

# ***Brandt Attorneys Fees***

## **Introduction**

“When an insurer’s tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense.”<sup>1</sup> However, “the proper method of calculating such damages in a contingent fee context”<sup>2</sup> requires an accounting of hours spent on contract, tort, and overlapping claims.

## **American Rule Against Recovering Attorneys Fees**

“The American rule has long been that each party to litigation should bear his own attorney fees. . . . [Three exceptions have been recognized] where the litigation has conferred benefits on others.”<sup>3</sup>

## **Statutory Recovery of Attorneys Fees**

“Except as attorney’s fees are specifically provided for by statute, the measure and mode of compensation of attorneys is left to the agreement, express or implied, of the parties.”<sup>4</sup> “In any action on a contract, where the contract specifically provides that attorney’s fees . . . shall be entitled to reasonable attorney’s fees in addition to other costs. . . . Reasonable attorney’s fees shall be fixed by the court, and shall be an element of the costs of suit.”<sup>5</sup> Civil Code “[s]ection 1717 was enacted to establish mutuality of remedy where [a] contractual provision makes recovery of attorney’s fees available for only one party, and to prevent oppressive use of one-sided attorney’s fees provisions.”<sup>6</sup>

## **Rationale for Recovery of Attorneys Fees**

“Undoubtedly, the general rule is that absent contractual or statutory authorization, attorney’s fees are not recoverable either as damages or costs, even in litigated disputes between insurer and insured. ¶ It follows as a matter of course [from bad faith law] that if the insurer’s tortious conduct makes it reasonable for the insured to seek the protection of counsel, the insurer is responsible for that item of damages. ¶ If the insurer . . . tortiously violates its covenant of good faith and fair dealing and thereby makes it reasonable for the insured to seek the protection of counsel, plain justice demands that the insurer be financially responsible for an expense which but for its tortious conduct would not have been incurred.”<sup>7</sup>

## **The *Brandt* Fee Rule**

### **1. Attorneys Fees Are Recoverable as Damages for Tortious Conduct**

Recoverable *Brandt* “attorney’s fees are an economic loss - damages - proximately caused by

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<sup>1</sup> *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817 (*Brandt*).

<sup>2</sup> *Cassim vs. Allstate Ins. Co.* (2004) 33 Cal 4th 780, 811 (*Cassim*).

<sup>3</sup> *Brandt, supra*, 37 Cal.3d at 822 (Lucas dissent).

<sup>4</sup> Code Civ. Proc. § 1021.

<sup>5</sup> Civ. Code § 1717(a).

<sup>6</sup> *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 128 (citations omitted).

<sup>7</sup> *Mustachio v. Ohio Farmers Ins. Co.* (1975) 44 Cal.App.3d 358, 363-64.

the tort. These fees must be distinguished from recovery of attorney's fees qua attorney's fees, such as those attributable to the bringing of the bad faith action itself. What we consider here is attorney's fees that are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action."<sup>8</sup>

## **2. Limitation on Recovery**

"The fees recoverable, however, may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract. Fees attributable to obtaining any portion of the plaintiff's award which exceeds the amount due under the policy are not recoverable."<sup>9</sup> "[T]he Brandt fees can never exceed the legal fees for the combined tort and contract recovery."<sup>10</sup> Nonetheless, one court upheld a trial court's exercise of discretion to limit a Brandt fee award of 40% of policy benefits.<sup>11</sup>

## **3. One Action**

"The fact that . . . the fees claimed as damages are incurred in the very lawsuit in which their recovery is sought, does not in itself violate [Code Civ. Proc. § 1021.] . . . "[T]here is no reason why recovery of such fees should be denied simply because the two causes . . . are tried in the same court at the same time. . . . There was no disadvantage to defendant in the fact that the causes, although separate, were concurrently tried."<sup>12</sup>

## **4. Trier of Fact to Decide Damages**

Although Civil Code § 1717(a) provides that "[r]easonable attorney's fees shall be fixed by the court," the Supreme Court ruled that "[s]ince the attorney's fees are recoverable as damages, the determination of the recoverable fees must be made by the trier of fact"<sup>13</sup> and authorized that the issue may be presented to a jury, even drafting a suggested jury instruction.

## **5. Proper Calculation of Brandt Fees**

The *Brandt* Court did not enunciate how Brandt fees are to be calculated. However, hourly time sheets may be necessary for attorneys to persuasively testify that fees that are properly allocable to the recovery of policy benefits.

### **A. Brandt Fees May Exceed Policy Benefits**

"Indeed, in either an hourly or a contingent fee case, the amount 'attributable to the attorney's efforts' to obtain the contract benefits could conceivably exceed those benefits entirely."<sup>14</sup> "The key question is how much did it cost the insured - how much were her damages - to hire an

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<sup>8</sup> *Brandt, supra*, 37 Cal.3d at 817 (citation omitted).

<sup>9</sup> *Id.* at 818.

<sup>10</sup> *Id.* at 809.

