Get out of the hole with "The Make Whole Rule"

Minimizing reimbursements by your client to insurers who paid claims under health insurance or auto policy medical benefits

By William Mitchell Margolin

The saying, "A little knowledge is a dangerous thing" is often quoted as a negative. Well, "A little knowledge..." is often just what the doctor ordered when it comes to helping your client make a better recovery, and hopefully be *made whole*. Knowing how and when to apply "The Make Whole Rule" (MWR) will make your life easier and you will be a better advocate for your clients.

The Make Whole Rule is generally used when an injured party (usually through his or her attorney) seeks a waiver of the contractual obligation to reimburse medical insurance and automobile medical payment benefits to the insurer. This obligation usually arises in cases after judgment or settlement, when the insurer shows up with its hand out demanding reimbursement for the benefits it has already paid. The Make Whole Rule may also come up in other cases such as in property-damage cases, via a reimbursement clause in a homeowner's insurance policy.

This article will give the consumer attorney a thumbnail guide to minimize or eliminate the calls for reimbursements by Medical Insurance (HMO/PPO, etc.) and Automobile Insurance Medical Payments (Med Pay) policies. This article will focus and provide ammunition for your arsenal against reimbursement to insurance companies. Included are some of the leading California Make Whole Rule cases, sample case scenarios, and sample letters. Failure to apply the MWR "doctrine" could come back to bite you later from your own client..."A little Knowledge...!"

The courts have been struggling with how to apply the MWR and the case law keeps morphing into infinite distinctions. An important issue has been whether total costs *including attorney fees* are included in the computation of whether the Plaintiff has been *made whole*.

The California Court of Appeals in San Diego, decided in *Allstate Insurance Company v. Superior Court of San Diego County* (*Tony Delanzo, Real Party in interest*) (2007) 151 Cal.App.4th 1512 [60 Cal.Rptr.3d 782], that an insurer that pays benefits under a first-party policy is usually entitled to reimbursement from funds paid by a third-party wrongdoer. The case was decided on the "narrow issue" of whether the "total recovery amount must be reduced by the insured's attorney fees and costs incurred to obtain compensation from a third party tortfeasor." The court held that attorney's fees and costs are not deducted when calculating the total recovery.

It should be noted that this does not mean that the insurer does not have to give the insured a reduction to their right to reimbursement under the Common Fund Doctrine once it collects subrogated amounts from your client. The courts justify and require a reduction under this doctrine since the attorney is doing the "collection litigation" for the insurance companies.

Allstate is helpful reading because it provides a complete historical study of the Make Whole Rule from Common Law through 2007.

The California Supreme Court in *21st Century Insurance Company v. Superior Court of San Diego County* (*Quintana*) (2009) 47 Cal.4th 511 [98 Cal.Rptr.3d 516], dealt with a matter regarding a small $6,000 auto accident settlement and a $1,000 Med Pay payment. The Court held that as applied to Med Pay claims, attorney's fees are not included in the calculation of whether the insured has been made whole. The Court, in dicta, stated that attorney's fees "are subject to a separate equable apportionment rule… that is analogous to the common fund doctrine. *21st Century Insurance* is narrowly construed to be specific to Med Pay claims only. The Court upheld the distinction that attorney fees are not to be considered in the reduction mathematics that are incorporated in the Make Whole Rule analysis to reimbursement.

Other important cases deciding the Make Whole Rule

Sapiano v. Williamsburg Nat. Ins. Co (1994) 28 Cal.App.4th 533 [33 Cal.Rptr.2d 659]. Adopted the make whole rule in California, holding that a commercial vehicle insurer in a subrogation claim cannot "assert its contractual right to repayment where the total third party insurance is insufficient to compensate the full loss suffered by the insured."

Barnes v. Independent Auto Dealers of Association of California Health and Welfare Benefit Plan (9th Cir. 1995) 64 F.3d 1389. Held: an injured party is entitled to recover for medical expenses despite the subrogation clause in the Plan's benefit agreement.

Progressive West Insurance Company v. Superior Court (2005) 135 Cal.App.4th 263 [37 Cal.Rptr.3d 434]. Held: The Make Whole Rule applies to Med Pay reimbursement; but the insurer's attempt to obtain reimbursement in violation of the MWR does not qualify as bad faith.

Plut v. Fireman's Fund Insurance Company (2000) 85 Cal.App.4th 98 [102 Cal.Rptr.2d 36]: further defines and clarifies the circumstances in which the MWR applies.

