 62A.095 (1996) (prohibiting use of subrogation clause in health insurance plan unless clause provides that it applies only after covered person has been made whole).

232. *See, e.g., Maday v. Yellow Taxi Co.*, 311 N.W.2d 849, 850-51 (Minn. 1981); *Preferred Risk Mut. Ins. Co. v. Pagel*, 439 N.W.2d 755, 757 (Minn. Ct. App. 1989);

Mississippi

In *Hare v. State of Mississippi & Centra Benefit Services, Inc.*,²³³ the Mississippi Supreme Court officially adopted the made whole rule of insurance subrogation. In *Hare*, the policy contained a detailed and comprehensive subrogation provision.²³⁴ However, the court, after reviewing competing views from jurisdictions such as Ohio and Arkansas, concluded that distinctions need not be made between equitable and conventional subrogation rights.²³⁵ Thus, in situations involving conventional subrogation, equitable principles and objectives are controlling.²³⁶ Thus, the insurer has priority of rights and is entitled to enforce its contractual right of subrogation only after the insurer has been fully compensated, or made whole.²³⁷ Under this approach the common law made whole rule is strictly applied and not subject to modification by the parties.²³⁸

Missouri

No Missouri court has expressly addressed the issue of priority of rights as between an insurer and its insured in the context of a conventional subrogation dispute. However, in *Hayde v. Womach*, the court in the context of the No Fault Act concluded that the dual objectives of subrogation precluded a no fault carrier from asserting a subrogation claim where its insured has not obtained full recovery.²³⁹

Montana

The 1977 Montana Supreme Court opinion in *Skauge v. Mountain States Telephone & Telegraph Co.*,²⁴⁰ integrated the made whole doctrine into the insurance law of Montana. *Skauge* involved a property insurance policy containing an expressed subrogation provision, which provided that the “[c]ompany may require from the insured an assignment of all right of recov-

State Farm Mut. Auto. Ins. Co. v. Galloway, 373 N.W.2d 301, 304 (Minn. 1985); Pfeffer v. State Auto. & Cas. Underwriters Ins. Co., 292 N.W.2d 743, 744 (Minn. 1980).

233. 733 So. 2d 277 (Miss. 1999).

234. *Id.* at 280.

235. *Id.* at 283.

236. *Id.*

237. *Id.* at 282.

238. *See, e.g.*, *Dunnam v. State Farm Mut. Auto. Ins. Co.*, 366 So. 2d 668, 672 (Miss. 1979) (subjecting contractual subrogation provision to made whole rule in the context of uninsured motorist act).

239. 707 S.W.2d 839, 842 (Mo. Ct. App. 1986).

240. 565 P.2d 628 (Mont. 1977).

ery against any party for loss to the extent that payment therefore is made by th[e] [c]ompany.²⁴¹

The parties agreed that the insured's loss exceeded the policy limits and that the insured would not be made whole when this amount was added to the tort recovery.²⁴² The *Skauge* court, after reviewing the objectives of subrogation, adopted the rationale that:

[w]hen the sum recovered by the Insured from the Tort-feasor is less than the total loss and thus either the Insured or the Insurer must to some extent go unpaid, the loss should be borne by the insurer for that is a risk the insured has paid it to assume.²⁴³

This rationale was the foundation for the court's adoption of the made whole rule.²⁴⁴ According to the rule, the insured is entitled to complete compensation for the entire loss, including costs of recovery and attorney's fees, before the insurer can assert its right to subrogation against either the insured or a third party.²⁴⁵ The amount of the insured's entire loss is treated as a question of fact.²⁴⁶

The made whole rule as articulated by the court in *Skauge* is subject to exception. In *Youngblood v. American States Insurance Co.*,²⁴⁷ the court held that while subrogation, subject to the made whole rule, was allowable, medical payment subrogation provisions violated the public policy of the state and were consequently altogether invalid and unenforceable.²⁴⁸

The Montana Supreme Court reaffirmed *Skauge* in 1994 in *DeTienne Associates v. Farmers Union Mutual Insurance*.²⁴⁹ As in *Skauge*, the court relied upon the dual objectives of subrogation to support its rejection of the insurer's argument that its subrogation clause mandated that it be reimbursed for the money it had paid to the insured.²⁵⁰ The *Skauge* holding has also been extended to workers' compensation claims.²⁵¹ Thus, in Montana the principles of equity, not the blanket language of the contract or statute, dictate how subrogation rights are to be administered.

241. *Id.* at 630.

242. *Id.* at 629-30.

243. *Id.* at 632.

244. *Id.*

245. *Id.* at 632.

246. *See, e.g.*, *State Comp. Ins. Fund v. McMillan*, 31 P.3d 347, 350 (Mont. 2001).

247. 866 P.2d 203 (Mont. 1993). *See also* *Swanson v. Hartford Ins. Co.*, 46 P.3d 584 (Mont. 2002).

248. *Youngblood*, 866 P.2d at 206.

249. 879 P.2d 704 (Mont. 1994).

250. *Id.* at 707-08.

251. *See McMillan*, 31 P.3d 347.

Nebraska

In *Shelter Insurance Cos. v. Frohlich*,²⁵² the Nebraska Supreme Court addressed the issue of whether a grant of a summary judgment motion to an insurer was proper where the insured had not been fully compensated for her loss.²⁵³ In resolving this issue, the court recognized that general subrogation clauses, while typically valid and enforceable, rarely define the precise nature and extent of an insurer's subrogation interest or right.²⁵⁴ Consequently, the common law rule that subrogation is unavailable until the subrogor has been paid in full is applicable unless the contract provides for subrogation on payment of less than full recovery.²⁵⁵ In other words, "unless a contract provides otherwise, equitable principles apply even when a subrogation right is based on contract."²⁵⁶ It is not enough that the contractual rights merely provide for or recognize the insurer's right of subrogation.²⁵⁷

Full compensation, in the absence of a contract or statutory provision to the contrary, is a prerequisite to subrogation.²⁵⁸ The rationale for this rule is that the insurance policy contains a basic promise to pay which should be subordinated to the insured's right to complete compensation.²⁵⁹ Thus, if anyone is to go unpaid it should be the insurer. Because the subrogation provision at issue in *Frohlich* was insufficient to modify the common law made whole rule, the court reversed the grant of summary judgment in favor of the insurer and remanded the case back to the trial court for purposes of determining what amount would constitute full compensation of the insured.²⁶⁰

In *Blue Cross & Blue Shield, Inc. v. Dailey*,²⁶¹ the Supreme Court of Nebraska recommitted itself to the common law made whole rule by overruling *Frohlich* to the extent that it could be construed to permit conventional subrogation when the insured has not been fully compensated.²⁶² In other words, the court in *Blue Cross* made it crystal clear that the parties may not contract out of the made whole rule.

