

Douglas S. Roberts (0023353)
Clark, Perdue, Roberts & Scott
471 East Broad St., Suite 1400
Columbus, Ohio 43215
(614) 469-1400
(614) 469-0900 (fax)
email: dsr@cprslaw.com
Attorney for Amicus Curiae Ohio
Academy of Trial Lawyers

Robert L. Washburn (0012004)
Rory P. Callahan (0072021)
Cloppert, Latanick, Sauter &
Washburn
225 East Broad St.
Columbus, Ohio 43215
(614) 461-4455
(614) 461-0072 (fax)
Attorneys for Amicus Curiae Ohio
Education Association

TABLE OF CONTENTS

	Page #
Table of Authorities.....	iv
Issue Presented for Review.....	1
Interest of the <i>Amicus Curiae</i>	1
Statement of the Case and Facts.....	2
Legal Argument.....	2
<u>Proposition of Law</u>	2
A subrogation and reimbursement clause which gives an insurer or health plan claim priority over the insured’s claim against a third party or other insurer is enforceable regardless of whether the insured has received full compensation.....	2
A. In Ohio, the equitable doctrine of made whole only applies in the absence of a contractual subrogation provision	2
B. An Overview of Made Whole.....	7
C. Public Policy Supports Enforcing Written Terms of a Health Plan Without Consideration of Made Whole.....	11
Conclusion.....	18
Certificate of Service.....	19
Appendix.....	20

TABLE OF AUTHORITIES

<u>Cases</u>	Page #
<u>Aetna Life Insurance Co. v. Martinez</u> (1982), 7 Ohio App.3d 178, 454 N.E. 2d 1338.....	17
<u>Alexander v. Buckey Pipe Line Co.</u> (1978) 53 Ohio St. 2d 241, 374 N.E. 2d 146.....	12
<u>Berrios v. State Farm Insurance Co.</u> (2002), 98 Ohio St. 3d 109, 781 N.E. 2d 149.....	6, 10, 13
<u>Blue Cross Blue Shield Mutual of Ohio v. Hrenko</u> (1995) 72 Ohio St. 3d 120, 647 N.E.2d 1358.....	4 – 6, 13, 17
<u>Blue Cross and Blue Shield of Florida v. Matthews</u> (Fla. 1986), 498 So.2d 421.....	8
<u>Bunting Bearings Corp. v. Miller</u> (N.D. Ohio 2001), 139 F. Supp. 2d 858.....	16
<u>Central Res. Life Ins. Co. v. Hartzell</u> (Nov. 30, 1995), Tuscarawas App. No. 94AP120094, 1995 Ohio App. LEXIS, 6027.....	4-5
<u>Duncan v. Integon General Insurance Co.</u> (Ga. 1997), 482 S.E. 2d 325.....	8
<u>Erie Insurance Co. v. George</u> (Ind. 1997), 681 N.E. 2d 183.....	8
<u>Ervin v. Garner</u> (1971), 25 Ohio St. 2d 231; 267 N.E.2d 769.....	3 – 6
<u>Esparza v. Scott and White Health Plan</u> (Ct. App, Tx. 1995), 909 S.W. 2d 548....	9
<u>Ex Parte State Farm Fire and Casualty Co. v. Hannig</u> (Ala. 2000), 764 So.2d 543, 546.....	8
<u>Florida Farm Bureau Inc. Co. v. Martin</u> (Fla. App. 1979), 377 So.2d 827.....	8
<u>Franklin v. Healthsource of Arkansas</u> (Ark. 1997), 942 S.W.2d 837.....	10
<u>Geraldine Simmons Collins v. Blue Cross & Blue Shield of Virginia</u> (Va. 1973), 193 S.E.2d 782.....	9
<u>Grine v. Payne</u> (Mar. 23, 2001), Wood App. No. WD-00-044, 2001.....	5

<u>Hamilton Ins. Serv. Inc. v Nationwide Ins. Cos.</u> (1999) 86 Ohio St. 3d 270, 714 N.E. 2d 898.....	12
<u>Hardware Dealers Mutual Fire Ins. Co. v. Ross</u> (Ill. 1970), 262 N.E.2d 618.....	8
<u>Hare v. State of Mississippi</u> (Miss. 1999), 733 So.2d 277.....	10
<u>Health Cost Controls Inc. v. Gifford</u> (Tenn. 2003), 108 S.W.3d 227.....	10
<u>Hershey v. Physicians Health Plan of Minn., Inc.</u> (Minn. App 1993), 498 N.W.2d 519.....	8
<u>Hill v. State Farm Mut. Auto Ins. Co.</u> (Utah 1988), 765 P.2d 864.....	9
<u>Holeton, et al. v. Crouse Cartage Co., et al.</u> (2001) 92 Ohio St. 3d 115, 748 N.E. 2d 1118.....	12, 15
<u>James v. Michigan Mutual Insurance Co.</u> (1985), 18 Ohio St. 3d 386, 481 N.E. 2d 272.....	6, 10
<u>Julson v. Federated Mutual Ins. Co.</u> (S.D. 1997), 562 N.W.2d 117.....	8
<u>Kittle v. Icard</u> (W.Va 1991), 405 S.E.2d 456.....	9
<u>Kral v. American Hardware Mutual Ins.,</u> (Colo. 1989) 784 P.2d 759.....	9
<u>Lombardi v. Merchant Mutual Insurance Co.</u> (R.I. 1981), 429 A. 2d 1290.....	9
<u>Ludwig v. Farm Bureau Mutual Insurance Co.</u> (Iowa 1986), 393 N.W.2d 143.....	8
<u>Marquez v. Prudential Property Casualty Ins. Co.</u> (Colo. 1980), 620 P.2d 29.....	9, 10
<u>Medica Inc. v. Atlantic Mutual Ins. Co.</u> (Minn. 1997), 566 N.W.2d 74.....	8
<u>Morin v. Massachusetts Blue Cross, Inc.</u> (Mass. 1974), 3411 N.E.2d 914.....	8
<u>Newcomb v. Cincinnati Ins. Co.</u> (1872) 22 Ohio St. 382.....	2 - 4
<u>Peterson v. Ohio Farmers Ins. Co.</u> (1963) 175 Ohio St. 34, 191 N.E. 2d 157.....	3, 4, 6
<u>Ploen v. Union Insurance Co.</u> (Neb. 1998), 573 N.W. 2d 436.....	8
<u>Porter v. McPherson</u> (W.Va 1996), 479 S.E.2d 668.....	9
<u>Porter v. Tabern</u> (Sept. 17, 1999), Champaign App. No. 98-CA-26 1999 Ohio App. LEXIS 4289.....	5

