# APPORTIONMENT OF RECOVERY BETWEEN INSURED AND INSURER IN A SUBROGATION CASE

Elaine M. Rinaldi, Esquire
Partner
Cozen and O'Connor
The Atrium - Third Floor
1900 Market Street
Philadelphia, PA 19103

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## I. INTRODUCTION

The doctrine of subrogation enables an insurer that has paid an insured's loss pursuant to a policy of property insurance to recoup the payment from the party responsible for the loss.[1] Essentially, the principle of subrogation permits one who is legally obligated to pay the debt of another to "stand in the shoes" of the person owed payment and enforce that person's right against the actual wrongdoer.[2]

Several policy considerations underlie the doctrine of subrogation. First, subrogation has its genesis in the principle of indemnity. Although an insured is entitled to indemnity from an insurer pursuant to coverage provided under a policy of insurance, the insured is entitled only to be made whole, not more than whole. Subrogation prevents an insured from obtaining one recovery from the insurer under its contractual obligations and a second recovery from the tortfeasor under general tort principles. Additionally, subrogation rights enable the insurer to recover payments made to the insured, who theoretically should have been made whole through those payments. Finally, subrogation advances an important policy rationale underlying the tort system by forcing a wrongdoer who has caused a loss to bear the burden of reimbursing the insurer for indemnity payments made to its insured as a result of the wrongdoer's acts and omissions.[3] This rationale has been termed the "moralistic basis of tort law as it has developed in our system."[4]

Modern legal principles have divided subrogation into two basic categories reflecting how the right of subrogation arises. Legal subrogation, also known as equitable subrogation, arises when an insurer fulfills its obligations to an insured pursuant to the contract of insurance and, in fact, that obligation should have been paid by another, i.e., the tortfeasor. This right arises in the absence of contractual language granting a right of subrogation.[5]

Conventional subrogation, also known as contractual subrogation, arises by virtue of a contract or agreement.[6] Conventional subrogation arises when an insurance policy specifically grants a right of subrogation to the insurer. In this regard, insurance policies routinely include a provision entitling the insurer, on paying a loss, to be subrogated to the insured's right of action against any person whose act or omission caused the loss or who is legally responsible to the insured for the loss caused by the wrongdoer.[7] Conventional subrogation also may arise when the insured specifically assigns its claim to the insurer by way of a subrogation receipt.

Insurance proceeds frequently do not compensate fully for damages sustained as a result of a loss. When this occurs, the insurer has a right to subrogate against a third party deemed responsible for the loss; the insured also is entitled to seek full compensation for its losses from the third-party tortfeasor. In such a case a fundamental issue arises as to the apportionment of any recovery between the insured and the insurer. While the language of the standard property insurance policy and subrogation receipt provides for a right of subrogation, these documents are unfortunately silent on the issue of how to allocate any subrogation recovery between an insured and insurer if the insured has suffered an uninsured loss.

When the insured has obtained a judgment against the tortfeasor in a third-party action, the judgment is said to establish conclusively the full scope of the insured's damages.[8] In such circumstances, several courts have held that the insurer is entitled to full reimbursement of the payments made to the insured, less its proportionate share of costs and legal fees.[9] These courts have found that an insured should not be allowed to defeat the insurer's subrogation claim by contending that his or her damages were greater than the sums received from the tortfeasor by way of the judgment. As one noted legal commentator stated:

> "An insured, who sues a wrongdoer and recovers a less amount than demanded, cannot avoid repaying the insurer which cooperated with him in the

> suit the amount which the insurer had paid him, on the theory that the latter amount, plus the amount of the judgment, did not equal the actual loss."[10]

In these cases the insured instituted the action against the third-party tortfeasor without the insurer's participation, Consequently, the issue of apportioning any recovery between the insured and the insurer was not addressed prior to the commencement of litigation.

In the absence of a judicial determination of damages, it is much more difficult to apportion a recovery obtained from a third-party tortfeasor when the insured contends that he or she is not fully compensated.[11] An insured often settles with a third-party tortfeasor for an amount less than the total loss. Several courts addressing these circumstances have held that the amount of the settlement is not necessarily coextensive with the amount of damages given the exigencies that may have warranted a settlement.[12] Because an insured, under these facts, should not be deemed to have been fully compensated simply because of the settlement, the apportionment issue necessarily will arise."[13].

## II. APPORTIONMENT OF RECOVERY

### A. Legal Commentaries

When the insured is not fully reimbursed for the loss, there is a split of authority among the jurisdictions as to whether the insurer or the insured has a superior interest in amounts recovered from third-party tortfeasors. Professor Robert Keeton, the well-known commentator on insurance law, has summarized various approaches to apportionment of subrogation recoveries between the insurer and insured as follows:

First Rule [Insurer: Whole Plus]: The insurer is the sole beneficial owner of the claim against the third-party and is entitled to the full amount recovered, whether or not its exceeds the amount paid by the insurer to the insured.

Second Rule [Insurer: Whole]: The insurer is to be reimbursed first out of the recovery from the third-party, and the insured is entitled to any remaining balance.

Third Rule [Proration]: The recovery from the third person is to be prorated between the insurer and the insured in accordance with the percentage of the original loss for which the insurer paid the insured under the policy.

Fourth Rule [Insured: Whole]: Out of the recovery from the third party the insured is to be reimbursed first, for the loss not covered by insurance, and the insurer is entitled to any remaining a balance, up to a sum sufficient to reimburse the insurer fully, the insured being entitled to anything beyond that amount.

Fifth Rule [Insured: Whole Plus]: The insured is the sole owner of the claim against the third-party and is entitled to the full amount recovered, whether or not the total thus received from the third-party and the insurer exceeds his loss.[14]

In general, the courts have avoided the rules providing either the insurer (Rule 1) or the insured (Rule 5) with exclusive rights because of the windfall effect these rules would have.[15] Surprisingly few courts have utilized the proration formulation (Rule 3), despite its apparent logic.[16] Instead, most jurisdictions have adopted the insurer-whole (Rule 2) or the insured-whole (Rule 4) formulation.

Leading legal commentators generally agree that the insurer should have no right of recovery until the insured is made whole (Rule 4). One authority states:

> "In contrast with the situation in which the insurer has not discharged its obligation in full, the insurer may in a given case have made the full payment required of it by its contract of insurance but this amount is not adequate to indemnify the insured in full. In such an instance, it has been held, in absence of waiver to the contrary, that no right of subrogation against the insured exists upon the part of the insurer where the compensation received by the insured is less than his loss.[17]

Similarly, another commentator has expressed the rule as follows:

> "As a general rule, the insurer has no right to reimbursement until the insured's entire loss has been paid. This is true even if the insurer is liable for only a part of the loss and pays its entire obligation. An insurer cannot recoup any part of its loss while the insured is still less then whole.[18]

Despite the generality of these axioms, there remains a substantial split of authority among the jurisdictions as to the efficacy of the insured-whole proposition. Although most jurisdictions have adopted the insured-whole rule, some follow the insurer-whole rule. Because of the lack of coherence in the rationales employed to reach a particular result, an examination of the case law is necessary to understand the different methods utilized by the courts to apportion damages in these cases.

