NO. 05-0791

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

FORTIS BENEFITS,

PETITIONER

V.

VANESSA CANTU AND FORD MOTOR CO.

RESPONDENTS

BRIEF OF AMICUS CURIAE THE TEXAS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT VANESSA CANTU

Brent M. Rosenthal (Lead Counsel)
State Bar No. 17281075
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Dallas, Texas 75214
Telephone: (214) 521-3605
Telecopier: (214) 520-1181

Peter M. Kelly
State Bar No. 00791011
Chair, Amicus Curiae Committee
TEXAS TRIAL LAWYERS ASSOCIATION
1005 Heights Blvd.
Houston, Texas 77008
Telephone: (713) 529.0048
Telecopier: (713) 529.2498

Marc S. Stanley
State Bar No. 19046500
President (2006)
Jay Harvey
State Bar No. 09179600
President (2007)
TEXAS TRIAL LAWYERS ASSOCIATION
1220 Colorado Street, Suite 500
Austin, Texas 78701
Telephone: (512) 476-3852
Telecopier: (512) 473-2411

COUNSEL FOR AMICUS CURIAE
THE TEXAS TRIAL LAWYERS ASSOCIATION

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Amicus curiae the Texas Trial Lawyers Association offers this brief in support of Respondent Vanessa Cantu.

INTEREST OF AMICUS CURIAE AND DISCLOSURES PURSUANT TO TEX. R. APP. P. 11

The Texas Trial Lawyers Association (TTLA) is a statewide trade association of approximately 2100 lawyers united to advance the cause of those who are damaged in person and property and who must seek redress therefor at law; to resist the constant efforts that are now being made to curtail the rights of such persons; to encourage cooperation between lawyers engaged in the furtherance of such objectives; and through such cooperation to promote justice and human welfare, and to protect the rights of the citizens of the State of Texas. TTLA is committed to the balanced and impartial administration of justice, and it seeks to ensure that the judicial system produces results that are fair to all parties, not only the plaintiffs. TTLA believes that the citizens of Texas are entitled to no less.

No fee was paid or promised in association with the preparation and filing of this brief.

SUMMARY OF ARGUMENT

Fortis' attempt to avoid the equitable "made whole" rule by invoking a provision in its insurance contract supposedly giving it the right to reimburse itself from Cantu's tort recovery should be rejected for at least two reasons. First, as a clear majority of states that have considered the question have concluded, provisions in an insurance contract that purport to give the insurer priority over the insured to money collected from a third party tortfeasor violate public policy. These types of contractual provisions are not "bargained for" but are unilaterally inserted into the insurance contract by the insurer. Such provisions do not prevent "double recovery" – on the contrary, by definition they deprive the insured of a full recovery – and experts have found that they do not benefit consumers by making insurance more affordable. They provide a windfall to insurance companies while depriving insurance consumers–many of whom have sustained catastrophic and permanent injuries–of full compensation. Texas should join the sixteen jurisdictions that have held that contractual abrogation of the "made whole" doctrine is unconscionable and unenforceable.

Second, the language in the insurance contract upon which Fortis relies is not sufficiently precise to entitle Fortis to priority. Courts that

have enforced contract provisions allowing insurers reimbursement from the first money received from a tort recovery require those provisions to be clear, unambiguous, and specific. In the cases upon which Fortis and its amicus curiae rely, the courts quoted specific contract language permitting reimbursement even if the beneficiary "has not received the full damages claimed" or providing that the insurer "will be accorded priority over the insured as to any funds recovered." No such language appears in the Fortis contract, and the vast majority of courts that have considered the question have held that general subrogation language is not sufficient to provide an insurer with a right to reimbursement out of the first money received from a tort claim. The refusal of the lower courts to violate Texas public policy by granting Fortis such a right should be affirmed.

ARGUMENT AND AUTHORITIES

I. Fortis's contractual claim to first monies recovered violates public policy and cannot be enforced under the "made whole" doctrine.

A. Texas, like the majority of states that have considered the issue, does not enforce subrogation clauses unless the insured has been "made whole" by the third party payments.

The ability of an insurer to recover payments made under a contract of insurance from a third party that tortiously inflicted the loss has its origin in equity. Roger M. Baron, *Subrogation: A Pandora's Box Awaiting*

Closure, 41 S.D. L. REV. 237, 238 (1996) (hereafter "Baron, *Pandora's Box*"). Both subrogation, which allows the insurer to pursue recovery directly from the third party, and reimbursement, which requires the insured to pay to the insurer the proceeds of the third party recovery, are intended primarily to prevent the insured from enjoying a "double recovery" for the same injury. *Id.* at 241-42. Initially, courts permitted subrogation only for claims involving property damage; subrogation for covered medical expenses caused by a tortfeasor "had been disallowed by virtually all courts until recently." Roger M. Baron, *Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: It's Time To Recognize the Elephant in the Courtroom*, 55 MERCER L. REV. 595, 603 (2004) (hereafter "Baron, *Public Policy*"). In the past forty years, insurers have increasingly sought recognition of subrogation and reimbursement for payment of medical expenses. Baron, *Pandora's Box*, 41 S.D. L. REV. at 238-239. Although a few states continue to prohibit subrogation or reimbursement of insurance payments for medical benefits, most allow some potential for reimbursement under appropriate circumstances. Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation*, 70 MO. L. REV. 723, 735(2005) (identifying Arizona,

Kansas, Missouri, Montana, and Nevada as states that still prohibit subrogation of medical benefits).

