INSURER, INSURED AND PRIORITY IN RECOVERY PROCEEDS —WHO GETS WHAT AND WHEN?

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In handling recovery matters, issues constantly arise concerning deductibles, uninsured losses and additional claims that may be or are asserted by insureds. There may be legitimate uninsured losses sustained by an insured when there is insufficient coverage for the risk. There may be claims that, asserted at law, are subject to standards and measures of damage that differ greatly from the insurer's contractual indemnity obligation. An insured may overvalue a loss, and thus claim uninsured loss, based upon a number of factors, legitimate or otherwise, regardless of whether the claimed damages are actually recoverable.

Recovery file handlers must be proactive in managing these situations. It is important to know what your policy forms provide with respect to subrogation rights and recovery priority. It is important to know what courts and/or statutes say about recovery priority in the jurisdiction where the loss occurred. It is particularly important to know what your damages are from a legally recoverable standpoint, as opposed to a "total of indemnity payments" standpoint. It is important to know when and how to negotiate a pro rata agreement with an insured and it is even more important to know when to tell an insured that it is on its own insofar as recovery against third parties is concerned.

In the discussion below, some historical background concerning the nature and origins of subrogation will provide context for a more detailed discussion of how various jurisdictions approach the question of whether an insured must be "made whole" before the insurer can subrogate. Some specific damage issues will be discussed from actual recovery matters as well.

LAW, EQUITY, SUBROGATION AND THE "MADE WHOLE" RULE

Except for Louisiana (which is a civil law state with law derived from the Napoleonic Code by virtue of French influence), the American states' legal systems derive from the systems of laws and courts developed over centuries in England and inherited by the original colonies. The historic framework for litigation of disputes included two very different court systems, one of law and one of equity. To generalize, the law courts provided justice, however harsh or unfair the result might be, while the equity courts (which were descended from ecclesiastical courts administered by the Church) were theoretically more interested in reaching a "fair" result. BLACK'S LAW DICTIONARY describes "equity" as denoting "equal and impartial justice as between two persons whose rights or claims are in conflict; justice, that is, as ascertained by natural reason or ethical insight, but independent of the formulated body of law." Equity courts had much greater flexibility than law courts in the fashioning of remedies for litigants.

Subrogation, defined (again by BLACK'S LAW DICTIONARY) as "the substitution of one person in the place of another with reference to a lawful claim, demand or right," is historically an equitable remedy and is therefore subject to defenses and doctrines peculiar to equitable claims. The "made whole" doctrine, which provides that no right of subrogation arises in favor of an insurer until the insured has been made whole (or completely compensated) for the loss sustained, is equitable and is based on the theory that, as between an insurer and an insured, if one is to bear a loss it is "fairer" for the insurer that accepted a risk for a premium to do so.

In contemporary American jurisprudence, a right of subrogation may arise in any of three ways: by operation of equitable principles, by contract or by statute. Statutory subrogation generally arises in the context of motor vehicle and worker's compensation regulatory schemes, and is of no significance to commercial property losses. Equitable and contractual subrogation rights, on the other hand, are at the core of property claim recovery. Contracts are "legal" constructs, which might suggest that equitable defenses and doctrines would have no bearing on rights and duties created by contract. The extent to which courts have blended, mingled, mangled and

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misunderstood the difference between equitable and contractual subrogation accounts for the wildly differing approaches of the various states to application of the "made whole" doctrine.

WHEN IS AN INSURED "MADE WHOLE?"

An insured is made whole, at least in theory, when it has been paid (from whatever source, whether an insurer or a liable third party) all legally recognized and recoverable damages for the injury or loss sustained. The "made whole" number may be greater or lesser than the sum of indemnity payments made by an insurer to the insured. A jury verdict or a binding settlement with a third party essentially liquidates a claim and puts an established value upon it. However, the legal measures of damage that apply to claims for injury to property tend to be very different from the standards for loss valuation and indemnification under insuring agreements. Knowing the difference between what must be indemnified under the insurance contract and what is recoverable in an action against a third party is very important when dealing with difficult insureds or when negotiating a *pro rata* recovery distribution agreement with an insured.