B. Majority Rule: Insured-Whole

Most courts have held that the insured must be fully compensated for any uninsured loss before the insurer may share in the proceeds of a recovery from the tortfeasor. The "insured-whole" rule has been adopted in Alabama,[19] Arkansas,[20] Colorado,[21] Connecticut,[22] Florida,[23] Georgia,[24] Illinois,[25] Indiana, [26] Iowa,[27] Kentucky, [28] Louisiana, [29] Maine,[30] Massachusetts,[31] Michigan,[32] Minnesota,[33] Mississippi[34] Montana,[35] Nebraska,[36] New Jersey,[37] North Carolina,[38] Oklahoma,[39] Rhode Island,[40] South Carolina,[41] Tennessee,[42] Texas,[43] Utah,[44] Vermont,[45] Washington,[46] West Virginia,[47] and Wisconsin.[48]

The United States Supreme Court may be partially responsible for this widespread adoption of the insured-whole rule[49] through its decision in *American Society Co. v. Westinghouse Electric Mfg Co.*[50] In *Westinghouse Electric*, the court held that "[a] surety liable only for a part of the debt does not become subrogated to collateral or to remedies available to the creditor unless he pays the whole debt or it is otherwise satisfied."[51]

The decision most frequently cited in support of the insured-whole doctrine was rendered by the *Wisconsin Supreme Court in Garrity v. Rural Mutual Insurance Co.*[52] The *Garrity* decision is significant in that the policy in question was a standard 165-line fire insurance policy containing the standard subrogation provision.[53] Moreover, the insurer in *Garrity* obtained from the insured a subrogation receipt providing that the insurer would be subrogated "to all of the rights, claims, and interest which the [insureds] may have against any person or corporation liable for the loss."[54]

The insureds in *Garrity* suffered a fire loss and were paid $67,227.12 by their insurer. This payment represented the policy limit. The insureds sought damages in the amount of $110,000 from a third-party tortfeasor. The tortfeasor's available assets were limited to liability insurance coverage of $25,000.

The *Garrity* court began its analysis by reviewing the common law regarding subrogation. Under common-law subrogation the court found that the insured must be made whole before the insurer may recover anything from the tortfeasor because the insurer assumed the risk of loss by accepting the insured's premiums.[55] The court concluded, without discussion, that the subrogation provisions in the standard fire insurance policy and the subrogation receipt did nothing to change the substantive common-law rights of the insured.[56] Accordingly, the court held that the insureds were entitled to be made whole before any monies were paid to the insurer pursuant to its right of subrogation.

In concluding that the insurance contract and subrogation receipt did not alter the common-law rule, the *Garrity* court specifically rejected the reasoning employed by the *Ohio Supreme Court in Peterson v. Ohio Farmers Insurance Co.*)[57] The Peterson court had recognized that, notwithstanding the general common law rule, the subrogation receipt assigned to the

insurer all rights of recovery against the tortfeasor up to its payout, thus according a priority of recovery to the insurer. The Wisconsin Supreme Court rejected this analysis, however, and held that any difference between the right of subrogation and the assignment was "purely procedural" and that absent express contract language to the contrary, such an assignment did to compel the conclusion that the insurer had priority over the insured to any recovery from the tortfeasor.[58]

In reaching the conclusion that the insured's right to be made whole takes precedence, the *Garrity* court stated: "[w]here 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.[59] It is not at all clear, however, that the risk of a large uninsured loss is one that the insurer has been paid to assume. In fact, a strong argument can be made that such a risk is one that the insured has agreed to assume in exchange for the payment of lower insurance premiums. Nevertheless, several courts have relied, at least partially, upon the dubious rationale advanced by the *Garrity* court in adopting the insured-whole rule.[60]

One of the most troubling aspects of the *Garrity* decision is that the court essentially ignored the distinctions between legal and conventional subrogation. In essence, the court abrogated the contractual basis of conventional subrogation in favor of purely legal subrogation. To date, no court or commentator has criticized the Wisconsin Supreme Court's abrogation of these important legal distinctions. To the contrary, many courts adopting the insured-whole position have ignored the legal distinctions in similar fashion.

Another case frequently cited in support of the insured-whole proposition was rendered by the Montana Supreme Court in *Skauge v. Mountain States Telephone & Telegraph Co.*[61] The policy involved in this case also contained the standard subrogation provision indicating that the company would require an assignment of the insureds' claim against any party liable for their

loss. Despite this policy provision, the court applied the general principles of legal subrogation and determined that absent specific contractual terms giving the insurer the right of first indemnity, the insured must be made whole before the insurer could participate in any recovery. As in *Garrity*, the Montana Supreme Court disregarded the policy provision and concluded that the insurer's legal right to subrogation made the policy provision unnecessary and of no effect.

Subsequent to *Garrity* and *Skauge*, the Tennessee Supreme Court adopted the insured-whole rule in *Wimberly v. American Casualty Co.*[62] In *Wimberly*, the insureds' property was destroyed by fire, leading to undisputed damages in the amount of $44,619. 10. The insureds obtained $15,000, which represented their policy limit, from their insurer. The tortfeasor had $25,000 in liability coverage, which apparently represented the total amount recoverable from the tortfeasor. The fire policy issued to the insureds contained the standard subrogation provision, and the insureds signed a standard subrogation receipt. The Tennessee court reviewed the decisions in *Garrity, Skauge* and *Peterson*, and the court adopted the decisions in *Garrity* and *Skauge* as the "better-reasoned authority". [63]

Interestingly, the *Wimberly* decision was limited by the subsequent Tennessee Supreme Court decision in *Eastwood v. Glen Falls Insurance Co*.[64] The insureds in Eastwood gave the insurer a subrogation receipt providing that no settlement would be made with a tortfeasor without the written consent of the insurer, but they settled without the requisite authority from the insurer.

The Tennessee Supreme Court held that the insureds could not enter into such a settlement without incurring further liability to the insurer because they failed to obtain its consent to the settlement. The court distinguished its prior decision in *Wimberly* noting that the

insureds in *Wimberly* had sought and received the insurer's consent to the settlement. To clarify its prior holding in *Wimberly*, the *Eastwood* court stated:

> "Nothing that was said in *Wimberly* diminishes or in any measure affects the obligation of the insured to obtain the written consent of his or her insurer who has subrogation rights prior to a settlement with the tortfeasor. *Wimberly* clearly stands for and all that it stands for is that when an insured has been paid the policy limits of his or her fire policy and the insured and his or her fire insurance carrier have agreed to a settlement with a tortfeasor that when added to the fire insurance proceeds is less than the insured's fire loss the insurer's subrogation rights cannot be enforced, because the insured has not been made whole."[65]

Notwithstanding this rationale, the court readily enforced certain contractual conditions contained in the subrogation receipt while simultaneously disregarding others and the contractual conditions of the insurance policy pertaining to subrogation. *Wimberly* and *Eastwood* thus are irreconcilable in their legal analysis.[66]

The insured-whole doctrine also was adopted by the Supreme Court of Louisiana in *Southern Farm Bureau Casualty Insurance Co. v. Sonnier*.[67] In *Sonnier*, the insureds' son was killed in an automobile accident. The insurer paid $2,758.40 for the decedent's funeral expenses under a medical payment clause in the insurance policy. The insureds then sued a third-party tortfeasor for the wrongful death of their son and obtained a judgment in the amount of $103,160, including $3,160 for funeral expenses. The insureds then settled their claim against the tortfeasor for $90,000.