Courts quickly recognized that it would often be unfair to allow an insurer–who, after all, received premiums in exchange for assuming liability for the insured's medical expenses–to recoup its payments under an insurance policy from a tort recovery that did not fully compensate the insured for his or her damages. To ameliorate this unfairness, courts developed the "made whole" doctrine, under which subrogation is permitted only after the insured has been fully compensated or "made whole." Baron, *Pandora's Box*, 41 S.D. L. REV. at 238 (1996). The Texas Supreme Court applied the "made whole" doctrine in 1980 to prevent an insurer from recovering $4,000 that it paid out on a fire insurance policy, citing the equitable rule that "[a]n insurer is not entitled to subrogation if the insured's loss is in excess of the amounts recovered from the insurer and the third party causing the loss." *Ortiz v. Great S. Fire & Cas. Ins. Co.*, 597 S.W.2d 342, 343 (Tex. 1980).

Over time, insurers began to attempt to avoid the operation of the equitable "made whole" rule by inserting in their contracts of insurance provisions purporting to entitle the insurer, rather than the insured, to recovery of the first money collected by the insured in a claim against a

third party tortfeasor. Courts in many jurisdictions declined to enforce these provisions, finding them unconscionable or against public policy. By our count, courts in sixteen states have refused to enforce these "first money" provisions. Courts in twelve states have held that contractual modification of the "made whole" doctrine is permissible but only by clear, unequivocal, and specific language. Only three states–Illinois, South Dakota, and Maryland–have held that general subrogation language such as that used by Fortis is sufficient to create a right to reimbursement out of the first monies recovered. A schedule of these jurisdictions that have considered the issue, grouped by the approach taken and with citation to the source of the rule, is attached as Appendix A to this brief.

Although the Texas Supreme Court has not considered the issue of whether the "made whole" rule can be negated by contract, three Texas courts of appeals and the Fifth Circuit have considered the issue. They all have concluded that a contractual right to subrogation is subject to the "make whole" doctrine. First, in *Oss v. United Services Automobile Ass'n*, 807 F.2d 457 (5th Cir. 1987), the Fifth Circuit considered an insurer's argument that its subrogation clause "reverse[d] the priority of rights between the insured and insurer to any recovery from a third party" and entitled it "to the first right of recovery from the tortfeasor whatever the

total damage." *Id.* at 460. The court held that fairness and the expectations of the parties required the subrogation clause to be "subordinated to the basic insurance promise" and thus that the insurer could not collect any proceeds from a tort recovery "until the insured has been fully indemnified." *Id., quoting* G. Palmer, LAW OF RESTITUTION § 23.14, at 434 & n.13 (1978). The Austin Court of Appeals reached a similar conclusion in *Esparza v. Scott and White Health Plan*, 909 S.W.2d 548 (Tex. App.—Austin 1995, writ denied). In that case, the court observed that the basic insurance promise "cannot be summarily overcome by a boiler-plate provision in an insurance contract that purports to entitle the insurer to subrogation out of the first monies received by the insured." *Id.* at 552. To find otherwise, the court noted, "would be to defeat the fundamental expectations of the average insured." *Id.*

The Waco Court of Appeals has ruled that the equitable "make whole" doctrine limits both statutory and contractual rights to subrogation. In *Texas Ass'n of School Boards, Inc. v. Ward*, 18 S.W.3d 256 (Tex. App.-Waco 2000, pet. denied), the court held that by providing a "naked" right of subrogation to a public school insurer, the Texas Legislature "did not confer any greater right to subrogation than would be found in the exercise of an equitable right to subrogation," *id.* at 260, and

thus did not impair the insured's right "to first be made whole." *Id.* at 261. And of course in the decision now on review here, the same court concluded that the insurer's "contractual subrogation and reimbursement rights are subject to the made-whole doctrine." *Fortis Benefits v. Cantu*, 170 S.W.3d 755, 758 (Tex. App.–Waco 2005, pet. granted).

Most recently, in *Rosa's Café, Inc. v. Wilkerson*, 183 S.W.3d 482 (Tex. App.—Eastland 2005, no pet.), the Eastland Court of Appeals endorsed the view that a provision in an insurance contract cannot override the "made whole" doctrine. In that case, after the death of the insured, the beneficiaries brought suit against the insurer to collect benefits under the insurance agreement. In settling the suit, the beneficiaries executed a written agreement in which they promised to reimburse the insurer with the first monies obtained in settlement or judgment from any third party responsible for the insured's fatal injuries. The beneficiaries then obtained a recovery from a third party, but refused to reimburse the insurer, citing the "made whole" rule. *Id.* at 484-86. The Eastland Court of Appeals held that the beneficiaries "contractually waived the application of the made whole doctrine" by executing the specific settlement agreement with the insurer. *Id.* at 488. The court emphasized, however, that the result would be different if the insurer "were only relying upon the subrogation

provision contained in the original benefit plan." *Id.* The court added that it did "not question the propriety of applying the made whole doctrine to an insurance contract written before the insurer and insured have knowledge of the circumstances which will cause the payment of benefits under the policy." *Id.*

Four different courts, then, have concluded that Texas law does not permit a general subrogation clause to trump the equitable "made whole" doctrine. In contrast, neither the petitioner nor the insurance industry amicus curiae can cite a Texas case applying a clause in derogation of the doctrine. Existing precedent thus supports adhering to the majority rule.

