S154790

IN THE
SUPREME COURT OF CALIFORNIA

21ST CENTURY INSURANCE COMPANY,
Petitioner,
vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,
Respondent,

SILVIA QUINTANA,
Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, CASE NO. D049430
SAN DIEGO COUNTY SUPERIOR COURT CASE NO. GIC857010

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, PERSONAL INSURANCE FEDERATION OF CALIFORNIA, MERCURY CASUALTY COMPANY, and MERCURY INSURANCE COMPANY IN SUPPORT OF PETITIONER 21ST CENTURY INSURANCE COMPANY

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Under California Rules of Court, rule 8.520(f), the Association of California Insurance Companies (ACIC), the National Association of Mutual Insurance Companies (NAMIC), the Personal Insurance Federation of California (PIFC), and Mercury Casualty Company and Mercury Insurance Company (Mercury companies) request permission

to file the attached amici curiae brief in support of petitioner 21st Century Insurance Company.

ACIC is an affiliate of the Property Casualty Insurers Association of America, a leading national property/casualty insurance company trade group with more than 1,000 members. ACIC represents more than 300 property/casualty insurance companies doing business in California. ACIC member companies write almost 40 percent of the total property/casualty insurance in California, including 53 percent of personal automobile insurance, 43 percent of commercial automobile insurance, 35 percent of homeowners insurance, 31 percent of business insurance, and 43 percent of private workers compensation insurance.

Founded in 1895, NAMIC is a full service national insurance trade association with more than 1,400 member companies that underwrite more than 40 percent of the property/casualty insurance premiums in the United States.

PIFC is a trade organization dedicated to representing its member companies' interests before governmental bodies, including the California Legislature, the California Insurance Commissioner, and the California courts. PIFC's members are insurers specializing in personal lines of insurance, primarily homeowners and private passenger automobile insurance. These member companies account for more than 50 percent of all personal lines insurance premiums sold in California.

The Mercury companies both issue personal automobile policies with med-pay coverage and reimbursement provisions similar to those used by 21st Century. Moreover, the Mercury companies have been sued in San Diego Superior Court by the same plaintiffs' counsel making the same allegations as in the present case. The cases against Mercury have been stayed pending resolution of this appeal.

ACIC, NAMIC, PIFC, and the Mercury companies are interested in the issue raised in this case. The decision here will impact millions of existing insurance policies and will affect the writing of millions of policies in the future. Amici have reviewed the parties' briefs on the merits and believe this court will benefit from additional briefing to

explain why expanding the made-whole rule as proposed by the insured in this case is unsound.

Dated: April 28, 2008 Respectfully submitted,

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AMICI CURIAE BRIEF

INTRODUCTION

This case concerns an oft-repeated scenario for compensation of an insured person who is injured in an automobile accident. First, the insured receives a relatively small payment under her own auto insurance policy for her medical expenses. This "med-pay" benefit is paid quickly because it is made regardless of fault for the accident. The insured then makes a claim against the person who caused the accident and recovers from that wrongdoer all of her damages, including her total medical expenses. The insured having now been over-paid for her medical expenses, her insurance carrier seeks reimbursement from her for the med-pay benefits it paid at the outset, less the pro rata portion of the insured's attorney fees attributable to recovering the reimbursement amount from the wrongdoer.

In this case, the insured says the carrier is not entitled to any reimbursement. She asserts that she paid more in total attorney fees to recover her damages from the wrongdoer than the med-pay benefits she received from the carrier and that, after paying her attorney fees, she would end up with somewhat less than her total damages. She argues this result would violate the "made-whole rule," an equitable doctrine that guarantees the insured full compensation before she is required to reimburse her carrier.

The question presented here is what constitutes "full compensation" under the made-whole rule. Is an insured fully compensated when she recovers all of her damages from a third-party wrongdoer, or is she less than fully compensated because after that recovery she must pay part of it to her attorney?

For numerous reasons, discussed both in this brief, in the Answer Brief of the carrier in this case, and in the well-reasoned Court of Appeal opinion below, the made-whole rule should be interpreted, as it traditionally has been, to allow the carrier to receive reimbursement under the circumstances here. The insured has been fully compensated when she has recovered all of her damages from the wrongdoer. The fact that she will pay attorney fees puts her in no worse position than any other personal injury plaintiff; indeed, her position is better than the plaintiff who has not received med-pay benefits because her carrier will collect from her less than complete reimbursement when it pays its pro rata share of the insured's attorney fee.