<u>Providence Washington Ins. Co. v. Hogges</u> (N.J. 1961), 171 A. 2d 120.....	8
<u>Ridge Tool Co. v. Silva</u> (1986), 33 Ohio App.3d 260, 515 N.E.2d 945.....	17
<u>Ruckel v. Gassner</u> (Wis. 2002), 646 N.W. 2d 11.....	10
<u>Samura v. Kaiser Foundations Health Plan</u> (Ca. Ct. of App, 1993), 17 Cal. App.4th 1284.....	8
<u>Smith v Travelers Ins. Co.</u> (1977) 50 Ohio St. 2d 43, 362 N.E. 2d 264.....	12
<u>Stancil v. Erie Ins. Co.</u> (Md. Ct. of Special App, 1999), 740 A.2d 46.....	8, 11
<u>Stephens v Emanhiser</u> (Aug 24, 1999), Seneca App No. 13-99-03.....	5, 17
<u>Swanson v. Hartford Insurance Co.</u> (Mont. 2002), 46 P. 3d 584.....	10
<u>The Automobile Insurance Company of Hartford v. Conlon</u> (Conn. 1966), 216 A.2d 828.....	8
<u>Thiringer v. American Motors Insurance Co.</u> (Wash 1978), 588 P.2d 191.....	9
<u>Travelers Indemnity Co. v. Ingebretsen</u> (Ca. Ct. App. 1974), 38 Cal. App. 3d 458.....	8
<u>Unified School District No. 259 v. Sloan</u> (Kan. 1994), 871 P.2d 861.....	8
<u>Wescott v. Allstate Insurance Co.</u> (Maine 1979), 397 A.2d 156.....	9
<u>Westendorf v. Stasson</u> (Minn. 1983), 330 N.W. 2d 699.....	8
<u>Westfield Insurance Co. v. Galatis, et al.</u> (2003) 100 Ohio St. 3d 216, 219, 797 N.E. 2d 1256.....	12
<u>Williams & Miller Gin. Co. v. Baker Cotton Oil Co.</u> (Ok. 1925), 235 P. 185.....	8
<u>Wine v. Globe American Casualty Co.</u> (Ky. 1996), 917 S.W. 2d 558.....	8
<u>York v. Sevier County Ambulance Authority</u> (Tenn. 1999), 8 S.W.3d 616.....	10
<u>Constitutional Provisions</u>	Page #
Section 10, Clause I, Article I, <i>United States Constitution</i>	11
Section 28, Article II, Ohio Constitution.....	11

<u>Treatises</u>	Page #
Appleman Insurance Law and Practice.....	7
Couch on Insurance 3d.....	7 - 10
Holmes' Appleman on Insurance 2d.....	7

<u>Law Reviews</u>	Page #
Greenblatt, Jeffrey. <u>Insurance and Subrogation: Where the Pie Isn't Big Enough, Who Eats Last?</u> 64 U. Chi. L. Rev. 1337, 1355 (1997).....	14 - 15
Sutton, Jr., Harry and Sorbo, Allen J. <u>Actuarial Issues in the Fee-For-Service/Prepaid Medical Group</u> 46 Center for Research in Ambulatory Healthcare Admin 2d ed. 1993.....	14
Sykes, Allen O. <u>Subrogation and Insolvency</u> vol. XXX Journal of Legal Studies 383 (2001).....	15

ISSUE PRESENTED FOR REVIEW

“Is a subrogation and reimbursement clause which attempts to give an insurer claim priority over the insured’s claim against a third party or other insurer, regardless of whether the insured has received full compensation for her injuries, against public policy and unenforceable?”

I.INTEREST OF AMICUS CURIAE

This brief is being filed on behalf of Kaiser Foundation Health Plan of Ohio (“Kaiser”), Golden Rule Insurance Co. (“Golden Rule”), Medical Mutual of Ohio (“MMO”), QualChoice Health Plan, Inc. (“QC”), US Humana Health Plan of Ohio, Inc. (“Humana”) and the National Association of Subrogation Professionals (“NASP”). Amici Kaiser, Golden Rule, MMO, QC and Humana are administrators of health benefits plans for thousands of Ohio citizens. These amici have a substantial interest in stabilizing the cost of health coverage and lowering the cost of premiums for their members.

NASP is a non-profit trade association of insurance subrogation personnel, attorneys practicing in the subrogation area and vendors serving in the subrogation field. There are over sixteen-hundred (1,600) members of NASP nationwide who regularly file, settle, and take to trial subrogation claims.

