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Making *Cents* Of It All
Calculating Attorney Fees in U.S. Subrogation Claims.

As a personal injury lawyer in British Columbia, you may have come across the odd client or opposing party that has a Washington State based insurance policy, creating a subrogation lien on your client's claim for damages. In Washington State, your client is entitled to a reasonable attorney fee in having their lawyer collect on that U.S. subrogation interest.

In the United States, where insurance is for the most part a private industry, there is often language in a policy agreement between the insurer and insured, to the effect that upon any payments made for medical benefits (called Personal Injury Protection or "PIP"), akin to Part 7 benefits in British Columbia, the insurer will agree to pay a portion of the legal fees to the Plaintiff's lawyer, for acting on behalf of the carrier in collecting their PIP expenses.

Thiringer v. *Am. Motors Ins. Co.*, 91 Wn.2d 215, 588 P.2d 191 (1978) announces Washington's public policy in favour of full compensation for injured persons. No insurance company has a right of reimbursement unless the plaintiff has first been fully compensated for his or her injuries.

The off-spring of *Thiringer* came in the form of the Washington State Supreme Court decisions in *Mahler* v. *Szucs*, 957 p.2d 632(1998); *Winters* v. *State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 31 P.3d 1164 (2001); and *Hamm* v. *State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 88 P.3d 395 (2004). These three cases make it clear that if an insurer is entitled to reimbursement, the amount of the reimbursement must be reduced by a pro rata share of the attorneys' fees and costs expended by the insured in obtaining the funds from which reimbursement is made possible.

The formula that arose from the cases of *Mahler*, *Winters* and *Hamm* is very easy to use from the practitioners perspective. It must be noted the formula applies to any common subrogation interest scenario that can arise in a Washington State subrogation-claim[1]. The formula is:

FR = CR - ((CR/CF) * (F + C))

FR – The final reimbursement (the amount your client pays the insurer on their subrogation claim).

CR – Is the amount of the claimed reimbursement.

CF – This is the common fund of recoveries from all sources of liability insurance, including any underinsured motor vehicle policy amounts.

F – Is the actual attorney (a Washington term for "lawyer") fees charged.

C – The actual amount of costs charged.

As a B.C. lawyer, a Washington State insurance carrier will likely assume you do not know about the *Mahler* formula. In most instances, the insurance company will provide you with their share of the attorney fees for collecting their subrogation claim; it is our advice to take great caution in blindly accepting their amount. In a typical soft tissue damage case, where damages may not be that high, the reduction of any lien on the claim can sometimes be the difference between your client wanting to settle, or not. By using the *Mahler* calculation, you will be in a position to not only advise your client appropriately, but to provide them a greater net return on their settlement.

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[1] *Thiringer, Mahler, Winters,* and *Hamm* apply to common law reimbursement under state law. These cases do not apply to statutory rights of reimbursement such as the statutory right of reimbursement for Washington Department of Labor and Industries, Washington Department of Social and Health Services, or Federal statutory rights of reimbursement.

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