<sup>11</sup> "The retainer agreement required plaintiff to pay counsel 40 percent of all sums recovered in this action. . . . The trial court did not err by limiting the [Brandt fee] award . . . to the percentage specified in the parties' contingency agreement." (*Textron Financial v. National Union* (2004) 118 Cal.App.4th 1061, 1072 (*Textron*)).

<sup>12</sup> *Brandt, supra*, 37 Cal.3d at 818.

<sup>13</sup> *Id.* at 819.

<sup>14</sup> *Cassim, supra*, 33 Cal 4th at 809.

attorney when her insurer acted in bad faith and denied the benefits due her under her policy.”<sup>15</sup> “Although [the insurer] argues that Brandt fees should be limited to 40 percent of the recovery on the contract, that method of calculation is flawed. . . . To conclude that to obtain a \$40,856.40 contract recovery plaintiffs are out of pocket precisely \$16,342.56, no more and no less, is therefore a fiction.”<sup>16</sup> “Certainly nothing in Brandt limits the amount of fees awarded as damages to a percentage of the contract benefits.”<sup>17</sup>

### **B. Legal Work Overlapping Contract and Tort Claims to be Allocated**

In *Cassim*, the Court rejected a policyholder’s argument that Brandt fees be based upon the “attorney’s legal work comprised an undifferentiated whole, with all work attributable to both the contract and tort causes of action.”<sup>18</sup> “Thus, to the extent some overlap in legal work occurs [on contract and tort claims], the trial court should exercise its discretion to apportion the fees.”<sup>19</sup>

### **C. No Brandt Fees for Punitive Damages**

“[N]o portion of legal fees attributable to the punitive damage award can be recovered as Brandt fees. Brandt’s focus was solely on ensuring that attorney fees for contract recovery did not diminish a plaintiff’s compensatory damages award, and did not concern diminution of the punitive damages award, which is essentially a windfall for plaintiffs that the law permits for public policy reasons.”<sup>20</sup>

### **D. The Brandt Fee Formula**

“Having found fault with the methods of calculating Brandt fees proffered by both parties, we turn to explaining the proper method of calculating such damages in a contingent fee context. This method requires the trier of fact to determine the percentage of the legal fees paid to the attorney that reflects the work attributable to obtaining the contract recovery.”<sup>21</sup> “To determine the percentage of the legal fees attributable to the contract recovery, the trial court should determine the total number of hours an attorney spent on the case and then determine how many hours were spent working exclusively on the contract recovery. Hours spent working on issues jointly related to both the tort and contract should be apportioned, with some hours assigned to the contract and some to the tort. This latter figure, added to the hours spent on the contract alone, when divided by the total number of hours worked, should provide the appropriate percentage.”<sup>22</sup>

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Id.* at 808.

<sup>17</sup> *Id.* at 809.

<sup>18</sup> *Id.* at 811.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Id.* at 812.

<sup>21</sup> *Id.* at 811-12.

<sup>22</sup> *Id.* at 812. However, Justice Baxter’s dissent argues to limit contingent Brandt fees to a simple formula of the retainer agreement contingent fee percentage multiplied by the amount of policy benefits recovered because that was the policyholder’s out-of-pocket cost to pay attorneys

### **E. CASI Jury Instruction**

CASI Jury Instruction 2350 provides in part: “The following are the specific items of damages claimed by [*name of plaintiff*] :2. [The cost of attorney fees to recover the insurance policy benefits;] [To recover attorney fees [*name of plaintiff*] must prove that because of [*name of defendant*]’s breach of the obligation of good faith and fair dealing it was reasonably necessary for [him/her/it] to hire an attorney to recover the policy benefits. [*Name of plaintiff*] may recover attorney fees [he/she/it] incurred to obtain policy benefits but not attorney fees [he/she/it] incurred for other purposes.]”

### **Brandt Fees Included in Punitive Damage Calculation**

“In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered.”<sup>23</sup> “To determine whether a jury’s award of punitive damages is grossly excessive, reviewing courts must consider, among other factors, whether the ‘measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff’ by comparing the amount of compensatory damages to the amount of punitive damages. Absent special justification, ratios of punitive damages to compensatory damages that greatly exceed 9 or 10 to 1 are presumed to be excessive and therefore unconstitutional.”<sup>24</sup>

### **Practice Pointer**

Percentage contingent fee agreements with attorneys who do not keep time sheets are problematic to maximize recovery of Brandt fees. The majority in *Cassim* requires a determination of how many hours were spent on: 1) contract claims; 2) tort claims; and 3) overlapping both contract and tort claims for which the trier of fact is to exercise discretion. Justice Baxter’s dissent in *Cassim* argues to limit a contingent Brandt fee recovery to the policyholder’s out-of-pocket loss was in fact honored in *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061.

Attorneys working on a contingent fee basis should consider adding a provision to a retainer agreement by which the policyholder agrees to pay attorneys fees for recovering policy benefits by the hour rather than a percentage of recover and should consider keeping time sheets.

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fees to recover policy benefits.

<sup>23</sup> *Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368.

<sup>24</sup> *Id.* at 367 (citation omitted).)