

## THE CASE AGAINST SUBROGATION

Elinor and Harlan Swanson were seriously injured when their Chevrolet Suburban and a USF/Reddaway tractor-trailer collided near Ravalli, Montana on August 4, 1998. They incurred over \$50,000 in medical expenses. Swansons owned homes in Plains, Montana and Colorado Springs, Colorado at the time of the accident and carried a Colorado auto insurance policy with Hartford Insurance Company of the Midwest. Hartford provided a type of no-fault coverage known as Personal Injury Protection (PIP) under which it paid medical expenses. Swansons submitted their medical expenses to Hartford some of which the company paid and some of which it refused. In the process, Hartford asserted subrogation rights sending a notice of subrogation to the carrier for Reddaway and holding for months a check for \$25,962.60 that Reddaway's insurance administrator issued jointly to Elinor Swanson and Hartford. This and other actions resulted in Montana Trial Lawyers Association member Rex Palmer filing a bad faith action in federal court in which the battle has centered on what, if any, subrogation rights Hartford possessed.

As a result, on March 19<sup>th</sup>, Federal Magistrate Judge Erickson, in the case of *Swanson v. Hartford Ins. Co. of the Midwest*,<sup>1</sup> certified to the Montana Supreme Court three most important questions regarding the state of subrogation law in Montana:

1. Is subrogation by the insurer to recover medical payments advanced to its insured, and later paid by the tortfeasor, void in Montana as against public policy?
2. Is it the public policy in Montana that an insured must be totally reimbursed for all losses as well as costs, including attorney fees, involved in recovering those losses before the insurer can exercise any right of subrogation regardless of any contract language providing to the contrary?
3. Does a provision in an insurance policy issued in Colorado, stating that Colorado law governs the insurer's subrogation rights for PIP benefits, violate Montana's public policy if Colorado law allows subrogation regardless of whether the insured has been made whole and fully compensated, including attorney fees and costs?

MTLA's amicus committee petitioned the court for permission to file an amicus brief which I later wrote. The court has scheduled oral argument en banc for November 1, 2001. Since the subrogation issues certified by Judge Erickson are so fundamental and important, the amicus brief in *Swanson v. Hartford Ins. Co. of the Midwest*<sup>2</sup> is incorporated as the insurance column in this issue. Additionally, because the Supreme Court has made some clear pronouncements regarding subrogation issues, the brief is prefaced with a short history of subrogation law in Montana, some of which was taken from *Securing Payment of Medical Expenses and Avoiding Subrogation*.<sup>3</sup>

### Some History on Subrogation in Montana

Subrogation arises in equity to compel the ultimate payment of a debt by one who in justice, equity, and good conscience should pay.<sup>4</sup> While those who deal in insurance law are most familiar with "conventional" subrogation, which arises under contract between the parties, "legal" subrogation can also arise by operation of law without a contract because the insurer has made a payment.<sup>5</sup> A casualty insurance policy will likely contain a variation of the standard form subrogation clause:

#### Our Right to Recover Payment

A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right. That person shall do:

1. Whatever is necessary to enable us to exercise our rights; and
2. Nothing after loss to prejudice them.

\* \* \*

B. If we make payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall:

1. Hold in trust for us the proceeds of the recovery; and
2. Reimburse us to the extent of our payment.

This language does not contemplate situations where there has been no duplicate recovery or where the wrongdoer has already been made to pay. In practice, the problem is that the insurer's subrogation can result in the insurer being made whole while its insured has only recovered a fraction of her damages.

However, in the landmark case of *Skauge v. Mountain States Tel. & Tel. Co.*,<sup>6</sup> the court held that an insurer is not entitled to exercise a right of subrogation until the insured has been made whole including expenses of litigation and attorney fees.<sup>7</sup> The court reasoned that, if a party must bear the loss, it should be the insurer, since that is the risk the insured paid the insurer to assume.<sup>8</sup> The court expressly noted that, under its ruling, the Skauges would not be unjustly enriched nor would the

tortfeasor go free from its legal obligation so that the decision honored the theory of insurance subrogation.<sup>9</sup> This rule has become known as the “Made-Whole” rule and was followed and confirmed again in 1994, in *Detienne Assoc. v. Farmers Union Mut. Ins. Co.*<sup>10</sup>

This “Made-Whole” rule has also been used in *Francetich v. State Comp. Mut. Ins. Fund*<sup>11</sup> and *Connery v. Liberty Northwest Ins. Co.*<sup>12</sup> to void insurance subrogation statutes giving workers’ compensation insurers a percentage offset against benefits payable if the injured worker pressed a claim against any third party. The court’s expressed basis for voiding those statutes that infringed the Made-Whole rule was that they violated the Full Legal Redress provision of Article II, Section 16 of the Montana Constitution.