B. A "first money" subrogation clause violates Texas public policy.

Texas courts will not enforce a provision in an insurance contract that is unconscionable or that violates public policy even if the provision is unambiguous. In *Puckett v. U.S. Fire Insurance Co.*, 678 S.W.2d 936 (Tex. 1984), an aviation insurer sought to avoid coverage for an airplane crash based on a clause in the policy suspending coverage if the insured failed to maintain an airworthiness certificate for the aircraft. This Court acknowledged that the plain language of the clause suspended coverage even if the failure to maintain the certificate was not a cause of the crash.

Id. at 938. This Court declined to apply the exclusion anyway, finding it "unconscionable" and "against the public policy of the state." *Id.*

Other jurisdictions have declined to enforce contractual attempts to abrogate the "make whole" rule on the basis that such provisions are contrary to public policy. The Wisconsin Supreme Court explained its refusal to apply such a contractual provision as follows:

> Humana contends that the language of the subrogation clause is unambiguous and that its intent is absolutely clear. This argument misses the point. The clause is not unclear; it is inequitable. It is contrary to the most fundamental precepts of subrogation. Subrogation in this circumstance would not avoid double recovery or prevent unjust enrichment of the insured. It would authorize incomplete recovery for the insured and shift loss from the insurer, who was paid to assume loss, to the insured, who paid to protect against loss. As the Wisconsin Academy of Trial Lawyers correctly notes in its brief as amicus curiae, subrogation on these facts would turn "the entire doctrine of subrogation on its head."

Ruckel v. Gassner, 646 N.W.2d 11, 19 (Wis. 2002). Similarly, the public policy of Texas, identified in this Court's own writings, militates against enforcement of provisions in insurance contracts purporting to grant the insurer the right to first monies received from a tort recovery.

1. Health insurers do not "bargain" for subrogation or reimbursement rights, but rather unilaterally claim such rights for themselves in the insurance contract.

It is axiomatic that insurance contracts are classic contracts of adhesion. And the fact that they are subject to state regulation does not mean that the insurance consumer has any realistic opportunity to reject provisions or clauses that the consumer deems undesirable. Professor Robert Keeton's observations on this issue in his landmark article on insurance are still true today.

> Insurance contracts continue to be contracts of adhesion, under which the insured is left little choice beyond electing among standardized provisions offered to him, even when the standard forms are prescribed by public officials rather than insurers. Moreover, although statutory and administrative regulations have made increasing inroads on the insurer's autonomy by prescribing some kinds of provisions and proscribing others, most insurance policy provisions are still drafted by insurers. Regulation is relatively weak in most instances, and even the provisions prescribed or approved by legislative or administrative action ordinarily are in essence adoptions, outright or slightly modified, of proposals made by insurers' draftsmen.

Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 966-67 (1970). More specifically, as one insurance expert has noted, "the doctrine of subrogation was conceived unilaterally, nurtured unilaterally, and cast upon the courts for the unilateral interest of insurers generally." Warren Freedman, FREEDMAN ON INSURANCE 360 (6th

ed. 1990).

It is thus black humor to suggest, as the National Association of Subrogation Professionals does in its amicus curiae brief, that a subrogation or reimbursement clause contained in an insurance contract is the result of arms-length bargaining between the insurer and the insurer. *See* Pet. for Rev. of Amicus Curiae National Association of Subrogation Professionals (hereafter "NASP Br.") at 13 (the made whole principle "was never intended to prohibit an insurer and insured from agreeing to different terms."). The "freedom of contract" that the insurers purport to defend is, in this context, imaginary.

This Court has explicitly recognized the tremendous bargaining power that insurance companies hold over their customers and beneficiaries. In *Arnold v. National County Mutual Fire Insurance Co.*, 725 S.W.2d 165 (Tex. 1987), the Court found that insurers owed their insureds a "duty of good faith and fair dealing" in the processing and resolution of claims, based not on any specific contractual provision but on the "special relationship" arising out of "the parties' unequal bargaining power" and "the nature of insurance contracts." *Id.* at 167. The "unequal bargaining power" enjoyed by insurers enables them to insert into their insurance contracts subrogation and reimbursement provisions that are unfavorable

to the insured but that the insureds are powerless to reject. Because of this unequal bargaining power, it is not unfair to decline to apply a contractual provision that seeks to avoid a well-accepted equitable doctrine that has been repeatedly affirmed as protecting the public policy interests of the State of Texas.

2. A "first money" clause does not prevent "double recovery" by the insured; on the contrary, enforcement of the clause would bestow a windfall on the insurer.

One policy reason advanced for allowing insurers to recoup medical payments from their insureds' tort recoveries is that such reimbursement prevents insureds from receiving an undeserved "double recovery." Baron, *Pandora's Box*, 41 S.D. L. REV. at 241. Of course, this justification-by definition-does not apply in cases in which the insured is not "made whole" by both the insurance payment and the tort recovery. On the contrary, courts have noted that even where an individual's tort recovery fully compensates for his or her losses, "[p]recluding the subrogation of the insurer does not result in a double recovery for the insured ***because the insured is merely receiving the benefits for which he has already paid. Allowing subrogation . . . results in a windfall recovery for the insurer.***" *Maxwell v. Allstate Ins. Cos.*, 728 P.2d 812, 815 (Nev. 1986) (emphasis added); *see also Allstate Ins. Co. v. Reitler*, 628 P.2d 667, 670 (Mont. 1981)

(similar); *Allstate Ins. Co. v. Druke*, 576 P.2d 489, 492 (Ariz. 1978) (similar). The double recovery the injured victim receives is not "undeserved"; the victim *paid for it* in the form of insurance premiums.