The above parties, by the filing of this brief, seek to join Appellee in urging affirmance of the appellate Court’s decision. This decision is in conformance with Ohio precedent and policy which guarantees the freedom to contract. Additionally, public

policy considerations weigh in favor of enforcing a contract as it is written so that the intention of the parties is given effect. Such a rule will benefit the majority of persons covered under a health plan who are not injured by the tortious conduct of other parties by ensuring that there are funds available to pay their claims when needed. This rule is superior to the alternative which could have the effect of providing injured persons with an economic windfall when they were in the best position to insure themselves against accidental injury.

II. STATEMENT OF THE CASE AND FACTS

Amici Kaiser, Golden Rule Insurance Co., MMO, QC, Humana and NASP will rely on the Statement of the Case and Facts as presented by Appellee Northern Buckeye Education Council Health Benefit Plan.

II. LEGAL ARGUMENT

PROPOSITION OF LAW NO. 1

A subrogation and reimbursement clause which gives an insurer or health plan claim priority over the insured's claim against a third party or other insurer is enforceable regardless of whether the insured has received full compensation.

A. IN OHIO, THE EQUITABLE DOCTRINE OF MADE WHOLE ONLY APPLIES IN THE ABSENCE OF A CONTRACTUAL SUBROGATION PROVISION.

As early as 1872, the Ohio Supreme Court reviewed the issue of made whole in Newcomb v. Cincinnati Ins. Co., 22 Ohio St. 382. This case involved legal/equitable

subrogation as opposed to conventional/contractual subrogation. The Newcomb court held that since the tortfeasor had only partial insurance coverage, the insured was entitled to the proceeds of the recovery to the full extent of his loss before reimbursing the insurer. Id. The crucial factors in Newcomb were that the insurer's subrogation right was not based in contract and that the insurer refused to assist its insured and participate in the cause of action against the tortfeasor. Id. Because of this, the Newcomb court balanced the equities in the favor of the insured.

In Peterson v. Ohio Farmers Insurance Co. (1963), this Court found that an insurer was entitled to reimbursement first out of the proceeds of the recovery from the wrongdoer based upon the language in the subrogation provision. 175 Ohio St. 34, 38; 191 N.E. 2d 157, 159. This Court held:

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.

Id.

Next, this Court reviewed a situation where there was a subrogation provision in the insurance policy but where the insurer did not cooperate in the insured's recovery of the proceeds from the wrongdoer in Ervin v. Garner (1971), 25 Ohio St. 2d 231; 267 N.E.2d 769. In Ervin, the insured signed a subrogation agreement that assigned all his rights against the wrongdoer to his insurer, up to the amount the insurer paid. Id. The Court upheld the subrogation agreement and gave priority to the insurer even though the proceeds were insufficient to satisfy both insurer and insured. Id. The Court reasoned,

Cases of contractual interpretation should not be decided on the basis of what is “just” or equitable. This concept is applicable even where a party has made a bad bargain, contracted away all his rights, and has been left in the position of doing the work while another may benefit from the work.

Where various written documents exist, it is the court’s duty to interpret their meaning, and reach a decision by using the usual tools of contractual interpretation (e.g., the written documents, the intent of the parties, and the acts of the parties) and not by a determination of what is fair, equitable, or just.

Id. at 239,774. (emphasis added)

Ervin also eliminated the participation requirement espoused in Newcomb and Peterson and effectively classified it as dicta. Id. The Court stated that the syllabus language in Peterson that appeared to rule that cooperation and assistance are necessary requirements for an insurer to recover, merely reflected “a judicial tendency to limit the syllabus statement to the specific facts involved, and was not intended to be a general requirement for the insurers recovery.” Id. at 237, 773.

In 1995, this Court reviewed the case of Blue Cross Blue Shield Mutual of Ohio v. Hrenko, 72 Ohio St. 3d 120, 647 N.E.2d 1358. In this matter, Robert Hrenko was injured in a motor vehicle accident with an uninsured driver. Id. Mr. Hrenko’s group health insurance carrier, Blue Cross Blue Shield Mutual of Ohio, paid his resulting medical and hospital bills. Pursuant to a subrogation provision its contract with Mr. Hrenko, Blue Cross sought reimbursement of the benefits it paid from the recovery Mr. Hrenko made from his uninsured motorist carrier, Allstate Insurance Co. Id. The Hrenko Court found that the subrogation provision clearly and unambiguously entitled Blue Cross to seek reimbursement for the medical bills it paid from Mr. Hrenko. Id.

Since Hrenko, some appellate courts incorrectly interpreted this Court’s syllabus to support their position that Ohio law changed to a “made whole” state regardless of contract language. See, Central Res. Life Ins. Co. v. Hartzell (Nov. 30, 1995),

Tuscarawas App. No. 94AP120094, 1995 Ohio App. LEXIS, 6027; Porter v. Tabern (Sept. 17, 1999), Champaign App. No. 98-CA-26, 1999 Ohio App. LEXIS 4289; Grine v. Payne (Mar. 23, 2001), Wood App. No. WD-00-044, 2001. Yet other courts have refused to take such a tortured reading of Hrenko and continued to hold that contract terms supersede the equitable right to be made whole. Stephens v Emanhiser (Aug 24, 1999), Seneca App No. 13-99-03. As such, the appellate courts were unclear as to what the syllabus of Hrenko changed, if anything, at all.

As forewarned by this Court, there is “a judicial tendency to limit the syllabus statement to the specific facts involved in the case at bar and was not intended that it set forth general rules or requirements.” Ervin at 237, 773. It is clear that this is what was done with the syllabus statement in Hrenko. However, some courts have suggested that the statement that Hrenko was fully compensated in the syllabus was meant to change over one hundred years of precedent without any discussion of this issue in the body of the decision. A close reading of the Hrenko opinion in its full context does not support such reasoning.