There is no precise formula for determining whether an insured has been made whole in Nebraska. The issue is generally treated as a question of fact. However, medical expenses and other damages suffered by the insured are to

252. 498 N.W.2d 74 (Neb. 1993), *overruled in part* by *Blue Cross & Blue Shield v. Dailey*, 687 N.W.2d 689 (Neb. 2004).

253. *Id.* at 79-80.

254. *Id.* at 78.

255. *Id.* at 78-79.

256. *Id.* at 79.

257. *Id.* at 79.

258. *Id.* at 78.

259. *Id.* at 82.

260. *Id.* at 82-83.

261. 687 N.W.2d 689 (Neb. 2004).

262. *Id.*

be considered.²⁶³ Factors affecting the enforceability of a subrogation right such as the tortfeasor's ability to pay beyond the amount of the subrogor's settlement and whether the settling parties have stipulated that the settlement satisfies all damages sustained by the insured are also relevant.²⁶⁴ Jury verdicts, however, are presumptively conclusive of the amount that would completely compensate the insured.²⁶⁵

New Jersey

Subrogation is a creature of equity. As such, equitable principles apply even if the right of subrogation arises out of contract. Application of the principles of equity, however, is subject to the rights of the parties to agree otherwise. In order to displace equity – the right of the insured to be made whole before the insurer may assert its claim – the contract must be specific. Where the contract is general or where doubt exists “the interests of the insured come first.”²⁶⁶ As observed by the Court in *Providence Washington Insurance Co. v. Hogges*:²⁶⁷

In the absence of express terms in the contract to the contrary, [the insured] must be made or kept whole before the insurer may recover anything from him or from a third party under its right of subrogation. Against the insured, as well as against third parties, there may be recovery by the insurer (again, subject to the express terms of the contract) ‘only if the cause is just and enforcement is consonant with reason and justice.’²⁶⁸

In New Jersey equitable principles are used to guide an analysis of subrogation disputes.²⁶⁹ In this context the relevant subrogation clause and agreements are to be evaluated.²⁷⁰ If the subrogation clause or contract is sufficiently specific to alter the common law made whole doctrine neither can be disregarded unless it fails to honor the reasonable expectation of the par-

263. *Frohlich*, 498 N.W.2d at 82.

264. *Id.*

265. *See Bartunek v. Hormel*, 513 N.W.2d 545, 552 (Neb. 1994); *see also Pleon v. Union Ins. Co.*, 573 N.W.2d 436 (Neb. 1998) (holding statute providing that settlement or judgment less than the policy limit of any applicable automobile liability insurance policy constitutes complete recovery of actual economic loss to be constitutional).

266. *Providence Washington Ins. Co. v. Hogges*, 171 A.2d 120, 124 (N.J. Super. Ct. App. Div. 1971).

267. *Id.*

268. *Id.* at 124.

269. *Culver v. Ins. Co. of N. Am.*, 559 A.2d 400, 404 (N.J. 1989).

270. *Id.* at 402.

ties, is unconscionable, and violative of public policy.²⁷¹ Under this approach the issue of whether the insured has been made whole or fully compensated is a question of law for the court.²⁷²

New York

In *Winkelman v. Excelsior Insurance Co.*,²⁷³ the court recognized that when the insured's actual loss exceeds the amount it has received from both the insurer and tortfeasor the insurer has no right to subrogation.²⁷⁴ The court's analysis in *Winkelman*, however, was "founded on the principles of equitable, not contractual, subrogation because [the insureds'] claims rest on equitable principles, not on rights or limitations arising from a release or assignment given [the insurer] by [the insured]."²⁷⁵ The made whole rule was extended to contractual subrogation in *USF&G v. Maggiore*.²⁷⁶ Therein, the court concluded that the burden of going uncompensated should rest with the party who assumed the risk and not on the inadequately compensated insured.²⁷⁷ As the law currently stands the made whole rule and not the agreement of the parties is dispositive of subrogation disputes.

North Carolina

In North Carolina the made whole doctrine mandates that when the total of the recovery by the insured from the tortfeasor and proceeds of the policy is less than total compensation and either the insured or insurer must go unpaid, the loss should be borne by the insurer.²⁷⁸

Ohio

In *Peterson v. Ohio Farmers Insurance Co.*,²⁷⁹ the court considered a subrogation dispute which arose out of fire damage to the insured's barn.²⁸⁰ The insurance company, Ohio Farmers, paid the insured \$7,814 on a real and personal property claim stipulated to be in excess of \$17,629.²⁸¹ The insureds,

271. *Id.* at 403.

272. *Werner v. Latham*, 752 A.2d 832, 836 (N.J. Super. Ct. App. Div. 2000).

273. 650 N.E.2d 841 (N.Y. Ct. App. 1995).

274. *Id.* at 843-44.

275. *Id.* at 843 n.*.

276. 749 N.Y.S.2d 555, 558-59 (N.Y. App. Div. 2002).

277. *Id.* at 559.

278. *St. Paul Fire & Marine Ins. Co. v. W.P. Rose Supply Co.*, 198 S.E.2d 482, 484 (N.C. Ct. App. 1973).

279. 191 N.E.2d 157 (Ohio 1963).

280. *Id.* at 157.