3. Allowing subrogation or reimbursement before the insured is "made whole" by a tort recovery would not make health insurance more affordable or benefit texas consumers in any way.

Another public policy rationalization proferred by the insurers for allowing "first money" reimbursement is to enable insurers to mitigate their losses and hold down the rates they charge their customers. Courts have long rejected the contention that rules permitting subrogation or reimbursement for medical expenses reduce insurance rates for consumers, finding that "anticipated recoveries under subrogation rights are generally not reflected in the computation of premium rates." *DeCespedes v. Prudence Mut. Cas. Co.*, 193 So. 2d 224, 227-28 (Fla. Dist. Ct. App. 1967), *aff'd* 202 So.2d 561 (Fla. 1967); *see also Travelers Indem. Co. v. Chumbley*, 394 S.W.2d 418, 425 (Mo. Ct. App. 1965) (reimbursement of medical payments coverage "does not, in fact, work a perceptible reduction in the premium charged for such coverage."); *Allstate Ins. Co. v. Druke*, 576 P. 2d 482, 492 (Ariz. 1978) (similar); *Maxwell v. Allstate Ins. Cos.*, 728 P. 2d 812, 815 (Nev. 1986) (similar).

Insurance experts agree. *See* John F. Dobbyn, INSURANCE LAW IN A NUTSHELL 284 (3d ed. 1996) ("Insurers consistently fail to introduce the factor of such recoveries into rate-determining formulae, but rather apply recoveries to increasing dividends to shareholders."); Baron, *Pandora's Box*, 41 S.D. L. REV. at 244 ("The prospect of a successful subrogation collection is not a factor in the insurer's rate determination.").

As the Subrogation Professionals concede, "only a small percentage of persons covered under a health plan will suffer a serious injury caused through the tortious conduct of another." NASP Br. 14. In view of this concession, Professor Baron's observation that "the conjectural and remote nature of subrogation militates against its inclusion as a factor in the setting of premium rates" has particular force. Baron, *Pandora's Box*, 41 S.D. L. REV. at 244. In any event, the benefits to Texas consumers flowing from a rule permitting the contractual abrogation of the "make whole" doctrine would be negligible if not imperceptible. The rule should not be sacrificed in a futile quest for this illusory benefit.

4. Allowing an insurer to grab the "first monies" from a tort recovery would have disastrous and inhumane consequences for catastrophically injured Texans.

Finally, tort reform rhetoric notwithstanding, it is well recognized that victims of negligence and defective products rarely obtain full

compensation for their losses from third party tortfeasors. Rather, in the "vast majority of such cases, due to liability insurance policy limits or lack of resources, these victims will never recover from the tortfeasor a settlement which fully compensates them for their damages." Baron, *Public Policy*, 55 MERCER L. REV. at 631-32. What's worse, it is the catastrophically injured who have the most difficulty obtaining full recoveries. "[T]he consistent undercompensation [of personal injury plaintiffs] at the higher end is so well replicated that it qualifies as one of the major empirical phenomena of tort litigation." Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System - And Why Not?*, 140 U. PA. L. REV. 1147, 1218 (1992).

"The sad fact in the vast majority of these critical injury cases is that the insured is left not only seriously impaired for life, but, if reimbursement is permitted, the insured is also left financially destitute." Baron, *Public Policy*, 55 MERCER L. REV. at 597. Surely, to promote this result through mechanical application of a subrogation provision-unilaterally incorporated in an insurance contract, to which the insured had neither the practical opportunity nor the bargaining power to object-violates Texas public policy.

II. The cited contractual language does not clearly provide Fortis with a "right to first monies recovered."

Fortis insists that the insurance policy that it issued to Cantu "clearly provides that Fortis should recover the full amount paid in benefits out of any settlement recovery by Cantu." Fortis Reply Br. at 15. But the language in both the "subrogation" clause and the "right of reimbursement" clause, quoted in Fortis' brief on the merits, does no such thing. At best, the two clauses are silent on the issue of which party–the insured or the injured victim–collects the first dollars when the tort recovery is not enough to compensate the victim in full. And several of the very cases cited by Fortis and its supporting amicus curiae actually suggest that the subrogation and reimbursement provisions in Fortis' policy are ***not*** clear and specific enough to allow Fortis any reimbursement out of Cantu's tort recovery.

It is true, as Fortis points out, that in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 1869, 164 L.Ed. 2d 612 (2006), the United States Supreme Court allowed an ERISA insurer to recoup its payments out of the first money recovered in the Sereboff's tort claim. But the ERISA plan in *Sereboff* expressly and specifically stated that the insurer's right to recover from the proceeds of a tort claim "will not be reduced because [the beneficiary] has not received the full damages claimed, unless [Mid

Atlantic] agrees in writing to a reduction." 126 S. Ct. at 1872.