Hrenko focused on the issue of whether or not the reimbursement provision was unenforceable as a violation of public policy regarding statutorily mandated uninsured/underinsured motorist coverage. Id. The Court concluded that Blue Cross’ reimbursement right, which allowed them to reach their insured’s uninsured motorist recovery, did not violate public policy because, “Hrenko received the full benefit of his bargain with Allstate and Blue Cross.” Id. at 123, 360. Particularly, this Court stated,

To permit Hrenko to circumvent the subrogation clause and to receive payment for medical expenses from both his group health insurer and his uninsured motorist carrier would place Hrenko in a better position that he was in before the accident.

Id. at 123, 1360. This Court rightfully reasoned that under the subrogation clause, Blue Cross assumed Hrenko’s right to seek recovery from Allstate for the medical expenses Blue Cross had already paid. Id. Further, as Hrenko had already recovered from Allstate for the medical expenses, Blue Cross was entitled to reimbursement from Hrenko. Id.

When read in context, the Hrenko case did not change the status of insurer subrogation rights in Ohio. The Court merely determined that the insured received the “full benefit of his bargain” and recovered all that he could have recovered from his uninsured motorist carrier. The Hrenko opinion never analyzed whether or not this amount was sufficient to compensate him for his total losses. In fact, Hrenko affirmed Ohio’s enforcement of contractual subrogation espoused in Peterson and Ervin. Hrenko looked at a subrogation provision in a health insurance contract and enforced its rights to repayment from the uninsured motorist recovery.

The Ohio Supreme Court has considered limitations on this right to contract only in the context of statutorily mandated insurance coverage. Consider, James v. Michigan Mutual Insurance Co. (1985), 18 Ohio St. 3d 386, 481 N.E. 2d 272; Berrios v. State Farm Insurance Co. (2002), 98 Ohio St. 3d 109, 781 N.E. 2d 149. In both James and Berrios, this Court refused to recognize subrogation rights for the same carrier providing both uninsured/underinsured motorist benefits and medical payments coverage. This Court distinguished these cases from Hrenko as subrogation was being sought under the same policy which was providing mandated uninsured/underinsured benefits. Berrios, 98 Ohio St. 3d at 114, 781 N.E. 2d at 153. Unlike Berrios or James, the present action presents an

employer sponsored health plan seeking recovery from the money received from the tortfeasor.

Ohio case law has continually recognized the general right of enforcement of contractual subrogation without resort to made whole. Ohio has only limited such contract rights when they are used by insurers to limit or reduce coverage mandated by legislative enactment. Thus, amici urge this Court to remain steadfast in its enforcement of contractual subrogation without consideration of made whole. Ohio should again affirm that it permits parties to enter into contracts that define and determine the obligations of their relationship without fear that the contracts will later be rendered meaningless.

B. AN OVERVIEW OF MADE WHOLE

The legal treatises and a majority of other states continually adhere to the principle that made whole can be eliminated by contractual subrogation provisions. As an equitable doctrine, made whole is a gap filler only to be used in the absence of a valid contract right. The scholars in the area of insurance law all agree that make whole was to be used only in the absence of contractual language. See 16 Couch on Insurance 3d §233:134 pgs. 223-147,148; 22 Holmes' Appleman on Insurance 2d §141.2[B][1] pg 426 (copyrighted 2003); 3 Appleman Insurance Law and Practice §1675 pg. 497 (copyrighted 1967).

The made whole rule is defined as follows:

it is widely held that in the absence of contrary statutory law or valid contractual obligation to the contrary, the general rule under the doctrine of equitable subrogation is that whether an insured is entitled to receive recovery for the same loss from more than one source, e.g., the

insurer and the tortfeasor, it is only after the insured has been fully compensated for all the loss that the insurer acquire a right to subrogation.

16 Couch on Insurance 3d §233:134, pgs. 233-147,148 (emphasis added). As stated, the make whole rule is the general rule used when there is no contractual obligation between the parties. In fact, Couch states that “where the right of an insurer to subrogation is expressly provided for in the policy, its rights must be measured by, and depend solely on, the terms of such provisions.” See *Id.* §222.23 pg. 222-51. A contractual obligation overrides the general rule and controls the obligation of the parties. Thus, the make whole rule of equity by its very creation was limited to situations where no contractual rights exist.

A majority of states have recognized that made whole can be overridden by contract terms in a policy. Ohio has long been in this majority by allowing parties to contract as to the extent of subrogation. Ohio is in the company of Alabama,¹ California,² Connecticut,³ Florida,⁴ Georgia,⁵ Indiana,⁶ Illinois,⁷ Iowa,⁸ Kansas,⁹ Kentucky,¹⁰ Maryland,¹¹ Massachusetts,¹² Minnesota,¹³ Nebraska,¹⁴ New Jersey,¹⁵

¹ *Ex Parte State Farm Fire and Casualty Co. v. Hannig* (Ala. 2000), 764 So.2d 543, 546.

² *Samura v. Kaiser Foundations Health Plan* (Ca. Ct. of App, 1993), 17 Cal. App.4th 1284, 1292-1295; See Also, *Travelers Indemnity Co. v. Ingebretsen* (Ca. Ct. App. 1974), 38 Cal. App. 3d 458, 465-66.

³ *The Automobile Insurance Company of Hartford v. Conlon* (Conn. 1966), 216 A.2d 828, 829.

⁴ *Florida Farm Bureau Inc. Co. v. Martin* (Fla. App. 1979), 377 So.2d 827, 830; See Also, *Blue Cross and Blue Shield of Florida v. Matthews* (Fla. 1986), 498 So.2d 421, 422.