In 1981, in *Allstate Ins. Co. v. Reitler*,<sup>13</sup> the court prohibited subrogation by auto insurers to recover amounts paid under Medical Pay coverage citing three public policy grounds. First, the insured paid a premium for the medical pay coverage. Second, the injured insured was the party most likely to suffer if the medical pay benefit had to be reimbursed out of the recovery from the tortfeasor. Third, the tortfeasor’s insurer could take the fact of the medical pay benefit received into account in settling with the claimant.<sup>14</sup> The court also held subrogation for benefits paid under Medical Pay coverage actually constituted an impermissible assignment of a personal injury chose in action, but later repudiated that ground as being incorrect in *Youngblood v. American States Ins. Co.*<sup>15</sup> The prohibition against subrogation was limited to Medical Pay benefits coverage three years later in *Farmers Ins. Exch. v. Christenson*,<sup>16</sup> when the court upheld an insurer’s right to recover through subrogation amounts paid under Uninsured Motorist Coverage. For the next 16 years following *Reitler*, it was accepted in Montana that auto insurers could not subrogate to recover benefits they paid under auto Medical Pay coverage.

In *Youngblood*,<sup>17</sup> the court sought to clarify that the *Reitler* decision on Medical Pay subrogation and the *Christenson* decision on Uninsured Motorist subrogation were not matters of assignment, but of subrogation. The court reaffirmed that insurer subrogation to secure reimbursement of medical expenses was against public policy on the three grounds cited above from *Reitler*. Importantly, the court refused the insurer’s argument that the Medical Pay subrogation clause was validated by the then-existing provision from what Montana lawyers call the “anti-stacking” statute which then provided:

A motor vehicle liability policy may also provide for other reasonable limitations, exclusions, or reduction of coverage which are designed to prevent duplicate payments for the same element of loss.<sup>18</sup>

The court was not convinced that the provision covered subrogation as a limitation, exclusion, or reduction and said that the legislature could have easily included it. In response, the legislature amended the clause in 1997 adding subrogation into it, so that it reads as follows:

A motor vehicle liability policy may also provide for other reasonable limitations, exclusions, reductions of coverage, or subrogation clauses that are designed to prevent duplicate payments for the same element of loss under the motor vehicle liability policy or under another casualty policy that provides coverage for an injury that necessitates damages or benefit payments or to prevent the adding together of insurance coverage limits in one policy or from more than one policy issued by the same company.<sup>19</sup>

After the statute was amended, insurers immediately asserted their right to press subrogation claims to recover benefits extended under automobile Medical Pay coverage. Apparently, some even assert that this amendment in some way overturned the *Skauge* and *Detienne* rule that the insurer may only subrogate after the insured is made whole including attorney fees and costs.

Finally, the insurer in Montana may not be subrogated against its own insured. Hence, State Farm cannot pay medical expenses under Medical Pay coverage to one insured party in an auto accident and then subrogate against their own insured tortfeasor. In *Home Ins. Co. v. Pinski Bros., Inc.*,<sup>20</sup> the court did not allow Home, which had paid a large loss to Montana Deaconess Hospital at Great Falls, to subrogate against the architects blamed for the hospital’s loss, since they were also insured by Home. In *Continental Ins. Co. v. Bottomly*,<sup>21</sup> the court blocked subrogation against the insured’s brother who was blamed for burning down the insured’s cabin where he was a guest. The court did so on the ground that the guest is in the same shoes as the insured. Also, the insurer may not recover from an “additional insured” in subrogation.<sup>22</sup>

## **The Brief Against Subrogation**

With that statement of history, here is the brief submitted by the amicus committee of the MTLA:

### **I. SUBROGATION BY THE INSURER TO RECOVER MEDICAL PAYMENTS ADVANCED TO ITS INSURED, AND LATER PAID BY THE TORTFEASOR, IS VOID IN MONTANA AS AGAINST PUBLIC POLICY.**

**A. The 1997 “subrogation amendment” to the statute, MCA § 33-23-203, did not authorize clauses for subrogation to recover medical payments advanced to an insured and later paid by a third-party tortfeasor.**

The Federal Court first asks this court whether subrogation for Medical Pay coverage is void in Montana as against public policy. This court so held in *Allstate Insurance Co. v. Reitler*.<sup>23</sup> At issue is the legal import of the “subrogation” amendment to MCA § 33-23-203(2) by Chapter 263, Laws Mont. 1997. In essence, the legislature added certain subrogation clauses to that statute’s list of provisions allowed in liability policies to limit or reduce coverage. The amended provision is now being misread and misconstrued by Hartford Insurance Company of the Midwest to include a broader range of subrogation clauses than its language allows.

