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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB, Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;	D049831 (San Diego County Super. Ct. No. GIC856160)
MICHELLE MONTPETIT, Real Party in Interest.	

PROCEEDINGS in mandate after the superior court denied petitioner's demurrer to the first amended complaint. Richard E. L. Strauss, Judge. Petition granted.

Interinsurance Exchange of the Automobile Club (Interinsurance Exchange) petitions for a writ of mandate challenging the trial court's denial of its demurrer to the first amended complaint filed by Michelle Montpetit. The legal issue in this case is

identical to the issue in *Allstate Insurance Company v. Superior Court* (*Delanzo*) (2007) __ Cal.App.4th ___, filed simultaneously with this opinion. Based on *Delanzo*, we conclude the court erred in overruling Interinsurance Exchange's demurrer. We thus grant Interinsurance Exchange's petition for writ of mandate, and order the court to vacate its order overruling Interinsurance Exchange's demurrer and enter a new order sustaining the demurrer.

FACTUAL AND PROCEDURAL BACKGROUND

Montpetit filed a class action complaint against Interinsurance Exchange, her former automobile insurer. As amended, the complaint alleged that Montpetit's former automobile policy with Interinsurance Exchange included first party, no-fault medical payments insurance coverage (med-pay coverage).

On September 15, 2000, Montpetit allegedly suffered injuries resulting from an automobile accident with a third party. Under its policy's med-pay coverage provisions, Interinsurance Exchange paid $2,000 to Montpetit. Montpetit then settled her claim against the third party tortfeasor for $12,500, and received the settlement payment in full. Montpetit allegedly incurred unrecovered attorney fees of $5,000 and costs of $1,083.70 (for a total of $6,083.70) to obtain this settlement.

Interinsurance Exchange then requested that Montpetit repay the $2,000 under Interinsurance Exchange's reimbursement provision, which states: "REIMBURSEMENT TO US - COVERAGE C [¶] If we pay to or for a person who is insured under COVERAGE C, we shall, to the extent of our payment, be entitled to the proceeds of any settlement or judgment that may result from that person's exercise of any rights of

recovery against any person or organization legally responsible for the bodily injury because of which we made payment. These proceeds must be held in trust for us and reimbursed to us to the extent of our payment. These proceeds must be reimbursed to us within 30 days of the receipt of such proceeds by or for a person insured. [¶] If there is full compliance with this provision, the amount of reimbursement due us will be reduced by our pro rata share of the attorney's fees incurred by or for a person insured in the exercise of any rights of recovery against any legally responsible person or organization. [¶] If there is not full compliance with this provision, the amount of reimbursement due us will not be reduced." (Boldface omitted.)

In response, Montpetit paid Interinsurance Exchange $1,200, which Interinsurance Exchange agreed was in full satisfaction of its claim. Interinsurance Exchange agreed to the reduction based on the "common fund" rule that an insurer is required to deduct from its reimbursement a pro rata portion of the insured's attorney fees incurred to recover covered losses against a third party tortfeasor when the insurer had knowledge of, but did not participate in, the litigation. (See *Lee v. State Farm Mut. Auto. Ins. Co.* (1976) 57 Cal.App.3d 458, 466-469.)

Based on these facts, Montpetit alleged four causes of action: (1) violation of Business and Professions Code section 17200, (2) conversion, (3) unjust enrichment, and (4) declaratory relief. The legal basis for each cause of action was Montpetit's assertion that Interinsurance Exchange's claim for reimbursement was improper and unlawful because Montpetit was not first "made whole" by the third party settlement ($12,500) plus the amount received from Interinsurance Exchange ($2,000), when taking into

account the attorney fees and costs incurred to obtain the settlement ($6,083.70). Montpetit did not dispute that the third party settlement ($12,500) constituted full compensation for her injuries, but alleged she was not made whole by this amount because her total gross recovery of $14,500 ($12,500 from the settlement plus $2,000 from Interinsurance Exchange), *minus* the costs and attorney fees ($6,083.70), was less than $12,500.