⁵ *Duncan v. Integon General Insurance Co.* (Ga. 1997), 482 S.E. 2d 325, 326.

⁶ *Erie Insurance Co. v. George* (Ind. 1997), 681 N.E. 2d 183, 188.

⁷ *Hardware Dealers Mutual Fire Ins. Co. v. Ross* (Ill. 1970), 262 N.E.2d 618.

⁸ *Ludwig v. Farm Bureau Mutual Insurance Co.* (Iowa 1986), 393 N.W.2d 143.

⁹ *Unified School District No. 259 v. Sloan* (Kan. 1994), 871 P.2d 861, 865.

¹⁰ *Wine v. Globe American Casualty Co.* (Ky. 1996), 917 S.W. 2d 558.

¹¹ *Stancil. v. Erie Ins. Co.* (Md. Ct. of Special App, 1999), 740 A.2d 46,49-50.

¹² *Morin v. Massachusetts Blue Cross, Inc.* (Mass. 1974), 3411 N.E.2d 914, 916.

¹³ *Westendorf v. Stasson* (Minn. 1983), 330 N.W. 2d 699, 703; See Also, *Medica Inc. v. Atlantic Mutual Ins. Co.* (Minn. 1997), 566 N.W.2d 74, 77; *Hershey v. Physicians Health Plan of Minn., Inc.* (Minn. App 1993), 498 N.W.2d 519.

¹⁴ *Ploen v. Union Insurance Co.* (Neb. 1998), 573 N.W. 2d 436, 443.

¹⁵ *Providence Washington Ins. Co. v. Hogges* (N.J. 1961), 171 A. 2d 120, 124.

Oklahoma,¹⁶ South Dakota,¹⁷ Texas,¹⁸ Utah,¹⁹ Virginia,²⁰ Washington,²¹ and West Virginia²² all of which allow contract terms to override application of the equitable doctrine. These jurisdictions favor this rule as it fosters the ability of insurance companies, employer sponsored health plans and other administrators to craft plans ensuring their fiscal solvency. Moreover, it places the burden of full insurance on an insured who is in a better position to insure himself fully for any loss he might sustain.

The treatises recognize that a subrogation clause may not in every instance be enforced without any limitation. See *Id.* §222.23. Couch acknowledges that legislation regarding uninsured/underinsured motorist coverage, no-fault coverage and worker's compensation may limit contractual rights. See §225.126 et seq. In these situations, the contractual terms will be enforced unless doing so, would undermine legislative intent.

Joining this majority view, a few states have limited the contractual rights of parties only when the contract would violate or interfere with mandated coverage under state statute. Several states such as Colorado,²³ Maine,²⁴ Rhode Island,²⁵ and West Virginia²⁶ have limited subrogation rights only when the legislature's intent would be thwarted by enforcing the terms as written. These states have employed made whole where legislatively mandated coverage would be reduced by subrogation rights such as uninsured motorist, personal injury protection (PIP) and no-fault coverage. As noted by

¹⁶ Williams & Miller Gin. Co. v. Baker Cotton Oil Co. (Ok. 1925), 235 P. 185, 187.

¹⁷ Julson v. Federated Mutual Ins. Co. (S.D. 1997), 562 N.W.2d 117, 121.

¹⁸ Esparza v. Scott and White Health Plan (Ct. App. Tx. 1995), 909 S.W. 2d 548.

¹⁹ Hill v. State Farm Mut. Auto Ins. Co. (Utah 1988), 765 P.2d 864, 866.

²⁰ Geraldine Simmons Collins v. Blue Cross & Blue Shield of Virginia (Va. 1973), 193 S.E.2d 782, 784-785.

²¹ Thiringer v. American Motors Insurance Co. (Wash 1978), 588 P.2d 191, 194.

²² Porter v. McPherson (W.Va 1996), 479 S.E.2d 668, 672.

²³ Marquez v. Prudential Property Casualty Ins. Co. (Colo. 1980), 620 P.2d 29, 32; See Also, Kral v. American Hardware Mutual Ins., (Colo. 1989) 784 P.2d 759.

²⁴ Wescott v. Allstate Insurance Co. (Maine 1979), 397 A.2d 156, 164-165.

²⁵ Lombardi v. Merchant Mutual Insurance Co. (R.I. 1981), 429 A. 2d 1290, 1293.

²⁶ Kittle v. Icard (W.Va 1991), 405 S.E.2d 456, 462.

the Colorado Supreme Court, the “Act [no-fault act] is incorporated as part of the insurance policy, and when conflict exists between the insurance policy and the statute, the latter governs. Marquez, 620 P. 2d at 33; See Also, James and Berrios, supra. Thus, contractual rights generally are voided only when necessary to ensure the intent of a state legislature under mandated coverage.

A very small minority of states prohibit parties from contracting away made whole. The states of Arkansas,²⁷ Mississippi,²⁸ Montana,²⁹ Tennessee,³⁰ and Wisconsin³¹ graft made whole onto all subrogation rights arising either in equity or contract. These courts view subrogation as purely equitable in origin and thus will not apply it until a double recovery can be shown.

This minority view fails to address that equity itself envisioned that such a rule would be overridden by a contractual provision. As the treatises have noted, made whole was to be used in the absence of contractual rights. See Couch § §233:134, pgs. 233-147,148. Made whole was not invented to supplant the rights of parties to bargain or contract. This equitable principle was never intended to prohibit an insurer and insured from agreeing to different terms. Made whole, which is an equitable defense to an equitable subrogation right (non contract right), was never meant to apply to a contractual provision in a policy of insurance or benefit plan booklet. Equity does not support the minority view of grafting made whole upon all such agreements.