Negotiation and compromise in the form of recovery sharing agreements between insurer and insured are often necessary. Insureds may not want to be involved in litigation unless they have a stake in the outcome. That the insured's loss ratio may be improved by successful recovery efforts with a favorable effect on future premium charges is not always enough of a "carrot" to obtain the desired level of cooperation. Obtaining the insured's assistance and the terms of any recovery sharing agreement will generally be worked out on a case-by-case basis, involving business considerations for the insurer, the extent to which the insured's active and willing participation in the recovery efforts are needed, whether the insured has any recoverable claim beyond the deductible and the amount of the insured's claim in comparison to the total recoverable amount of damages.

KNOW YOUR DAMAGES

Although many property forms provide replacement cost coverage for business equipment and personal property, the legal measure of damage for such items is almost universally the fair market value of such items as of the time of the loss. For example, an insurer may be contractually obligated to indemnify an insured $300,000.00 to replace computers and office equipment that is only worth $100,000.00 on the open market.

Business interruption coverage forms use specific contractual yardsticks to measure loss and limit the period of time (usually on both ends of the period of indemnity) for which the insurer must indemnify the insurer. The measure of damage for lost profits, however, can be a very different calculation for purposes of proving that claim. It is entirely possible for an insurer to be liable for indemnity under a business interruption coverage form even if the business is not actually profitable at the time of the loss. It is also possible for a business to lose considerably more than the amount of coverage available if there are circumstances that cause the loss period to exceed what is allowed by the insurance contract. In the first instance, there may be little possibility of recovery from third parties, since if the business is not making a profit, there is no "lost profit" to recover, though arguments to the contrary can be made. In the second instance, the insured may have a valid uninsured loss.

Building claims can be equally problematic. In general, the legal measure of damage for injury to a building is the lesser of either (1) its diminution in fair market value as a result of the loss or (2) the cost to repair the structure, provided that repairing it is not economic waste. Replacement cost coverage will often pay out more than either of these measures in a loss. Even a standard ACV calculation (replacement cost less depreciation) can result in a number that is larger than what is actually recoverable by claim against a third party.

For example, consider an apartment complex in which 85% of the units are dedicated by contract with the U.S. government for low-income or subsidized housing. Because of peculiarities in accounting for this type of business operation, owners generally avoid capital expenditures for improvements and allocate greater sums to annual maintenance budgets as expense instead. This has the effect on paper of increasing the cost of operating the apartments and reducing its profitability. Since valuation of rental property is affected by the net income the property generates, an appraisal of a damaged set of units may reflect a much lower value than either the ACV or the repair cost of the units.

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All of these concepts come into play when evaluating an insured's claim for uninsured loss and when considering what terms and percentages should be in a *pro rata* recovery distribution agreement. It is almost always to the advantage of the insurer to have its percentage of recovery calculated on the basis of what is has paid in indemnity to the insured. It is equally to the advantage of the insurer to value the insured's uninsured claims on the basis of the applicable legal standard.

If, for example, we look at the example set out in the first paragraph of this section, in which it costs the insured $300,000.00 to replace equipment with a fair market value of $100,000.00, for purposes of recovery against third parties the insured's provable loss is only $100,000.00 and the insurer's subrogated claim obviously cannot be any greater than the insured's claim. Since the insured will have been paid $200,000.00 more than the legally recoverable damages for the business personal property claim, that sum offsets any other uninsured loss the insured may claim or actually have sustained. Being aware of the distinction between indemnity payment and recoverable damage can help to make the determination whether there is any point at all in entering into a *pro rata* agreement with the insured. This distinction can also provide the insurer useful bargaining leverage in the event the insured has been paid replacement cost but is still claiming an over-valued uninsured loss.

KNOW YOUR COVERAGE FORMS

The ISO commercial property forms that are typically used in conjunction with special coverage forms contain a number of conditions. Regarding subrogation, the forms provide:

> TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US
>
> If any person or organization to or for whom we make payment under this policy has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them.

As will be seen later in discussion of specific cases and jurisdictions, this language can have great significance in determining an insurer's recovery rights and priority.

The ISO commercial property forms impose a specific duty of cooperation upon the insured in connection with the investigation and adjustment of the first-party claim:

> YOUR DUTIES IN EVENT OF LOSS
>
> * * * * *
>
> (8) Cooperate with us in the investigation or settlement of the claim.

The forms are notable, however, for what they do not require as well. The insurer has no contractual duty to subrogate. The insurer has no contractual duty to pursue recovery of the insured's deductible. There is no specific contractual requirement that the insured be reimbursed for its deductible if a recovery is made. There is no contractual requirement for an insured to contribute to costs of recovery. While the insured is required to do "everything necessary" to secure the insurer's rights of recovery after a loss, there is no contractual requirement for an insured to participate in or assist recovery efforts once recovery rights are secured.

