

Liability Insurance Carrier Only Required to Pay A Pro Rata Share of Fees Incurred In The Subrogated Recovery Context, Not The Entire Amount Under The "Made Whole" Doctrine

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In [21st Century Insurance Co. v. Superior Court](#), 2009 DJDAR 12587 (August 24, 2009), the [California Supreme Court](#) ruled on an undecided question pertaining to the proper application of the "[Made-Whole](#)" rule versus application of the "[Common Fund](#)" doctrine in the context of an automobile liability insurance policy.

Silvia Quintana (Quintana) was insured by 21st Century Insurance Co. (21st Century). She was injured in an automobile accident with a third party. 21st Century paid \$1,000 under the no-fault medical payment (med-pay) insurance provision contained in the policy. Quintana then sought damages against the third party. She eventually settled the third party claim for \$6,000.

In the course of the suit, she incurred more than \$2,000 in attorney fees and costs. Quintana's insurance policy required her to reimburse 21st Century for the med-pay amount, so to avoid double recovery by her. She paid \$600 representing full reimbursement of \$1,000 less the *pro rata* attorneys' fees of \$400 but argued that 21st Century was required to reimburse all the litigation expenses incurred in order to satisfy the "made-whole" rule. 21st Century contended that California law did not require an insurer to pay such expense to meet this rule. Rather, litigation expenses should be determined separately per "the common fund doctrine" on a *pro rata* basis.

Quintana subsequently filed a class action lawsuit against 21st Century. The insurer demurred to the complaint, asserting that Quintana did not state a cause of action because California law does not include attorneys' fees in the made-whole doctrine. The trial court overruled the demurrer and 21st Century filed a petition for writ of mandate. The Fourth Division of the California Court of Appeal agreed with 21st Century's view of the law and Quintana petitioned for review before the Supreme Court.

The Court of Appeal ruling was affirmed by the Supreme Court. The court stated that the made-whole rule "limits the insurer's reimbursement right . . . where the insured has not recovered [her entire debt]." Thus, an insurer may not accept any money from a third party until the insured "has been fully compensated for [her] injuries."

The common fund doctrine holds that where "a number of parties are entitled in common to a specific fund, such action brought . . . in [their] benefit . . . results in the creation or preservation of the fund such that . . . attorney's fee [may be awarded] out of the fund."

Here, Quintana argued that reimbursement of her litigation costs would better reflect compensation of her entire debt. However, the court found no law requiring or supporting her contention. Rather the policies underlying these two legal theories supported the conclusion that 21st Century should be responsible only for the *pro rata* share of the litigation expenses incurred.