In *Walker v. Wal-Mart Stores, Inc.*, 159 F.3d 938 (5th Cir. 1998), the court held that the ERISA plan was not ambiguous, but the plan in that case specifically guaranteed reimbursement "regardless of whether the payment is designated as payment for such damages including, but not limited, to pain and/or suffering, loss of income, medical benefits or any other specified damages; or any other damages made or to be made by any person . . . ." *Id.* at 940. The *Walker* plan thus made clear that regardless of whether the plaintiff received full recovery for his or her various elements of damages, the plan would be reimbursed. Moreover, as the Fifth Circuit pointed out in *Walker*, ERISA plans are not "held to the same standard that an insurance contract purchased in an open market is held to" because ERISA forbids "boilerplate language in its plans" and imposes other "statutory drafting requirements." *Id.* The ERISA cases cited by Fortis indicate that the language in its contract is not unambiguous and specific enough to provide it with a right to "first money recovery" under Texas common law.

As the Subrogation Professionals point out, the Ohio Supreme Court recently announced that "principles of equitable subrogation, including the made-whole doctrine, do not override clear and unambiguous

contractual provisions." NASP Br. 3, *quoting Northern Buckeye Educational Counsel Group Health Benefits Plan v. Lawson*, 814 N.E.2d 1210, 1215 (Ohio 2004). But the court went on to specify that

> a reimbursement agreement between an insured and a health-benefits provider clearly and unambiguously avoids the make-whole doctrine if the agreement establishes both (1) that the insurer has a right to a full or partial recovery of amounts paid by it on the insured's behalf ***and (2) that the insurer will be accorded priority over the insured as to any funds recovered.***

Northern Buckeye, 814 N.E.2d at 1217 (emphasis added). The court upheld the insurer's claim for reimbursement based on the insured's specific agreement to pay the insurer out of the tort recovery "irrespective of whether any such settlement or judgment may or may not provide reimbursement to me ***for all [my damages]"***. *Id.* (emphasis added).

As Appendix A to this brief demonstrates, of the 31 states (other than Texas) that have considered contractual modifications to the "made whole" doctrine, sixteen refuse to enforce any such provision. Twelve will enforce a contract term allowing the insurer the right to reimbursement out of the first money recovered from a tort claim, but insist that that the contract term be "clear," "express," "unambiguous," and/or "specific." Only three states–Illinois, Maryland, and South Dakota–have held that general subrogation and reimbursement language of the type included in

Fortis's policy is sufficiently specific to entitle the insurer to reimbursement out of the first money recovered by the insured in a tort claim. The Maryland court enforced the right in a property insurance case, holding open the possibility that it might not a enforce a "first money" right in a case involving medical benefits. *Stancil v. Erie Ins. Co.*, 740 A.2d 46, 48 (Md. Ct. Spec. App. 1999).

The overwhelming majority of states that have considered the issue, then, would refuse to grant Fortis the right to recoup the amount of medical benefits it paid under the policy from Cantu's tort recovery. This result comports with public policy and the rules applied in this state for interpreting private insurance contracts. The Waco Court of Appeals properly denied Fortis's claim to a portion of Cantu's tort recovery.

PRAYER

Amicus Curiae The Texas Trial Lawyers Association prays that this Court affirm the judgment of the court of appeals.

Respectfully submitted,

BARON & BUDD, P.C.
A PROFESSIONAL CORPORATION
The Centrum, Suite 1100
3102 Oak Lawn Avenue
Dallas, Texas 75219
Telephone: 214.521.3605
Telecopier: 214.520.1181

BY: _____
BRENT M. ROSENTHAL
State Bar No. 17281075
Lead Counsel for Amicus Curiae The Texas Trial Lawyers Association

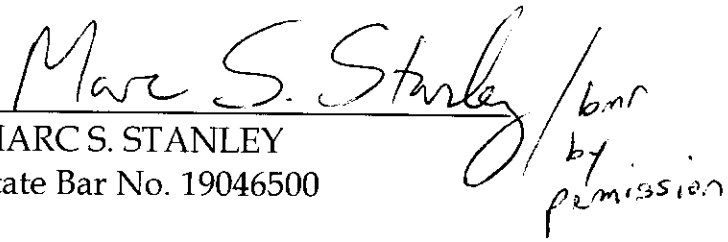
–and–

MOORE & KELLY, P.C.
1005 Heights Boulevard
Houston, Texas 77008
Telephone: 713.529.0048
Telecopier: 713.529.2498

BY: _____ / bmr by permission
PETER M. KELLY
State Bar No. 00791011

-and-

MARC S. STANLEY
State Bar No. 19046500
President (2006)
JAY HARVEY
State Bar No. 09179600
President (2007)
Texas Trial Lawyers Association
1220 Colorado, Suite 500
Austin, Texas 78701
Telephone: 512.476.3852
Telecopier: 512.473.2411

BY: 

MARC S. STANLEY
State Bar No. 19046500

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Brief of Amicus Curiae was served via certified mail, return receipt requested, on the following parties in accordance with the Texas Rules of Appellate Procedure on December 8, 2006:

Loren B. Smith
Kelly, Smith & Murrah, P.C.
4305 Yoakum Blvd.
Houston, Texas 77006
Counsel for Petitioner Fortis Benefits

Thomas B. Cowart
Turley Law Firm
1000 Turley Law Center
6440 North Central Expressway
Dallas, Texas 75206
Counsel for Respondent Vanessa Cantu

Gary L. Wickert
Matthiesen, Wickert & Lehrer
1111 East Summer Street
P.O. Box 270670
Hartford, Wisconsin 52027-0670
Counsel for Amicus Curiae
National Association of Subrogation Professionals

BRENT M. ROSENTHAL

APPENDIX A

JURISDICTIONS THAT HAVE HELD THAT THE "MADE WHOLE" DOCTRINE CANNOT BE MODIFIED BY CONTRACT

Arkansas

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

Court applies "made whole" rule despite insured's express assignment of tort recovery to insurer; attempt to enforce the "literal language" of the assignment "ignores the fact that this type of contract is realistically a unilateral contract of insurance and overlooks the insured's total lack of bargaining power in negotiating the terms of these types of agreements." *Id.* at 840.