In pertinent part, the statute reads as follows:

(2) A motor vehicle liability policy may also provide for other reasonable limitations, exclusions, reductions of coverage, or subrogation clauses that are designed to prevent duplicate payments for the same element of loss under the motor vehicle liability policy or under another casualty policy that provides coverage for an injury that necessitates damages or benefit payments. . .

Plain reading of this unambiguous provision shows that it approves subrogation clauses only in narrow confines: First, a subrogation clause must “prevent duplicate payments for the same element of loss.” The principle overarching each limitation, exclusion, reduction or subrogation clause approved by the statute is that it must be designed to apply where the insured seeks to recover duplicate payments for the same element of damages. If the subrogation clause is not designed to do so, it is not authorized.

Second, and more importantly, the statute’s application to prevent duplicate payments must be “for the same element of loss *under the motor vehicle liability policy...*” (emphasis added), and, because auto policies are not the only liability policies, the statute continues, “*or under another casualty policy that provides coverage*” [i.e., a homeowners policy or a CGL policy]. The phrase “under the motor vehicle liability policy” refers to a certain single policy and is defined by reference to the companion statute, MCA § 33-23-204(2):

“Motor vehicle liability policy” means a policy of automobile or motor vehicle insurance against liability required under Title 61, chapter 6, parts 1 and 3, and all additional coverages included in or added to the policy by rider, endorsement, or otherwise, whether or not required under Title 61, including, without limitation, uninsured, underinsured, and medical payment coverages.

Hence, MCA § 33-23-203(2) on its face only applies to “the motor vehicle liability policy,” its endorsements and riders and only authorizes clauses designed to prevent duplicate payments under that same policy. It does not apply to prevent duplicate recovery under different policies.

The statute, when read plainly, serves a reasonable purpose, authorizing types of clauses designed to prevent an insured from recovering the same element of damages under different coverages on the same policy. Consider, for example, the auto passenger injured by joint negligence of his driver and an uninsured motorist. The statute approves provisions designed to prevent such an insured from recovering the same medical expenses under the Medical Pay coverage in the car in which she rode, then under the Bodily Injury Coverage on that same car, and again under the Uninsured Motorist Coverage on that car. However, the statute on its face does not approve clauses for use where there will be no duplicate payment for the same element of loss. Nor does it authorize clauses that allow subrogation claims by first-party Medical Pay insurer’s against third-party tortfeasors.

While proponents of the “subrogation” amendment may assert that the amended statute’s plain meaning does not square with their intent, their intent is not relevant absent ambiguity. Statutory language must be interpreted according to its plain meaning. *In Re Adoption of Snyder*.<sup>24</sup> If the language is clear and unambiguous, then no further interpretation is required. *Sherner v. Conoco, Inc.*<sup>25</sup> The Supreme Court will resort to legislative history only if intent cannot be determined from the plain wording of the statute. *Stratemeyer v. Lincoln County*.<sup>26</sup>

It is clear that the amended statute does not authorize first-party Medical Pay insurer’s subrogation against third-party tortfeasors. This means the amendment did not override this court’s decision holding medical pay subrogation to be void as against public policy in *Allstate Insurance Co. v. Reitler*.<sup>27</sup> *Reitler* is still good law having never been overruled by the court and having never been overridden by legislative enactment. More importantly, the principles upon which *Reitler* was decided are sound and consistent with the modern trend to find Medical Pay subrogation void as against public policy.

**B. A subrogation clause in Medical Pay coverage should be void as against public policy in Montana and is not a “reasonable” subrogation clause allowed under MCA § 33-23-203(2).**

Analysis of whether Medical Pay subrogation in Montana is against public policy should start with review of the twin theories traditionally used to justify imposition of this equitable doctrine:<sup>28</sup> First, will the insured be unjustly enriched by virtue of recovery from both the insurer and the wrongdoer absent repayment of the insurer?