Relying upon the standard subrogation provision in the insurance policy,[68] the insurer sought to recover its payment of $2,758.40 from the settlement proceeds. The Louisiana Supreme Court rejected the insurer's position, holding that the insurer had no right of subrogation unless and until the insureds received full payment for their loss:

> "According to French jurisprudence dating back as far as 1712, the original creditor or subrogor is always preferred to the subrogee in such a case; he comes before the latter, and the subrogee can only claim that which remains after the

> subrogor has been paid.... Accordingly, when an insurer pays his insured only part of the damages to which the insured is entitled from a tortfeasor, the insurer becomes only partially and subordinately subrogated to the insured's right, and the insured is entitled to exercise his right for the balance of the partially paid claim in preference to the insurer-subrogee."[69]

Most jurisdictions, as demonstrated by *Garrity*, *Skauge*, *Wimberly*, and *Sonnier*, adhere to the proposition that the insured is entitled to be made whole before the insurer may share in any recovery from a tortfeasor. The rationales used to reach this conclusion are varied and untenable at times. Perhaps most untenable is the apparent willingness by the courts to disregard the provisions of the insurance policy and the standard subrogation receipt. Thus, while the insured-whole rule clearly represents the majority position, it is a position without cohesiveness.[70]

C. Minority Rule: Insurer-Whole

Although they represent a distinct minority, courts in a number of jurisdictions have held that the insurer is entitled to be made whole first as a general rule. The jurisdictions adopting this rule include California,[71] Idaho,[72] Ohio,[73] Virginia,[74] and Wyoming.[75] Moreover, a number of courts have recognized that an insurer is entitled to be made whole first under certain circumstances, even though the jurisdiction's general rule would entitle the insured to be made whole first.

In *Cedarholm v. State Farm Mutual Insurance Co.*[76], the Idaho Supreme Court faced the issue of apportionment within the context of a tort action resulting from a motor vehicle collision. In an independent action against the third-party tortfeasor, the insureds entered into a settlement in the amount of $8,500. The insurer had paid the insureds $1,199.50 for damage to their car. The insurer sought to recover this amount from the insureds. The lump sum settlement of $8,500 was not apportioned into specific amounts for personal injury or property damage.[77] The court reasoned that:

> "It was incumbent upon appellants [the insureds], either in the settlement or by request for a special finding on this point, upon payment of their property damage, to separate from the total sum they recovered the sum payable to respondent [insurer], subrogee, by reason of its right of subrogation."[78]

Further, the court reasoned that the insureds could not be permitted to undermine the insurers' right of subrogation by agreeing to a lump sum settlement and then alleging that their total damages were in excess of that settlement. The court's conclusion was to allow the insurer to recoup the total amount it paid to the insureds notwithstanding the fact the insureds had not been made whole.[79]

The most frequently cited decision supporting the insurer-whole doctrine was rendered by the Ohio Supreme Court in *Peterson v. Ohio Farmers Insurance Co*.[80] The insureds suffered a fire loss to their barn and other property. They signed a proof-of-loss and standard subrogation receipt and received payment from the carrier in the amount of $7,814. The insured's loss, however, totaled $17,629.56.

After the insurance settlement, the insurer and the insureds commenced an action against the tortfeasor. Each party employed its own counsel, who collaborated in conducting the litigation, and each party paid its own expenditures. The insurer and insureds obtained a joint verdict of $11,514. The parties disputed the division of the proceeds, however, and the insureds filed a declaratory judgment action seeking indemnification up to the full amount of their loss, plus counsel fees and costs. The policy issued to the insureds contained the following provision relating to subrogation:

> "This company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefore is made by this company. [81]

Moreover, the subrogation receipt signed by the insureds provided:

> "In consideration of and to the extent of said payment the undersigned hereby subrogates said insurance company, to all of the rights, claims and

> interests which the undersigned may have against any person or corporation liable for the loss mentioned above, and authorizes the said insurance company to sue, compromise or settle in the undersigned's name or otherwise all such claims and to execute and sign releases and acceptances and endorse checks or drafts given in settlement of such claims in the name of the undersigned, with the same force and effect as if the undersigned executed or endorsed them."[82]

Relying upon these provisions, the Ohio Supreme Court found that the insureds had assigned their entire right of recovery, to the extent of payment, to the insurer. Because the court determined that the policy provision and subrogation receipt amounted to an assignment, the court held that the words "all right of recovery" in the policy would be without meaning if the insurer were not accorded priority as to the funds received from the third-party tortfeasor. The court concluded:

> "In summary then, we conclude that, where the policy subrogation provisions and the subrogation assignment to the insurer convey all right of recovery against any third-party wrongdoer to the extent of the payment by the insurer to the insured, the insurer, who has cooperated and assisted in proceedings against the wrongdoer, is entitled to be indemnified first out of the proceeds of any recovery against the wrongdoer."[83]

Although the *Peterson* Court predicated its decision on the express language of the insurance policy, the Ohio Supreme Court later found the insurer entitled to priority in the proceeds based on equitable principles of subrogation.[84] In *Ervin v. Garner*,[85] the court held that an insured is not entitled to be made whole first from the proceeds of the recovery if the insured refuses cooperation and assistance from the insurer. As such, under the law in Ohio, only when an insurer refuses to cooperate in the pursuit of a third-party recovery is the insured entitled to be made whole first.[86]

Interestingly, two recent pronouncements of the law in Ohio emphasize the significance of the policy language in resolving the apportionment issue. In *Aetna Life Ins. Co. v. Martinez*,[87] the Ohio Court of Appeals held that a medical reimbursement agreement provided specifically for proration of the recovery between insured and insurer where full recovery was not obtained

from the wrongdoer.[88] Also, in *Risner v. Erie Insurance Co.*,[89] the Ohio Court of Appeals held that the specific and unequivocal language of a subrogation clause in an automobile policy granted the insurer an unqualified right of subrogation to the entire amount paid under the policy.[90] Consequently, although the Ohio cases may be interpreted to provide for an insurer-whole rule, one must scrutinize the contractual language at issue before concluding that the insurer is entitled to be made whole first.

Another jurisdiction seemingly following the insurer-whole rule is California. In *Travelers Indemnity Co. v. Ingebretsen*,[91] the court accorded insurers priority in the recovery from the third-party wrongdoer. The insureds' claims were based upon policies containing the standard subrogation clause. All of the insureds signed subrogation receipts assigning their claims to the insurers. In prosecuting the claims against the tortfeasor, the insurers and insureds shared the expenses and work of the litigation. Like the Ohio court, the California court relied heavily upon the subrogation agreements obtained from the insureds: "The fact that [the insurers] made payments under the insurance policy to (the insureds] and obtained subrogation agreements is sufficient to establish their right to a corresponding amount from that judgment.'[92] The court also relied upon the cooperation between the insureds and insurer in prosecuting the claims against the tortfeasor:

> "If an insurer paying a claim for a loss caused through the negligence of a third person requests that the insured prosecute his claim against the tortfeasor, and bears its share of the burden in 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, equal to the full value of the property destroyed.'[93]

Based upon the assignments contained in the subrogation receipts, as well as the insurers' cooperation with the insureds in prosecuting the claims, the court determined that the insurers

would receive first and total indemnification from the recovery obtained from the tortfeasor before the insureds would be entitled to participate in that recovery.

