In auto cases, Washington courts have long held that an insured has priority of recovery over a subrogating insurer. In the 1978 case of Thiringer v. American Motors Insurance Co., the Washington Supreme Court adopted the “made whole” rule, which it characterized as follows:

[W]hile an insurer is entitled to be reimbursed to the extent that its insured recovers payment for the same loss from a tort-feasor responsible for the damage, it can recover only the excess which the insured has received from the wrongdoer, remaining after the insured is fully compensated for the loss.


Until recently, there were no regulations or case law to guide a subrogating insurer’s duty with respect to reimbursement of an insured’s deductible in the property context. However, this issue is squarely addressed by a Washington Administrative Code (WAC) provision effective as of August 21, 2009. WAC § 284-30-393, which is part of Washington’s Unfair Claims Settlement Practices Regulation, states:

The insurer must include the insured’s deductible, if any, in its subrogation demands. Subrogation recoveries must be allocated first to the insured for any deductible(s) incurred in the loss. Deductions for expenses must not be made from the deductible recovery unless an outside attorney is retained to collect the recovery. The deduction may then be made only as a pro rata share of the allocated loss adjustment expense. The insurer must keep its insured regularly informed of its efforts related to the progress of subrogation claims. “Regularly informed” means that the insurer must contact its insured within sixty days after the start of the subrogation process, and no less frequently than every one hundred eighty days until the insured’s interest is resolved.

Through this regulation, the Washington Insurance Commissioner has clearly extended the “made whole” rule to deductibles. The rule requires that a subrogation recovery is “allocated first to the insured for any deductible(s) incurred in the loss.” Now, an insurer must reimburse its insured’s deductible out of a subrogation recovery in every case, regardless of whether the insured is pursuing recovery on its own.

The regulation allows for the deduction of expenses from the insured’s deductible recovery under specific circumstances. First, deduction of expenses can only be made if an “outside attorney is retained to collect the recovery.” “Outside attorney” is not defined in the regulation or WAC chapter. Likewise, where deduction is possible, it can only be made as “as a pro rata share of the allocated loss adjustment expense.”

Finally, the regulation includes new reporting requirements for subrogating insurers. Specifically, the subrogating insurer “must contact its insured within sixty days after the start of the subrogation process, and no less frequently than every one hundred eighty days until the insured’s interest is resolved.”

As WAC § 284-30-393 is a new regulation, Washington courts have not yet interpreted it, and it is not clear what the consequences may be if a subrogating insurer fails to comply with the provision’s requirements. However, since it is included in a WAC chapter addressing unfair claim practices, it is reasonable to assume that arguments will be made that an insurer risks a claim of bad faith if it fails to follow the regulations. Washington insurers should take note of this new regulation, and should now include the deductible as a matter of course in its pursuit of subrogation recoveries.