Second, in the absence of such double recovery by the insured, will the wrongdoer go free despite his liability in connection with the loss? If, in the arena of Medical Pay coverage in Montana, insureds are not making double recovery; or are, but are not being unjustly enriched; or, if the wrongdoers are not going free from their obligation; then, subrogation lacks legal foundation, and should be void as against public policy.

### **1. The insured who receives his Medical Pay benefits and recovers against a third-party tortfeasor is not making a “double recovery.”**

Analysis has revealed that in most cases, the insured will not make any “double recovery” if subrogation is denied.<sup>29</sup> Even when the insurer perceives that there is a double recovery, it is likely not the case, because of the impossibility of ascertaining the exact loss given the incalculable nature of such elements of damages as pain and suffering and emotional distress.<sup>30</sup> As the Oklahoma court said in *Aetna Casualty and Surety Co. v. State Board for Property and Casualty Rates*,<sup>31</sup> “the exact loss is never totally capable of ascertainment and therefore [t]he same reasons militating against double recovery do not obtain. The general rule, therefore, is that the insurer is not subrogated to the insured’s right or the beneficiary’s rights under contract of personal injury.” The problem is that the insurers insist it is a “double recovery” when an insured attempts to collect on a contract promise for which he has paid a premium and then recovers from the tortfeasor. Collecting on an unconditional contract promise to pay medical expenses in the event of an accident is a legal contract transaction very different from recovery of tort damages for medical expenses. As California Justice Friedman said in his concurrence in *Lee v. State Farm Mut. Ins. Co.*<sup>32</sup> in 1976:

The defendant insurance company argues that these clauses prevent double recovery. . . In a free society an individual may go out and buy and keep all the merchandise he desires. The question is not whether the policyholder is recovering from two sources but whether the insurance company is supplying the merchandise for which it exacted a premium. The double recovery argument is singularly unmoving.

The collateral source doctrine has long held that the wrongdoer should not get off the hook because of the victim’s wise investment in insurance premiums for benefits such as Medical Pay coverage. As one insurance scholar says of subrogation:<sup>33</sup>

Why, then, should the insured victim be limited to the same total recovery that a non-insured victim would receive? Some courts have recognized exactly this - that the insured is not gaining a double recovery but is simply recovering on a contract for which a premium has been paid.

Ironically, that same scholar cites with approval this court’s language in the *Reitler* decision where it said, “The allegation that the insured will make a double recovery in the absence of medical payments subrogation is not persuasive for the insured has paid for that additional coverage.”<sup>34</sup> Simply put, recovery of benefits under an indemnity contract for which the insured has paid a premium is not the same as recovery of an award for tort liability.

### **2. The insured victim who recovers Medical Pay benefits from his own policy and damages from a third-party tortfeasor is never “unjustly enriched” so as to justify subrogation, because he can’t recover his attorney fees, litigation costs, or damages compromised in settlement negotiations.**

In *Reitler*, this court pointed out:

The one injured bears the cost of suit including attorney fees and litigation expenses. Yet under a subrogation clause the insurer collects 100 percent of payments made with no corresponding obligation for expenses. Furthermore, the injured person often must compromise the personal injury claim, either because of liability problems or because of limited coverage carried by the tortfeasor. Yet under subrogation the plaintiff’s insurer makes a full recovery.

Under Montana tort law, injured victims even in clear liability cases do not recover attorney fees or the bulk of their litigation costs. Consequently, if they use the services of an attorney and expend money in fact investigation and proving of liability, causation, and damages, they are never made whole. The more difficult their task of investigation, litigation, and negotiation, the farther they will be from being made whole. The court could take judicial notice of the fact that injured insureds who use attorneys generally gain access to civil justice in Montana by paying, in addition to costs of litigation, standard contingent attorney fees of 25% for recovery by settlement, 33 1/3% for recovery on filing litigation, 40% for recovery at trial, and 50% for recovery on appeal. It is so certain that lay insureds not served by an attorney and negotiating settlement with liability insurers for third-party tortfeasors will not recover their full damages that this court could take judicial notice of that fact. The fact is that tort victims who carry Medical Pay coverage are unlikely ever to be made whole by reason of

compromising their claims in negotiating and by reason of their unrecoverable attorney fees and litigation costs. Consequently, Montana insureds are not being unjustly enriched so as to invoke the equitable doctrine of subrogation.