Unlike liability coverage forms, which specifically require the insured to cooperate in defending claims, the first-party property form imposes a specific duty of cooperation only in the context of investigation and/or settlement of the claim. However, a fair argument can be made that cooperating and assisting with subrogation is part of "securing" the rights of the insurer. There is often language used in subrogation receipts or loan receipts which make specific provision for the insured's assistance in a recovery action as well.

Note that some jurisdictions require actual "consideration," that is, some thing of value or benefit, to be conveyed by the insurer to the insured as part of an enforceable agreement that modifies or waives an insured's right to

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first-dollar recovery. If there is specific subrogation language in the insurance contract, it forms part of the bargain for coverage. With a recovery distribution agreement, this consideration is usually the undertaking of the insurer to advance all costs of any recovery efforts without any contribution from the insured, with the insured having no liability for those costs unless a recovery is actually obtained.

With subrogation receipts, the insurer is essentially making a payment that is required by the insurance contract and some courts may not find that an assignment of rights or a waiver of priority in recovery is supported by consideration when the receipt is given in exchange for nothing more than the performance the insurer is obligated to make under the insurance contract. The loan receipt, as a legal fiction purporting to make a loan to the insured from the insurer repayable only in the event of a recovery from third parties, is recognized in many jurisdictions as a means to leave the insured as the real party in interest in a recovery action. This "loan" may be conditioned on assistance with recovery by the insured.

SPECIFIC JURISDICTIONS AND CASES

CALIFORNIA

California's law on the applicability of the "made whole" doctrine appears to be in a state of perpetual flux. The vast majority of reported decisions dealing with this issue have either been criticized in some way or substantially overruled.

American Contractors Indemnity Co. v. Saladino, 115 Cal. App. 4th 1262, 9 Cal. Rptr. 3d 835 (2004) is, as of this writing, a solid and valid holding. It states what appears to be the general rule in California:

> The common law precondition of payment in full applies equally to cases for implied in law reimbursement rights as it does to cases for contractual subrogation, again, absent clear and express language to the contrary in the contract. [Citation omitted.] Absent clear and express language to the contrary, the "general rule is that an insurer that pays a portion of the debt owed to the insured is not entitled to subrogation for that portion of the debt until the debt is fully discharged. In other words, the entire debt must be paid. Until the creditor has been made whole for its loss, the subrogee may not enforce its claim based on its rights of subrogation." [Citations omitted.]
>
> *Id*. at 1271, 9 Cal. Rptr. 3d 842.

In *Samura v. Kaiser Foundation Health Plan, Inc.,* 17 Cal. App. 4th 1284, 22 Cal. Rptr. 2d 20 (1993), the insurance contract contained a right of subrogation, a right of reimbursement and an explicit waiver of the "made whole" doctrine, giving the insurer priority in any recovery proceeds to the extent of its payments to its insured. The contractual provision was detailed and clear and the insurer's priority in recovery was affirmed.

The decision in *Travelers Indemnity Co. v. Ingebretsen,* 38 Cal. App. 3d 858, 113 Cal. Rptr. 769 (1979) turned on the language of the subrogation receipt that had been executed by several property owners after receiving payment for damage to dwellings caused by earth movement attributable to a governmental entity. The subrogation receipt stated:

> In consideration of and to the extent of said payment the undersigned hereby assigns and transfers to the said Company all rights, claims, demands and interest which the undersigned may have against any party through the occurrence of such loss and authorizes said Company to sue, compromise or settle in the name of the undersigned or otherwise all such claims and to execute and sign releases and acquittances in the name of the undersigned.

Id. at 865, 113 Cal. Rptr. 684. The court held that the "assignment by appellants of 'all rights,' 'to the extent of' the payments by the insurance companies entitles the latter to first and total indemnification out of the recovery had against the county." The court also noted that

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> where, as here, the insured controls the litigation against the third party, the burden of requesting a special finding or verdict, and of proving that the judgment against the third party represents noninsured damages, rests upon the insured. [Citations omitted.]

Id. at 868, 113 Cal. Rptr. 686.

