Special Focus: Insurance Law

Mahler in the Property Damage Context: *Averill v. Farmers*

by Paul Veillon

Collecting a contingency fee for recovering the cost of your client's repair or total loss from the at-fault carrier has historically reduced your client's share of their overall recovery. Under those circumstances, it's hard to charge a fee for making those claims, and most attorneys don't do it. *Averill v. Farmers* may provide a solution under some circumstances.

Many insurance policies arguably require the carrier to share in your client's attorneys' fees and costs when you recover property damage from a third-party carrier and create a common fund for the benefit of your client and his or her insurer. If you think of collision payments for the cost of repair or total loss like PIP payments for medical bills, then making all of your client's claims - including for property damage - results in greater third-party settlements; where equitable fee-sharing applies, the greater resulting contingency fee does not reduce your client's share of the recovery.

Would you allow your client's PIP insurer to recover its medical payments directly from the at-fault insurer? Of course not, especially since PIP must reimburse your client's attorneys' fees for that collection effort. So why allow your client's collision carrier to directly subrogate its total loss settlement if the same fee-sharing rules apply?

Whether equitable subrogation defenses like the common fund doctrine and fee sharing apply in the property damage context depends on how the policy characterizes its right to recover payment. Your client's insurer may approach subrogation in one of two ways: either through "classic subrogation," where your client assigns his or her right to recover payment to the insurer in exchange for accepting a first-party benefit, or through a "right of reimbursement," where the insurer's payment triggers a parallel right to recover payment but does not destroy the insured's right. *Chen v. State Farm*, 123 Wn. App. 150, 157, 94 P.3d 326 (2004). The language required for a "classic subrogation" approach is distinct from the language that invokes a "right to reimbursement." In *Chen*, for example, the State Farm policy stated that, "the right of recovery of any party we pay [under any coverage besides Personal Injury Protection] passes to us." *Id.* (emphasis added). Subrogation may instead be enforced as a right to be reimbursed from your client's eventual third-party recovery. *Meas v. State Farm*, 130 Wn. App. 527, 533, 123 P.3d 519 (2005). The latter approach does not destroy the insured's right to recover damages from the at-fault party, even where his or her own insurance company has provided compensation for those same damages. *Averill v. Farmers*, 155 Wn. App. 106, 112, 229 P.3d 380 (2010). This includes damages for property loss that have already been paid under a first-party coverage. Id. at 113.

Where a policy approaches subrogation as a "reimbursement," rather than an assignment, Washington's "made whole" doctrine arguably prohibits the insurer from collecting any funds until the insured party has been made entirely whole for all damages. *Thiringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 219, 588 P.2d 191 (1978). Damages under RCW 4.56.250(1) include both bodily injury and property losses. If you notify your client's insurance company that you will be collecting property losses paid under collision from the at-fault insurer, then your client's insurer should subrogate through you, not the at-fault insurer directly.

Further, where a policy approaches subrogation as a "right of reimbursement," the "common fund doctrine" applies and a first-party insurer must pay its proportional share of an insured's attorneys' fees and costs incurred in pursuing recovery from the at-fault party. *Mahler v. Szucs*, 135 Wash.2d 398, 404-405, 957 P.2d 632 (1998) (applicable to PIP payments); *Averill*, 155 Wn. App. at 113. In *Averill*, the insured was partially at fault for her collision, so her insurer, Farmers, recovered only part of her property damage deductible. She brought suit alleging that Farmers was not entitled to recover for her property damage payments because she had not been made whole. The Court disagreed, reasoning that Farmers, not Averill, had recovered the funds from the other party. But the Court went on to warn:

> Farmers has acknowledged that the made whole doctrine would limit its reimbursement if Averill had recovered directly from the tortfeasor for the property damage. We agree. In that scenario, the combination of the property loss insurance payments and the third party recovery would have created a common fund. *Mahler*, 135 Wn.2d at 426-27, 957 P.2d 632. Any claim by Farmers for reimbursement of the property loss payments would have been limited by the made whole rule. *Id.* at 417-18, 957 P.2d 632. Under those facts, Averill would have been entitled to recover her full deductible before any obligation to reimburse Farmers. And, pro-rata fee sharing would have applied. *Id.* at 426-427, 957 P.2d 632.

Therefore, read your client's policy and determine whether the property damage subrogation term is expressed as an assignment ("classic subrogation") or a "right of reimbursement." If the carrier's right to recover payment for property losses is parallel to your client's, or if the policy is ambiguous, then you can seek to recover all of your client's damages - including the property losses - from adverse insurer, even if your client's own insurer has provided benefits for some of those damages under the PIP or collision coverage. You may reach a single global settlement or obtain a global judgment for all of your client's harms and losses and hold in Trust any amounts necessary to reimburse your client's insurer for collision and PIP payments it has made. To the extent that your client incurs attorneys' fees for the third-party property claims, including property damage claims, your client can ask his or her insurance company to pay its pro-rata share of his/her fees and costs incurred when you satisfy the global subrogation lien when the case ends.

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