281. *Id.*

upon receipt of the proceeds, signed a proof-of-loss and executed the insurer's standard subrogation receipt.²⁸² Thereafter, both jointly filed a petition against the third party claiming that the insured's loss was \$17,629.56.²⁸³ A joint verdict in favor of both parties against the tortfeasor was subsequently returned in the amount of \$11,514 and judgment was entered.²⁸⁴

Thereafter, a dispute arose between the insured and insurer as to the division of the proceeds of the judgment.²⁸⁵ The court in *Peterson* determined that the key to resolving the dispute was to be found in the language of the subrogation provision of the policy and the subrogation receipt signed by the insured.²⁸⁶ According to the court the language providing that the insured "hereby subrogates said Insurance Company, to all of the rights, claims and interest which the undersigned may have" conveyed every bit of the insured's rights of recovery up to \$7,814.²⁸⁷ Therefore, the insurer being the owner of all the rights of the insured "must have priority in payment out of the funds recovered."²⁸⁸ Ultimately the court concluded that an insurer who has cooperated and assisted against the tortfeasor is entitled to be compensated first out of the proceeds of any recovery where the subrogation provision or receipt conveys all of the rights of recovery to the extent of payment by the insurer.²⁸⁹

Three decades later, the Ohio Supreme Court revisited the issue of priority of rights in the context of health insurance in *Blue Cross & Blue Shield Mutual of Ohio v. Hrenko*.²⁹⁰ The court reiterated its position that the dispositive consideration was the language of the policy or subrogation receipts.²⁹¹ While the court found the language of the policy to be clear, unambiguous and enforceable, it was also influenced by the fact that the insured had received the full benefits of his bargain.²⁹² Consequently, the court concluded that pursuant to the terms of the policy, an insurer who has paid benefits to its insured and has been subrogated to the rights of its insured may enforce that right after the insured receives full compensation.²⁹³ In subsequent opinions involving health insurance subrogation disputes courts of appeals have construed the relevant analysis to turn on an examination of the policy language and a consideration of whether the insured had been made whole. Whether the insured had received complete compensation however, ultimately was

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 159.

287. *Id.*

288. *Id.*

289. *Id.* at 159-60.

290. 647 N.E.2d 1358 (Ohio 1995).

291. *Id.* at 1360.

292. *Id.*

293. *Id.*

accorded greater weight in the analysis and became the dispositive consideration.²⁹⁴

The court explained the critical nature of the requirement that the insured be made whole before the insurer can assert its subrogation right in *Central Reserve Life Insurance Co. v. Hartzell*.²⁹⁵ In *Central Reserve*, the court of appeals went further than any court before and declared that any attempt by the insurer to claim priority over a partially compensated insured via a subrogation clause was “unenforceable and contrary to public policy.”²⁹⁶ Thus, the court concluded that it is contrary to the public policy of Ohio to allow an insurer to contractually establish priority over an insured’s claim before the latter has been made whole.²⁹⁷

The accuracy of the conclusion that whether the insured has been made whole is dispositive of who has priority of rights in a subrogation dispute was called into question by the court of appeals in *Northern Buckeye Education Council Group Health Benefits Plan v. Lawson*.²⁹⁸ There, the court entertained a subrogation dispute arising out of the payment of medical expenses.²⁹⁹ The insured in *Lawson* argued that pursuant to the made whole doctrine the insurer was not entitled to reimbursement until she had received full compensation.³⁰⁰ The insurer argued that pursuant to the plan, specifically the terms of the Reimbursement and Subrogation Agreement which insured signed, it was entitled to full reimbursement regardless of whether the insured had been made whole.³⁰¹

The court in *Lawson*, purporting to balance the principles of freedom of contract and equity, concluded that “unless the terms of a subrogation agreement clearly and unambiguously provide otherwise, a health insurer’s subrogation interests will not be given priority where doing so will result in less than a full recovery to the insured.”³⁰² This conclusion constituted a break with prior court of appeals decisions and a modification of the made whole rule.³⁰³

294. See, e.g., *Huron County Bd. of Comm’rs v. Saunders*, 775 N.E.2d 892, 897 (Ohio Ct. App. 2002); *Grine v. Payne*, No. WD-00-044, 2001 Ohio App. LEXIS 1342, at *8 (Ohio Ct. App. 2001); *Cent. Reserve Life Ins. Co. v. Hartzell*, No. 94AP120094, 1995 Ohio App. LEXIS 6027, at *5 (Ohio Ct. App. 1995).

295. 1995 Ohio App. LEXIS 6027, at *7.

296. *Id.*

297. *Id.*

298. 798 N.E.2d 667 (Ohio Ct. App. 2003), *aff’d*, 814 N.E.2d 1210 (Ohio 2004).

299. *Id.* at 668-69.

300. *Id.* at 669.

301. *Id.*

302. *Id.* at 673.

303. *Id.* at 673-74.

Oklahoma

In *Equity Fire & Casualty Co. v. Youngblood*,³⁰⁴ the Supreme Court of Oklahoma addressed the enforceability of subrogation and reimbursement provisions in health insurance policies for the first time. The court questioned whether “a contractual subrogation or reimbursement provision, which contain[ed] no priority of payment provision, [was] enforceable under Oklahoma law where the recipient of the benefits sought to be recovered has not been fully compensated by payments from a third party.”³⁰⁵ While the policy in dispute was governed by the Employment Retirement Income Security Act (ERISA), the court nevertheless concluded in the negative.³⁰⁶ It held that an insurer could not share in the settlement proceeds because: (1) the plan did not expressly delineate a priority for payment of such monies; (2) the plan’s managers were not expressly vested with authority to bind plan members with their interpretation of ambiguous provisions of the plan; and (3) the proceeds paid to the insured failed to fully compensate her for her damages.³⁰⁷

Oklahoma courts have extended the rationale and holding of *Youngblood* to subrogation disputes arising out of insurance policies not governed by ERISA. For example, in *American Medical Security v. Josephson*,³⁰⁸ the court of appeals applied the three part holding of *Youngblood* to a subrogation dispute arising out of a health insurance policy not governed by ERISA. The *Josephson* court also held that a settlement did not presumptively constitute complete compensation or make a party whole.³⁰⁹ Rather, whether a party has been made whole by proceeds from a settlement with a tortfeasor clearly presents a question of fact.³¹⁰

Statutory subrogation is viewed entirely different from contractual subrogation in Oklahoma. Consequently, it is not automatically subject to the made whole rule.³¹¹

Pennsylvania

In Pennsylvania, an insurer’s subrogation rights are not superior to the rights of an insured because subrogation does not arise until the insured has been made whole.³¹² This rule of law has been consistently applied by lower

304. 927 P.2d 572 (Okla. 1996).

305. *Id.* at 574.

306. *Id.* at 576.

