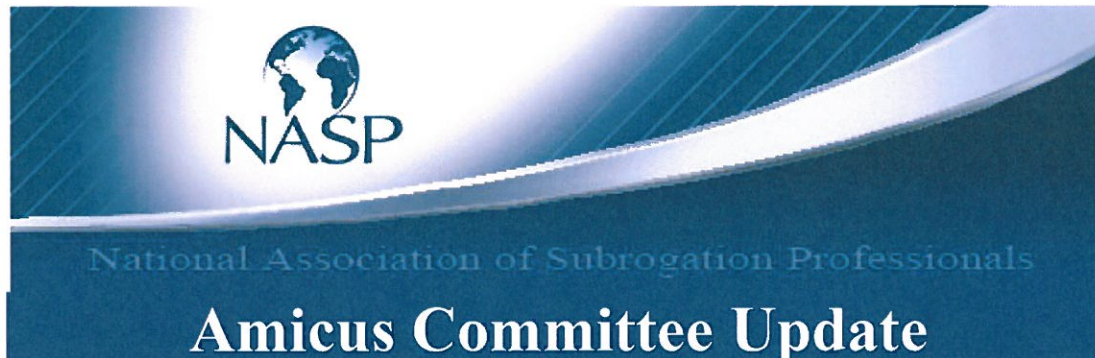


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Subject: NASP Amicus Committee Update - Pennsylvania



PENNSYLVANIA SUPREME COURT HOLDS MADE WHOLE DOCTRINE INAPPLICABLE TO COLLISION DEDUCTIBLES

Affirming dismissal of a class action lawsuit, the Pennsylvania Supreme Court recently upheld the practice of reimbursing collision deductibles from subrogation recovery on a *pro rata* basis, as authorized by state insurance regulations. *Jones v. Nationwide Property and Casualty Ins. Co.*, --- A.3d ---, 2011 WL 6379955 (December 21, 2011).

In 2005, Brenda Jones was in a car accident. Her insurer, Nationwide, paid for the damage to her car pursuant to her collision insurance, less a \$500 deductible. Nationwide then pursued subrogation against the other driver. A state insurance regulation (31 Pa. Code § 146.8(c)) requires that an insured's deductible be included, upon request, in any subrogation demand and that any recovery be shared on a *pro rata* basis with the insured. Nationwide ultimately recovered 90% of its claim and reimbursed Ms. Jones 90% of her deductible. Ms. Jones sued Nationwide, asserting that the made whole doctrine bars subrogation recovery unless and until her entire deductible was refunded.

The Pennsylvania Supreme Court disagreed. First, the Court found that the equitable principles underlying the made whole doctrine – such as avoiding double recovery and prioritizing an insured's recovery in cases of limited funds – were not implicated in the case. Second, the Court found that Pennsylvania's Motor Vehicle Financial Responsibility Law (MVFRL) sets forth a clear legislative policy regarding deductibles. The MVFRL not only requires that collision premiums be based on the amount of the deductible but also expressly forbids issuing collision policies without deductibles. To require that the deductible be reimbursed prior to pursuing subrogation would essentially create a no-deductible policy in violation of

the MVFRL.

The Court also distinguished collision policies (with no set policy limits and premiums based on the insured accepting first dollar liability) from other first-party insurance (where an insurer accepts the risk of the first dollar of coverage up to policy limits). Applying the made whole doctrine to collision deductibles would force the insurer essentially to cover the risk of the first-dollar damage – the deductible – when the insured has not paid premiums to cover that risk.

The concurring opinion declined to address the made whole doctrine at all, since the practice of *pro rata* reimbursement is specifically allowed by law.

The Jones decision soundly establishes that subrogation professionals should continue to refund Pennsylvania collision deductibles on a *pro rata* basis. Although the language of the decision could be read to apply to any first-party coverage with a deductible, because the regulation that provides a basis for the practice only applies to automobile insurance, subrogation professionals with claims in Pennsylvania should review their case with legal counsel before attempting to pro-rate deductibles on other types of policies.

A PENNSYLVANIA APPELLATE (SUPERIOR) COURT SUGGESTS THAT SUBROGATION IS BARRED IN AUTOMOBILE CLAIMS

In an unpublished opinion, a Pennsylvania appellate court (Superior Court) recently held that section 1722 of the State's Motor Vehicle Financial Responsibility Law ("MVFRL") provides a complete defense to claims seeking to recover first party benefits paid by insurers. *State Farm Mut. Auto. Ins. Co. v. Christian Soxman*, No. 2659 EDA 2010 (Pa. Super. Ct. Nov. 15, 2011). While the statute is clearly intended to prevent an insured's double recovery, the Court noted that because a subrogating insurer is subject to all defenses that can be raised against the insured, section 1722 provides a complete defense to a subrogation claim arising from the use of a motor vehicle.

Relying on case law interpreting section 1722, the legislative purpose of the statute, and common sense, the dissenting opinion points out the absurdity of extinguishing subrogation in motor vehicle cases, and would be a good resource for subrogation professionals encountering this defense.

Kammy Poff, Amicus Chair

Joseph Willis, Legislative Affairs Chair

And special thanks to Todd Harshman, an attorney with Grotefeld Hoffmann Schleiter Gordon & Ochoa in their San Francisco office for writing the above summaries. Todd has agreed to assist the Amicus Committee with further written reports on Amicus events.

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