²⁷ Franklin v. Healthsource of Arkansas (Ark. 1997), 942 S.W.2d 837.

²⁸ Hare v. State of Mississippi (Miss. 1999), 733 So.2d 277 (rejecting to follow Ohio law allowing contract to override as established in Hrenko).

²⁹ Swanson v. Hartford Insurance Co.(Mont. 2002), 46 P. 3d 584.

³⁰ York v. Sevier County Ambulance Authority (Tenn. 1999), 8 S.W.3d 616; See Also, Health Cost Controls Inc. v. Gifford (Tenn. 2003), 108 S.W.3d 227.

³¹ Ruckel v. Gassner (Wis. 2002), 646 N.W. 2d 11.

Also, the minority view fails to account for the ability of the parties to insure their own risks. A health plan or property insurer cannot and should not be penalized for the insured's failure to adequately insure their person or property. See Stancil, 740 A. 2d at 50. An individual can insure his person, automobiles and property as he possesses an insurable interest. In contrast, the health plan of an employer cannot purchase uninsured motorist coverage, property damage coverage, or automobile medical payments coverage for the injured party who is enrolled in their plan. The minority view would essentially create a situation where a health insurer becomes responsible for paying for pain, suffering, uninsured motorist and disability benefits. In fact, the minority approach would threaten the solvency of health plans whose ratings, premiums and decisions take into account the subrogation ability of the plan or insurer.

Ohio has long been in the majority of jurisdictions which allow the parties to contract regarding subrogation rights. This tradition has been recognized in Ohio since 1872. Further, there are no statutes evidencing the legislature's intent to advance the made whole rule into all insurance contracts. On the contrary, Ohio has always protected the Constitutional right to allow parties to contract freely. This Court should keep Ohio among the majority of states and in accordance with the legal treatises by allowing parties to an insurance policy to contract away made whole.

C. PUBLIC POLICY SUPPORTS ENFORCING WRITTEN TERMS OF A HEALTH PLAN WITHOUT CONSIDERATION OF MADE WHOLE

It is well established that an insurance policy is a contract and that the freedom to contract is protected by both the United States and Ohio Constitutions. See Clause 1,

Section 10, Article I, *United States Constitution*, and Section 28, Article II, Ohio Constitution. When interpreting a contract, the role of a court is to give effect to the intent of the parties by looking to the plain and ordinary meaning of the language in the policy unless another meaning is apparent from the contents of the policy. Westfield Insurance Co. v. Galatis, et al. (2003) 100 Ohio St. 3d 216, 219, 797 N.E. 2d 1256, 1261 citing Hamilton Ins. Serv. Inc. v Nationwide Ins. Cos. (1999) 86 Ohio St. 3d 270, 273, 714 N.E. 2d 898 and Alexander v. Buckeye Pipe Line Co. (1978) 53 Ohio St. 2d 241, 374 N.E. 2d 146, paragraph two of the syllabus. “When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties.” See Galatis, supra, at 219.

As an initial premise, Appellant correctly asserts that the purpose of tort law in Ohio is to provide compensation for those who are damaged or injured. However, it is also well established that the state has a legitimate interest in preventing double recoveries. Holeton, et al. v. Crouse Cartage Co., et al. (2001) 92 Ohio St. 3d 115, 121-22, 748 N.E. 2d 1118. Also, appellant seems to ignore the fact that a health plan who pays for medical expenses caused by the injurious act of another, does itself, suffer an injury and damages. Smith v Travelers Ins. Co. (1977) 50 Ohio St. 2d 43, 45, 362 N.E. 2d 264 (finding that an insurer who pays medical expenses on behalf of its insured becomes the real party in interest with respect to the medical expenses). The health plan is an injured party and is considered the real party in interest with respect to medical expenses. Id. Consequently, when Appellant and its amici argue that strict application of the made whole doctrine is supported by public policy considerations regarding

compensation for injured parties, they fail to account that Ohio recognizes a subrogated carrier as an injured party.

What Appellant and its amici argue under the guise of “public policy” or “public welfare” is really a misnomer. Examination of their argument reveals its purpose is to favor only personal injury plaintiffs and not all citizens of Ohio. Their arguments look only to provide compensation to the personal injury plaintiff without regard to how this affects the rest of the public and their insurance premiums.

In looking at this issue in the context of this case, this panel should keep in mind the public of Ohio as a whole. First, “public” in this instance would be all residents who are covered members of a health plan, whether it is self funded or funded through the payment of insurance premiums. In contrast, fewer residents of the “public” are personal injury plaintiffs. Affirming the past precedent and decision of the appellate court would benefit the “public” by ensuring the financial integrity of health coverage provided to residents of Ohio.

Secondly, this panel should recognize that we are dealing with health coverage as opposed to automobile insurance. The primary purpose of health coverage is not to pay for expenses caused by a third party’s tortious conduct, but rather to pay for illness or injury not caused by the fault of anyone.³² Fortunately, only a small percentage of persons covered under a health plan will suffer a serious injury caused through the tortious conduct of another. When health plan dollars come from a limited fund, the right of subrogation is important to the financial stability of those plans. What public policy of Ohio requires the health plan and its participants to bear the financial loss when the

³² This should be contrasted with uninsured/underinsured coverage which is aimed specifically at tortious injuries. Contrast Hrenko with Berrios.

contract provides otherwise? Ohio should not force health insurers to become the uninsured motorist, disability and other loss insurers for Ohio citizens who choose not to purchase sufficient insurance for their own protection.