307. *Id.* at 576-77.

308. 15 P.3d 976 (Okla. Ct. App. 2000).

309. *Id.* at 979.

310. *Id.*

311. *See Tomlinson v. Cont’l Cas. Co.*, 77 P.3d 628, 632 (Okla. Ct. App. 2003) (holding make whole rule not applicable to workers’ compensation act).

312. *See Nationwide Mut. Ins. Co. v. DiTomo*, 478 A.2d 1381, 1383 (Pa. Super. Ct. 1984).

state courts to both equitable and contractual subrogation disputes between insurers and their insureds.³¹³ The made whole doctrine is also applicable to statutory subrogation disputes in the absence of a legislative intent to displace the rule.³¹⁴ In determining the subrogation rights of the insurer, most courts limit the recovery from the insured to the amount by which the sum received by the insured from the tortfeasor, together with the insurance payments made, exceeds the loss and expense incurred by the insured in realizing the claim against the wrongdoer.³¹⁵ Pursuant to this measure, the expenses of making the recovery from the wrongdoer, including attorneys' fees, must be taken into account in determining whether the insured has any excess recovery to which the insurer would be entitled under the doctrine of subrogation.³¹⁶ However, there is authority for the proposition that when the insured settles with the tortfeasor the settlement conclusively establishes the settlement amount as full compensation.³¹⁷

Rhode Island

In *Lombardi v. Merchants Mutual Insurance Co.*, the Supreme Court of Rhode Island concluded that the right of subrogation did not arise until the insured had received full compensation.³¹⁸ *Lombardi*, however, was subsequently distinguished by the lower state court in *Ditomasso v. Ocean State Physicians Health Plan, Inc.*³¹⁹ Therein the court found an unambiguous subrogation provision which displaced the made whole rule enforceable. According to the court in *Ditomasso*:

Lombardi is inapplicable to and distinguishable from the case at bar. First, *Lombardi* addressed the issue of subrogation rights as applicable to general liability insurers. Here, the defendant is a health insurer. Second, the Court in *Lombardi* held that the defendant insurance companies subrogation rights did not arise until the plaintiffs had received full satisfaction of the judgment against the uninsured. Plaintiff in the instant matter has not received a judg-

313. See, e.g., *Gallop v. Rose*, 616 A.2d 1027 (Pa. Super. Ct. 1992).

314. See, e.g., *id.* at 1031; *City of Meadville v. Workers' Comp. Appeal Bd.*, 810 A.2d 703, 706 (Pa. Commw. Ct. 2001).

315. *Nationwide Mut. Ins. Co. v. Butler*, 28 Pa. D. & C.3d 627, 630 (Pa. Com. Pl. 1983).

316. *Nationwide Mut. Ins. Co. v. Kintz*, 27 Pa. D. & C.3d 164 (Pa. Com. Pl. 1983); see also *Associated Hosp. Serv. v. Pustilnik*, 439 A.2d 1149, 1151-52 (Pa. 1981).

317. See, e.g., *Butler*, 28 Pa. D. & C.3d at 632.

318. 429 A.2d 1290, 1292 (R.I. 1981).

319. No. 87-2467, 1988 R.I. Super. LEXIS 52, at *5-6 (May 5, 1988).

ment from any court but rather has been paid \$ 25,000 (the policy limit) from her uninsured motorist coverage.³²⁰

South Dakota

In South Dakota the made whole doctrine is a default rule subject to the right of the parties to agree otherwise.³²¹ The agreement need not be specific or use the magical phrase "made whole."³²² Rather, the South Dakota Supreme Court has adopted a plain meaning approach to reach the conclusion that general subrogation language is sufficient to displace the doctrine.³²³ Under this approach the absence of language in the policy or statute that limits the right of subrogation to instances where the insured has been made whole evidences the parties' intent to dispense with the default rule.³²⁴

Tennessee

In *Wimberly v. American Casualty Co.*, the Supreme Court of Tennessee announced that an insurer could not assert a subrogation claim until the insured has been made whole.³²⁵ The *Wimberly* court rejected the argument that the equitable nature of subrogation could be modified by the terms of a contract.³²⁶ According to the court the distinction between legal and conventional subrogation is only dispositive of "whether there is a right of subrogation in the first instance, rather than in the enforcement of such right."³²⁷ While an insurer can not contractually modify the common law made whole rule, a failure on the part of the insured to obtain contractually required permission of the insurer to a settlement preserves the latter's subrogation rights even if the insured is not made whole.³²⁸ Thus, where the insurer does not participate in the settlement negotiations between its insured and the tortfeasor or does not waive its rights the subrogation claim must be honored and the made

320. *Id.*

321. *Westfield Ins. Co., Inc. v. Rowe*, 631 N.W.2d 175, 180 (S.D. 2001); *Julson v. Federated Mut. Ins. Co.*, 562 N.W.2d 117, 121 (S.D. 1997).

322. *Rowe*, 631 N.W.2d at 180; *Julson*, 562 N.W.2d at 121.

323. *Rowe*, 631 N.W.2d at 180; *Julson*, 562 N.W.2d at 121.

324. *Rowe*, 631 N.W.2d at 180; *Julson*, 562 N.W.2d at 121.

325. 584 S.W.2d 200, 203 (Tenn. 1979).

326. *Id.*

327. *Id.* (quoting *Castleman Contr. Co. v. Pennington*, 432 S.W.2d 669, 675 (Tenn. 1968)).

328. *Eastwood v. Glens Falls Ins. Co.*, 646 S.W.2d 156, 158 (Tenn. 1983); *Rader v. Traylor*, No. 03A01-9403-CV-00079, 1994 Tenn. App. LEXIS 418, at *4-5 (Aug. 1, 1994).

whole doctrine is inapplicable.³²⁹ This exception to the made whole rule is subject however, to a further caveat which provides that if the parties agree that the insured has not been made whole or the underlying facts make clear that the recovery is for less than full compensation the insurer's subrogation claim is extinguished.³³⁰

Tennessee's law of subrogation is quite simple despite its seeming complexity. The common law made whole rule governs in both legal and conventional subrogation or reimbursement disputes between insurers and their insureds.³³¹ Thus, where the issue of whether the insured has been fully compensated is raised at the trial level the insurer's subrogation claim is stayed until this issue is resolved.