### **3. Insurers subrogating on Medical Pay receive a windfall.**

The insurer that is allowed to subrogate on Medical Pay coverage makes a “pure windfall.”<sup>35</sup> The insurer has calculated predicted losses for medical expense and spread those losses over the pool of similarly situated insureds in the form of premiums. The insured, who is risk averse, has agreed to pay a certain fixed loss in the form of a premium to be free from the risk of suffering a larger loss in the form of trauma-caused medical expense. When the Medical Pay insurer subrogates to recapture part of the insured’s recovery from the third party tortfeasor, two things happen: First, the insurer gets its money back, thereby bearing no loss, but keeping the premium. Second, the risk-averse insured, by losing part of his third-party recovery to the subrogating insurer, suffers the actual loss he thought he contractually transferred to the risk-neutral insurer and for which he paid the premium. A subrogation clause that allows this is not “reasonable” within the meaning of subsection (2) of MCA § 33-23-203 and should be declared void as against public policy.

### **4. Insurers in Montana who include subrogation clauses in automobile Medical Pay coverage are ultimately providing illusory coverage for a premium by inserting a clause that defeats the coverage.**

Montana’s Mandatory Liability Protection Act, MCA § 61-6-301 requires all motor vehicles operated in the state to carry minimum limits of liability coverage in conformance with the Motor Vehicle Safety Responsibility Act, MCA § 61-6-103. Therefore, every motor vehicle operated in the state must be insured for \$25,000 per person and \$50,000 per occurrence limits of Bodily Injury coverage. If an auto insurer inserts a subrogation clause in the Medical Pay policy coverage in Montana, the Medical Pay coverage becomes illusory in any case in which a third-party insured tortfeasor causes the injury.

Clauses that render the coverage illusory or defeat the coverage for which the insured has paid are void in Montana as against public policy.<sup>36</sup> An insurer may not place in an insurance policy in Montana a provision that defeats coverage for which the insurer has received valuable consideration.<sup>37</sup> In *Bennett v. State Farm*,<sup>38</sup> this court said this is true even if the coverage is not required by statute, citing a long line of Montana cases and saying: “The public policy expressed in *Braun*,<sup>39</sup> and in the earlier cases cited above favors adequate compensation for accident victims.” The absence of a statutory requirement is irrelevant, for the public policy considerations that invalidate provisions that defeat mandatory coverages also support invalidating those provisions in a non-mandatory coverage.<sup>40</sup>

### **5. If the court enforces Medical Pay subrogation clauses, it will encourage and enable insurers to avoid paying promised benefits under Medical Pay coverage.**

The insured who buys Medical Pay coverage buys the insurer’s unconditional no-fault promise to pay the insured’s medical expenses if she is injured in an accident. The insured has paid a premium to assure that her auto or premises policy will protect her from medical expenses, even if she is injured through her own negligence. The only condition is presentation of proof of injury and the resulting medical bills. There is no condition that Medical Pay coverage exists only where there is no liable third party.

Nevertheless, insurers treat Medical Pay coverage as though such a precondition exists, advising their insureds that, because their case involves a third-party tortfeasor, they must tender their medical bills to the third party’s carrier instead of their own. This perspective can be seen in the insurers’ testimony as reflected in the Legislative History of Chapter 263 (the “subrogation” amendment) in the 1997 Montana Legislature. The testimony occurred before the court’s decision in *Ridley v. Guaranty National Ins. Co.*<sup>41</sup> required advance payment of medical expense by insurance carriers for third-party tortfeasors. In fact, at that time it was still common practice for the tortfeasor’s insurance carrier to refuse advance payment of medical expenses pending final settlement. This was especially true if there were issues of comparative negligence or medical causation. Consequently, the most effective way of insuring timely payment of medical expenses before *Ridley* was for the injured to turn them in to her own auto carrier. Nevertheless, at the hearing on the subrogation amendment, the insurers complained bitterly about tortfeasors’ insurers recommending that the injured victim turn the medical bills into his or her own carrier for payment under the Medical Pay coverage.

If this court puts its imprimatur on Medical Pay subrogation clauses, it is dead certain that first-party Medical Pay insurers will tell their own insureds that there is no point in seeking payment under Medical Pay coverage, because the carrier is entitled to get the benefits back from the insured when the insured recovers from the third parties. In essence, subrogation will, in practice, ultimately defeat the promises contained in the Medical Pay coverage where there is a third-party tortfeasor. The medical pay carriers, rather than run the risk that an attorney will challenge their subrogation, will simply try to avoid paying the benefit to the insured in the first place.