ALABAMA

For a while, Alabama strictly applied the "made whole" doctrine to an insurer's subrogation claim. *See Powell v. Blue Cross & Blue Shield of Alabama,* 581 So. 2d 772 (Ala. 1990). However, in *Ex parte State Farm Fire and Casualty Co.*, 764 So. 2d 543 (Al. 2000), the Alabama Supreme Court returned to a rule that had first been enunciated in *International Underwriters/Brokers, Inc. v. Liao,* 548 So. 2d 163 (Al. 1989), holding that equitable principles (including the "made whole" doctrine) apply to all instances of subrogation except when the contract expressly provides otherwise. This principle has been applied consistently thereafter. See, e.g., *Allstate Ins. Co. v. Hugh Cole Builders, Inc.,* 772 So. 2d 1145 (Al. 2000); *Wolfe v. Alfa Mut. Ins. Co.,* 880 So. 2d 1163 (Al. Civ. App. 2003).

The question here, of course, is how "expressly" the equitable principles must have been waived in the contract. *Liao* cited 16 COUCH ON INSURANCE 2D § 61.2 (1966) in support of a distinction between contractual ("conventional") and equitable subrogation and went on to quote *Westendorf v. Stasson,* 330 N.W. 2d 699 (Minn. 1983):

> However, subrogation remains an offspring of equity. Thus, even when the right to subrogation arises by virtue of an agreement, the terms of the subrogation will nonetheless be governed by equitable principles unless the agreement clearly and explicitly provides to the contrary. . .

Id. at 703. In *Liao,* the insurance contract was not part of the appellate record, so no language was available; the Court simply assumed that the contract did not contain an explicit waiver of equitable principles.

Ex parte State Farm involved an appeal from a grant of partial summary judgment against the plaintiff insurer in a subrogation claim because there was no evidence that the insured's $250.00 deductible had been paid. The trial court concluded this was a failure of the insurer to establish that the insured was "made whole" and granted the defendants' summary judgment motion, a ruling that was affirmed by the Alabama Court of Civil Appeals.

State Farm had an agreement with its insureds providing that it would retain counsel on its insureds' behalf to seek recovery from the tortfeasor. The agreement further provided that the insureds were to be paid $5,250 of any recovery. Of this sum, $5,000 was to compensate the insureds for the loss of use of the house, the "aggravation" associated with the repairing of the house, and the expenses for temporary alternative housing. The remaining $250 of this sum was a refund of the insureds' 250 deductible. In addition, the agreement provided that State Farm could give any amount in excess of its total claim payment ($64,884.93) to its insureds.

Thus, the waiver of the "made whole" doctrine in this matter was in consequence of a carefully thought out recovery distribution agreement, rather than arising from any policy language. Thus, these two seminal cases appear to suggest the basic language in an insuring agreement giving the insurer a right of subrogation is not enough to waive the "made whole" doctrine, but rather that an "explicit" provision such as was laid out in the recovery distribution agreement at issue in *Ex parte State Farm.*

The requirement for an explicit waiver, rather than standard subrogation language in the insurance contract, was further clarified in *Wolfe v. Alfa Mut. Ins. Co.,* 880 So. 2d 1163 (Al. Civ. App. 2003):

> [O]ur starting point in ascertaining whether Alfa has "expressly provide[d] that the insured must reimburse Alfa even if the insured has not been made whole is the language of the contracts themselves. The first of the two paragraphs at issue in the insurance contracts states 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." It seems clear that this paragraph simply states the fact that Alfa holds a general right of subrogation when the insured has a right to recover damages from a third party. Cases from other

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> jurisdictions have also considered such language to be "general" subrogation language, not sufficient to modify the applicability of the made-whole doctrine. [Citations omitted.]
>
> The second paragraph at issue, on the other hand, seems to state something different than the established equitable principle of subrogation. It states 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] payments, costs and fees.
>
> * * * * *
>
> We must conclude, therefore, that the trial court did not err in holding that this provision requires the insured to reimburse Alfa without regard to whether the insured has been made whole.

Id. at 1167-1168.

Alabama also applies the "common fund" doctrine to subrogation matters:

The common-fund doctrine in insurance subrogation cases is based on the equitable notion that, because an insurer is entitled to share, to the extent of its subrogation interest, in any recovery its insured achieves against a tortfeasor, the insurer should bear a proportionate share of the burden of achieving that recovery—including a *pro rata* share of the insured's attorney fee.

