

No. S154790

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

21ST CENTURY INSURANCE COMPANY
Petitioner,

v.

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

SYLVIA QUINTANA, et al.,

Real Parties in Interest.

Fourth Appellate District, Division One, No. D049430
Superior Court of San Diego County
The Honorable Kevin A. Enright
Superior Court No. GIC 857010

APPLICATION TO FILE AMICUS CURIAE BRIEF
and
AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF
SUBROGATION PROFESSIONALS
(In support of Petitioner)

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APPLICATION TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rule of Court 8.520(f), the National Association of Subrogation Professionals (“NASP”) hereby applies for permission to file an amicus curiae brief.

NASP is a non-profit trade association of insurance subrogation personnel, attorneys, and vendors. There are approximately 2,300 individual members of NASP, representing numerous insurance companies, who regularly file, settle, and take to trial subrogation claims. The purpose of NASP is “to enhance the stature and effectiveness of subrogation and recovery professionals through education, training and the exchange of information.” Through NASP, members are able to retrieve, organize, and exchange information, and expand the use of technology to promote subrogation efforts on a cost-effective basis.

NASP believes its submission of an amicus curiae brief will assist the Court in deciding this matter by adding NASP’s specialized perspective on subrogation and the significant policy considerations involved. NASP has previously filed amicus briefs in the U.S. Supreme Court and several state supreme courts.

I. THE MADE WHOLE RULE IS INAPPLICABLE IN THE MED PAY REIMBURSEMENT CONTEXT

The Court should reject Petitioner's proposed application of the made whole rule because it is inappropriate to extend the made whole doctrine into the med pay arena. The only California case supporting extension of the made whole rule in any form to med pay claims was wrongly decided, and this Court should correct that error.

A. Properly Understood, the Made Whole Rule Applies Only When the Insurer Has a Right to Sue the Third Party Directly, and Fails to Exercise that Right

Before 2005, no California court had held that any form of the made whole rule applied in the context of personal injury claims (as opposed to property damage claims). In *Progressive West Ins. Co. v. Sup. Ct.* (2005) 135 Cal.App.4th 263, the court of appeal held for the first time that the made whole rule applies to med pay reimbursement (although the court did not address whether attorney fees are to be considered in applying the rule).

Before *Progressive West*, California had applied the made whole rule only in property damage subrogation claims – situations in which an insurer is subrogated to the insured's interests and has standing to pursue an action against the tortfeasor. The very definition of the made whole rule incorporates the premise that the insurer had – but failed to exercise – a

right to pursue the tortfeasor:

When an insurer does not participate in the insured's action against a tortfeasor, despite knowledge of that action, the insurer cannot recover any funds obtained through settlement of the action unless the full amount received exceeds the insured's actual loss.

(*Plut v. Fireman's Fund Ins. Co.*, (2000) 85 Cal.App.4th 98, 104-105.) By

“participate,” *Plut* was referring to intervention into the action as a party.

(*Id.* at 104.)

This emphasis on failure to exercise a right to participate has its roots in the earliest cases establishing the made whole doctrine – cases which are based heavily on a moral condemnation of an insurer that sits idly by while its insured incurs the costs and risks of suit, and then attempts to claim most or all of the fruits of the litigation. (Answer Brief on the Merits at 24-25.)

Unlike a property damage insurer, however, a med pay insurer has no standing to sue the tortfeasor or intervene in an insured's personal injury action against a tortfeasor. (*California Physicians' Service v. Superior Court* (1980) 102 Cal.App.3d 91, 97.)

In extending the made whole rule to med pay claims, *Progressive West* erroneously relied on property damage cases for the notion that a med pay insurer can “interplead” itself into an insured's personal injury action, and held that if the insurer does exercise this supposed interpleader right

then its reimbursement rights are limited by the made whole rule.

(*Progressive West Ins. Co. v. Superior Court*, *supra*, 135 Cal.App.4th at 273.) Presumably, by “interplead” the court meant “intervene,” since interpleader under Code of Civil Procedure § 386 is clearly inapposite. (Compare Code of Civ. Proc. § 386 [interpleader] with Code of Civ. Proc. § 387 [intervention].) But we know from *California Physicians’ Service v. Superior Court*, *supra*, 102 Cal.App.3d at 95-97, that a med pay insurer has no right of intervention.