Tennessee recognizes two analytical frameworks for assessing the subrogation rights of insurers in the context of statutory subrogation disputes. The primary objective of the court under both frameworks is to identify and give effect to the intent and purpose of the legislature.³³² Under one analysis, if the statute merely creates a subrogation right without embracing or abandoning the made whole rule the court is prone to conclude that the legislature "intended for the statute to reflect the equitable principle that subrogation is subject to the made whole doctrine."³³³ The analytical framework is premised on the notion "that subrogation is founded upon principles of equity and 'not dependent upon statute or custom or . . . contract.'"³³⁴

The second analytical framework is applicable where the statute provides the insurer with a statutory lien. Pursuant to this analysis, a statutory lien is not subject to the equitable requirement that the insured be made whole.³³⁵

Texas

The made whole doctrine is firmly entrenched in Texas' law of insurance subrogation. However, the rules pertaining to the doctrine are distinguishable on the basis of legal and contractual subrogation. In the context of legal or equitable subrogation, "[a]n insurer is not entitled to subrogation if

329. *Eastwood*, 646 S.W.2d at 158; *Doss v. Tenn. Farmers Mut. Ins. Co.*, No. M2000-01971-COA-R3-CV, 2001 Tenn. App. LEXIS 906, at *10-11 (Dec. 10, 2001).

330. *Doss*, 2001 Tenn. App. LEXIS 906, at 12-13.

331. *Health Cost Controls, Inc. v. Gifford*, 108 S.W.3d 227, 231 (Tenn. 2003); *York v. Sevier County Ambulance Auth.*, 8 S.W.3d 616, 621 (Tenn. 1999); *Wimberly v. Am. Cas. Co.*, 584 S.W.2d 200, 203 (Tenn. 1979).

332. *Blankenship v. Estate of Joshua*, 5 S.W.3d 647, 651 (Tenn. 1999); *See, e.g., Castleman v. Ross Eng'g, Inc.*, 958 S.W.2d 720, 724 (Tenn. 1997); *Graves v. Cocke County*, 24 S.W.3d 285, 289 (Tenn. 2000).

333. *Blankenship*, 5 S.W.3d at 651.

334. *Id.* (citing *Wimberly*, 584 S.W.2d at 203).

335. *See, e.g., Castleman*, 958 S.W.2d at 724; *Graves*, 24 S.W.3d at 289.

the insured's loss is in excess of the amounts recovered from the insurer and the third party causing the loss."³³⁶ Reasonable expenses in making the recovery, including attorneys' fees, are included in the calculation of the insured's total loss.³³⁷ In determining whether the insured has been made whole only that portion of the recovery attributable to the insured loss is relevant.³³⁸ Thus, an insurer, after a deduction of its share of the cost of collection, is entitled to subrogation to the extent that the total of insurance collected plus the amount recovered from the tortfeasor for the insured's losses exceeds the amount of the total insured loss.³³⁹

In *Esparza v. Scott & White Health Plan*,³⁴⁰ the court of appeals addressed the issue of whether a contractual agreement providing for the right of subrogation completely removes the issue of subrogation from the realm of equity. According to the court, "[w]hile an insurance contract providing expressly for subrogation may remove from the realm of equity the question of whether the insurer has a right to subrogation, it cannot answer the question of when the insurer is actually entitled to subrogation or how much it should receive."³⁴¹

In essence, express subrogation provisions "confirm but [do] not expand, the equitable subrogation rights of insurers. To avoid injustice, the equities must still be balanced in deciding what amount, if any, the subrogee is entitled to receive in a given case."³⁴²

Pursuant to the balancing of the equities analysis, which is applicable to contractual subrogation disputes, the made whole rule is not absolute.³⁴³ Consequently, the court may consider not only whether the insured has been made whole, but also whether (1) the insured acted to circumvent or compromise the subrogee's interest, and (2) the subrogee failed to protect its own interest by waiting until a settlement had been achieved in determining the equities of the case.³⁴⁴ The equation for determining whether the insured has been made whole however, is the same as that used in legal subrogation disputes.

Statutory subrogation disputes, in the absence of a specific statutory definition, are subjected to a plain meaning of the words of the statute approach. Where a statute merely employs the term "subrogation" the court is prone to conclude that "the Legislature did not, and did not intend to, confer

336. *Ortiz v. Great S. Fire & Cas. Ins. Co.*, 597 S.W.2d 342, 343 (Tex. 1980).

337. *Id.* at 344.

338. *Id.*

339. *Id.*

340. 909 S.W.2d 548 (Tex. App. 1995).

341. *Id.* at 551 (emphasis omitted).

342. *Id.* at 552 (citations and quotation omitted).

343. *Id.*

344. *Id.* at 533 (applying balancing of the equities analysis allowed insurer one half of its subrogation claim).

any greater right to subrogation than would be found in the exercise of an equitable right to subrogation."³⁴⁵

Utah

The Utah Supreme Court adopted the equitable made whole rule in *Hill v. State Farm Mutual Auto Insurance Co.*³⁴⁶ The court in *Hill* recognized that the doctrine could be modified by contract.³⁴⁷ However, the modification, in order to effectively displace the doctrine, must be sufficiently clear and unambiguous as to put the insured on notice of that fact.³⁴⁸ General subrogation language is insufficient to explicitly inform an insured that its insurer has priority of rights even though the assets of the third party are inadequate to fully compensate the former.³⁴⁹

The made whole doctrine's application to statutory subrogation disputes depends upon the court's determination of the legislative intent and purpose of the statute. Equitable principles are to be employed in determining how the right is to be exercised where the statute merely grants the insurance carrier the right to subrogation.³⁵⁰ However, if the statute provides a detailed statutory scheme governing how an insurer's subrogation right may be exercised and how the proceeds from an action against the third party are to be distributed, the common law made whole rule must give way.³⁵¹

Washington

In *Thiringer v. American Motors Insurance Co.*,³⁵² the Washington Supreme Court applied the equitable made whole rule to determine the priorities, as between an insured and its insurer, in the proceeds of a settlement between the insured and the responsible third party.³⁵³ The policy in question in *Thiringer* reserved to the insurer a right of subrogation and provided that the insured should do nothing to prejudice such right.³⁵⁴ The Supreme Court agreed with the trial court's conclusion that in the context of a general settlement involving automobile personal injury protection the proceeds should be first applied toward the payment of the insured's general damages and then, if

345. *Tex. Ass'n of Sch. Bds., Inc. v. Ward*, 18 S.W.3d 256, 260 (Tex. App. 2000).