I.

THE MADE-WHOLE RULE GUARANTEES THE INSURED FULL COMPENSATION FOR HER *DAMAGES*, BUT ATTORNEY FEES IN A PERSONAL INJURY LAWSUIT ARE *NOT* DAMAGES.

When an insured is harmed by another and the insured is compensated for that harm by her insurance carrier, the carrier is often entitled to recoup its payment through subrogation. (See *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 633 ["Generally, an insurer on paying a loss is subrogated in a corresponding amount to the insured's right of action against any person responsible for the loss"].) If the insured's harm is a personal injury, however, the carrier usually cannot directly sue the wrongdoer. (See *Lee v. State Farm Mut. Auto. Ins. Co.* (1976) 57 Cal.App.3d 458, 465 ["in the absence of statutory authority, a cause of action for personal injury is not subject to subrogation"]; cf. Ins. Code, § 11580.2, subd. (g) [subrogation in uninsured motorist cases].) Instead, the carrier will wait until the insured has recovered compensation from the wrongdoer and then seek reimbursement from the insured's recovery. (*Lee*, at p. 466.)

This case concerns one aspect of the circumstances under and the extent to which a carrier may be reimbursed. The parties dispute how to apply the made-whole rule, an equitable rule that guarantees the insured's full compensation before the carrier is reimbursed (see *Barnes v. Independent Auto. Dealers of California* (9th Cir. 1995) 64 F.3d

1389, 1394). They disagree about the method for determining when an insured has been "fully compensated" for purposes of the rule, specifically whether the insured should be compensated for all attorney fees she incurred in obtaining a recovery from the wrongdoer.

In this case, the insured's loss was $6,000, the amount she was paid by the wrongdoer. In addition to that $6,000 settlement, she also received $1,000 from her insurance carrier in med-pay benefits. [1/] To collect the settlement from the wrongdoer, the insured incurred $2,000 in attorney fees and $106.50 in costs. She later paid $600 to her insurance carrier, an amount representing reimbursement for the $1,000 med-pay benefits the carrier had paid less the attorney fees incurred to recover that $1,000. The insured sued her carrier, however, contending she should not have had to pay any reimbursement at all. Although she received a total of $7,000 ($6,000 from the wrongdoer and $1,000 from her insurance carrier) for a loss of only $6,000, the insured nevertheless argued she was not fully compensated because she paid over $2,000 in attorney fees and costs.

Thus, according to the insured, full compensation under the made-whole rule includes not only the payment received from the

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1/ "Automobile med-pay insurance provides first party coverage on a no-fault basis for relatively low policy limits (generally ranging from $5,000 to $10,000) at relatively low premiums. [Citations.] The coverage is primarily designed to provide an additional source of funds for medical expenses for injured automobile occupants without all the burdens of a fault-based payment system. [Citation.] There is no statutory obligation for med-pay benefits." (*Nager v. Allstate Ins. Co.* (2000) 83 Cal.App.4th 284, 289-290.)

wrongdoer for her loss, but also recoupment of all the attorney fees she incurred to obtain that payment. Basic principles of California law on attorney fees and damages establish that the insured's argument is wrong.

The made-whole rule is at its core about compensating the insured for her *damages*. (See, e.g., *Sapiano v. Williamsburg Nat. Ins. Co.* (1994) 28 Cal.App.4th 533, 537, quoting 6A Appleman, Insurance Law and Practice (1972) § 4094, p. 265, fn. omitted ["'where the loss was greater than the insurance, and the insured settled with the wrongdoer for *damages* which, when added to the insurance, were less than the loss, the insurer could recover nothing from the insured'" (emphasis added)]; *Travelers Indem. Co. v. Ingebretsen* (1974) 38 Cal.App.3d 858, 865 ["Appellants argue that the insurance companies should be denied any recovery until appellants are first 'made whole' for the *damages* they suffered" (emphasis added)].) But *attorney fees are not damages*, except in specific circumstances not present here.