Colorado

Kral v. Am. Hardware Mut. Ins. Co., 784 P.2d 759 (Colo. 1989)

Court rules that express and specific subrogation agreement does not require the insured to reimburse the insurer out of a tort recovery unless she has been made whole, holding generally that such agreements "should be deemed enforceable only to the extent such reduction in benefits would not impair the ability of the insured to achieve full compensation . . . ." *Id.* at 763.

Connecticut

Wasko v. Manella, 849 A.2d 777 (Conn. 2004)

Court rejects insurer's argument that subrogation clause authorized by a Connecticut statute provides an insurer with "an inviolate right" to bring a subrogation action, *id.* at 783, noting that contractual terms "may be 'trumped' by principles of equity," *id.* at 785, and adding that "under traditional principles of subrogation, if an insured brings an action against a negligent party, an insurer generally is entitled to recover the amount it paid to the insured only if the amount of damages awarded exceeds the difference between the amount the insurer paid and the insured's actual damages." *Id.* at 784.

Georgia	*Davis v. Kaiser Found. Health Plan of Georgia, Inc.*, 521 S.E.2d 815 (Ga. 1999) Court holds that the "made whole" rule reflects state policy that "overrides the parties' freedom of contract" and therefore that a provision in an insurance contract that required an insured to reimburse the insurer with proceeds from a tort recovery without regard to whether the insured had received complete compensation is unenforceable as "violative of public policy." *Id.* at 818. *See also* GA. CODE § 33-24-56.1, codifying the holding in *Davis*.
Iowa	*Ludwig v. Farm Bureau Mut. Ins. Co.*, 393 N.W.2d 143 (Iowa 1986) Court adopts the rule that "when the total of the insured's recovery from a third party and the insurance company's payments under the policy still are less than the loss sustained, the insured has not been made whole, and the insurer may not recover against him." *Id.* at 146-67. Court also held that insurer may obtain reimbursement if insured is "made whole" with respect the elements of damages covered by insurance; courts need not take into account other elements of damages (such as pain and suffering) in determining whether insured was "made whole" by tort recovery. *Id.*
Louisiana	*S. Farm Bureau Cas. Ins. Co. v. Sonnier*, 406 So. 2d 178 (La. 1981) Court holds that despite subrogation clause, if insured is less than fully compensated by tort recovery, insurer is only partially subrogated, and insured has complete priority in receiving payment. *See also Brister v. Blue Cross and Blue Shield of Florida, Inc.*, 562 So.2d 1040,1044 (La. Ct. App. 1990) ("What the Supreme Court held in *Sonnier* was that since the survivors had not been fully compensated, the subrogated insurer could not collect from the survivors the amount the insurer had paid them.").

Michigan

Union Ins. Soc. of Canton v. Consol. Ice Co., 245 N.W. 563 (Mich. 1932)
Court holds that insurer is not entitled to subrogation against the insured for the judgment recovered against the wrongdoer if the total amount received by insured, after deducting attorney's fees and costs, does not fully compensate insured. *Id.* at 564. *See also Mich. Mut. Ins. Co. v. Shaheen*, 300 N.W.2d 599 (Mich. Ct. App. 1980) (holding that agreement providing that insured would hold, for the benefit of insurer, all rights and claims which he had against any other parties involved in the action should be interpreted to compel insured to reimburse insurer only for that amount of insured's recovery which exceeds damages defendant has suffered, including costs and attorney fees).

Mississippi

Hare v. State, 733 So. 2d 277 (Miss. 1999)
Court adopts the "made whole" rule, rejecting insurer's argument that it was entitled to reimbursement of "all sums recovered . . . by settlement" for hospital, medical or related services under the terms of the insurance plan. The Court explains that allowing the literal language of an insurance contract to destroy an insured's equitable rights "ignores the fact that this type of contract is realistically a unilateral contract of insurance and overlooks the insured's total lack of bargaining power in negotiating the terms of these types of agreements." *Id.* at 284 (citations omitted).

Montana

Swanson v. Hartford Ins. Co. of Midwest, 46 P.3d 584 (Mont. 2002)
Court rejects argument that contract language can override equitable made whole doctrine, and reaffirms holding that the public policy in Montana requires 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. *Id.* at 589; *see also Youngblood v. Am. States Ins. Co.*, 866 P.2d 203 (Mont.

1993) (observing that "subrogation of medical payment benefits in Montana is void as against public policy.")