346. 765 P.2d 864 (Utah 1988).

347. *Id.* at 866.

348. *See, e.g., State Farm Auto. Ins. Co. v. Green*, 89 P.3d 97, 105 (Utah 2003).

349. *Id.*

350. *Anderson v. United Parcel Serv.*, 96 P.3d 903, 907 (Utah 2004).

351. *Id.*

352. 588 P.2d 191 (Wash. 1978).

353. *Compare id.* at 194, with *Cook v. USAA Cas. Ins. Co.*, 90 P.3d 1154 (Wash. Ct. App. 2004) (holding that *Thiringer* does not apply when there is no third party tortfeasor liable to the insured).

354. *Thiringer*, 588 P.2d at 216.

any excess remains, toward the payment of the special damages covered by personal injury protection insurance.³⁵⁵ Thus, the insured is entitled to recover its general damages before subrogation is allowed.³⁵⁶

The made whole doctrine presupposes that an insurer is entitled to reimbursement for payments made to the extent that the insured recovers from a responsible third party. However, it can only recover the excess the insured receives from the third party after the insured has been fully compensated for its loss. According to Washington's law, reimbursement disputes are to be resolved on a case-by-case basis upon a consideration of "the equitable factors involved, guided by the principle that a party suffering compensable injury is entitled to be made whole but should not be allowed to duplicate his recovery."³⁵⁷

The factors used to determine the equitable resolution of a subrogation or reimbursement dispute between an insurer and its insured where the insured executes a general release with the tortfeasor include: (1) the knowledge of insureds and tortfeasors as to outstanding subrogation claims; (2) the extent of the prejudice to insurer's subrogation interests; (3) the desirability of encouraging settlements; (4) the possibility of sharp practices by tortfeasors, insureds or their insurance carriers; and (5) the general public policy that persons suffering compensable injuries are entitled to be made whole.³⁵⁸ "Where the equities are evenly balanced, the principle that persons suffering compensable injury are entitled to be made whole without duplicating their recovery becomes determinative."³⁵⁹

While the insured is entitled to recoup his general damages from the tortfeasor before subrogation is permitted, in doing so it may not do anything to prejudice the rights of the insurer.³⁶⁰ As explained by the court of appeals in *British Columbia Ministry of Health v. Homewood*:³⁶¹

[T]o establish prejudice [the insurer] must show (1) the percentage of negligence of [each of three tortfeasors]; (2) the total losses the plaintiff suffered; [and] (3) that the settlement as a percentage of plaintiff's total injuries was less than the percentage of the settling entities' comparative negligence. Only if the latter percentage ex-

355. *Id.* at 195; *see also* B.C. Ministry of Health v. Homewood, 970 P.2d 381, 386 (Wash. Ct. App. 1999) (concluding that general settlement involving health insurance should be apportioned first to general damages and then any excess to special damages).

356. *Homewood*, 970 P.2d at 385 n.5.

357. *Leader Nat'l Ins. Co. v. Torres*, 779 P.2d 722, 723 (Wash. 1989) (quoting *Thiringer*, 588 P.2d at 194) (applying the same principle to a subrogation dispute).

358. *Id.*

359. *Id.* at 725.

360. *See, e.g., Homewood*, 970 P.2d at 386.

361. 970 P.2d 381.

ceeds the former will [the insurer's] subrogation rights have been prejudiced³⁶²

The holding in *Thiringer* was construed by the court of appeals in *Fisher v. Aldi Tire, Inc.* to allow the parties to the contract to modify subrogation standards developed at common law.³⁶³ However, the language purporting to change the common law standards must be clear and unambiguous.³⁶⁴

West Virginia

The made whole rule was first incorporated into West Virginia's law of insurance subrogation in 1991.³⁶⁵ In *Kittle v. Icard*³⁶⁶ the West Virginia Supreme Court of Appeals addressed the issue of whether the West Virginia Department of Human Services (DHS) was entitled to be fully reimbursed for medical expenses paid on behalf of an insured from the amount the insured received in settlement from a tortfeasor.³⁶⁷ DHS argued that the trial court erred when it applied the common law made whole rule instead of West Virginia Code Section 9-5-11 (1990).³⁶⁸ According to DHS, the statute abrogated common law equitable principles.³⁶⁹

The Supreme Court in *Kittle* agreed that the West Virginia statute was applicable.³⁷⁰ However, the court was not persuaded that the use of the term "subrogation" in the statute altered its common law meaning.³⁷¹ According to the court, in the absence of a clearly expressed legislative intent requiring otherwise, the term subrogation is to be given its usual and ordinary meaning.³⁷² Thus, the use of the term "subrogation" in a statute merely grants the insurer a right of subrogation.³⁷³ The extent to which that right may be exercised, however, is to be guided by the principles of equity.³⁷⁴

362. *Id.* at 387 (quoting *Elovich v. Nationwide Ins. Co.*, 707 P.2d 1319, 1327 (Wash. 1985)).

363. 902 P.2d 166, 169 (Wash. Ct. App. 1995).

364. *Id.*

365. *Kittle v. Icard*, 405 S.E.2d 456, 464 (W. Va. 1991).

366. 405 S.E.2d 456.

367. *Id.* at 464.

368. *Id.* at 459.

369. *Id.* at 460.

370. *Id.*

371. *Id.*

372. *Id.*; but see *Grayam v. Dep't of Health & Human Res.*, 498 S.E.2d 12, 16 (W. Va. 1997) (construing amended statute to preclude application of made whole rule); *Cart v. Gen. Elec. Co.*, 506 S.E.2d 96, 99 (W. Va. 1998) (construing workers' compensation statute to abrogate common law made whole rule).

373. *Id.* at 461.

374. *Id.* at 461-62.