Accordingly, *Progressive West* creates an impossible standard for med pay insurers. They can avoid the made whole rule if they intervene in the insured’s action, yet they have no right to intervene. *Chong v. State Farm Auto Ins. Co.*, 85 428 F.Supp.2d 1136 (S.D. Cal. 2006) repeats the same error as *Progressive West*. Because *Progressive West* and *Chong* are both based on the manifestly incorrect premise that a med pay insurer has a right to intervene in an insured’s action, this Court should reject the analysis of those decisions and not perpetuate their error. The law should not punish an insurer for failing to do what it has no right to do. Because med pay insurers have no right to intervene, and because the made whole doctrine is premised on an insurer’s failure to do so, it is inappropriate to extend the made whole doctrine to the med pay context.

B. The Made Whole Rule Does Not Apply to Med Pay Reimbursement, Because Med Pay Reimbursement is Purely a Creature of Contract, not Equity

An independent reason to refuse to import the made whole rule in any form into the med pay context is that the made whole rule is a creature of equity that was created to limit subrogation rights that likewise arose in equity. It should have no role in med pay reimbursement – a right that arises purely by contract. While it may be appropriate for courts freely to create equitable rules to limit other court-made equitable rules, courts should be proceed with great caution in creating equitable rules that interfere with freedom of contract.

Property damage subrogation rights began as creatures of equity, and such rights exist even if the insurance contract is silent as to subrogation. (*Sapiano v. Williamsburg National Ins. Co.* (1994) 28 Cal.App.4th 533, 538.) While a property insurance contract may include a subrogation provision, “those provisions typically are general and add nothing to the rights of subrogation arising by law.” (*Ibid.*)

Personal injury reimbursement rights, in contrast, do not arise from equity. (*Block v. Cal. Physicians’ Service* (1966) 244 Cal.App.2d 266, 271.) To the contrary, assignment of personal injury claims is contrary to public policy in California. (*Fifield Manor v. Finston* (1960) 54 Cal.2d 632, 638.)

There is no subrogation or reimbursement allowable for such claims unless created by statute (such as workers' compensation subrogation pursuant to Labor Code §3852) or by contract as reimbursement and recognized by case law. (*See, e.g., Lee v. State Farm Mut. Auto. Ins. Co.* (1976) 57 Cal.App.3d 458.) Thus, since med pay reimbursement is not a creation of equity, and since no right of reimbursement or subrogation for med pay would exist in the absence of a contract, the court should decline to import the equitable made whole rule in any form to judicially regulate contractual med pay reimbursement rights.

II. AS A PRACTICAL MATTER, PETITIONER SEEKS TO ELIMINATE MED PAY REIMBURSEMENT

A. Petitioner's Proposed Rule Would Automatically Eliminate Most Med Pay Reimbursements

For more than 30 years, med pay providers have been entitled to reimbursement under language similar to the policy language in this case:

It has been clearly established in California that insurance contract provisions, although classified as adhesion contracts, requiring reimbursement of medical payments under the label of subrogation but providing only access to the proceeds of settlement or judgment resulting from the exercise of rights of recovery by the injured person, are valid and enforceable.

(*Lee v. State Farm Mut. Auto. Ins. Co.* (1976) 57 Cal.App.3d 458, 465-466.)

Thus, for many years, med pay reimbursement has been a known right and obligation in California.

Petitioner proposes a different rule, injecting the “made whole” doctrine into the med pay reimbursement arena, and, for the first time, defining “made whole” with reference to recovery of attorneys’ fees. This change would not just modify med pay reimbursement, it would eliminate med pay reimbursement for all practical purposes and thus eviscerate the established rule that citizens have relied on to conduct their affairs. The math involved in Petitioner’s proposed rule is as follows:

$$\begin{array}{rcl} & \text{a. Amount of injury settlement} & \\ \text{plus} & \text{b. Med Pay benefit} & \\ & \text{c. [Attorney fees and costs]} & \\ \text{minus} & & \\ \hline & \text{d. Net to Injured party} & \end{array}$$

As Petitioner would have it, the injured party is made whole only if line (d) equals or exceeds line (a). It follows, then, that under Petitioner’s proposed rule, plaintiff will be deemed “made whole” only when line (b) exceeds line (c). This will be rare, because (1) med pay benefits are typically small, and (2) the greater the med pay benefit, the greater the attorney’s fee will be because the fee is driven in part by the medical special damages. Thus, adopting Petitioner’s rule would be a judicial elimination of the insurer’s contractual med pay reimbursement in essentially all cases.