To reiterate, your clients have not have been made whole if the amount recovered from third-party tortfeasors does not fully compensate them for their injuries. In these cases, insurance companies should not be allowed to receive reimbursement through their right to subrogation. This is the primary concept of the MWR derived from the common law. There is no right to subrogation when the injured party has not been made whole. You must include in the calculation of making the insured whole all medical costs, pain and suffering, and other damages. However, in California, attorney fees and costs are not included in the analysis.

Further, it must be noted that even though the law in California does not include attorney's fees and costs in calculating whether the insured has been made whole, practitioners must be aware that policy language (especially with insurance company policies from other States) may allow attorney fees and costs to be added to the cost breakdown to help qualify for the waiver either by policy language, or dare I say, the sympathy factor. Therefore, consider this in making your plea.

Make certain that you **Do Not** mislead, misquote or fail to cite appropriate cases in representing your clients to the insurance companies.

Limitations on Make Whole

By simply stating all costs up front, you might persuade the insurance companies to be reasonable when reviewing your requests for waiver of repayment versus their requests for subrogation repayment. They are likely, of course, to cite *Allstate* and *21st Century* to argue that attorney's fees cannot be included in the made-whole analysis. These cases nevertheless will require the insurer to reduce its reimbursement demand by a reasonable percentage under the common-fund doctrine.

The insurance company's best bet to defeat MWR's application is by altering the contract language in the health care or med pay policy language to include a clause giving the insurer's reimbursement rights priority, even if the policyholder has not yet been made whole. While this option is available to the insurance companies, to date only a handful of health insurance policies and automobile liability policies have been changed to create such a priority.

Kaiser Permanente's policies do include this waiver in their policy, yet they still often resolve your cases reasonably regardless of their own clause. I would quote and argue the MWR to Kaiser anyway or at least the theory of why they should waive their right to subrogation, based on the MWR analysis and purpose as to why it was created in the first place. Good Luck.


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See following pages for examples of letters

• Sample letter: Health Insurance – Medical/Health Insurance (Blue X, etc.):
Ms. Claims Representative & Supervisor
MEDICAL INSURANCE COLLECTION COMPANY
Third Party Subrogation Department
12345 Main Street #100, Slicklizzard, Alabama
FAXED AND SENT BY US MAIL
(800) 555-1212 FAX (800) 555-1122

RE: MY CLIENT: Mr. Joe Bob Magillicutty, Sr.
YOUR CLIENT: Blue Hexagon of California
YOUR MEMBER: Mr. Joe Bob Magillicutty, Sr.
Hexagon CASE #: 123456789
DATE OF LOSS: 3/31/2007

RE: WAIVER OF REIMBURSEMENT REQUESTED DUE TO EXIGENT CIRCUMSTANCES AND THE MAKE WHOLE RULE DUE TO LOW SETTLEMENT
Dear Claims:

Thank you for your October 15, 2007, letter re: reimbursement. This is an appeal for a waiver of repayment due to the MAKE WHOLE RULE, here in California. The settlement in this case is only $6,000. Mr. Magillicutty, Sr. has incurred medical expenses of $1,669.34 ($2,069-of which BHX Paid $1,669.34) and $1,718.00 totaling $3,787 before your payment and with your reduction of the billing $3,387.34. The contractual attorney fees (1/3) and attorney costs [$250] have also been incurred and when considering Mr. Magillicutty's pain and suffering, he *has not been "made whole" by this settlement.*

Because of this, there will ($0.00) available to the client after expenses.

Pursuant to *The Make Whole Rule* in California, we **are hereby requesting that you waive your right of reimbursement.** See, *Sapiano v. Williamsburg Nat. Ins. Co* (1994) 28 Cal.App.4th 533, which adopted the make whole rule in California, and that an insurer cannot recover on its reimbursement lien until the insured is made whole. In 1995, the Ninth Circuit adopted the "make whole" rule in *Barnes v. Independent Auto Dealers of Calif.* (9th Cir. 1995) 64 F.3d 1389. *Barnes* defined what constitutes being "made whole": past and future medicals, loss of earnings, pain, suffering, and attorneys' fees.

My client has not been made whole as the amount received from the third parties is insufficient and therefore should not be subject to reimbursement.

We therefore respectfully request that you waive reimbursement. As time is of the essence, we need to receive your response as soon as possible. Thank you in advance for your courtesy and cooperation.