Despite the fact that *Kittle* was subsequently statutorily superceded, courts continue to apply its rationale and holding in all forms of subrogation dispute.³⁷⁵ Thus, in the absence of clear statutory law or valid contractual arrangements to the contrary, an insured must be made whole for losses sustained before the subrogation rights of the insurer can be exercised.³⁷⁶ General subrogation language does not defeat application of the complete compensation rule.³⁷⁷ Only contractual arrangements which clearly and expressly create an agreement to the contrary have such an effect.³⁷⁸

“[T]he right of subrogation depends upon the facts and circumstances of each particular case.”³⁷⁹ In determining the application of the made whole rule the court is to be guided by the rationale that the made whole doctrines embodies a socially desirable policy and that if anyone is to go uncompensated it should be the insurer.³⁸⁰ The court should also consider, among other factors, the following: (1) the ability of parties to prove liability; (2) the comparative fault of all parties involved in accident; (3) the complexity of the legal and medical issues; (4) future medical expenses; (5) nature of injuries; (6) the assets or lack of assets available above and beyond the insurance policy.³⁸¹

Wisconsin

Wisconsin decisional law has done more to influence the expansion of the made whole doctrine than that of any other jurisdiction.³⁸² In two decisions, *Garrity v. Rural Mutual Insurance Co.*³⁸³ and *Rimes v. State Farm Mutual Auto Insurance Co.*,³⁸⁴ the Wisconsin Supreme Court recognized the importance of equitable principles in the context of insurance subrogation. In *Garrity*, the issue before the court was “when an insured’s loss exceeds the amount recoverable under a standard fire insurance policy written in conformity with [WIS. STAT. § 203.01 (1969)], what are the respective rights of the insured and the subrogated insurer to the damages recovered from the tort-

375. *Kanawha Valley Radiologists v. One Valley Bank, N.A.*, 557 S.E.2d 277, 282 (W. Va. 2001).

376. *Id.*

377. *Id.*

378. *Id.*

379. *Kittle*, 405 S.E.2d at 463.

380. *See id.*; *Provident Life & Accident Ins. Co. v. Bennett*, 483 S.E.2d 819, 825 (W. Va. 1997).

381. *Bennett*, 483 S.E.2d at 825.

382. The cases most cited in support of the made whole doctrine – *Garrity v. Rural Mut. Ins. Co.*, 253 N.W.2d 512 (Wis. 1977) and *Rimes v. State Farm Mut. Auto. Ins. Co.*, 316 N.W.2d 348 (Wis. 1982) – are both Wisconsin opinions.

383. 253 N.W.2d 512.

384. 316 N.W.2d 348.

feasor who caused the loss?"³⁸⁵ In resolving this issue, the court reasoned that under common law subrogation principles a partially subrogated insured is a competitor with the insurer and that "where either the insurer or the insured must to some extent go unpaid, the loss should be borne by the insurer for that is a risk the insured has paid it to assume."³⁸⁶ Consequently, under basic principles of subrogation, whether the subrogation is "legal" or "conventional," the insurer is not entitled to recoup anything until the insured has been made whole.³⁸⁷ The court in *Garrity* further concluded that the subrogation clause in the policy did not change the substantive common law rule because the contract contained no language to the contrary.³⁸⁸

In *Rimes*, the issue was stated as:

[W]hether an automobile insurer . . . which, under a subrogation agreement signed by its insured . . . has made payment under the medical-pay provisions of its policy, has the right to recover those payments out of the monies received by its insured in a settlement with negligent third-party tortfeasors and their liability insurers, when . . . the settlement figure was less than the total damages sustained by the insured . . .³⁸⁹

Rather than analyzing the text of the subrogation agreement, the court relied on the principles of *Garrity* to support its conclusion that "the contractual terms of subrogation agreements in an insurance policy were to be applied according to the rules of equity."³⁹⁰ Thus, the principles of equity and not the contract language control even where the language of the agreement unambiguously states that the insurer's subrogation rights are superior to the insured's right to be made whole.³⁹¹

The made whole rule is not absolute. It may be altered by statute. Certain circumstances such as where the settlement will allow the tortfeasor to escape liability all together or where an insured and tortfeasor settle without involving the subrogated insurer and without submitting the issue of the subrogated insurer's rights to the court, requires that the court balance the equities between the insured and insurer in determining the right and extent of subrogation.³⁹² Nevertheless, where the situation ultimately boils down to a

385. *Garrity*, 253 N.W.2d at 512.

386. *Id.* at 514.

387. *Id.* at 514-515.

388. *Id.* at 516.

389. 316 N.W.2d 348, 350 (Wis. 1982).

390. *Id.* at 353.

391. See *Ruckel v. Gassner*, 646 N.W.2d 11, 12-13 (Wis. 2002).

392. See *Blue Cross & Blue Shield United v. Fireman's Fund Ins. Co.*, 411 N.W.2d 133, 135 (Wis. 1987), *overruled by* *Schulte v. Frazin*, 500 N.W.2d 305 (Wis. 1993); *Mut. Serv. Cas. Co. v. Am. Family Ins. Group*, 410 N.W.2d 582, 584 (Wis. 1987); *Vogt v. Schroeder*, 393 N.W.2d 876, 879 (Wis. 1986).

competition between subrogated insurer and its insured who has not been made whole and (1) the insured settles with the tortfeasor without resolving the subrogated insurer's part of the claim; (2) settling parties request a Rimes hearing; and (3) the subrogated insurer had an opportunity to participate in the hearing the subrogated insurer's rights of subrogation depend on whether the settlement made the insured whole.³⁹³

In Wisconsin, a settlement is not dispositive of whether an insured has been made whole.³⁹⁴ Rather, the court, in the context of the subrogation dispute, must conduct an evidentiary hearing on this matter. In the context of this hearing, the court should focus on what loss the plaintiff had actually experienced instead of what the plaintiff was legally entitled to receive.³⁹⁵

III. CLASSIFICATIONS

As originally conceived the made whole doctrine applied to subrogation, whether legal or conventional. Consequently, even where the insurer had paid all of the policy proceeds and included an expressed subrogation provision in the policy, the right to subrogation was stayed until the insured received complete compensation. Many states however, have adopted a modified made whole doctrine. According to these states, since the doctrine is of equitable origins and conventional subrogation is grounded upon a legal contract the parties are free to agree that the made whole doctrine is not applicable. However, in order to contract out of the equitable principle the agreement must satisfy certain requirements. At a minimum, to be effective the agreement must clearly and explicitly reflect the intentions of the parties that the equitable doctrine is not applicable. In essence the doctrine in these jurisdictions is a default rule applicable to conventional subrogation unless modified by an agreement otherwise. In the absence of an agreement precluding the application of the doctrine, the insured is entitled to be made whole before the insurer may recover any portion of its payments.