Civil Code section 3333 states the rule for compensatory damages in tort actions: "For the breach of an obligation not arising from contract, the measure of damages . . . is the amount which will compensate for all the detriment proximately caused thereby . . . ." Code of Civil Procedure section 1021 states the "American Rule" for attorney fees: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties." (See also *Olson v. Automobile Club of Southern California* (2008)

42 Cal.4th 1142, 1147 [the American Rule is that "each party bears its own costs and attorney fees"].)

Under these two statutes, the attorney fees that the insured incurred here to recover compensation from the wrongdoer are clearly not part of her *damages*.

In *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, this court recognized one could argue "attorney fees are recoverable for all torts under section 3333 of the Civil Code because it would always be true that the plaintiff would not have incurred attorney fees if the defendant had not committed a wrong against him." (*Id.* at p. 506.) The court rejected the argument, explaining that it "would render meaningless, in all tort actions, the provisions of section 1021 that each party is responsible for his attorney fees absent a statutory or contractual provision to the contrary. It would also be contrary to a consistent line of cases decided since 1872, when section 3333 of the Civil Code was enacted, which, with [certain] exceptions . . . , deny attorney fees to the prevailing party in an action for tort." (*Ibid.*)

There is one limited circumstance in which an insured's attorney fees *are* tort damages that an insurance carrier must pay. But that contrasting situation is relevant only to show how inappropriate a carrier's payment of its insured's attorney fees would be here.

In *Brandt v. Superior Court* (1985) 37 Cal.3d 813, this court recognized that "[w]hen an insurer *tortiously* withholds benefits" from its insured, "attorney's fees, reasonably incurred to compel payment of the policy benefits, [are] recoverable as an element of the damages

resulting from such tortious conduct." (*Id*. at p. 815, emphasis added.) Therefore, if an insurance carrier's tortious (i.e., bad faith) conduct causes its insured to incur fees, the carrier must pay for those fees. When the carrier's conduct is not tortious, however, the insured bears her own fees, even if she successfully sued the carrier to recover insurance benefits owed. (*Id*. at p. 819 ["'When no bad faith has been alleged and proved, [case law] preclude[s] the award of attorney's fees incurred in obtaining benefits that the insurer erroneously, but in good faith, withheld from the insured'"].)

Here, no tortious conduct—by the insurance carrier or anyone else—caused the insured to incur attorney fees. [2/] Those fees thus are not part of the damages for which the insured should be made whole.

2/ The insured might argue that the wrongdoer's tortious conduct caused her to retain a lawyer, but that would be fallacious, as this court recognized in *Gray v. Don Miller & Associates, Inc.*, *supra*, 35 Cal.3d at page 506, discussed above. The wrongdoer's tortious conduct injured the insured and therefore quite likely caused her to incur medical expenses. But the insured did not go to a lawyer for treatment. The wrongdoer would be liable for the insured's legal expenses only if the wrongdoer subsequently refused to compensate the insured for her personal injuries and the refusal was somehow found to be tortious. (See *Brandt v. Superior Court*, *supra*, 37 Cal.3d at p. 817 ["'When a pedestrian is struck by a car, he goes to a physician for treatment of his injuries, and the motorist, if liable in tort, must pay the pedestrian's medical fees. Similarly, . . . [if] an insurance company's refusal to pay benefits has required the insured to seek the services of an attorney to obtain those benefits, . . . the insurer, because its conduct was tortious, should pay the insured's legal fees'"].)

Significantly, the insurance carrier here did pay *a portion* of its insured's attorney fees, and properly so, but not because the fees were part of the insured's damages. Rather, the carrier paid under one of the three recognized exceptions to the American Rule of attorney fees that this court has developed under its "'inherent equitable authority.'" (*Trope v. Katz* (1995) 11 Cal.4th 274, 279.)

The exception—the common fund theory—"recognizes the common law 'historic power of equity to permit . . . a party . . . recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund . . . or directly from the other parties enjoying the benefit." (*City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110.) Under that theory, because the insured incurs attorney fees to obtain a recovery out of which the insurance carrier receives its reimbursement, the carrier pays its pro rata share of those fees. (*Lee v. State Farm Mut. Auto. Ins. Co.*, *supra*, 57 Cal.App.3d at pp. 466-469; see also *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1297.)

Applying the common fund theory best complies with the American Rule's dictate that parties should bear their own attorney fees, because, under the common fund theory, the parties are doing just that. Here, for example, the carrier paid $400, or 40 percent of the amount it was owed as reimbursement. The carrier therefore paid the attorney fees attributable to recovering the amount of its prior med-pay payment to its insured, while the insured paid only those attorney fees attributable to the recovery of her damages.