### **6. Insurers do not include assumptions of subrogation recovery in setting premiums.**

Insurers do not consider subrogation recovery in setting premiums.<sup>42</sup> They do not factor subrogation into their actuarial rate setting, because it is too difficult to calculate subrogation recovery.<sup>43</sup> Consequently, subrogation by the insurer is not part of the financial bargain between insurer and insured, and the insured does not get a reduced premium by agreeing to subrogation clauses. Furthermore, as a segue into the next argument, insurers are indifferent to whether a jurisdiction adopts the made-whole rule, since they can always spread their risk among policyholders.<sup>44</sup> This is reflected in the fact that no part of the legislative history of the “subrogation amendment,” Chapter 263, Laws Mont. 1997, contained insurer complaints about the made-whole doctrine which had been applied in Montana for 20 years.

Because insurers do not factor subrogation into the premiums paid by their insureds, their argument that denying them the benefit of their subrogation clauses would have to mean higher premiums for the insured is not credible. Nor is it likely that the insureds have any appreciation for the meaning of the subrogation clauses when they pay their premium.

## **7. Wrongdoers are not going free in Montana.**

Hartford Insurance Company of the Midwest makes no case or allegations that wrongdoers are going free of their tort obligations when the injured has Medical Pay coverage and subrogation is not allowed. In fact, it appears that the crux of the problem is that the wrongdoing tortfeasor’s insurer is being exhausted by claims from the injured insured and the insured’s Medical Pay covers insurer.

Hence, the theories that support subrogation are not present in Montana when insureds recover medical pay benefits and then claim against a tortfeasor. There is no double recovery, no unjust enrichment, and the tortfeasors are not being freed from their obligations. The equitable remedy of subrogation should not apply, in this circumstance, and the court should not enforce subrogation provisions on Medical Pay coverage.

## **II. IT IS THE PUBLIC POLICY IN MONTANA THAT AN INSURED MUST BE TOTALLY REIMBURSED FOR ALL LOSSES AS WELL AS COSTS, INCLUDING ATTORNEY FEES, INVOLVED IN RECOVERING THOSE LOSSES BEFORE THE INSURER CAN EXERCISE ANY RIGHT OF SUBROGATION REGARDLESS OF ANY CONTRACT LANGUAGE PROVIDING TO THE CONTRARY.**

*Should concepts of public policy militate against allowing an insurer to recover its payments and retain any premiums the insured had paid, while the insured is not made whole?* Keith E. Edeus, Jr.<sup>45</sup>

### **The “Made-Whole” doctrine is public policy in Montana and completely consistent with MCA § 33-23-203(2).**

The Federal Court in its second certified question asks whether the “made-whole” doctrine is public policy in Montana regardless of policy language to the contrary. Under Montana law, this question presents no legal issue. This court, in *Skauge v. Mountain States Telephone & Telegraph Co.*,<sup>46</sup> in 1977, and *DeTienne Associates Limited Partnership v. Farmers Union Mutual Insurance Co.*,<sup>47</sup> in 1994, established the made-whole doctrine in the state. The “subrogation amendment” to MCA § 33-23-203 (2) did not change the result in those cases and is consistent with the made-whole doctrine. The provision, amended in 1997, approved subrogation clauses “designed to prevent duplicate payments for the same element of loss” under a motor vehicle policy or another type of casualty policy. Nothing in *Skauge* or *DeTienne* conflicts with any expressed legislative policy against duplicate payment for the same element of loss. Review of the legislative history behind Chapter 263, Laws Mont. 1997 reveals multiple complaints about perceived duplicate payments for the same element of loss and no complaints regarding the impact of the made-whole doctrine which had been a part of subrogation law in Montana for the 20 years from this court’s decision in *Skauge* in 1977 to the amendment in 1997. Nothing in the legislative history evidences any intent to change the legal fact that, in Montana, any contractual right of subrogation is subject to the made-whole doctrine. The court’s statement of public policy and the legislature’s could be considered complements: An insured should not receive duplicate payments under the same policy for the same element of loss, and the insurer has no right of subrogation until the insured has recovered compensation for each separate element of loss including attorney fees and litigation costs.