The following classifications of the doctrine turn upon the extent to which it can be modified by agreement. However, it should be noted that the doctrine can be classified according to the equation used by courts to assess whether the insured has been made whole. Classification along this line would render two subclasses; one in which courts consider the expenses, including attorney fees, incurred by insured in making the recovery from the

393. *Shulte*, 500 N.W.2d at 310-11.

394. *See Rimes v. State Farm Mut. Auto. Ins. Co.*, 316 N.W.2d 348, 355 (Wis. 1982).

395. *Compare Ives v. Coopertools*, 559 N.W.2d 571, 573 (Wis. 1997) (plurality decision), with *Sorge v. Nat'l Car Rental Sys., Inc.*, 512 N.W.2d 505, 507-09 (Wis. 1994).

third party and a second in which expenses and attorneys fees are not considered.³⁹⁶

A. Common Law Equitable Made Whole Doctrine

At common law, subrogation, whether legal or conventional, was to be governed by equitable principles. Subrogation agreements merely recognized the right of an insurer to be subrogated. The agreement neither expanded nor determined the extent to which the right of subrogation could be exercised. These issues were to be resolved exclusively on the basis of equity. Jurisdictions which follow the view that the made whole doctrine cannot be contractually modified include Arkansas, Colorado, Connecticut, Georgia, Iowa, Louisiana, Michigan, Mississippi, Montana, Nebraska, New York, North Carolina, Oklahoma, Pennsylvania, Tennessee, and Wisconsin.

B. Made Whole Doctrine Subject to Contractual Modification

At least fourteen jurisdictions have adopted the view that parties are free to agree that the made whole rule is inapplicable. These jurisdictions employ different standards regarding how specific the language used to defeat appli-

396. Whether attorney fees are to be considered in the equation for determining made whole is extremely important because 14 of the 34 jurisdictions which recognize the made whole doctrine also follow the common fund doctrine (Alabama, California, Colorado, Florida, Illinois, Louisiana, Michigan, Montana, Nebraska, North Carolina, Pennsylvania, Tennessee, Texas, Washington, and Wisconsin). Pursuant to the latter doctrine, if subrogation is allowed, an insurer who fails to participate in the process of making the recovery is obligated to pay the insured's attorney a pro rata share of the cost of his services in creating the fund. Alabama, which recognizes both doctrines, does not consider attorney fees in determining made whole but does allow for the recovery of attorney fees from the insurer if subrogation is allowed. Other jurisdictions such as Michigan, Montana, Pennsylvania, and Texas recognize both that attorney fees and expenses incurred in making the recovery from the tortfeasor are to be considered in determining whether the insured has been made whole and in the event the insurer is allowed subrogation the an insurer, under circumstance supporting the application of the common fund doctrine is responsible for a pro rata share of the insured attorney fees incurred in creating the fund. *See supra* respective section for each jurisdiction on made whole. *See also* Powell v. Blue Cross & Blue Shield, 581 So. 2d 772, 781 (Ala. 1990); CNA Ins. Cos. v. Johnson, 639 So. 2d 355 (Ala. 1994) (common fund); Foremost Life Ins. Co. v. Waters, 337 N.W.2d 29, 32 (Mich. Ct. App. 1983) (common fund); Mont. W. Farm Bureau Mut. Ins. Co. v. Hall, 38 P.3d 825, 828 (Mt. 2002) (common fund); Cataldi v. Methodist Hosp. & Coordinated Health Servs., 747 A.2d 1239, 1241 (Pa. Super. Cr. 2000) (common fund); Lancer Corp. v. Murillo, 909 S.W.2d 122, 126 (Tex. App. 1996) (common fund). For a detailed discussion of the common fund doctrine, see Johnny Parker, *The Common Fund Doctrine: Coming of Age in the Law of Insurance Subrogation*, 31 IND. LAW REV. 313 (1998).

cation of equity must be. Consequently, these jurisdictions fall into four sub-classifications. The first sub-classification consists of jurisdictions which recognize that general subrogation language is sufficient to prevent the application of the full recovery rule. Jurisdictions that follow this view include Illinois, South Dakota, and Maryland. The second subclass requires that the agreement contain clear, explicit and/or specific language. Jurisdictions that fall within this group include: Alabama, Florida, Indiana, Kentucky, New Jersey, Ohio, Rhode Island, Utah, and West Virginia. The third sub-classification requires not only clear and specific language but also that the insurer actively participates in the recovery process. California is the only jurisdiction to adhere to this view. The last subclass requires that the agreement, in order to be effective, use magical or unequivocal words. This view is followed in Minnesota.

C. Made Whole Doctrine Subject to a Balancing of the Equities

Three jurisdictions, Texas, Washington, and West Virginia, engage in a balancing of the equities analysis in determining the application of the made whole doctrine in a contractual subrogation dispute between an insurer and its insured. In the analysis, the facts and circumstances of the case, conduct of the parties, contractual language and the general public policy that the insured should be made whole are considered in determining the extent to which the doctrine applies. As a rule, in the absence of opprobrious conduct on the part of the insured, where the equities are evenly balanced or where there is serious doubt, the made whole doctrine should be accorded greater weight in the analysis and the equities should be balanced in favor of complete compensation for the insured.

IV. CONCLUSION

The made whole doctrine has received much judicial and scholarly attention. Judges and commentators however, have avoided delving into the intricacies of the doctrine. Consequently, the principle is discussed and explained as if it were a single rule subject to a single exception. The reality is that the made whole or complete compensation rule is a complex equitable principle designed to achieve fairness between the parties to a subrogation dispute. As demonstrated by its multiple forms, fairness does not always require that one or the other group (i.e. insurers or insureds) of disputing parties always prevail. Rather, as demonstrated by the state-by-state survey, the rule can be the subject of as many requirements as deemed necessary in order to effectuate perfect justice. A comprehensive understanding of the doctrine simplifies this task and allows the court to rearrange the boundaries so that the reasonable expectation of the parties and the public are reflected in both the equation and the result.

