

S109711

In The
Supreme Court of California

FAREED CASSIM and RASHIDA CASSIM,
Plaintiffs, Respondents, and Cross-Appellants,
vs.
ALLSTATE INSURANCE COMPANY,
Defendant, Appellant, and Cross-Respondent.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION ONE
CASE NO. B139975

**APPLICATION OF UNITED POLICYHOLDERS FOR
PERMISSION TO FILE BRIEF AS AMICUS CURIAE
AND BRIEF OF AMICUS CURIAE**

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APPLICATION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 29.1(f) of the California Rules of Court, United Policyholders (“UP”) seeks permission to file a brief in this action as amicus curiae. UP was founded in 1991 as a non-profit organization dedicated to promoting greater understanding of insurance issues and consumer rights. The organization is tax-exempt under Internal Revenue Code §501(c) (3). UP is funded by donations and grants from individuals, businesses, and foundations.

In addition to serving as a resource on insurance claims for disaster victims and commercial insureds, UP monitors legal and marketplace developments that affect policyholders’ interests. UP receives frequent invitations to testify at legislative and other public hearings, and to participate in regulatory proceedings on rate and policy issues.

A diverse range of policyholders and policyholder advocates communicate on a regular basis with United Policyholders, which allows it to provide important and topical information to courts throughout the country via the submission of *amicus curiae* briefs in cases involving insurance principles that are likely to impact large segments of the public. UP is intimately familiar with the issues that arise when insureds are forced to hire attorneys to secure policy benefits.¹

Our interest in *Cassim v. Allstate* is two-fold: *Brandt* fees are the key to the courthouse for the vast majority of policyholders whose claims are wrongfully denied.² *Brandt* fees should be calculated so that successful policyholder litigants receive the full contract benefits they bargained for. These benefits include specific dollar amounts or a defense, and the reasonable expectation that the insurer will voluntarily honor its promise to provide peace of mind and economic security in the event of a loss or claim.

¹ United Policyholders publishes claim tips titled; “Hiring an Attorney” that state: “Many policyholders in dispute with their insurer cannot afford to pay a lawyer by the hour. Most lawyers who represent policyholders in disputes with insurers will work under contingent fee agreements. Under such agreements, the attorney is only paid if the client recovers money in a lawsuit or settlement. Then, the lawyer takes a percentage of the recovery. If a case settles before a case goes to trial, most attorneys set their contingency fee at 33% of the recovery. If a case goes to trial, the range increases to 33-40%. See www.unitedpolicyholders.org/claimtips

² Brandt v. Sup. Ct. (1985) 37 Cal.3d 813.

The proposed amicus brief will only address the *Brandt* fee issue in *Cassim*. UP has filed *amicus* briefs on behalf of policyholders in over one hundred cases throughout the United States. UP's *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana, Inc. v. Forsythe* (1999) 525 U.S. 299, and its arguments were favorably considered by this Court in *Vandenberg v. Sup. Ct.* (1999) 21 Cal.4th 815. The terms "policyholders" and "insureds" are used interchangeably herein.

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS

SUMMARY OF ARGUMENT

The Petition before this Court raises the question: What measure of attorneys' fees should be recoverable in an action for the breach of an insurance contract? The answer will depend on how this Court defines "policy benefits." We urge the definition that was adopted by the appellate court in *Cassim* and a recent Federal trial court decision³ and that comports with the insurance marketplace and established law. Peace of mind is a policy benefit. Emotional distress damages compensate policyholders for the wrongful denial of that benefit. Attorneys fees incurred in obtaining all compensatory damages that resulted from the wrongful denial of an insurance claim are recoverable under the general rule of tort damages and the reasoning set forth by this Court in *Brandt v. Superior Court* *supra*, 37 Cal.3d 813 and its progeny.

I. Peace of Mind is a Bargained For and Paid For Policy Benefit

Allstate argues for a narrow definition of policy benefits that is at odds with decades of California case law on insurance contracts as well as the express representations insurers make to the public through advertisements and marketing slogans. Policyholders are repeatedly told when they pay their premiums that they are buying peace of mind...that their insurer will "put

³ *Hangarter v. UNUM/Provident, et al* (2002) 236 F.Supp.2d 1069, Appeal pending, held a disability claimant was entitled to *Brandt* fees on the emotional distress portion of her award because her peace of mind was a policy benefit and her attorneys efforts to obtain damages for her emotional distress caused by the insurer's bad faith termination of her policy was compensable as incurred to obtain benefits due her under the policy.

them back where they belong” if disaster strikes. Peace of mind is a policy benefit, just as Additional Living Expenses, monthly disability income payments and a defense against third party claims are policy benefits. It has been held to be “undeniable” that consumers buy insurance to “provide the peace of mind and security that comes from knowing that if the insured contingency arises, the insurer will defend against the claim”. Campbell v. Sup. Ct. (Farmers Ins. Co.) (1996) 44 Cal.App.4th 1308, 1319.

The bargained and paid for benefit of peace of mind is particularly important to insureds in the latter context of insurer’s duty to defend.

The insured’s desire to secure the right to call on the insurer’s superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability. Montrose Chemical Corp. v. Sup. Ct. (1993) 6 Cal.4th 287, 296.

