Appellate Reports and cases in brief

Laffitte v. Robert Half International *confirms that courts in California may award class counsel a 33.33 percent fee based on common-fund recovery*

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Laffitte v. Robert Half International

(2014) __ Cal.App.4th __ (2d Dist., Div. 7.)

Who needs to know about this case: Lawyers seeking fees in common-fund class-action lawsuits.

Why it's important: Confirms that in California, courts may award class counsel a 33.33 percent fee based on a common-fund recovery.

Synopsis: Plaintiff Mark Laffitte, on behalf of himself and other class members, settled a class-action lawsuit against defendants, Robert Half International Inc., for $19 million. David Brennan, a class member, objected to the settlement. The trial court overruled his objections and approved the settlement, which included an award of attorneys' fees to class counsel of one-third of the settlement, or approximately $6.3 million. Brennan appealed. Affirmed.

Brennan argued on appeal that the trial court erred by calculating the amount of class counsel's attorneys' fees based on a percentage of the common fund, rather than the lodestar method. He argued that the lodestar approach is the primary method for establishing the amount of attorneys' fees in class actions. The court explained that, "While Brennan is correct that, as a general rule, the lodestar method is the primary method for calculating attorneys' fees, the percentage approach may be proper where, as here, there is a common fund." The lodestar method is the primary method in fee-shifting cases, where the defendant is forced to pay the plaintiff's fees. But in common-fund cases, a percentage-of-the fee approach can be used, although the lodestar method may also be used.

The trial court's use of a percentage of 33.33 percent of the common fund was consistent with, and in the range of, awards in other class action lawsuits (citing *Chavez v. Netflix* [27.9 percent award]; *Bell v. Farmers Ins. Exch.* [25 percent award]; *Fischel v. Equitable Life Assur. Society* [25 percent award.] "Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." Here, the trial court also used the lodestar method to "cross-check" the amount of the award, which was appropriate. The lodestar amount was approximately $3 million, and class-counsel sought a multiplier of 2, which was within the range of acceptable multipliers.

The Court also rejected Brennan's objection that, in connection with the court's lodestar calculations, class counsel did not submit detailed attorney time records. But such detailed time records are not required. "It is well established that 'California courts do not require detailed time records, and trial courts have discretion to award fees based on declarations of counsel describing the work they have done and the court's own view of the number of hours reasonably spent.'"

Graciano v. Mercury General Ins. Co.

(2014) __ Cal.App.4th __ (4th Dist., Div. 1.)

Who needs to know about this case: Lawyers who make policy-limits demands in an effort to "open" the policy.

Why it's important: Shows that, in order to violate the implied covenant of good faith and fair dealing, which is the predicate for forcing the insurer to pay for an excess judgment, the insurer's conduct in rejecting the settlement demand must have been unreasonable under all the circumstances. Since the court held that the carrier's conduct had not been unreasonable, it reversed a $2 million award for the plaintiff, as insured's assignee, based on the failure to settle.

Synopsis: Graciano suffered severe injuries from being struck by a Cadillac driven by Saul Ayala, who had been drinking. Saul had a $50,000 auto policy issued by CAIC. CAIC had also issued a separate policy to Saul's son, Jose Saul Ayala, which insured the same Cadillac as on Saul's policy. Saul reported the accident to CAIC. Based on its preliminary investigation after the accident – and before it even knew Graciano's identity – CAIC determined that Saul would be 100 percent liable for an amount in excess of his $50,000 policy limit.

Graciano retained counsel, DeDominicis. DeDominicis contacted CAIC's claim center and reported that her client had been injured by "Saulay Ala" and gave a policy number which corresponded

to Jose's policy, which had previously been canceled before the accident. Based on DeDominicis's call, CAIC opened a second claim, which was against Jose. A few days later, on November 5, 2007, DeDominicis mailed CAIC a demand letter, which named Jose as the named insured and identified his policy number. The offer was for policy limits, and remained open for only 10 days. CAIC requested an extension, which DeDominicis refused to provide. On November 14, CAIC informed DeDominicis that its preliminary investigation revealed that Jose's policy was not in force on the date of the accident, and it therefore could not accept the policy-limits demand.

On November 15, CAIC connected the claim against Jose with the claim reported by Saul. It immediately prepared a letter offering Saul's $50,000 policy limit to Graciano, who received the letter before the 10-day expiration period on her demand letter to Jose had expired. Graciano rejected the offer and pursued a lawsuit against Saul. She obtained a judgment against him for over $2 million, and then obtained an assignment of his rights, which she pursued in a claim against CAIC.

