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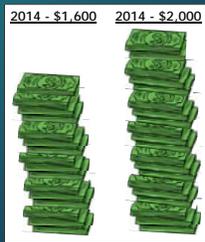
Attorneys Fees in "Bad Faith" Cases



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Attorneys Fees - Big & Getting Bigger

- Highest Hourly Rate?
 - '15 - Corps Paying \$1000+/hour
 - 59%



Attorneys Fees - Big & Getting Bigger

- \$345k Duracell Battery Class Award
 - \$5.7M Attorneys Fees
- \$2.75M Minority Shareholder Award
 - \$6M Attorneys Fees
- Vimpelcom defended Foreign Corrupt Practices Act Case
 - \$105M Attorneys Fees

Attorneys Fees = "Bad Faith" Damages

- Attorneys Fees Can be Entirety of Damages
 - E.g., Duty to Defend Case
- Two Types of Attorneys Fees
 - Underlying Case
 - Sometimes Over
 - Sometimes Ongoing
 - "Bad Faith" Case
 - Always Ongoing

ISSUES

- Who Decides Attorneys Fees?
 - Dis/Advantages of Jury vs. Post-Trial Motion?
- What is Recoverable?
 - All Claims/Parties?
 - In-House Counsel's Time?
- How Low is Plaintiffs' Burden?
- How High is Defendants' Burden?
- What are the Discovery Difficulties?
 - Attorney-Client? Work-Product?
 - Depositions of Opposing/In-House Counsel?
- Expert?

Offer Too Good to Refuse?

- Plaintiff's Offer
- Decide Fees by Post-Trial Motion
 - Save \$ On Discovery
 - No Bill Review
 - No Lawyer Depositions
 - Save \$ on Motions to Compel
 - Save \$ on Fee Experts
 - One Less Issue at Trial
 - If Defense Wins, Never Have to Bother
- Why Not Agree?



How Low is Plaintiff's Burden?

- Attorneys Fees - "Presumed Reasonable"
 - *Stryker Corp. v. XL Ins. Am.*, 2008 WL 68958 (W.D. Mich. 2008) ("Plaintiffs are correct that as a consequence of defendant's decision not to defend plaintiffs in the underlying lawsuits the settlements and defense costs for the underlying lawsuits are *presumed reasonable*.")
 - *Knoll Pharm. Co. v. Auto. Ins. Co. of Hartford*, 210 F. Supp. 2d 1017, 1025 (N.D. Ill. 2002) (that the policyholder paid all the defense costs "*strongly implies commercial reasonableness of the fees*, especially in light of the fact that ultimate recovery of the fees was uncertain because [the insurance company] refused to pay")

How Low is Plaintiff's Burden?

- NOT Have to Produce Bills
 - Plaintiff "can carry its burden of establishing its entitlement to attorney fees by submitting a declaration from counsel instead of billing records or invoices" *Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 487-488
 - "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." *Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691, 698

How Low is Plaintiff's Burden?

- Plaintiffs' Attorneys Have to Sit for Deposition?
 - Maybe Not
 - *Riverside Sheriffs' Assn. v. County of Riverside* (2007) 152 Cal.App.4th 414, 424-25 (lawyer's testimony not compelled where bills produced)

How High is Defendant's Burden?

- Prove Fees Unreasonable
- Prove Allocation Between
 - Claims - Covered or Not
 - Parties - Insured or Not
- *Stalberg v. Western Title Ins. Co.*, 230 Cal.App.3d 1223, 1233 (1991) insurer failed to demonstrate fees could be logically allocated between covered and non-covered claims

Take Plaintiff's Offer?

- Without discovery, how defendants meet their burden?
- Judges Fee Experts?
 - Former Prosecutors?
- Judges Like Insurance Companies?
 - Anybody?

Advantages of a Jury

- Jury Trial on Attorneys Fees:
 - Puts Plaintiff & Plaintiff's Lawyers on Trial
 - Opportunity to Turn Tables
 - People like Attorneys?
 - Below Politicians
 - 34% - Contribute Little or Nothing to Society
- People think Attorneys Underbill? Underpaid?

Advantages of a Jury

- Keeps Focus on:
 - Plaintiff Has Powerful Attorneys
 - Plaintiff Has \$ to Pay
 - Plaintiff NOT Need Sympathy

Investors Case

- Produced Heavily Redacted bills
 - \$2.5M
 - Multiple litigation cases & transactional work
 - 28 Billers from 4 Offices in 2 States
- Court: No Attorneys' Depositions
 - Said no deposition & no trial testimony so Plaintiff probably couldn't carry burden
 - PROBLEM - Court Wrong

Liberty Case

- Produced Bills & 2nd Set of Bills
 - In Underlying Litigation, Plaintiffs won & sought fees from opposing parties first
 - Changed Who Paid & How Much
 - False Declarations from Client & Lawyer
- 2nd Phase Trial -
 - Court Awarded \$1M in Attorneys Fees
 - Judge Said Could Have "Corrected"
- 3rd Phase Trial
 - Waived Attorneys Fees

Discovery

- Get the Bills & Retainer Agreement
- Depose the Lead Lawyer & Law Firm PMK
 - Spectra-Physics, Inc. v. Superior Court* (1988) 198 Cal.App.3d 1487 (authorizing attorney deposition as witness to "bad faith" conduct)
- Depose the Client & In-House Counsel
- Depose All who Communicated with Insurer re "Bad Faith"

Discovery Motions

- Motion to Compel or Exclude All
 - Redactions - Unredact or Don't Pay
 - Witnesses - Deposition or Exclude all Writings & Testimony at Trial
 - Plaintiffs' "Bad Faith" Correspondence

This bad faith conduct of Chicago caused substantial damages to the Insureds, including, but not limited to, loss of rental income from the property and compelling the Insureds to incur attorney's fees and costs to obtain a reversal of the Superior Court's Judgment. Accordingly, the Insureds request to know what Chicago proposes to do to mitigate the damages which its bad faith conduct has caused to the Insureds.

Attorneys Fees Expert?

- % of Judges Who Prefer Attorneys Fee Expert?
 - 67% - NALFA Survey

Challenges to Attorneys Fees

- NO:
 - Vague Descriptions
 - Over-Redactions
 - Block billing
 - Round Numbers
 - Excessive time
 - Multiple Attorneys
 - Duplicative Work
- Unreasonable Rates
- Administrative Work
- Intra-Office Comm.
- Tender of Claim
- Pre-lawsuit Work

Attorneys Fees Case Theme

- Where Attorneys Fees Primary Damages...
- This Case Is About Who Pays the Lawyers
 - Don't Worry – Lawyers Got Paid, Millions
 - Plaintiffs Paid
 - Plaintiffs Say Insurer Has to Pay Instead
 - What Attorneys Do, How Much Paid, Reasonable?

Don't Say "Bad Faith"

- "Bad Faith" Synonyms
 - Cheating Untrue Double-Crossing
 - False Unfaithful Infidelity Sedition
 - Treachery Treason Traitorous
 - Deceitful Double-Dealing Two-Faced
 - Two-Timing Subversive

Don't Say "Bad Faith"

- Agree to "Evil"?



Don't Say "Bad Faith"

- "Bad Faith" - Not in the Instructions
- "Reasonableness"
- Motion in Limine to Preclude "Bad Faith"
- Plaintiffs Twice Agreed
 - Avoid Adverse Appellate Ruling