B. Insureds Could Easily Avoid Making Med Pay Reimbursements, Even Where not Automatically Eliminated

Even in the rare instances in which Petitioner’s proposed rule left some money available to pay the reimbursement, the rule would enable injured parties and their attorneys, acting perfectly ethically, to enter fee agreements to avoid any reimbursement payments. As an example, if an injured party received a med pay benefit of \$3,000, settled his civil claim for \$6,000, and paid a total of \$2,000 in attorneys’ fees and costs, plaintiff would be left with a total of \$7,000. Under Petitioner’s proposed rule, that would leave an extra \$1,000 above the \$6,000 “made whole” amount that the injured party would have to reimburse to the med pay insurer.

Injured parties and their lawyers could easily avoid having to pay the \$1,000 back to the insurer by entering fee agreements increasing the attorneys’ fees and costs to \$3,000, leaving no amount left after plaintiff was “made whole.” For example, the fee agreement could provide that the attorney’s fee shall in no event be less than the amount of med pay benefits received when the recovery exceeds med pay benefits.¹ The incentive for

¹ Many contingency fee agreements are stepped, such that the percentage fee increases depending on the stage of litigation. Under those agreements, another way to transfer med pay reimbursement funds to attorneys’ fees would be to advance the litigation stage even where it does not increase the settlement level. Thus, an attorney might be able to increase his or her fee from one-third to 40% by filing suit, appearing at a case management conference, or meeting some other milestone. The increased fee would reduce or eliminate the reimbursement funds.

the lawyers to have such a clause is obvious - a larger fee. Injured parties would have no objection because they would simply be paying the excess money to their attorney rather than an insurance company. The above paragraph does not describe dishonest or unethical conduct; it simply reflects the contracting strategies honest injured persons and their lawyers, acting rationally, would have incentive to engage in.

In any event, under the misguided rule Petitioner proposes, injured parties and their lawyers would assume total control of reimbursement rights because those interests could easily control the numbers that determine whether an injured party has been made whole. This would drain the made whole rule, which arises in equity, of all fairness and meaning.

As Respondent has addressed, judicial abrogation of contractual rights and expectations inappropriately interferes with the freedom to contract, disrupts legitimate commercial expectations grounded in longstanding law, and would tend to result in higher premiums by increasing the net cost of med pay claims. (Answer Brief on the Merits at 18-20, 2-29).

III. CONCLUSION

For more than 30 years, California has recognized and adhered to contractual med pay reimbursement and enjoyed its benefits. Only recently

did a California court, wholly unwittingly, transfer the made whole concept from property subrogation to med pay reimbursement, purporting to punish med payors when they do not “participate” in subrogation. Med payors have no right to participate, and thus punishing them for not participating makes no sense. Though Petitioner asks this Court to modify the made whole rule by including consideration of attorneys’ fees, Petitioner’s argument fails to explain or justify why the made whole rule should exist at all in the med pay arena. It should not.

Respectfully Submitted,

Dated: April 10, 2008

GIBSON ROBB & LINDH LLP

Joshua E. Kirsch
Attorney for Amicus Curiae
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CERTIFICATE OF COMPLIANCE

I, Joshua E. Kirsch, Attorney for Amicus Curiae National Association of Subrogation Professionals, certify that the foregoing brief is prepared in proportionally spaced Times New Roman 13 point type and, based on the word count of the word processing system used to prepare the brief, the brief is 2737 words long.

Joshua E. Kirsch

PROOF OF SERVICE BY MAIL

21st Century Insurance Company v. Superior Court of the State of California for the County of San Diego

Superior Court of the State of California for the County of San Diego, Case No. **GIC857010** Court of Appeal, Fourth Appellate District, Division One, Case No. **D049430** Supreme Court of California, Case No. **S154790**.

I am employed in the City and County of San Francisco by the law firm of GIBSON ROBB & LINDH LLP, 100 First Street, 27th Floor, San Francisco, California 94105. I am over the age of 18 years and not a party to the within action. I am readily familiar with the practice of GIBSON ROBB & LINDH LLP with respect to the collection and processing of pleadings, discovery documents, motions and all other documents which must be served upon opposing parties or other counsel in litigation. The below-described document(s) will be deposited in the ordinary course of the business of GIBSON ROBB & LINDH LLP with the United States Postal Service on the same date as I sign this document. On April 10, 2008, I served the within **APPLICATION TO FILE AMICUS CURIAE BRIEF and AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF SUBROGATION PROFESSIONALS** in said action by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon

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Following the ordinary business practices of GIBSON ROBB &
LINDH LLP, I placed the aforesaid envelope in the place for collection and
mailing on the date specified.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 10, 2008, at San Francisco, California.

Anna Adams