Insurers that wrongfully refuse to defend their insureds are liable for damages beyond merely the attorneys’ fees and settlements their insureds incur providing their own defense because otherwise insurers would be “encouraged” to stonewall claims at the outset. This is because insurers would have an incentive to gamble that their policyholder won’t want to get involved in further litigation or if they do sue the insurer, the insurer’s maximum liability will be limited to the attorneys fees and settlement they would have be liable for anyway. Campbell v. Sup. Ct., Id.

Where an insurer unreasonably refuses to defend or settle a case within policy limits, the policyholder must be allowed to recover all consequential damages, including excess judgments and attorneys fees incurred to secure redress. Crisci v. Security Ins. Co. (1967) 66 Cal.2d 425. If this were not the rule, insurers would escape liability for refusing to provide a covered defense and policyholders would be financially stranded. Insurers must suffer the detriments of a determination to unreasonably refuse to settle just as they reap the benefits where they avoid providing a defense or settling a third party claim. *Id.* at 431.

II. **Brandt Fees Must Be Recoverable for Obtaining All Compensatory Damages**

California Courts have long recognized that insurance contracts have an “invisible” provision implied in law – the covenant of good faith and fair dealing. Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809, 818. Under that covenant, an insurer is obligated to act

reasonably and deliver the full benefits owed under the policy. Good faith requires that benefits owed be paid voluntarily. Where an insurer's performance under a contract must be enforced via litigation, the insured has been denied the important policy benefit of peace of mind, as well as the benefit of monies or the defense that was owed. (When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under the policy, it follows that the insurer should be liable in a tort action for that expense. Brandt v. Sup. Court, *supra*, 37 Cal.3d 813, 817. The attorney's fees are an economic loss – damages – proximately caused by the tort. Mustachio v. Ohio Farmers Ins. Co. (1975) 44 Cal.App.3d 358, 363. The insured compelled to retain an attorney is entitled to be made whole, which only happens where he or she recovers the full measure of attorney fees incurred to compel the insurer's performance and secure redress.

III. **Brandt Fees Are the Key to the Courthouse for Policyholders**

Contemporary reality is that particularly in claims involving large dollar losses, many policyholders are faced with the choice of accepting offers far below the benefits they are owed or hiring counsel. It is socially and economically necessary for policyholders to have legal recourse against wrongful claim denials. However, most non-commercial policyholders cannot afford to pay an attorney by the hour to do battle with an insurance company. The only true option for most policyholders seeking to enforce insurance contract recovery rights is to hire an attorney on a contingent fee basis. Contingency fee contracts are the key to the courthouse for the vast majority of policyholders.

Attorney fees, particularly contingent attorney fees, must be recoverable or attorneys will not be willing to do battle with well financed, experienced insurer counsel and insureds will be left with no effective recourse to enforce their contract rights. In the real world, contingent fee agreements compensate attorneys for work performed on the basis of *all monies* they recover for the insured. Virtually all policyholder attorneys who are unable to get insurers to reverse claim denials prior to litigation charge between 33%-40% of all monies received, depending on how far litigation proceeds.

IV. It is Not Reasonable to Segregate Attorney Time in This Context

It is not realistically possible for attorneys to segregate the time they put in litigating separate elements of compensatory damages in insurance cases. When an insured's attorney deposes or cross-examines a claim adjuster, the questions cover all aspects of the claim denial. This includes the dollar amounts and claim in dispute, the adjusters' dealings with the policyholder and all other issues that may be relevant. These issues necessarily include delay, which touches on both monies owed and the impact on the plaintiff of the unavailability of those monies. Both issues are germane to compensatory damages. It is impossible to segregate the attorney's time and effort expended to litigate categories of damages.

Consistent with the traditional principles that underlie *Brandt*, a tortfeasor is liable for all damages proximately caused by their conduct. Accordingly, insureds are entitled to recover attorneys' fees on all compensatory damages.

CONCLUSION

There are myriad reasons why policyholders, particularly those who suffer large losses, must hire attorneys to secure fair claim settlements. Competition and state regulation alone cannot effectively counter-balance insurer's natural temptation to delay and minimize claim payments. Attorneys who effectively prosecute wrongful claim denials perform a quasi-private attorney general function. This function is critically important to sustaining our state's economy. Without fair claim settlements, insureds cannot rebuild homes, restock businesses, or sustain themselves without public assistance. Policyholder attorneys must have the assurance that they will be paid to perform this function or they will simply practice elsewhere and policyholders who cannot afford hourly counsel will be helpless.

Ideally, no policyholder should have to retain counsel to secure benefits owed under an insurance contract. An insurance contract arises from premium dollars paid in exchange for peace of mind and economic security. Security is the primary benefit of the bargain for the consumer and the essence of the product insurers sell. Policyholders do not reasonably expect to have to hire a lawyer to get the benefit they bargained for, but in the real world, many do.

Of the non-commercial policyholders who are forced to retain counsel to secure fair insurance settlements, virtually none can afford to pay attorneys on an hourly basis for claims that are litigated. Insurance companies dedicate substantial resources to fully litigating claim disputes. Numerous depositions, contentious discovery battles and lengthy trials are the norm in insurance coverage and bad faith litigation. Contingency fee agreements allow policyholders at every income level to afford counsel. *Brandt* fees allow them to be fully compensated.

For the reasons set forth above, United Policyholders respectfully requests that this Court uphold the Court of Appeal's opinion in *Cassim v. Allstate* as to *Brandt* fees. There are sound equitable justifications for allowing plaintiffs to recover attorneys fees incurred to obtain all compensatory damages in insurance cases.

Dated: May 2, 2003 Respectfully submitted,

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