A change in the long standing enforcement by Ohio courts of subrogation provisions in health plans would impact the premiums charged employers and their employees for such coverage. It is necessary to understand how rates are set for health plans.³³ Because the primary goal of a health plan is to spread risk amongst its various members, plans use historical evidence or actual experience data in setting the rates for a given group. Therefore, when one member of the group incurs a large loss which goes unreimbursed, the effect of the loss will be passed on to the other members of the group via higher rates and premiums.

The determination of whom should bear the risk of loss should be made by determining whom is in the best position to insure their selves against this risk. Several commentators and experts in law and economics agree that in applying optimal risk bearing rationale, the only conclusion is that the individual group member is in the best

³³ “Insurance companies can take subrogation into account in setting their rates, at least in setting health insurance rates....An insurance company sets its rates based on historical net costs. Thus, if the insurer had one hundred policyholders in the experience period, and experienced a total of \$ 20,000 in claim costs, it will set its actuarial premiums at \$ 200 per policy holder. If, on the other hand, the insurance company experienced \$ 20,000 in claim costs and received \$ 5,000 in subrogation, it will set its actuarial premiums at \$ 150 per policy holder. Thus, whether the insurer lists subrogation as a factor in its actuarial calculations is irrelevant; it is implicitly included.” See Jeffrey A. Greenblatt, Insurance and Subrogation: Where the Pie Isn’t Big Enough, Who Eats Last? 64 U. Chi. L. Rev. 1337, 1355 (1997) citing Harry L. Sutton, Jr. and Allen J. Sorbo, Actuarial Issues in the Fee-For-Service/Prepaid Medical Group 46 (Center for Research in Ambulatory Healthcare Admin 2d ed 1993) (“An adjustment to estimated total HMO expenses ... should be included to project the impact of coordination of benefits, workers' compensation, and subrogation.”) and author’s Phone Interview and Letter from Dean K. Lamb, Senior Actuary for Allstate Insurance Company, to Jeffrey A. Greenblatt, Jan 30, 1997 (“Lamb letter”) (on file with U Chi L Rev).

position to bear the risk.³⁴ This is because individual members of a health plan can insure themselves for catastrophic or fatal injury through the purchase of uninsured/underinsured motorist insurance, life insurance, and accident and disability insurance.

In fact, this occurred in the case at bar and is why Appellant received additional coverage for underinsured motorist benefits. While unfortunate to have been seriously injured, Appellant was fortunate enough that her parents had the foresight to purchase coverage with limits higher than the tortfeasor. Regrettably though, this coverage was not ample enough or this issue would not be before the Court.

On the other side of the issue, the other participants in the Northern Buckeye Education Health Plan are not in a position to purchase additional coverage for Appellant. In effect, if the plan's clear subrogation and reimbursement clause is made subject to made whole, the other participants of the plan will have been forced to provide underinsured motorist coverage for Appellant without ever intending to do so.

As stated earlier, Ohio law acts in many circumstances to prevent double recovery. See Holeton 92 Ohio St. 3d at 121-22. This is to say, when an injured party has her accident related medical expenses paid by a health plan, this is the first recovery. When an injured party receives compensation from the tortfeasor based on these expenses, this is the second recovery. Undoubtedly, appellant's position is that the

³⁴ After employing a mathematical model, one professor notes that "[t]he made-whole doctrine seems seriously at odds with sound policy. The analysis here suggests that the opposite rule--that the insurer should be made whole first--will be best for insureds except when the insured is unable to purchase efficient amounts of insurance coverage." See Alan O. Sykes, Subrogation and Insolvency vol. XXX Journal of Legal Studies 383, 396 (2001). Further it is more efficient for the insured to bear the risk for three reasons. "First, it better tracks the risk preferences of the parties. Second, it places the incentive to achieve the last dollar of recovery from a tortfeasor on the party whose efforts matter most in achieving it: the insured. Finally, it avoids the definitional problems of the made-whole doctrine and the time and effort of a mini-trial." See Jeffrey A. Greenblatt, Insurance and Subrogation: Where the Pie Isn't Big Enough, Who Eats Last? 64 U. Chi. L. Rev. 1337, 1366 (1997).

injured party's pain and suffering must be taken care of first before medical expenses are reimbursed. As a practical matter, this is not how it occurs. In fact, some courts have taken judicial notice that in valuing personal injury claims, insurers and injured parties often set their value by using a multiple of the medical specials. Bunting Bearings Corp. v. Miller (N.D. Ohio 2001), 139 F. Supp. 2d 858, 859 (“Judicial notice can be taken from the fact that lawyers in personal injury cases typically assess the settlement value of a case on a multiple of specials.”) The “economic damages” for actual medical expenses which can be more readily valued are used to calculate the “psychic damages” for pain and suffering. Sufficient to say, when evaluating a claim in which both elements are present, a tortfeasor would never pay for any “psychic damages” before they paid for the “economic damages” first. As such, it can be inferred that in a settlement, the first dollars paid by a tortfeasor are for economic damages, whether or not the overall settlement is sufficient to cover all damages.

Appellants and their amici argue that because the terms of a health plan are not individually negotiated, that members of a health plan lack the power to negotiate the terms. In fact, the opposite is true. Because the terms are negotiated on behalf of a larger group of persons, the group is in a better bargaining position than the individual. Such is the purpose of collective bargaining. Further, it should also be noted that employees are not compelled to enroll in the employer sponsored health plan. They may opt out, if they choose, and purchase an individual plan on the open market.