Montpetit sought to represent the class of "all California insureds, past and present, of [Interinsurance Exchange] who: 1) were not made whole after deducting attorney's fees and costs from the money they received from the resolution of their claims against third party tortfeasors; 2) the amount paid by [Interinsurance Exchange] to or on behalf of such insureds pursuant to the medical payments coverage contained in their personal automobile insurance policies was less than the amount paid by such insureds for such attorney's fees and costs; and 3) such insureds paid [Interinsurance Exchange] money in response to its demand for reimbursement of payments it paid under such medical payments coverage."

Interinsurance Exchange demurred to the complaint, arguing that Montpetit's claims did not state a cause of action under any legal theory because, under California law, the made-whole doctrine does not include a consideration of attorney fees and costs in determining whether a med-pay insured was made whole. Interinsurance Exchange argued that Montpetit's view of the made-whole rule as including a consideration of these expenses was improper because it conflicted with the settled "equitable apportionment" or "common-fund" rule that an insurer's reimbursement is subject to the requirement that

it pay a proportionate amount of the insured's attorney fees incurred in obtaining the recovery. Interinsurance Exchange alternatively argued that the made-whole rule applies only "when the parties have not contracted otherwise," and here "the parties expressly contracted to share attorney fees pro rata."

The trial court sustained the demurrer with leave to amend on Montpetit's conversion and unjust enrichment claims, but overruled the demurrer with respect to her Business and Professions Code section 17200 claim and declaratory relief claim.

Interinsurance Exchange filed a petition for writ of mandate, challenging the portion of the court's order overruling the demurrer. The parties asserted the same arguments as those asserted in the *Delanzo* case. Interinsurance Exchange also contended that the policy provision pertaining to Interinsurance Exchange's obligation to bear pro rata attorney fees precluded the application of the made-whole doctrine. Montpetit was represented by the same counsel as was the insured in the *Delanzo* case and Interinsurance Exchange was represented by the same counsel as was the insurer in the *Delanzo* case. We issued an order to show cause, and issued an order stating Interinsurance Exchange's writ petition would be considered with the *Delanzo* case, as well as with three other writ petitions raising the identical legal issue.

DISCUSSION

In *Delanzo, supra,* __ Cal.App.4th __, this court held that, in applying the made-whole doctrine in the context of med-pay coverage, the insured's attorney fees and costs incurred to obtain a recovery from a third party are not deducted from the insured's total recovery amount for purposes of determining whether the insured was made whole for his or her losses. Each of Montpetit's claims are predicated on Montpetit's assertion that she was not made whole because she was required to bear her attorney fees and costs in settling with the third party. Under *Delanzo,* Montpetit's claims do not state a valid cause of action under California law. Based on this ruling, we need not reach Interinsurance Exchange's alternative contract-based argument. We grant Interinsurance Exchange's petition for writ of mandate, and order the court to vacate its order overruling defendant's demurrer and enter a new order sustaining the demurrer.[1]

DISPOSITION

Petition for writ of mandate granted. This court issues a writ of mandate directing the superior court to vacate its order overruling Interinsurance Exchange's demurrer and

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1 As in *Delanzo*, we deny Montpetit's request that we take judicial notice of Interinsurance Exchange's insurance filings. Because we do not consider Interinsurance Exchange's argument that including attorney fees in the made-whole calculation will result in higher premium rates for med-pay coverage, the judicial notice materials are not relevant to our determination in this case.

enter a new order sustaining the demurrer. The parties to bear their own costs in the writ proceeding. The stay issued on November 29, 2006 is vacated.

HALLER, J.

I CONCUR:

MCDONALD, J.

NARES, Acting P.J., dissenting:

For the reasons expressed in my dissent in *Allstate Insurance Company v. Superior Court* (*Delanzo*) (2007) __ Cal.App.4th ___, I respectfully dissent from the majority's opinion.

NARES, Acting P. J.