Government Employees Ins. Co. v. Capulli, 859 So. 2d 1115, 1119 (Al. Civ. App. 2002). See also International Underwriters/Brokers, Inc. v. Liao, 548 So. 2d 163 (Al. 1989)

TEXAS

Texas is a rarity among jurisdictions, in that its courts have drawn bright lines for determining whether the insured or the insurer has priority in recovery proceeds when the insured is not "made whole." In Fortis Benefits v. Cantu, 234 S.W. 3d 642 (Tex. 2007), the Court drew a sharp distinction between equitable subrogation rights (which would be subject to the "made whole" doctrine) and contractual subrogation rights, such as arise from policy language giving the insurer such rights.

The contract at issue in *Fortis* contained both subrogation and reimbursement provisions, none of which suggested that the insured must be made whole before the insurer can subrogate. The Court held that the specific contractual language governed the insurer's right to subrogate. Therefore, the equitable defense of the "made whole" doctrine did not apply. *See also Bay Rock Operating Co. v. St. Paul Surplus Lines Ins. Co.,* ___ S.W. 3d ____, 2009 WL 856040 (Tex. App. – San Antonio 2009) ("A contractual subrogation provision must be enforced as written, subject to general contract law principles of construction."); *Ysasaga v. Nationwide Mut. Ins. Co*., 279 S.W. 3d 858 (Tex. App. 2009) ("We have determined Nationwide's right to subrogation was defined by the policy; therefore, equitable subrogation and the "made-whole" doctrine have no application here."); *Osborne v. Jauregui, Inc.,* 252 S.W. 3d 70 (Tex. App. 2008) ("Furthermore, if a contract provides for subrogation regardless of whether the insured is first made whole, '[t]he contract's specific language controls . . . and the equitable defense of the 'made whole' doctrine must give way.") (Citing *Fortis, supra.*).

Thus, Texas holdings turn the issue of priority on its head in comparison to other jurisdictions. Rather than require an explicit waiver of the "made whole" doctrine, the Texas courts will not apply that doctrine to contractual subrogation unless the contract clearly provides for such.

WASHINGTON

When there is no prior waiver of the insured's priority in recovery, whether by language in the insuring agreement or otherwise, Washington follows the equitable doctrine that the insurer has no right of recovery before its insured has been fully compensated for all of its damages. *See Thiringer v. American Motors Insurance Company*,

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91 Wash. 2d 215, 588 P. 2d 191 (1978). Where an insurance policy is silent on the matter, the insured may recoup his or her general damages from settlement proceeds before allowing subrogation.

Washington also recognizes that a contractual right of subrogation is different from an equitable right of subrogation. In *Meas v. State Farm Fire and Cas. Co*., 130 Wash. App. 527, 123 P. 3d 519 (Div. 2 2005), the Court examined language similar to what can be found in the ISO property forms pertaining to subrogation. The Court held that the policy language was an assignment and gave the carrier the right to pursue the recovery of its dollars paid to the insured in a separate action against the third-party tortfeasor.

Washington applies in essence the “common fund” doctrine to recoveries made by an insured to which an insurer asserts a claim—if the insurer has benefited from the recovery, it has to pay its share of reasonable costs and attorney fees. In the absence of policy language addressing attorney fees, the courts have developed a different standard for determining when an insurer must share the expense of recovering subrogated funds. Under the common law rule, “an insurer who makes a recovery from a third party for moneys paid its insured is only required to pay attorney fees which were ‘reasonably and necessarily incurred’ to make the recovery. Absent an agreement to the contrary, an insurer is only obligated for attorney fees if it is benefited*.” Pena v. Thorington*, 23 Wash. App. 277, 281, 595 P. 2d 61, review denied, 92 Wash. 2d 1019 (1979) (*quoting Ridenour v. Nationwide Mut. Ins. Co*., 273 Or. 514, 541 P. 2d 1377, 1378 (1975)).

ILLINOIS

Generally, the insurer takes priority unless the insurance contract fails to provide a right of subrogation to the insurer. The doctrine of subrogation arose as an equitable right and remedy to ensure that one who has indemnified an injured party is entitled to pursue those legally responsible for the loss and recoup payments it was obligated to make on the injured party's behalf, but it will not be imposed where it would be inequitable to do so. (See *Dix Mutual Insurance Co. v. LaFramboise*, 149 Ill. 2d 314, 319, 173 Ill. Dec. 648, 650, 597 N.E. 2d 622, 624 (1992).) Subrogation may also arise by statute (see 40 ILCS 5/14-129 (West 1992)), or by contract. (See *Dworak v. Tempel*, 17 Ill. 2d 181, 190-92, 161 N.E. 2d 258, 263-64 (1959).)