Having the carrier pay *all* the insured's attorney fees, as the insured here proposes, would be either (1) an unwarranted expansion of the common fund exception, because the carrier would be paying fees incurred to obtain not only its own reimbursement but also to obtain the payment that the insured keeps, or (2) the creation of a new exception altogether. Either approach would be contrary to this court's warning that it has "'moved cautiously in expanding the nonstatutory bases on which awards of attorney's fees may be predicated.'" (*Gray v. Don Miller & Associates, Inc.*, *supra*, 35 Cal.3d at p. 507.)

II.

THE MADE-WHOLE RULE APPLIES BASED ON THE AMOUNT OF THE INSURED'S *RECOVERY*, BUT THE RECOVERY AMOUNT IS DETERMINED *BEFORE* THE INSURED PAYS ATTORNEY FEES.

Even the insured in this case seems to agree that whether she was fully compensated under the made-whole rule depends on the size of her "recovery." She concedes that there is an impermissible double recovery when the insured "has been made 'more than whole' by a combination of insurance benefits and tort *recovery*" (OBOM 14, emphasis added) and she argues that "[i]njured parties do not *recover* fully for their losses, and are therefore not made whole, to the extent that their attorney's fees are not included in such analysis" (Reply Brief 30, emphasis added). The insured is right about the importance of

focusing on the "recovery," but she misconstrues the meaning of the word.

The amount of a plaintiff's "recovery" is how much she is awarded in a lawsuit or obtains by a settlement, not how much of that amount the plaintiff keeps after paying her attorney fees and litigation costs. This is in keeping with the general rule that a "recovery" is determined before any disbursement of the money. As one court noted in another context, "[t]he recovery of damages ordinarily means the recovery of a judgment, not the payment of money" (*Bruno v. Superior Court* (1981) 127 Cal.App.3d 120, 130) and there is a "distinction between the recovery and the distribution of damages" (*id*. at p. 131, fn. 7).

This distinction is recognized specifically in the context of attorney fees. This court has noted that contingent fee agreements "do not operate to transfer a part of the cause of action to the attorney but only give him a lien upon his client's recovery." (*Fifield Manor v. Finston* (1960) 54 Cal.2d 632, 641; see *Block v. Cal. Physicians' Service* (1966) 244 Cal.App.2d 266, 273.) The attorney fee is taken *from* the recovery, it is not a *part of* the recovery.

In harmony with this fundamental principle of California law is the United States Supreme Court's decision in *C.I.R. v. Banks* (2005) 543 U.S. 426 [125 S.Ct. 826, 160 L.Ed.2d 859]. The court there held that, for tax purposes, the entirety of a plaintiff's money judgment or settlement is considered income to the plaintiff, even if the plaintiff's attorney takes part of that money as a contingent fee. The court

concluded that, "when a litigant's *recovery* constitutes income, the litigant's income includes the portion of the *recovery* paid to the attorney as a contingent fee." (*Id*. at p. 430, emphases added.)

Therefore, under her own formulation of the rule, the insured in this case "*has* been made 'more than whole' by a combination of insurance benefits and tort *recovery*." (OBOM 14, emphases added.) Because of that circumstance, the insurance carrier is entitled to reimbursement.

III.

REQUIRING COMPENSATION OF ALL THE INSURED'S ATTORNEY FEES WILL MAKE INSURANCE MORE COSTLY.

The overriding principle of insurance coverage should be that you get what you pay for. Here, however, the insured wants something for nothing.

It is unsurprising that an insurance policy providing that an insurance carrier has a right to reimbursement from its insured costs less than a policy that does not provide a reimbursement right. (See, e.g., *Mercury Casualty Co. v. Maloney* (2003) 113 Cal.App.4th 799, 801 [noting the existence of "more expensive [med-pay] coverage" that did not require reimbursement].) Indeed, amici Mercury offers its insureds an option of buying non-reimbursable med-pay coverage, but that option is twice as expensive as reimbursable coverage.

It follows that an interpretation of the made-whole rule that reduces reimbursements for carriers would have the corresponding effect of increasing premiums for reimbursable policies. In fact, the practical impact of the insured's proposed rule would be to eliminate med-pay reimbursement altogether in most cases, likely causing premiums for med-pay coverage to rise to the rates for non-reimbursable coverage.