Since *Ingebretsen*, the Court has engrafted some limitations on the application of the insurer-whole rule in California. In *Sapiano v. Williamsburg National Ins. Co.*,[94] the court distinguished *Ingebretsen* and retreated in part to the insured-whole rule. In that case, the insured was involved in an automobile accident for which he was paid $14,500 from Williamsburg, the limits of liability under his property policy of insurance. Sapiano then instituted a third-party action against the tortfeasor and recovered $10,000 for the property damage claim, again the limits under the tortfeasor's liability policy.

Williamsburg claimed entitlement to the entire $10,000 recovery. Sapiano followed with a declaratory judgment action.

In seeming reliance on Williamsburg's nonparticipation in the third-party action, the court held that the insured was entitled to the difference between the value of the "totaled" vehicle (more than $20,000) and the amounts received from his insurer before the insurer could. exercise its subrogation rights.[95] In recognition of its contrary decision in *Ingebretsen*, the Sapiano Court distinguished Ingebretsen on the basis that the Williamsburg policy language was not as broad as the policy at issue in Ingebretsen and that Williamsburg had failed to assist Sapiano in the prosecution of the third-party action unlike the insurer in Ingebretsen.[96]

In some respects, California is an insurer-whole state only to the extent that the contractual provisions provide as such and the insurer participates along with the insured in the pursuit of a recovery from the wrongdoer.

Another jurisdiction applying the insurer-whole rule is Wyoming. In *Iowa National Mutual Insurance Co. v. Huntley*,[97] the Wyoming Supreme Court reasoned that when the insured

undertakes the cause of action against the third-party tortfeasor to recover for the damages sustained, the insured is charged with protecting the interest of the insurer. As such, the insurer has first rights to any recovery from a lump sum settlement that is less than the insurer's total damages.[98]

The insurer-whole rule also has arisen in cases in which the insured has impaired or prejudiced the insurer's rights. In such circumstances several courts have held that the insure is entitled to be made whole first from any recovery from a third-party tortfeasor, even though the jurisdiction's general rule is to the contrary.[99] In *North River Insurance Co. v McKenzie*,[100] for example, the insureds suffered property damage and received $2,537 from their insurer. This payment constituted the limit payable under the policy. The insureds then started an action against the tortfeasor, alleging total property damage of $7,500. Without notice to the insurer, the insureds subsequently settled their claim against the tortfeasor for $5,982.15. The insurer subsequently commenced an action against the insureds, seeking repayment of the $2,537 paid under the insurance contract. The Alabama Supreme Court held that equitable principles dictated that the insured reimburse the insurer for the payment made under the policy. In effect, the court held that when an insured accepts from the insurer the amount of the policy for damage to his property and thereafter settles his claim against the tortfeasor to the detriment of the insurer, the insurer is entitled to recover from the insured the amount paid on the policy without necessarily demonstrating that the settlement exceeded the actual loss less the amount paid on the policy.

Similarly, in *Winkelmann v. Excelsior Ins. Co.*,[101] the New York Court of Appeals held that "an insurer who has paid its insured the full amount due under a fire policy, but less than the insured's loss, may proceed against the third-party tortfeasor responsible for the loss before the insured has been made whole by the tortfeasor."[102] In *Winkelmann*, the New York Court of

Appeals concluded that since an insurer's rights of subrogation arise upon payment of the loss, an insurer who has paid the policy limits may proceed as subrogee against the negligent third party to recoup the amount paid on the policy, even though the insurance proceeds do not fully compensate the insureds' losses.[103] Such subrogation does not prevent the insured from suing for the amount of loss not covered by insurance.[104] The *Winkelmann* court reasoned that "[I]f the insurer is required to forego its rights while the insured delays asserting its claim against the third party, as [insureds] did here, the delay may compel the insurer to litigate a stale claim, or worse, may result in its action being time barred."[105] Although some may interpret *Winkelmann* as adopting the insurer-whole rule, it is more likely a fact specific result recognizing the insurer's subrogation rights in the context of the insureds failure to promptly prosecute a third-party claim.

The insurer-whole rule also has been recognized when the insured receives full payment for only a portion of his or her total damages in an action against a third-party tortfeasor. Several courts have held that when amounts recovered against a third-party for separate elements of a claim can be identified and attributed toward subrogation claims, an insurer is entitled to subrogation for payments made even though other elements of the third-party claim may not be fully satisfied.[106]

Finally, some courts adhering to the insured-whole rule have held that the parties may modify the insured-whole rule by express terms in their contract.[107] The Indiana Court of Appeals, for example, has recognized that certain subrogation provisions in an insurance policy may be sufficient to modify the insured-whole rule. In *Mutual Hospital Insurance, Inc. v. MacGregor*,[108] the insured was injured in an automobile accident and incurred medical expenses in the amount of $5,168.58. These were paid by the insurer. The insured then commenced an action against the tortfeasor, which was subsequently settled for $10,000. The settlement amount

equaled the limit of the tortfeasor's liability coverage The insurer, Blue Cross-Blue Shield, brought suit against the insured to recover the $5,168.58 payment.

The policy at issue provided, in pertinent part:

> "In the event of any payment for services under this policy, Blue Cross-Blue Shield shall, to the extent of such payment be subrogated to all the rights of recovery of the Member or Dependent arising out of any claim or cause of action which may accrue because of the alleged negligent conduct of a third-party."[109]

The court noted that "[a]n insurance policy is a contract and the rules governing the construction of contracts generally apply to the construction of a policy or contract of insurance."[110] Considering the insurance policy at issue, the court held that the insured was obligated to reimburse the insurer from any monies received from the tortfeasor. Notwithstanding the result in the *Mutual Hospital* case, many courts have found similar policy provisions insufficient to modify the insured-whole rule."[111] Moreover, several courts have found that any contractual attempt to modify the insured-whole rule is fundamentally inequitable and will not be permitted."[112]

## III. THE LITIGATION AGREEMENT

Because of the divergent and often untenable rationales employed by the courts in apportioning recoveries, insureds and insurers should enter into a litigation agreement when pursuing claims against a tortfeasor. Known as a proration agreement, it is the soundest method of resolving the apportionment of damages issue. Like any contract, a litigation agreement is negotiable, but it typically provides for the sharing of recovery and expenses based on the percentage each party's recoverable loss bears to the entire recoverable loss."[113] For example, when the insured has sustained a total loss of $100,000 and the insurer has paid the insured the limit of a $60,000 policy, a litigation agreement would provide for a sharing of any recovery, as

well as expenses, on the basis of a 40 percent share for the insured and a 60 percent share for the insurer.