Not surprisingly, the courts in 25 states have now adopted the made-whole doctrine in subrogation.<sup>48</sup> The fact that the Hartford auto policy in this case contained a subrogation clause that purported to abrogate the made-whole doctrine is irrelevant. In both *Skauge* and *DeTienne*, the policies contained clauses purporting to give the insurers full rights of subrogation and not mentioning any allowance for the insured’s remaining unpaid elements of loss, attorney fees or costs. In *Reitler*, the subrogation clause provided that “Allstate shall be subrogated to the extent of such payment to all of the insured’s rights or recovery therefore.”<sup>49</sup> The policy in *DeTienne* provided that “the Company shall be subrogated to all the insured’s rights of recovery against any third person or organization...”<sup>50</sup> Nevertheless, the court made the clauses in each case subject to the made-whole doctrine and gave no indication that its ruling was premised on any missing provision in the policy.

The made-whole doctrine is common law that limits the right of subrogation in Montana and, in essence, says that the insured will be made whole first when the fund to compensate insured and subrogating insurer is inadequate. The concept that the insurer can simply draft the contract policy to avoid the made-whole principle of law in Montana would result in a court ruling that the drafted provision is void as against public policy. The right to contract in insurance is not inviolate, and the court invalidates provisions that violate public policy.<sup>51</sup>

The made-whole doctrine governs recovery by the insurer only where the recovery from the tortfeasor will be inadequate to make the insured whole. Failure to recognize the made-whole doctrine in such cases means the medical pay insured loses the benefit “of his thrift and foresight” in buying the coverage.<sup>52</sup> He actually comes out worse than an uninsured who is fully compensated by the tortfeasor, since he effectively realizes no benefit from the Medical Pay coverage and had to pay premiums.<sup>53</sup>

### **III. A PROVISION IN AN INSURANCE POLICY ISSUED IN COLORADO, STATING THAT COLORADO LAW GOVERNS THE INSURER’S SUBROGATION RIGHTS FOR PIP BENEFITS, VIOLATES MONTANA’S PUBLIC POLICY IF COLORADO LAW ALLOWS SUBROGATION REGARDLESS OF WHETHER THE INSURED HAS BEEN MADE WHOLE AND FULLY COMPENSATED, INCLUDING ATTORNEY FEES AND COSTS.**

The Federal Court in this case is faced with insureds who suffered an auto accident and injury in Montana while covered under a Colorado auto insurance policy. The policy provided Personal Injury Protection, “PIP” and provided for subrogation of Medical Pay coverage. In each of those pertinent respects, the facts are on all fours with those in this court’s decision in *Youngblood v. American States Ins. Co.*, 262 Mont. 391, 866 P.2d 203 (1992). If this court finds on the first certified issue that a Medical Pay subrogation clause is void as against public policy, then *Youngblood* controls as explained in the brief of the insureds, Swansons, and the provision in the Colorado policy should be stricken as void against public policy in Montana. *Youngblood* is still good law, and its premises sound. If this court finds that the Hartford policy’s failure to honor the made-whole doctrine violates public policy in Montana, applying *Youngblood*, the Colorado provision should be declared void as against public policy and the made-whole doctrine should be applied to the subrogation provision.

### **CONCLUSION**

MCA § 33-23-203, as amended does not allow subrogation to recover medical payments advanced to an insured and later paid by a third-party tortfeasor. Nor does the amendment alter Reitler’s holding that such subrogation is void as against public policy. However, even if it did, it only allows “reasonable” subrogation clauses, and this court should find medical pay subrogation unreasonable.

In any event, the made-whole doctrine is public policy in Montana, and a Colorado insurance provision that provides for full subrogation for the insurer in derogation of the made-whole doctrine should be declared invalid as against public policy.