Med-pay reimbursement would necessarily disappear in most cases under the insured's proposed rule. The proposal precludes reimbursement until the insured has received compensation not just for her damages, but for *all* her attorney fees, too, even those attorney fees *not* attributable to recovering the insurance carrier's previous payment. Thus, even when the recovery from the wrongdoer equals the insured's damages (by definition, the recovery would not be greater than her damages), a carrier could not get reimbursement unless its payment to its insured is larger than the insured's total attorney fees. Because med-pay benefits are "relatively low . . . (generally ranging from $5,000 to $10,000)" (*Nager v. Allstate Ins. Co.*, *supra*, 83 Cal.App.4th at p. 289), this will rarely happen.

The present case is typical. The carrier paid $1,000 in med-pay benefits, and the insured incurred more than twice that amount in attorney fees and costs. Under the insured's proposed rule, the carrier is not reimbursed for any of its $1,000 payment, which the insured keeps in addition to recovering her $6,000 in damages from the wrongdoer.

In cases where the insured has received the maximum $5,000 or $10,000 med-pay benefits, the result would be the same. For example, where a $5,000 med-pay benefit has been paid, there would be no reimbursement to the insurance carrier whenever the damages recovered from the wrongdoer exceed $15,000, assuming a one-third contingency fee arrangement between the insured and her lawyer. Since it would be a rare case in which a plaintiff with at least $5,000 in medical expenses would not have medical, property, and pain and suffering damages totaling more than $15,000, the carrier's right to reimbursement would become illusory if the insured's proposed rule applied.

The insured's proposed rule would not only affect *future* insurance rates, however. It would also seriously distort the rights of insurance carriers and insureds regarding *existing* policies. Carriers have already calculated premiums based on expectations of reimbursement under the made-whole rule and the common fund theory as applied by the Court of Appeal below. That is why, as discussed, policies that require reimbursement are less expensive than those that don't. If, as the insured advocates, her proposed rule is applied retroactively to existing policies, insureds will be getting non-reimbursable coverage for the discount price of reimbursable coverage.

This court has warned against just this kind of judicial revision of standard insurance coverage, stating that it "might have untoward effects generally on individual insurers and individual insureds and also on society itself." (*Certain Underwriters at Lloyd's of London v.*

Superior Court (2001) 24 Cal.4th 945, 968 (*Lloyd's of London*).) The court explained that, "[t]hrough the standard policy, individual insurers made promises, and individual insureds paid premiums, against the risk of loss. To rewrite the provision [in issue there] might compel insurers to give more than they promised and might allow insureds to get more than they paid for, thereby denying their 'general[] free[dom] to contract as they please[]' of any effect in the matter." (*Ibid*.)

The court also concluded that courts are ill-equipped to revise insurance provisions: "It is conceivable that to rewrite the provision thus might result in providing society itself with benefits that might outweigh any costs that it might impose on individual insurers and individual insureds. It is conceivable. But unknown. Knowledge 'depend[s] in large part on' what we are ill suited for, that is, the 'amassing and analyzing of complex and extensive empirical data.' [Citation.] Without such knowledge, we could not proceed." (*Lloyd's of London*, *supra*, 24 Cal.4th at p. 968.)

IV.

THIS COURT SHOULD REJECT ANY RULE THAT REQUIRES, OR EVEN ENCOURAGES, INSURANCE CARRIERS TO PARTICIPATE IN THEIR INSURED'S PERSONAL INJURY LAWSUITS.

The insured in this case supports her proposed expansion of the made-whole rule in part by arguing that an insurance carrier can avoid

the rule by participating in its insured's tort action against the wrongdoer. (OBOM 16-17.) This is a red herring.

To begin with, an insurance carrier might not be allowed to intervene in an insured's personal injury lawsuit. As discussed, a personal injury cause of action is not subject to subrogation (*Lee v. State Farm Mut. Auto. Ins. Co.*, *supra*, 57 Cal.App.3d at p. 465) and intervention may be unavailable when there is no subrogation right (see *California Physicians' Service v. Superior Court* (1980) 102 Cal.App.3d 91, 96-97; cf. *Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540, 549-550 [intervention possible where insurance carrier *does* have subrogation rights; construction defect lawsuit]).