An important issue to consider in preparing a litigation agreement is calculating the "loss" for both the insurer and the insured."[114] It is important to note that the insured's right to recover damages in excess of those paid by the insurer is governed by the law of the local jurisdiction on recoverable damages, not by the total amount for which an insured could have been insured. Generally speaking, the right to recover for damage to real property is limited to the diminution in the fair market value of the property or the cost of replacement, whichever is less. Therefore, if the insured has received payment of a certain sum for property losses under a replacement cost policy, but the diminution in value of the damaged property is a smaller amount, the insured may be considered to have been "made whole" under general principles of damage law even though a substantial deductible remains on the replacement cost policy. [115]

A litigation agreement also should express some legally valid consideration."[116] In the subrogation context the consideration typically is found when the insurer promises to pay for all expenses associated with the attempts to recover the damages caused by the actual tortfeasor. Such expenses may include fees paid to expert witnesses, travel expenses, and copying costs. A good litigation agreement also should provide that the insured will cooperate fully with the insurer in the pursuit of a recovery and, most important, that the insurer may prosecute any lawsuit in the name of the insured alone."[117]

The issue of adequate consideration is a difficult aspect of litigation agreements. On the one hand, the insurer is contractually obligated to pay its insured for a covered loss. On the other hand, it is essential that the insurer give something of value (i.e., recovery of uninsured damages) to its insured beyond that for which it is already contractually obligated. Otherwise the litigation

agreement will be unenforceable for lack of consideration."[118] Additionally, the timing of the "consideration" may be important. Some courts have relied primarily on the timing of the execution of the litigation agreement (before or after the execution of a loan or subrogation receipt) as a basis for determining the agreement's validity and for determining whether the agreement or the receipt controls the lawsuit."[119]

To avoid future misunderstandings (and possible conflicts of interest for counsel), a litigation agreement also should address all possible contingencies that may arise in the litigation, such as attorney fees; uninsured damages; litigation costs; punitive damages; and authority to settle, litigate, and counterclaim.

Several jurisdictions have recently addressed the efficacy of proration agreements as a means of apportioning recoveries between insureds and insurers."[120] In the seminal case of *Culver v. Insurance Co.*,[121] New Jersey courts addressed the validity of proration agreements. In *Culver*, the insured suffered damages in a fire loss estimated at $185,000. The insurer paid its policy limits of $82,373.12, leaving an uninsured loss of $103,000. The insurer took a total assignment of rights and started a subrogation action against the alleged tortfeasors. The insured and the insurer entered into a proration agreement under which 80 percent of any recovery would be paid to the insurer and 20 percent to the insured. The risks of litigation, the questionable potential for a recovery, and the expenses associated with litigation were discussed before entering into the Proration Agreement.

The claims against the alleged tortfeasors ultimately yielded $160,000 in settlement proceeds. The proceeds were allocated in accordance with the Proration Agreement -$92,000 to the insurer, $23,583.33, to the insured and $44,416.67 for attorneys' fees and costs. Significantly, the insurer was made more than whole as a result of the proration.

The trial court affirmed the distribution of the settlement proceeds, and the insured commenced a collateral action seeking to avoid the proration agreement and vacate the distribution order. The court in that action granted summary judgment in favor of the insurer, holding that the doctrine of res judicata barred the collateral action.

The Appellate Division of the New Jersey Superior Court reversed the decision, finding that the proration agreement was unenforceable as a matter of public policy. The court further held that, pursuant to common-law principles, the insured was entitled to be made whole, to the full extent of her loss, prior to any distribution to the insurer. Thus the insurer was limited to recovering the amounts it had paid. In concluding that the agreement should be set aside, the court stated:

> "We think it clear then that the facts of record here support plaintiffs' claim for relief from the order enforcing their agreement with INA. At the least, if there are material facts which might yet be the subject of dispute, plaintiffs are entitled to the opportunity to prove their right to relief."[122]

The New Jersey Supreme Court reversed, holding that res judicata barred the insured's action. While the court did not consider the enforceability of the particular litigation agreement in question, it did uphold the general principle that the parties may vary, by contract, the common-law rule entitling the insured to be made whole first from any recovery from a tortfeasor.

The New Jersey Supreme Court's decision in *Culver* appears to recognize the validity of litigation agreements that are fair and equitable. Obviously, caution should be utilized in drafting a litigation agreement so as to ensure that the insurer is not made more than whole while leaving an insured less than whole.

In *Magsipoc v. Larsoni*,"[123] the insurer sought to recover the portion of a settlement recovered by an insured for the wrongful death of its dependant which the insurer claimed was

attributable to the medical expenses it paid prior to the dependent's death. The court interpreted Florida Statute § 768.78(4) which provides for a pro rata distribution of a recovery involving medical expenses and costs paid for by an insurer. Florida Statute § 768.76(4), in relevant part, provides:

> "A provider of collateral sources that has a right of subrogation shall have a right of reimbursement from a claimant to whom it has provided collateral sources if such claimant has recovered all or part of such collateral sources from a tortfeasor. Such provider's right of reimbursement shall be limited to its pro rata share of collateral sources provided, minus its pro rata share of costs and attorneys fees incurred by the claimant recovering such collateral sources from the tortfeasor.[124]

In interpreting this statute, the court concluded that the statute "contemplates a pro rata recovery for the collateral source provider where the tortfeasor pays only part of the injured party's medical costs and expenses, and the insurer's payment under its contract, plus the recovery from the tortfeasor, do not cover the total amount of the insured's medical costs and expenses."[125] Significantly § 768.76(4) allows for a healthcare provider which has paid medical costs of an insured to recover a pro rata share of such medical costs if the insured receives any reimbursement attributable to those medical costs.[126]

Although recognizing the enforceability of the proration rule, the *Magsipoc* Court concluded that there was no differentiation as to the damages recovered and, therefore, the statute could not be applied. The matter was remanded to allow for differentiation of the damages recovered.[127]

Similarly, in *Hayes-Albion Corp. v. Whiting Corp.*[128] the insured, along with its insurer, sought to recover damages from the third-party tortfeasor. The insured entered into a proration agreement with its insurer which established a division of any expenses incurred and the recovery obtained in actions against third parties. Initially, the defendant appealed to the trial

court from a mediation in which the mediators awarded $155,000 for the uninsured loss and $750,000 for the insured loss.[129]

On appeal, the defendant argued that the insured was not a real party in interest to the insurance paid portion of the claim. The court rejected the defendant's argument and reasoned that the defendant, by virtue of its recognition of the proration agreement had knowledge that the insured was in fact a real party in interest to the insurance paid portion of the claim."[130]

Significantly, the court rejected the argument that the insured and the insurer were required, pursuant to Michigan Statute § 24.12836 (4), to maintain separate actions. The court explained that since the defendant recognized the co-interest of the insured and insurer in the proration agreement, the statute regarding subrogation agreements did not apply.[131] Indeed proration agreements such as that in *Hayes-Albion Corp*. not only resolve the apportionment issue but also allow the insured and the insurer to combine their efforts and increase their efficiency in an attempt to recover from a third-party tortfeasor.