Additionally, appellants and their amici have argued that health plans contain standardized language that is set forth in “ISO”(Insurance Services Office) forms. Once again, they are attempting to confuse uninsured/underinsured motorist coverage with that

found in a group health plan. A review of just a couple cases in comparison to the present language shows how varied these plan provisions can be regarding the extent of the plan's right of recovery.³⁵ In fact, the Northern Buckeye Education Health Plan at issue contain restrictions on the subrogation rights by not extending to first party benefits from uninsured/underinsured, automobile medical payments or other similar first party insurance. Other subrogation provisions may call for pro-ration of the recovery dollars. See Aetna Life Insurance Co. v. Martinez (1982), 7 Ohio App.3d 178, 454 N.E. 2d 1338. Additionally, it is also known that there are health plans which contain no express right of recovery. See Ridge Tool Co. v. Silva (1986), 33 Ohio App.3d 260, 515 N.E.2d 945. Clearly, health plans vary subrogation provisions to respond to the group's request.

Fundamentally, this case represents a question of contractual interpretation. As a matter of public policy, this Court should resist the instinct to allow well intentioned sympathies to graft equitable terms onto a contract. Such a ruling presents a slippery slope and would only lead to additional conflicts and controversies in the law. If a clear provision in a health plan is subject to made whole, why should the Attorney Representation Contract with the injured party not be subject to the same principle of law. If this is the case, the law would prevent any Attorney representing a seriously injured person from taking a fee on these cases until the injured person is made whole. Surely, this concept might cause some of the amici in this case to change their position.

³⁵ Compare, Hrenko, 72 Ohio St. 3d at. 121-122, 647 N.E. 2d 1358, 1359-690 (“for purposes of subrogation, uninsured and under-insured motorist policies are also considered to be Other Contracts”) to Stephens, pg. 2 (“plan shall be subrogated.... to any monies paid or payable by any other plan ... or person by reason of illness or injury”).

III.CONCLUSION

For the reasons discussed above, Amici Kaiser Foundation Health Plan of Ohio, Golden Rule Insurance Co., Medical Mutual of Ohio, QualChoice Health Plan, Inc., US Humana Health Plan of Ohio, Inc. and the National Association of Subrogation Professionals urge this Court to affirm the judgment of the Court of Appeals for the Sixth District of the State of Ohio. Such a ruling would be in keeping with well over a hundred years of precedent in the State of Ohio and would leave Ohio aligned with the vast majority of Courts who refuse to disturb parties' right to contract as to the extent of an insurer or plan's subrogation rights.

Respectfully Submitted,

Daran P. Kiefer, Esq. (0064121)
Helen A. Thompson, Esq. (0067282)
Ted M. Traut, Esq. (0072514)
Kreiner & Peters Co., L.P.A.
P.O. Box 6599
Cleveland, Ohio 44101
(216) 771-6650
(216) 771-6110 (fax)
Attorneys for Amicus Curiae Kaiser
Foundation Health Plan of Ohio, Golden
Rule Ins. Co., US Humana Health Plan of
Ohio, Inc., Medical Mutual of Ohio,
QualChoice Health Plan, Inc., and The
National Association of Subrogation
Professionals

Certificate of Service

The undersigned hereby certifies that a true copy of the foregoing Merit Brief of *Amicus Curiae* Kaiser Foundation Health Plan of Ohio, Golden Rule Insurance Co., Medical Mutual of Ohio, QualChoice Health Plan, Inc., US Humana Health Plan of Ohio, Inc. and the National Association of Subrogation Professionals was served via regular U.S. mail upon the following counsel on this 23rd day March 2004:

Joseph W. O'Neil, Esq. (0002414)
Daniel R. Michel, Esq. (0066560)
Jennifer N. Brown (0073696)
Arthur, O'Neil, Mertz & Michel Co., L.P.A.
901 Ralston Ave., P.O. Box 781
Defiance, Ohio 43512
(419) 782-9881
(419) 782-4377 (fax)
Attorneys for Defendant/Appellant

Douglas S. Roberts (0023353)
Clark, Perdue, Roberts & Scott
471 East Broad St., Suite 1400
Columbus, Ohio 43215
(614) 469-1400
(614) 469-0900 (fax)
email: dsr@cprslaw.com
Attorney for Amicus Curiae Ohio
Academy of Trial Lawyers

Jennifer J. Dawson (00033707)
Michael A. Gonzalez (0069822)
Marshall & Melhorn
Four Seagate, Eighth Floor
Toledo, Ohio 43604
(419) 249-7100
(419) 249-7151(fax)
Attorneys for Plaintiff/Appellee

Robert L. Washburn (0012004)
Rory P. Callahan (0072021)
Cloppert, Latanick, Sauter &
Washburn
225 East Broad St.
Columbus, Ohio 43215
(614) 461-4455
(614) 461-0072 (fax)
Attorneys for Amicus Curiae Ohio
Education Association

DARAN P. KIEFER, ESQ.
Attorney for *Amicus Curiae*

Appendix Index

	Appendix Page #
Decision and Judgment Entry, Court of Appeals.....	1
<u>Central Res. Life Ins. Co. v. Hartzell</u> (Nov. 30, 1995), Tuscarawas App. No. 94AP120094, 1995 Ohio App. LEXIS, 6027.....	18
<u>Grine v. Payne</u> (Mar. 23, 2001), Wood App. No. WD-00-044, 2001.....	22
<u>Porter v. Tabern</u> (Sept. 17, 1999), Champaign App. No. 98-CA-26 1999 Ohio App. LEXIS 4289.....	27
<u>Stephens v Emanhiser</u> (Aug 24, 1999), Seneca App No. 13-99-03.....	37
Section 10, Clause 1, Article I <i>United States Constitution</i>	42
Section 28, Article II Ohio Constitution.....	43