1. *Swanson v. Hartford Ins. Co. of the Midwest*, No. 01-198 (D. Mont. Mar. 19, 2001).
2. Amicus brief for *Swanson v. Hartford Ins. Co. of the Midwest*, No. 01-198 (Mont. filed Aug. 9, 2001).
3. Gregory S. Munro, *Securing Insurance Coverage of Medical Expense and Avoiding Subrogation*, Montana Trial Trends, Spring 2000, at 43.
4. *Skauge v. Mountain States Tel. & Tel. Co.*, 565 P.2d 628, 630 (Mont. 1977); *Youngblood v. American States Ins. Co.*, 866 P.2d 203, 205 (Mont. 1993).
5. *Skauge*, 565 P.2d at 629; *Youngblood*, 866 P.2d at 205.
6. 565 P.2d 628 (Mont. 1977).
7. *Id.* at 632.
8. *Id.*
9. *Id.*
10. 879 P.2d 704 (Mont. 1994).
11. 827 P.2d 1279 (Mont. 1998).
12. 960 P.2d 288 (Mont. 1998).
13. 628 P.2d 667 (Mont. 1981).
14. *Id.* at 670.
15. 866 P.2d at 207.
16. 683 P.2d 1319, 1322 (Mont. 1984).
17. 866 P.2d at 207.
18. MCA § 33-23-203(2) (1995).
19. *Id.*(quote reflects amendment by Ch. 263 L. 1997 and by Ch. 495, L. 1997).
20. 500 P.2d 945 (Mont. 1972).
21. 760 P.2d 73 (Mont. 1991).
22. *Truck Ins. Exch. v. Transport Indem. Co.*, 591 P.2d 188 (Mont. 1979).
23. 628 P.2d 667 (Mont.1981).
24. 996 P.2d 875 (Mont. 2000).
25. 995 P.2d 990 (Mont. 2000).

26. 915 P.2d 175 (Mont. 1996).
27. 628 P.2d 667 (Mont. 1981).
28. **Skauge v. Mountain States Tel. & Tel. Co.**, 565 P.2d 628 (Mont. 1977).
29. Roger M. Baron, *Subrogation on Medical Expense Claims: The "Double Recovery" Myth and the Feasibility of Anti-Subrogation Laws*, 96 Dick L. Rev. 581, 589 (1992).
30. **Aetna Casualty and Surety Co. v. State Bd. for Property and Casualty Rates**, 637 P.2d 1251 (Okla. 1981).
31. *Id.* at 1255.
32. 129 Cal. Rptr. 271 (Cal. Ct. App.).
33. Roger M. Baron, *Subrogation: A Pandoras Box Awaiting Closure*, 41 S. Dak. L. Rev. 241, 242 (1996).
34. **Reitler**, 628 P.2d at 669.
35. Baron, above, 41 S. Dak. L. Rev. at 243 (1996).
36. **Bennett v. State Farm Mut. Auto. Ins. Co.**, 862 P.2d 1146 (Mont. 1993).
37. *Id.*
38. *Id.*, 862 P.2d at 1148.
39. **State Farm Mutual Automobile Insurance Co. v. Estate of Braun**, 793 P.2d 253 (Mont. 1990).
40. *Id.*
41. 951 P.2d 987 (Mont. 1997).
42. Keith E. Edeus, Jr., Comment: *Subrogation of Personal Injury Claims: Toward Ending an Inequitable Practice*, 17 N. Ill. U. L. Rev. 509, 515 (1997); citing **Hospital Service Corp. v. Pennsylvania Ins. Co.**, 227 A.2d 105, 110 (R.I. 1967).
43. **Maynard v. State Farm Mutual Auto. Ins. Co.**, 902 P.2d 1328, 1333-34 (Alaska 1995); **Allstate Insurance Co. v. Druke**, 576 P.2d 489, 490 (Dist. Ct. App. 1966); **Cooper v. Argonaut Insurance Companies**, 556 P.2d 525, 527 (Alaska 1976).
44. Jeffrey Greenblatt, Comment: *Insurance and Subrogation: When the Pie Isn't Big Enough Who Eats Last?*, 64 U. Chi. L. Rev. 1337 (1997).
45. Edeus, above, 17 N. Ill. L. Rev. at 510.
46. 565 P.2d 628.
47. 879 P.2d 704.
48. Elaine M. Rinaldi, *Apportionment of Recovery Between Insured and Insurer in a Subrogation Case*, 29 Tort & Ins. L.J. 803, 807 (1994) (listing 25 states, case names and cites).
49. **Reitler**, 628 P.2d at 668.
50. **DeTienne**, 879 P.2d at 707.
51. See, for example, **Iowa Mutual Ins. Co. v. Davis**, 752 P.2d 166 (Mont. 1988); **McGlynn v. Safeco Ins. Co.**, 701 P.2d 735 (Mont. 1985); and **Ruckdaschel v. State Farm**, 948 P.2d 700 (Mont. 1997).
52. **Allstate Insurance Co. v. Druke**, 576 P.2d 489, 491 (Ariz. 1978).
53. Edeus, above, 17 N. Ill. L. Rev. at 515, citing **Druke**.