## IV. CONCLUSION

Apportioning damages in a subrogation case is fraught with difficulty. Jurisdictions approach the issue differently and the rationales utilized in adopting the various rules for apportionment lack cohesiveness. Although most jurisdictions adhere to the insured-whole rule, some continue to advocate the insurer-whole rule. Significantly, many jurisdictions have yet to address the apportionment issue.[132] The various rationales utilized by the courts following the majority and minority rules make it difficult to predict how undecided jurisdictions ultimately will address the issue.

Given the fairness and simplicity of the proration rule, it is in the best interests of both the insured and the insurer, where permitted, to enter into a litigation agreement prior to

commencing any action against a third-party tortfeasor. Ensuring that the rights of the insured and insurer are addressed in all respects by mutual agreement clearly is the best way to apportion damages in a subrogation case.

## ENDNOTES

[1] JOHN J. PAPPAS & SCOTT S. KATZ, INSURING REAL PROPERTY § 41.01[l] (Stephen A. Cozen ed., 1992).

[2] James M. Mullen, *The Equitable Doctrine of Subrogation*, 3 Md. L. Rev. 201 1,1939).

[3] Powell v. Blue Cross & Blue Shield, 581 So. 2d 772, 775 (Ala. 1990).

[4] Id. at 775 (citing Spencer A. Kimball & Don A. Davis, *The Extension of Insurance Subrogation*, 60 Mich.L.Rev. 841 (1962)).

[5] 16 MARK S. RHODES, COUCH CYCLOPEDIA OF INSURANCE LAW § 61:43 (2d ed. rev. vol. 1983) [hereinafter COUCH].

[6] Mullen, supra note 2, at 216-17.

[7] Although the standard property insurance policy provides for contractual subrogation, subrogation would arise in any event pursuant to the doctrine of legal subrogation. The differences become important, however, if it necessary to determine the right of first recovery, i.e. whether the insurer is entitled to be made whole when the insured has not been made whole.

[8] See Florida Farm Bureau Ins. Co. v. Martin, 377 So.2d 827, 831 (Fla. Dist. Ct. App. 1979); United Pac. Ins. Co. v. Boyd, 661 P.2d 987, 990 (Wash. Ct. App. 1983); Rimes v. State Farm Mut. Auto Ins. Co., 316 N.W. 2d 348, 354 (Wis. 1982).

[9] See Associates Hosp. Serv. v. Pustilnik, 396 A.2d 1332, (Pa. Super. Ct. 1979), *vacated and remanded on other grounds*, 439 A.2d 1149 (Pa. 1981).

[10] COUCH, supra note 5, § 61:43.

[11] Florida Farm Bureau Ins. Co. v. Martin, 377 So. 2d 827 (Fla. Dist. Ct. App~ 1979); Cooper v. Younkin, 339 N.W.21) 552 (Minn. 1983); Dimick v. Lewis, 497 A.2d 1221 (N.H. 1985); Rimes v. State Farm Mut. Auto Ins. Co., 316 N.W.2d 348 (Wis. 1982).

[12] Hill v. State Farm Mut. Auto. Ins. Co., 765 P.2d 864 (Utah 1988).

[13] There is authority to the contrary in some jurisdictions. In Pennsylvania a settlement by the insured conclusively establishes the full amount of the insured's damages. Illinois Auto Ins. Exch. v. Braun, 124 A. 691, 693 (Pa. 1924); Associated Hosp. Serv. v. Pustilnik, 396 A.2d 1332 (Pa. Super. Ct. 1979), *vacated and remanded on other grounds*, 439 A.2d 1149 (Pa. 1981). In Florida and New Hampshire a settlement is for any amount less than the limit of the tortfeasor's liability insurance. Morgan v. General Ins. Co. of Am., 181 So. 2d 175 (Fla. Dist. **Ct.** App. 1965); Roy v. Ducnuigeen, 532 A.2d 1388 (N.H. 1987).

[14] ROBERT E. KEETON, BASIC TEXT ON INSURANCE LAw § 3.10(c)(2), at 160-62 (1971) (footnotes omitted).

[15] Julius Denenberg, *Subrogation Recovery: Who Is Made Whole*, 29 FED'N INS. COUNS. Q. 185,188 (1979). But see Travelers Ins. Co. v. Brass Goods Mfg. Co., 146 377 (N.Y. 1925) (applying insurer-whole-plus doctrine).

[16] See Travelers Ins. Co. v. Brass Goods Mfg. Co., 146 N.E. 377 (N.Y. 1925). But see Pontiac Mut. County Fire & Lightning Ins. Co. v. Sheibley, 116 N.E. 644 (111. 1917).

[17] COUCH, supra note 5, § 61:64.

[18] ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 10.06 (1982).

[19] Powell v. Blue Cross & Blue Shield, 581 So. 2d 772,775 (Ala. 1990); International Underwriters/Brokers, Inc. v. Liao, 548 So. 2d 163,165 (Ala. 1989).

[20] Shelter Mut. Ins. Co. v. Bough, 834 S.W.2d 637, 641 (Ark. 1992).

[21] Marquez v. Prudential Property & Casualty Ins. Co., 620 P.2d 29, 33 (Colo. 1980). Although Marquez concerns the interpretation of Colorado's no-fault act, the court noted that its interpretation is consistent with Skauge v. Mountain States Tel. & Tel. Co., 565 P.2d 628 (Mont. 1977), which adopted the insured-whole rule.

[22] Automobile Ins. Co. v. Conlon, 216 A.2d 828 (Conn. 1966).

[23] Florida Farm Bureau Ins. Co. v. Martin, 377 So. 2d 827 (Fla. Dist. Ct. App. 1979).

[24] Duncan v. Integon General Insurance Corp., 482 S.E.2d 325 (Ga. 1997). The Supreme Court of Georgia held that the "complete compensation rule," the rule that an insured must be made whole before an insurer may exercise rights of subrogation, limits an insurer's right to reimbursement, "unless and until its insured has been completely compensated for his losses.

Id. at 326.

[25] Hardware Dealers Mut. Fire Ins. Co. v. Ross, 262 N.E.2d 618 (Ill. App. Ct. 1970).

[26] Capps v. Klebs, 382 N.E.2d 947 (Ind. App. Ct. 1978).

[27] Ludwig v. Farm Bureau Mut. Ins. Co., 393 NW.2d 143,144 (Iowa 1986).

[28] Wine v. Globe American Casualty Co., 917 S.W.2d 558 (Ky. 1996). Although the Supreme Court of Kentucky held that general principles of equity require that the insured be made whole before an insurer's right to subrogation arises, the court also held that this principle of equity may be modified by both statute and "valid contractual obligations to the contrary." Id. at 561-62.

[29] Southem Farm Bureau Casualty Ins. Co. v. Sonnier, 406 So. 2d 178,180 (La. 1981); Smith v. Manville Forest Prods. Corp., 521 So. 2d 772, 776 (La. Ct. App. 1988).

[30] Wescott v. Allstate Ins. Co., 397 A.2d 156,169 (Me. 1979).

[31] Frost v. Porter Leasing Corp., 436 N.E.2d 387 (Mass. 1982).