In re Estate of Scott, 208 Ill. App. 3d 846, 153 Ill. Dec. 647, 567 N.E. 2d 605 (1991), if a subrogation clause is enforceable, it is the contract terms, and not common law concepts of subrogation, which control.

In *Capitol Indem. Corp. v. Strike Zone*, 269 Ill. App. 3d 594, 646 N. E.2d 310 (Ill. App. 4 Dist. 1995), in August 1991, a building and business owned by the insured was totally destroyed in a fire caused by the crash of a private plane. Pursuant to a policy of insurance issued to the insured by Capitol, the insured was paid $461,759.29 for its losses, the applicable policy limits. In October 1992, the insurer filed a complaint for declaratory judgment seeking a declaration of its right to enforce the subrogation provisions under the policy against any recovery obtained from responsible third parties. The subrogation clause provided:

> “If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them.”

In January 1993, the insurer and the insured entered into a settlement agreement with the third-party tortfeasor for the sum of $693.997.65, of which $465,000 was placed in escrow pending the outcome of the declaratory judgment action. The insured’s losses exceeded the combined payments of the policy proceeds and the tort recovery.

The Court held that when an insurance contract gives the insurer the right to subrogate to the extent of its payment, the contract will be enforced as written and the insurer will receive full subrogation, even if the insured's losses exceed the amount it recovers from the tortfeasor and the insurer. Thus, contractual subrogation rights pre-empt equitable ones when the insurance contract contains subrogation language that transfers rights from the insured to the insurer.

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NEW YORK

When there are constraints on potential recovery, as in the circumstance where the tortfeasor has limited or no insurance or other ability to satisfy a judgment, New York applies the "limited funds" approach.

If "the sources of recovery ultimately available are inadequate to fully compensate the insured for its losses, then the insurer-who has been paid by the insured to assume the risk of loss-has no right to share in the proceeds of the insured's recovery from the tortfeasor" *Winkelmann v. Excelsior Ins. Co*., 85 N.Y. 2d 577, 650 N.E. 2d 841(N.Y. 1995). *Fasso v. Doerr*, 12 N.Y. 3d 80, 903 N.E. 2d 1167 (N.Y. 2009).

Although the insured has the right to be made whole, once the payment is made to the insured, the insurer can pursue the recovery of its funds from a liable third-party. The insurer does not have to delay the pursuit of subrogation until the insured has exhausted its efforts to collect from a third party. The insurer may proceed as long as it does not prejudice the insured's rights (i.e. enough financial resources to cover both the insurer's and insured's claims). *Winkelmann v. Excelsior Ins. Co*., 85 N.Y. 2d 577, 650 N.E. 2d 841 (N.Y. 1995).

FLORIDA

Florida generally follows the equitable doctrine that an insured must be fully compensated for its losses before the insurer can share in any recovery from the tortfeasor. *Magsipoc v. Larsen*, 639 So. 2d 1038, 1040-41 (Fla. 5th DCA 1994); *Rubio v. Rubio*, 452 So. 2d 130, 132 (Fla. 2d DCA 1984); *Florida Farm Bureau Ins. Co. v. Martin*, 377 So. 2d 827, 831 (Fla. 1st DCA 1979).

As in New York, the Florida courts have applied a "limited funds" approach to matters in which the there are constraints on the available funds recoverable from liable third parties, holding that the insured's right to be made whole only takes priority when there are limited funds available to pay both the insured's and insurer's claims. *Schonau v. GEICO General Ins. Co*., 903 So. 2d 285 (Fla.App. 4 Dist. 2005).

CONCLUSION

As the cases from the selected jurisdictions show, there is no single clear rule regarding the insurer's priority in recovery proceeds. Court decisions, contractual provisions, language in loan receipts or subrogation receipts and/or recovery distribution agreements can all play a material role in determining whether the insured must be "made whole" before the insurer can subrogate. The question must be approached essentially on a state-by-state and case-by-case basis, a good reason for involving recovery counsel at an early stage of the recovery process so that the applicable precedent and rules can be determined. If the recovery file handler knows the contract, knows what other documents have been executed by the insured in connection with subrogation and knows how to evaluate recoverable damages (as opposed to total of indemnity payments), he or she can go a long way towards reaching a favorable result for the insurer even when confronted with underinsured or aggressive insureds.

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