Very truly yours,

Encl: Billing;

• Med Pay: Sample letter: (Your automobile Medical insurance)

As of today, Your Company agreed to pay out $4,496 for the April 11, 2004, accident identified by the above referenced claim number as the medical pay portion of Ms. Fish's policy. Your Company has also agreed to add $340 more dollars to the January 27, 2004, med pay payout. Ms. Fish was only able to recover $3,500 for the April 11, 2006, accident from the third party carrier. After deducting attorney fees of 40 percent and costs, the balance available to the client and medical care provider's totals $2,100 less costs of $250. This leaves only $1,850 to satisfy with the outstanding substantial medical bills. You have made a determination that the $4,496 medical payment from your policy is related to the April accident.

Pursuant to *The Make Whole Rule*, her recovery is less than the payout and as such, no reimbursement should be required. This analysis was already performed by you and this letter is to confirm and acknowledge in writing your prior decision of MM/DD/YYYY. See the attached copy of the settlement release for 4/11/04 accident and my prior request for waiver and your letter confirming the same.

Ms. Fish's injuries are continuing and she has sought additional care after her April 11, 2004, accident-claim #abcdefgh just three months later exacerbating her injuries from the first accident which were not yet healed. As such, she incurred additional medical care and expenses for such totaling $15,856.01. This medical care and billing total includes care for the January and April 2004 accidents. Based on *The Make Whole Rule* as applied in California, on behalf of Ms. Fish, we **hereby request that you waive the company's right of reimbursement.** See, *Sapiano v. Willaimsburg Nat. Ins. Co* (1994) 28 Cal.App.4th 533, which adopted the make whole rule in California and held that an insurer cannot recover on its reimbursement lien until the insured was made whole. See also, *Barnes v. Independent Auto Dealers of Calif.* (9th Cir. 1995) 64 F.3d 1389 where the Ninth Circuit recognized the make whole rule. *Barnes* held that being "made whole" includes past and future medicals, loss of earnings, pain and suffering and attorneys' fees. Further, *Progressive West Insurance Company v. Superior Court* (2005) 135 Cal.App.4th 263 held the **make whole rule applies to med pay.**

Please advise this office whether we will have to repay either the current payment of $340 or $4,496 or any balance up to the policy limit. Since my client has not been made whole, she should not be required to reimburse the med pay lien. Please advise us in writing of your position today or as soon as possible. Thank you in advance for your courtesy and cooperation.

Very truly yours,

• Med Pay: Sample letter: (Your Automobile Medical Insurance)

As you know, this office represents the above referenced clients. Your company has paid out $5,000 med pay for both Ms. Smith and Mr. Jones. Ms. Smith had medical specials totaling $5,361 and Mr. Jones's medical specials totaled $6,470. Additionally, there was a loss of earnings by each client. We are in the process of settling their claims with Stud Farm Insurance. Our clients have not been made whole given the best offer to date is $6,400 for Smith and $7,200 for Jones. Given the remaining amounts of their medical specials (the difference between $5,000 and their total bill), their loss of earnings, the attorney fees and costs they have incurred by hiring this office, and their pain and suffering.

Based on applicable case law and the application of *The Make Whole Rule* in California, we are hereby requesting on behalf of Ms. Smith and Mr. Jones that Stud Farm waive its right of reimbursement, barring a priority clause in the insured policy. See, *Sapiano v. Williamsburg Nat. Ins. Co* (1994) 28 CalApp.4th 533, which adopted the make whole rule in California and held that an insurer cannot recover on its reimbursement lien until the insured is made whole. This rule is recognized by the Ninth Circuit since 1995, when it adopted *The Make Whole Rule* in *Barnes v. Independent Auto Dealers of Calif.* (9th Cir. 1995) 64 F.3d 1389. *Barnes,* defines what constitutes being made whole and includes in the computation past and future medicals, loss of earnings, pain and suffering, and attorney's fees. Further, it should be noted that *Progressive West Insurance Company v. Superior Court* (2005) 135 Cal.App.4th 263, held the make whole rule applies to med pay cases.

As such, if Stud Farm has a priority clause in the insured policy, demand is hereby made for a copy of the policy that was in force and effect at the time of the above collision. Barring a priority clause in the policy, my clients have not been made whole, and shall not reimburse Stud Farm for its med pay lien.

Please advise me in writing of your position. Thank you in advance for your courtesy and cooperation.

Very truly yours,