

***George Byers v. Superior Court of Contra Costa County (2024 DJDAR 3844)***

When a party seeks attorneys fees as damages caused by an insurer's breach of covenant of good faith and fair dealing under *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 819, it impliedly waives the attorney-client privilege as to attorney fees documents provided in support.

**FACTS/PROCEDURAL HISTORY**

George and Sheila Byers filed a lawsuit against USAA General Indemnity Company (USAA), their homeowner's insurance, and other defendants, including Masters Distribution, Inc., Clifton Michael Potter, and Crawford and Company. Their complaint included, among other causes of action, claims for breach of contract and breach of the covenant of good faith and fair dealing related to the installation of hardwood flooring at their Orinda home. They sought attorney fees and costs as part of the complaint's prayer of relief.

On May 17, 2021, in response to an interrogatory from USAA, the Byerses stated that they were entitled to attorney fees (Brandt fees) as an element of damages caused by USAA's wrongful withholding of policy benefits, including attorneys' fees and other prelitigation expenses incurred by the Byers' in attempt to obtain the policy benefits. On May 1, 2023, USAA subsequently served document requests asking the Byerses to produce "each and every fee agreement with YOUR attorneys in the instant litigation" and "each and every billing record, fee statement, invoice, receipt and proof of payment from YOUR attorneys in the instant litigation."

The Byerses refused to produce these documents, claiming they were protected by attorney-client privilege and the work product doctrine. They also objected to the scope of the requests, arguing they were ambiguous, overbroad, and burdensome.

Following a hearing, the trial court granted USAA's motion to compel production of the attorney fees documents. The court believed that there was value in producing the attorney invoices due to the fact that Byers intended to seek attorneys' fees as damages in a claim for attorneys' fees under *Brandt v. Superior Court*, and that USAA would be prejudiced by not having access to this information during discovery. Consequently, the court ordered the production of all documents responsive to USAA, but allowed Byers' counsel to redact documents that reflected attorney work product. USAA was given the opportunity to challenge the redactions made by Byers, and such redactions were to be evaluated by Court in an in camera hearing.

The Byerses filed a petition seeking relief from the order and requesting a stay of the trial court's order. They argued that the trial court abused its discretion by forcing them to waive the attorney client privilege during litigation as a condition of seeking Brandt fees, and by ordering production of all invoices/fee agreements/payment history. The court of appeals issued an order to show cause.

**HOLDING/DISCUSSION**

The California Court of Appeals for the First Appellate District denied the petition for writ of mandate, vacated the stay previously issued, and issued a remittitur. The main issue in this case is whether by seeking attorneys fees as damages (Brandt fees), a party impliedly waives the attorney client privilege regarding the documents supporting those fees.

In *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 819, the Supreme Court created an exception to the general rule that each party must assume its own attorney fees. (*Brandt, supra*, 37 Cal.3d at p. 817.) Under *Brandt*, an insurer is liable for attorney fees when the insurer's conduct in refusing to pay insurance benefits requires the insured to retain an attorney to obtain the benefits of the policy. (*Byers v. Superior Court of Contra Costa County*, 2024 WL 2006044 at p. 3.) “The attorney's fees are an economic loss—damages—proximately caused by the tort,” which are similar to recovery of medical fees as damages in a personal injury action. (*Id.*)

The Court disagreed that the trial court forced the Byerses to waive the attorney-client privilege. Byerses’ complaint alleged breach of the covenant of good faith and fair dealing, and their prayer for relief included attorneys’ fees. Additionally, Byerses’ interrogatory responses stated that they are entitled to *Brandt* fees as an element of damages caused by USAA wrongfully withholding policy benefits. Byerses cannot assert that they are entitled to *Brandt* fees, and at the same time, claim that they are not seeking these fees in order to get away from providing discovery regarding the amount of such fees.

The court reasoned that when a party seeks attorney fees as damages caused by an insurer's breach of the covenant of good faith and fair dealing, fundamental fairness requires disclosure of the information supporting the fees claim.

Here, the court found that USAA had a right to learn during discovery of the attorneys fees aspect of the Byerses’ claimed damages, and by seeking such damages, the Byers has impliedly waived the attorney client privilege. The Byerses have put at issue the attorney fees they incurred in an effort to seek coverage under their insurance policy, and disclosure of supporting documents is necessary to fairly resolve the damages issue. However, the Byerses may redact entries that are not recoverable as *Brandt* fees because these fees were not incurred to obtain payment under the insurance policy.

The court briefly addressed the order of an in camera review of attorney’s fees. However, it found the issue to be premature because the Byerses have not yet produced any responsive documents.

Thus, the court held that the Byerses impliedly waived the attorney client privilege regarding documents provided in support of attorneys fees as damages, and the insurer is entitled to discovery of these documents. The trial court’s decision was affirmed.