An insured's claim for bad faith based on an alleged wrongful refusal to settle first requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. The offer satisfies this first element if (1) its terms are clear enough to have created an enforceable contract resolving all claims had it been accepted by the insurer, (2) all of the third party claimants have joined in the demand, (3) it provides for a complete release of all insureds, and (4) the time provided for acceptance did not deprive the insurer of an adequate opportunity to investigate and evaluate its insured's exposure. A claim for bad faith based on an alleged wrongful refusal to settle also requires proof the insurer unreasonably failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance. But when a liability insurer timely tenders its full policy limits in an attempt to effectuate a reasonable settlement of its insured's liability, the insurer has acted in good faith as a matter of law.

An insured's claim for "wrongful refusal to settle" cannot be based on his or her insurer's failure to initiate settlement overtures with the injured third party, but instead requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. The Court reversed the judgment against CAIC because it concluded that there was no substantial evidence that Graciano ever offered to settle her claims against *Saul* for an amount within Saul's policy limits. The only settlement "offer" CAIC could have accepted was DeDominicis's November 5, 2007 letter that identified Jose as the driver and the insured, and listed his policy number. The plain import of this letter is that Graciano offered only to settle her claims against Jose. Because Graciano never demanded payment of Saul's policy limits in exchange for a release of Saul's liability, Saul would not have been protected even had CAIC accepted the terms of Graciano's demand.

In addition, the undisputed evidence showed CAIC did timely tender Saul's full policy limits within the timeframe selected by Graciano in an attempt to settle Graciano's claim, and therefore acted in good faith as a matter of law by offering the policy limits in exchange for a release [thereby doing] all within its power to effect a settlement.

Short(er) takes:

Employment law; whistleblower protections; retaliation against perceived whistleblowers: *Diego v. Pilgrim United Church of Christ* (2014) __ Cal.App.4th __ (4th Dist., Div. 1.)

Diego worked for the Pilgrim United Church pre-school (PUCC) as the school's assistant director. Her employment was at will. After another employee anonymously reported the school to the Dept. of Social Services for alleged violations of the Health & Safety Code, the department conducted an unannounced inspection. The school's director accused Diego of making the report, and fired her several days later. Diego then sued PUCC for wrongful termination in violation of public policy. The trial court granted summary judgment to PUCC, finding that because Diego had not actually made the report, she was not a whistleblower and was not entitled to whistleblower protections. Reversed.

At-will employees can proceed against their employers if they are terminated in violation of fundamental California public policy. That public policy encourages employees to report suspected wrongdoing by the employer to the proper authorities. That policy also protects employees who report illegal conduct from retaliation by the employer. Here, although Diego was not actually a whistleblower, she was entitled to the protection of that public policy. Allowing employers to terminate "perceived whistleblowers" would frustrate the public policy encouraging employees to report illegal conduct by their employers.

Insurance; uninsured/underinsured motorist protection; which documents become part of policy: *Elliott v. Geico Indemnity Co*. (2014) __ Cal.App.4th __ (3rd Dist.)

Elliott's husband was killed when his motorcycle was struck by a truck driven by Shaffer, who had driven after becoming intoxicated at work. Shaffer had a $15,000 policy, which her insurer tendered to Elliott. Since Elliott's Geico auto policy contained $100,000 in UM/UIM coverage, she sought to recover $85,000 from Geico (the $100,000 policy limit less the $15,000 she recovered from Shaffer.) But Elliott also recovered $250,000 from Shaffer's employer. Because the $265,000 total that Elliott recovered exceeded the

policy's $100,000 UM/UIM limit, Geico refused to pay. Elliott sued. The trial court granted Geico summary judgment. Affirmed.

Geico's policy, which was nearly identical in wording to Insurance Code section 11580.2, subd. (p)(4), clearly provided that its maximum liability for UM/UIM coverage would not exceed the policy's coverage limit "less the amount paid to the insured by or for any person or organization that may be held legally liable for the injury." Elliott sought to avoid this provision by relying on an illustration provided with the policy, which suggested that the UM/UIM coverage was based only on the driver's policy limit. But that illustration was not part of the policy, and the policy's terms were clear. Any "reasonable expectations" that Elliott had based on the illustration were not legally relevant.

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