Nebraska

Blue Cross and Blue Shield of Neb., Inc. v. Dailey, 687 N.W.2d 689 (Neb. 2004)
Court holds that contractual language that attempts to allow insurer to recover regardless of whether insured is fully compensated is unenforceable. *Id.* at 699. Court explains that insurance terms which purport to place burden of loss on the insured despite the fact that the insured has paid the insurer to bear the risk are "in direct opposition to the equitable principles upon which subrogation is allowed." *Id.*

New York

USF & G v. Maggiore, 299 A.D.2d 341 (N.Y. App. Div. 2002)
Court applies "make whole" rule despite subrogation clause, noting that allowing subrogation where insured is not fully compensated would be "contrary to the principal purpose of an insurance contract: to protect an insured from loss, thereby placing the risk of loss on the insurer [though] the insurer has accepted payments from the insured to assume this risk of loss." *Id.* at 558-59 (quoting 16 COUCH, INSURANCE 3D, § 223:136, at 152-153).

North Carolina

St. Paul Fire & Marine Ins. Co. v. W. P. Rose Supply Co., 198 S.E.2d 482 (N.C. Ct. App. 1973)
Court holds that, when the sum recovered by the insured is less than the total loss, the loss should be borne by the insurer. *Id.* at 484; *see also* 11 N.C.A.C. 12.0319 (prohibiting subrogation clause in life or accident and health insurance policies).

Pennsylvania

Nationwide Mut. Ins. Co. v. DiTomo, 478 A.2d 138 (Pa. Super. 1984)
Court holds that insurer's claim against insured which sought subrogation of money that the insured had received from insurer of tortfeasor involved in auto collision failed to state a claim where the insured had

not been made whole. *Id.* The right to subrogation does not even arise until the insured has been made whole. *Id.*

Tennessee

Wimberly v. American Cas. Co. of Reading, Pa. (CNA), 584 S.W.2d 200 (Tenn. 1979)
Court finds no right of subrogation where insured has not first been made whole. *Id.* at 203; *see also Abbott v. Blount County,* --- S.W.3d ----, 2006 WL 3199277 (Tenn., Nov. 7, 2006), in which the Court holds that insurers may not bind insured's right to settlement by using artful contract terms because "[c]ontract terms that require the consent of the insurer would allow the insurer to withhold consent from any settlement that does not make the insured whole and thereby compel the insured to seek a larger award at trial." *Id.* at *2.

Washington

Thiringer v. Am. Motors Ins. Co., 588 P.2d 191 (Wash. 1978)
Court finds that, in the context of a general settlement of personal injury claims, the insurer is entitled to subrogation only after payment of the insured's general damages; unless "otherwise directed by statutory requirements," courts must be "guided by the principle that a party suffering compensable injury is entitled to be made whole but should not be allowed to duplicate his recovery." *Id.* at 194.

Wisconsin

Ruckel v. Gassner, 646 N.W.2d 11 (Wis. 2002)
Court specifically reaffirms that an insured must be made whole before the insurer may exercise subrogation rights against its insured, even when unambiguous language in an insurance contract states otherwise.

JURISDICTIONS THAT REQUIRE THAT CONTRACTUAL MODIFICATION OF THE "MAKE WHOLE" DOCTRINE BE MADE BY CLEAR, UNEQUIVOCAL, AND/OR SPECIFIC LANGUAGE

Alabama	*Ex parte State Farm Fire and Cas. Co.*, 764 So. 2d 543, 546 (Ala. 2000) Court recognizes that equitable "made whole" doctrine may be modified by contract only where terms of the insurance policy are "clear and unambiguous" in requiring the insured to reimburse the insurer to the extent of its payment to the insured. *Id.* at 545-46. *See also Wolfe v. Alfa Mutual Ins. Co.*, 880 So. 2d 1163, 1167 (Ala. Civ. App. 2003). (general subrogation language is "not sufficient to modify applicability of the made-whole doctrine").
California	*Sapiano v. Williamsburg Nat'l Ins. Co.*, 28 Cal. App.4th 533 (Cal. Ct. App. 1994) Court holds that, in absence of specific language to contrary, general provision that insurer was subrogated to rights of insured does not permit insurer to recover from third-party tortfeasor until insured has been made whole. *Id.* at 538. The court also observed that where the insured does not assist in prosecution of the claim, insured may not be permitted to recover until insured has been made whole. *Id.*
Florida	*Florida Farm Bureau Ins. Co. v. Martin*, 377 So. 2d 827 (Fla. Dist. Ct. App. 1979) Court rules that equitable principles such as the "made whole" doctrine apply even when the subrogation is based on contract, except as modified by specific provisions in the contract. *Id.* at 830. "In the absence of specific terms to the contrary, the insured is entitled to be made whole before the insurer may recover any portion of the recovery" from the tortfeasor. *Id.*

Indiana	*Willard v. Auto. Underwriters, Inc.*, 407 N.E.2d 1192 (Ind. Ct. App. 1980) Court holds that "made whole" doctrine applies to contractual as well as equitable subrogation. *Id.* at 1193. A contract may not avoid application of the doctrine unless it is "clear, unequivocal and so certain as to admit no doubt on the question to avoid application of the before the debt is satisfied." *Id.*
Kentucky	*Wine v. Globe Am. Cas. Co.*, 917 S.W.2d 558 (Ky. 1996) Court rules that subrogation rights may be modified by contract only if violence is not done to established equitable principles. *Id.* at 562. Court held that principles of equity did not require insured to be "made whole" before carrier was entitled to subrogation where (1) insurance language clearly and explicitly provided insurer with the right of subrogation and subordinated insured's interests in any recovery in favor of insurer until insurer was reimbursed, and (2) at time of claim, each party was represented by counsel and enjoyed a parity in bargaining position, and (3) insured's losses had already been sustained and were fully known and appreciated. *Id.* at 565.
Minnesota	*Westendorf v. Stasson*, 330 N.W.2d 699 (Minn.1983) Court applies "make whole" rule despite contract provision giving HMO provider right to reimbursement to extent of damages recovered, noting that equitable principles apply to all instances of subrogation unless modified by specific provisions in the contract. *Id.* at 230-31.
New Jersey	*Culver v. Ins. Co. of N. Am.*, 559 A. 2d 400 (N.J. 1989) Court observes that "made whole" doctrine applies to contractual as well as equitable subrogation. *Id.* at 404. An insurer may not avoid application of make whole doctrine unless contract is sufficiently specific and honors reasonable expectations of the parties. *Id.* at 403.