Even if a carrier could intervene, that should not be encouraged. The insured does not explain what benefit would result from involving one more lawyer in a personal injury lawsuit. (More accurately, it would be involving another lawyer in a *claim* for personal injury damages, because many of those claims, like the one in the present case, are resolved short of litigation.)

If the benefits of carrier participation are difficult to discern, the drawbacks are not. For example, if, as the insured here contends, carrier participation in its insured's action (claim) makes the made-whole rule inapplicable, that participation would create conflicting interests. Without the insured having to be "made whole" before the carrier is reimbursed, the carrier would have an interest only in the insured's recovering the small med-pay amount, while the insured would of course have an interest in maximizing her recovery.

Also, if the insured's claim went to trial, it would not assist her case for a jury to learn that she had insurance coverage for at least some of her damages. (See *Hrnjak v. Graymar, Inc.* (1971) 4 Cal.3d 725, 732-733.) It is therefore not surprising that in a companion case to this one the insured's counsel "acknowledged at oral argument [that] he would 'most likely' object to an insurer's efforts to intervene, reflecting a candid assessment that interjecting insurance payments into a personal injury action is not a desirable development from a plaintiff's view." (*Allstate Ins. Co. v. Superior Court* (2007) 151 Cal.App.4th 1512, 1532, review granted Sept. 25, 2007, S154815 (*Delanzo*); [3/] see also *Travelers Indem. Co. v. Ingebretsen*, *supra*, 38 Cal.App.3d at p. 865 ["It may well be that the attorneys for the homeowners did not desire formal intervention by the insurance companies in their lawsuit"].)

Certainly, the absence of insurance carrier participation does not harm the insured. Under the common fund theory, the carrier would ultimately pay its fair share of the insured's attorney fees—those attributable to recovering the carrier's reimbursement—so that even after reimbursement the insured would come out ahead of a plaintiff who has not received med-pay benefits. [4/] If anything, it would be the

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3/ The Court of Appeal concurrently issued separate opinions, including *Delanzo*, in several cases raising the same issue presented here. We cite to the *Delanzo* opinion because it was the one opinion with detailed reasoning; the opinion in the present case contained little discussion of the issue, instead relying on the *Delanzo* opinion.

4/ For example, if the insured here had received no med-pay benefits, but had recovered the same $6,000 judgment against the

carrier that is disadvantaged by not participating because, "absent intervention, the insurer is to a large extent at the mercy of its insured's efforts and success in recovering from the responsible third party." (*Hodge v. Kirkpatrick Development, Inc.*, *supra*, 130 Cal.App.4th at p. 553.)

V.

REQUIRING COMPENSATION OF ALL THE INSURED'S ATTORNEY FEES WILL COMPLICATE THE MADE-WHOLE RULE BY REQUIRING CONSIDERATION OF OTHER SOURCES OF COMPENSATION.

The made-whole rule as generally applied now, and as applied by the Court of Appeal below, is simple. As long as the wrongdoer pays all of the insured's damages (e.g., the wrongdoer has sufficient insurance and/or assets to pay full compensation), the insurance carrier obtains reimbursement for its med-pay benefit payment to the insured less its share of the insured's attorney fees attributable to that

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wrongdoer and paid the same $2,000 (one-third) continency fee to her attorney, she would have received a net amount of $4,000. But because she was paid med-pay benefits of $1,000 and her carrier accepted from her only $600 in reimbursement so as to pay the carrier's pro rata share of her attorney fees, the net amount she received was instead $4,400: $7,000 ($1,000 med-pay plus $6,000 recovery) less $2,000 in attorney fees and $600 reimbursement to the carrier.

reimbursement. Other sources of compensation for the insured are irrelevant to the carrier's reimbursement right.

Under the expansion of the made-whole rule proposed by the insured here, however, the determination whether the insured has been fully compensated becomes more complex. No longer is it enough that the wrongdoer has paid all of the insured's damages. Rather, the insured has not been fully compensated if her total attorney fees exceed the insurance carrier's med-pay payment. In that situation, other sources of compensation must be considered because they might have contributed enough additional funds to make the insured whole. But making that determination will be complicated and will place an additional burden on the courts.

For example, besides med-pay payments under the insured's auto policy and recovery of damages from the wrongdoer, the insured may have received compensation for her injuries from health insurance, Medicare, worker's compensation, or disability insurance. Further, the courts will have to do more than just determine whether those payments plus the auto policy med-pay payments are greater than the insured's attorney fees. To evaluate whether the insured has been fully compensated under her proposed version of the made-whole rule, courts will also have to resolve disputes about what reimbursements those other compensation sources received and what portion, if any, of the insured's attorney fees they paid.