[32] Union Ins. Soc'y v. Consolidated Ice Co., 245 N.W. 563, 565 (Mich. 1932). But see Wolverine Ins. Co. v. Klomparens, 263 N.W. 724 (Mich. 1935).

[33] Westendorf v. Stasson, 330 N.W. 2d 699 (Minn. 1983).

[34] Home Ins. Co. v. Hartshorn, 91 So. 1 (Miss. 1922).

[35] Skauge v. Mountain States Tel. & Tel. Co., 565 P.2d 628, 632 (Mont. 1977).

[36] Shelter Ins. Co. v. Frolich, 498 N.W.2d 74 (Neb. 1993).

[37] Providence Wash. Ins. Co. v. Hogges, 171 A.2d 120 (N.J. Super. Ct. App. Div. 1961). See also Culver v. Insurance Co. of N. Am., 535 A.2d 15, 19 (N.J. Super. Ct. App. Div. 1987) (holding "right of subrogation does not arise until injured party has been made whole"), *rev'd on other grounds*, 559 A.2d 400 (N.J. 1989).

[38] St. Paul & Marine Ins. Co. v. W. P. Rose Supply Co., 198 S. E. 2d 482 (N. C. Ct. App.), *cert. denied*, 200 S.E.2d 655 (N.C. 1973).

[39] Gentry v. American Motorist Ins. Co., 867 P.2d 468 (Okla. 1994); But cf. Fields v. Framers Ins. Co., Inc., 18 F.3d 831 (10th Cir. 1994) (Subrogation provision in insurance contract may modify general common law rule thus according to insurer priority of recovery even when insured has not been fully compensated).

[40] Lombardi v. Merchants Mut. Ins. Co., 429 A.2d 1290 (R.I. 1981).

[41] Powers v. Calvert Fire Ins. Co., 57 S.E.2d 638 (S.C. 1950). Quoting 29 American Jurisprudence 1007, Insurance, § 1346, the Supreme Court of South Carolina stated:

> The principle that an insurer which has paid a claim for property destroyed though the negligence of a third person may--in some circumstances, at least--be reimbursed out of funds received by the insured in satisfaction of his claim against the third person, is very generally recognized. Most of the courts, however, in applying the rule for reimbursement of the insurer, limit the recovery against the insured to the amount by which the sum received by the latter from the wrongdoer, together with the insurance, exceeds the loss . . . .

Powers, at 643 (emphasis added). Under Powers, subrogation by the insurer may be had only with respect to those funds received by the insured over and above full compensation of the loss incurred.

[42] Wimberly v. American Casualty Co., 584 S.W.2d 200 (Tenn. 1979).

[43] Ortiz v. Great S. Fire & Casualty Ins. Co., 597 S.W.2d 342 (Tex. 1980).

[44] Hill v. State Farm Mut. Auto. Ins. Co., 765 P.2d 864 (Utah 1988); Lyon v. Hartford Accident & Indem. Co.,480 P.2d 739 (Utah 1971), *overruled on other grounds*, Beck v. Farmers Ins. Exchange, 701 P.2d 795 (Utah 1985).

[45] Vermont Indus. Dev. Auth. v. Setze, 600 A.2d 302 (Vt. 1991).

[46] Thiringer v. American Motors Ins. Co., 588 P.2d 191 (Wash. 1978).

[47] Bush v. Richardson, 484 S.E.2d 490 (W. Va. 1997); Porter v. McPherson, 479 S.E.2d 668 (W. Va. 1996); Kittle v. Icard, 405 S.E.2d 456 (W. Va. 1991).

[48] Garrity v. Rural Mut. Ins. Co., 253 N.W.2d 512 (Wis. 1977). *See also* Sorge v. National Car Rental System, Inc., 512 N.W.2d 505, 507 (Wis. 1994) (stating that "*Garrity* makes it clear that subrogation insurers are not entitled to reimbursement when the insured has not recovered all of the damages to which she is entitled. "); and Danielson v. Larsen Co., 541 N.W.2d 507, 512 (Wis. Ct. App. 1995) ("Under Wisconsin common law rules of subrogation, one who claims subrogation rights is barred from any recovery unless the insured is made whole").

[49] Denenberg, supra note 16, at 185.

[50] 296 U.S. 133 (1935).

[51] Id. at 137 (1935) (citing United States v. National Sur. Co., 254 U.S. 73, 76 (1920)).

[52] 253 N.W.2d 512 (Wis. 1977)

[53] Lines 162-65 provide that the insurer "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 [the insurer]." Id. at 513.

[54] Id. at 515.

[55] Id. at 514.

[56] Id.

[57] 191 N.E.2d 157 (Ohio 1963).

[58] Garrity, 253 N.W. 2d at 516.

[59] Id. at 514 (citing St. Paul Fire & Marine Ins. Co. v. W.P. Rose Supply Co., 19 N.C. App. 302, 305, 198 S.E.2d 482, 484 (1973) cert. denied, 284 N.C. 254, 200 S.E.2d 655 (1973)).

[60] *See* Powell v. Blue Cross & Blue Shield, 581 So. 2d 772 (Ala. 1990); Skauge v. Mountain States Tel. & Tel. Co., 565 P.2d 628 (Mont. 1977); Ortiz v. Great S. Fire & Casualty Ins. Co., 597 S.W.2d 342 (Tex. 1980).

[61] 565 P.2d 628 (Mont. 1977).

[62] 584 S.W.2d 200 (Tenn. 1979).

[63] *Id*. at 204.

[64] 646 S.W.2d 156 (Tenn. 1983).

[65] *Id*. at 158.

[66] More recently, the United States Middles District Court in Tennessee interpreted the common law right of subrogation in Tennessee to be derived from general principles of equity, and not contract. Marshall v. Employers Health Ins. Co., 927 F. Supp. 1068, 1072 (M.D. Tenn. 1996). "The right of subrogation rests not upon a contract, but upon the principle of natural justice ... An insured must be made whole before an insurer is entitled to subrogation against a tortfeasor. " *Id*. (citing 15 TENN. JUR. Insurance § 77 (1984)). The United States District Court then when on to cite Wimberly for the proposition that favorable subrogation rights do not arise for insurers unless and until the insured is made whole. Id. at 1072-73.

[67] 406 So.2d 178 (U. 1981).

[68] The policy provided that the insurer would "succeed to all the rights of recovery of the insured" upon paying a covered loss. Id. at 180.

[69] Id.

[70] In Pennsylvania, in the context of uninsured motorists, it has been held that public policy prohibits an insurer from subrogating itself, through language in the insurance contract, to third-party recovery proceeds before the insured has been fully compensated. Shamey v. State farm Mut. Auto. Ins. Co., 331 A.2d 498, 501 (Pa. Super. Ct. 1974); Wiertel v. 1,egler, 55 Erie 59, 63-65 (1972).

[71] Travelers Indem. Co. v. Ingebretsen, 113 Cal. Rptr. 679 (Ct. App. 1974); Shiffin v. McGuire & Hester Constr. Co., 48 Cal. Rptr. 799 (Ct. App. 1966).