Ohio	*N. Buckeye Educ. Council Group Health Benefits Plan v. Lawson*, 814 N.E.2d 1210 (Ohio 2004) Court holds clear and unambiguous language allows subrogation where insured is not fully compensated. *Id.* at 1215.
Oklahoma	*Equity Fire and Cas. Co. v. Youngblood*, 927 P.2d 572 (Okla. 1996) Addressing the enforceability of subrogation provisions in the context of an ERISA claim, Court holds that where the plan does not specifically provide that insurer is entitled to priority of payment and does not expressly give its managers the right to resolve ambiguities, and where the facts do not clearly show that the beneficiary's settlement included reimbursement for medical expenses, the plan will not be allowed to recover unless insured is made whole. *See also American Med. Sec. v. Josephson*, 15 P.3d 976 (Okla. Civ. App. 2000) (holding that, in the absence of a priority-of-payment provision, subrogation clause is unenforceable unless insured has been fully compensated).
Rhode Island	*Lombardi v. Merchants Mut. Ins. Co.*, 429 A.2d 1290, 1292-93 (R.I. 1981). Court applies the "made whole" doctrine and rejects automobile insurers' claims for a share in the proceeds of a safety responsibility bond obtained by the uninsured motorist tortfeasor unless the insureds' loss (stated in their judgment against the tortfeasor), was fully paid. *But see Ditomasso v. Ocean State Physicians Health Plan, Inc.*, No. 87-2487, 1988 WL 1016798 (R.I. Super. 1988) (distinguishing *Lombardi*, and holding that insured has enforceable right to subrogation where the language of the contract regarding subrogation is clear and unambiguous).

Utah	*Birch v. Fire Ins. Exch.*, 122 P.3d 696, 698 (Utah 2005) Court reiterates that while the doctrine of equitable subrogation may be modified by contract, "in the absence of express contractual terms to the contrary, 'the insured must be made whole before the insurer is entitled to be reimbursed from a recovery from the third-party tort-feasor.'" *Id.*, (quoting *Hill v. State Farm Mut. Auto. Ins. Co.*, 765 P.2d 864, 866 (Utah 1988) (citations omitted)).
West Virginia	*Kittle v. Icard*, 405 S.E.2d 456, 464 (W. Va. 1991) Court sets forth the West Virginia Supreme Court's adoption of the "make whole" rule, stating that "[a]bsent a clearly expressed legislative intent requiring otherwise, 'subrogated' is to be given its usual, ordinary meaning." *Id.* (citations omitted). While the legislature superseded the holding of *Kittle* by statute as set forth in *Grayan v. Dept. of Health and Human Res.*, 498 S.E.2d 12 (W. Va. 1997), West Virginia courts continue to apply *Kittle*'s rationale, holding that "subrogation is an equitable principle and, as such, the general rules of equity, including the made-whole rule, will apply regardless of whether the subrogation arises from common law or by contract, unless a contrary agreement is clearly and expressly stated." *Kanawha Valley Radiologists, Inc. v. One Valley Bank, N.A.*, 557 S.E.2d 277, 282 (W. Va. 2001).

JURISDICTIONS THAT HOLD THAT GENERAL SUBROGATION LANGUAGE GIVES INSURERS THE RIGHT TO THE FIRST MONIES RECOVERED FROM A TORT CLAIM

Illinois

Capitol Indem. Corp. v. Strike Zone, S.S.B. & B. Corp., 646 N.E.2d 310 (1995)

Court holds that where an insurance contract gives the insurer the right to subrogate to the extent of its payment, the contract will be enforced as written even if the insured's losses exceed the amount it recovers from the tortfeasor and the insurer. *Id.* at 312.

Maryland

Stancil v. Erie Ins. Co., 740 A.2d 46 (Md. Ct. Spec. App. 1999)

Court holds that, in the context of homeowner's insurance policy in which insured elected not to fully insure his property, principles of equity did not require insured to be made whole before insurer was entitled to subrogation. *Id.* at 48. The court distinguished *Stancil* from those cases involving health care claims, recognizing that the principles of equity might demand that the insured be made whole before insurer would be entitled to subrogation in the context of health care claims. *Id.*

South Dakota

Westfield Ins. Co., Inc. v. Rowe ex rel. Estate of Gallant, 631 N.W.2d 175 (S.D. 2001)

Court holds common law "made whole" doctrine will generally apply absent a subrogation clause in the insurance policy, but if there is any such clause, the made whole doctrine will not apply unless the clause specifically limits the insurer's right of subrogation to instances where the insured has been made whole. *Id.* at 180. Court finds that automobile insurer is entitled to subrogation even though the insured was not made whole. *Id.*