The complexities pendent to the insured's proposed expansion of the made-whole rule militates against its adoption, especially when the rule it would replace is fair, equitable, and easily administered.

VI.

THIS COURT SHOULD LEAVE OPEN THRESHOLD ISSUES, NOT CONTESTED BY THE PARTIES, ABOUT WHETHER THE MADE-WHOLE RULE APPLIES AT ALL IN CASES LIKE THIS.

As explained, petitioner 21st Century Insurance Company is correct that the made-whole rule does not require the insured to be compensated for all her attorney fees before being required to reimburse her insurance carrier. It is important also to note that certain threshold issues are not contested here and thus should not be decided. (See, e.g., *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1002, fn. 6 ["declin[ing] to resolve [a] conflict" in Court of Appeal decisions "[b]ecause the question is not squarely presented"].)

For example, the parties in this case have not briefed whether the particular reimbursement provision in 21st Century's policy precludes operation of the made-whole rule. This court should therefore not decide that issue.

"Subrogation is of two sorts: 'legal' and 'conventional.' Legal subrogation has its source in equity and arises by operation of law.

[Citation.] Conventional subrogation arises by act of the parties and rests on contract." (*Fifield Manor v. Finston*, *supra*, 54 Cal.2d at p. 638.) The made-whole rule is an equitable doctrine that can be altered or entirely negated by contract. (See *Barnes v. Independent Auto. Dealers of California*, *supra*, 64 F.3d at p. 1394 ["It is a general *equitable* principle of insurance law that, *absent an agreement to the contrary*, an insurance company may not enforce a right to subrogation until the insured has been fully compensated for her injuries, that is, has been made whole" (emphases added)].)

Thus, the parties to an insurance contract can agree that, contrary to the equitable made-whole rule, the insurance carrier will be reimbursed regardless of whether the insured has first been fully compensated. (See, e.g., *Samura v. Kaiser Foundation Health Plan, Inc.*, *supra*, 17 Cal.App.4th at pp. 1292-1294; *Travelers Indem. Co. v. Ingebretsen*, *supra*, 38 Cal.App.3d at pp. 865-866.) Some courts, however, have found that insurance policy subrogation clauses "typically are general and add nothing to the rights of subrogation arising by law," i.e., most policy provisions do not displace the made-whole rule. (*Sapiano v. Williamsburg Nat. Ins. Co.*, *supra*, 28 Cal.App.4th at p. 538.)

Under these principles, courts are ordinarily required to determine whether the policy language is sufficiently clear to negate the made-whole rule. But whether the specific policy language here permits application of the made-whole rule is a question not presented by the parties and therefore should not be decided in this case.

The parties also have not addressed whether the made-whole rule should even apply in cases, like the present one, involving personal injuries and no-fault med-pay coverage. The Court of Appeal below recognized the made-whole rule was only recently applied in that context "for the first time." (*Delanzo*, *supra*, 151 Cal.App.4th at p. 1512, citing *Progressive West Ins. Co. v. Superior Court* (2005) 135 Cal.App.4th 263.) However, the appellate court did not decide the issue itself, noting that the insurance carrier "[did] not challenge *Progressive West's* holding." (*Delanzo*, *supra*, 151 Cal.App.4th at p. 1523, fn. 6.) Because that issue has not been contested or briefed here, this court should not decide it now. [5/]

Finally, another issue that should not be decided here because it has not been briefed is whether an insured is fully compensated under the made-whole rule when she has recovered just those damages for which she has been paid by her insurance carrier, or only when she has recovered *all* of her damages. As the Court of Appeal here noted, "Some jurisdictions have narrowly construed the made-whole exception as referring only to an insured being fully compensated for the covered losses." (*Delanzo*, *supra*, 151 Cal.App.4th at p. 1523, fn. 5.)

5/ The amicus brief filed by the National Association of Subrogation Professionals addresses some of the reasons why the made-whole rule might not apply in cases like this.

CONCLUSION

For the reasons stated, this court should affirm the Court of Appeal's judgment.

Dated: April 28, 2008 Respectfully submitted,

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CERTIFICATE OF WORD COUNT

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