[72] Cedarholm v. State Farm Mut. Ins. Co., 338 P.2d 93 (Idaho 1959).

[73] Ervin v. Garner, 267 N. E. 2d 769 (Ohio 197 1); Peterson v. Ohio Farmers Ins. Co -, 191 N.E.2d 157 (Ohio 1963).

[74] Collins v. Blue Cross, 193 S.E.2d 782 (Va. 1973).

[75] Iowa Nat'l Mut. Ins. Co. v. Huntley, 329 P.2d 569 (Wyo. 1958).

[76] 338 P.2d 93 (Idaho 1959).

[77] *Id*. at 94.

[78] *Id*. at 95-96.

[79] *Id*.

[80] 191 N.E.2d 157 (Ohio 1963).

[81] *Id*. at 159.

[82] *Id*.

[83] *Id*. at 159-60.

[84] *Id*.

[85] 267 N.E.2d 769 (Ohio 1971).

[86] Newcomb v. Cincinnati Ins. Co., 22 Ohio St. 382 (1872).

[87] 454 N.E.2d 1338 (Ohio Ct. App. 1982).

[88] *Id*. at 1340-41.

[89] 633 N.E.2d 588 (Ohio Ct. App. 1993).

[90] *Id*. at 591.

[91] 113 Cal. Rptr. 679 (Ct. App. 1974).

[92] *Id*. at 683-84.

[93] *Id*. at 685 (citing COUCH, supra note 5, § 61:43).

[94] 33 Cal. Rptr.2d 659 (Ct. App. 1994).

[95] *Id*. at 661-62.

[96] *Id*.

[97] *Id*. at 661-62.

[98] *Id* at 574.

[99] *See* North River Ins. Co. v. McKenzie, 74 So. 2d 599 (Ala. 1954); Morgan v. General Ins. Co., 181 So. 2d 175 (Fla. Dist. Ct. App. 1965); Aetna Life Ins. Co. v. Martinez, 454 N.E.2d 1338 (Ohio Ct. App. 1982); Eastwood v. Glen Falls Ins. Co., 646 S.W.2d 156 (Tenn. 1983); Motor Ins. Corp. v. Blakemore, 584 S.W.2d 204 (Tenn. Ct. App. 1978).

[100] 74 So. 2d 599 (Ala. 1954). Interestingly, Cedar Home v. State Farm Mut. Ins. Co., 338 P.2d 93 (Idaho 1959), cited McKenzie, *supra*, as authority in reaching its conclusion.

[101] 650 N.E.2d 841 (N.Y. 1995).

[102] *Id*. at 842.

[103] *Id*. at 844.

[104] *Id*.

[105] *Id*. at 845. Significantly, however, the Winkelmann Court specifically held that an insurer may not proceed in equitable subrogation against its own insured until the insured has been made whole by the proceeds from a third party plus the proceeds from the insurance policy. Id. "Only if the insured's recovery exceeds its loss can the insurer share in the excess proceeds." Id.; *see* also Niemann v. Luca, 645 N.Y.S.2d 401, 403 (N.Y. Sup. Ct. 1996) (explaining Winkelmann's holding).

[106] *See* Ludwig v. Farm Bureau Mut. Ins. Co., 393 N.W.2d 143 (Iowa 1986); Ortiz v. Great S. Fire & Casualty Ins. Co., 597 SW.2d 342 (Tex. 1980). But see Rimes v. State Farm Mut. Auto. Ins. Co., 316 N.W.2d 348, 353 (Wis. 1982) ("[E]ven though an insured has recovered from a tortfeasor a sum more than sufficient to equal the subrogated amount claimed by the insurer, the insurer is not entitled to subrogation unless the insured has been made whole for his loss.").

[107] International Underwriters/Brokers, Inc. v. Liao, 548 So. 2d 163 (Ala. 1989); Higginbothan v. Arkansas Blue Cross and Blue Shield, 849 S.W.2d 464 (Ark. 1993); Westendorf v. Stasson, 330 N.W.2d 699 (Minn. 1983); Skauge v. Mountain States Tel. & Tel. Co., 565 P.2d 628 (Mont. 1977); Shelter Ins. Co. v. Frohlich, 498 N.W.2d 74 (Neb. 1993); Providence Wash. Ins. Co. v. Hogges, 171 A.2d 120 (N.J. Super. Ct. App. Div. 1961); Fields v. Farmers Ins. Co., Inc., 18 F.3d 831 (10th Cir. 1994)(applying Oklahoma law); Lyon v. Hartford Accident & Indem. Co., 480 P.2d 739 (Utah 1971), *overruled on other grounds*, Beck v. Farmers Ins. Exchange, 701 P.2d 795 (Utah 1985); Vermont Indus. Dev. Auth. v. Setze, 600 A.2d 302 (Vt. 1991); Garrity v. Royal Mut. Ins. Co., 253 N.W.2d 512 (Wis. 1977).

[108] 368 N.E.2d 1376 (Ind. Ct. App. 1977).

[109] *Id*. at 1377.

[110] *Id*. at 1379.

[111] *See* Willard v. Auto Underwriters, Inc.,407 N. E. 2d 1192 (Ind. Ct. App. 1980); Lyon v. Hartford Accident & Indem. Co.,480 P.2d 739, 745 (Utah 1971), *overruled on other grounds*, Beck V. Farmers Ins. Exchange, 701 P.2d 795 (Utah 1985).

[112] *See* Powell v.Blue Cross & Blue Shield, 581 So. 2d 772,775 (Ala. 1990); Allurn v. MedC--nter Health Care, Inc., 371 N.W.2d 557, 560 (Minn. Ct. App. 1985); Wimberly v. American Casualty Co., 584 S.W. 2d 200 (Tenn. 1979).

[113] PAPPAS & KATZ, supra note 1, § 41.03[4].

[114] *Id*.

[115] *Id*.

[116] *Id*.

[117] *Id*.

[118] *Id*.

[119] *Id*. (citing General Ins. Co. of Am. v. Bowers, 228 S.E.2d 348 (Ga. Ct. App. 1976); Preferred Risk Mut. Ins. Co. v. Faulkner, 553 S.W.2d 296 (Ky. Ct. App. 1977)).

[120] See Aetna Life Ins. Co. v. Martinez, 454 N.E. 2d 1338 (Ohio Ct. App. 1982) (Upholding a proration formula in a reimbursement agreement executed by the insured and its insurer).

[121] 535 A.2d 15 (N.J. Super. Ct. App. Div. 1987), *rev'd*, 559 A.2d 400 (N.J. 1989).

[122] *Id*. at 21 (emphasis added).

[123] 639 So.2d 1038 (Fla. Dist. Ct. App. 1994).

[124] Florida Stat. § 768.76(4).

[125] 639 So.2d at 1042.

[126] Florida Stat. § 768.76(4).

[127] 639 So.2d at 1043.

[128] 459 N.W.2d 47 (Mich. Ct. App. 1990)

[129] *Id* at 48.

[130] *Id* at 51, 52.

[131] *Id*. at 52.

[132] Within a property damage context these jurisdictions include Alaska, Arizona, Delaware, Hawaii, Kansas, Maryland, Missouri, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, and South Dakota.