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May 26, 2011

## Insurance - Bad Faith Damages

*Linda Richards, et al. v. Sequoia Insurance Company*  
Court of Appeal, First District (April 28, 2011)

The California Supreme Court has previously ruled that attorneys who bring an action on their own behalf for breach of a contract containing an attorneys' fees provision cannot recover for the value of their own services expended in bringing the action. This case considered whether similar fees by an insured who is also an attorney were recoverable as damages in a bad faith lawsuit.

Linda and Thomas Richards owned the Jack London Lodge, which was insured under a general liability policy that included liquor liability coverage from Sequoia Insurance Company. In December, 2004, a 20-year-old patron was fatally injured in a single car accident after leaving the Lodge's bar. Her estate filed a lawsuit against the Richards and the Lodge claiming that she was negligently served alcohol that contributed to her death.

On February 29, 2006, the Richards tendered the defense of the lawsuit to Sequoia. Sequoia responded by letter on March 8, 2006 indicating that it was referring the matter to coverage counsel for review, that it did not anticipate it would have a response before the time was due for a responsive pleading on the lawsuit, and that the Richards should hire their own attorney. Sequoia also stated that if it subsequently determined that there was coverage for the claim, it would reimburse reasonable defense costs incurred from the date of tender. The Richards retained counsel.



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On March 17, 2006, Sequoia accepted the defense of the case pursuant to a written reservation of rights. Sequoia reimbursed the legal fees from the Richards' personal attorney and then paid for defense counsel it retained on behalf of the Richards. Sequoia subsequently paid to settle the lawsuit. After the underlying action was settled, the Richards approached Sequoia and offered to settle their claims for "denial of the defense and indemnity" of the underlying action. The Richards claimed that in the week and a half after receiving the March 8 letter from Sequoia, they spent 60 hours each researching and working on their own case. The Richards demanded \$250 per hour for their time, for a total of \$30,000. Sequoia rejected this settlement demand, and the Richards filed suit for breach of contract and breach of the covenant of good faith and fair dealing.

The trial court granted summary judgment for Sequoia on the basis that the Richards were not entitled to recover for the time they expended on their own defense, and that Sequoia expeditiously accepted defense and coverage of the lawsuit. The Richards appealed.

The Court of Appeal upheld the trial court decision. The Court of Appeal noted that it need not consider whether the lapse of 9 days between Sequoia's first letter on March 8 and its acceptance of tender on March 17 was an unreasonable denial of coverage. Instead, it focused on the nature of damages being claimed by the Richards and found that the Richards sustained "no legally cognizable damages" for any alleged breach of the insurance contract or the covenant of good faith and fair dealing.

The court noted that the general measure of contract damages owed an insured due to an insurer's breach of the duty to defend are the costs and attorneys' fees expended by the insured defending the underlying action. The Court of Appeal held that compensation for the Richards' self-representation is not the payment of "attorney's fees expended by the insured." Moreover, the insurance policy obligated Sequoia to compensate the Richards for "expenses incurred" at Sequoia's request, but not those voluntarily assumed by them. The Court held that the commonly accepted usage of "incur" means "to become obligated to pay." It therefore follows that an attorney litigating on his or her own behalf cannot be said to "incur"

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compensation for his time and lost business opportunities. As such, since the work the Richards performed themselves represented neither fees expended nor incurred, they had no damages to support a claim for breach of contract.

Similarly, any claim for breach of the covenant of good faith and fair dealing requires that the insured show proof of economic loss. The Richards' own time spent was not a compensable economic loss claim. The Court of Appeal held that summary judgment was also proper as to the breach of the covenant of good faith and fair dealing claim. Summary judgment was therefore affirmed.

## COMMENT

This case is consistent with others that have dealt with the issue of whether an attorney representing himself or herself is entitled to recover fees for their own services in the context of contractual or extra contractual claims. Since such fees are not actually "incurred" or "expended," they are not recoverable and will not support a claim for bad faith regarding the duty to defend.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/A127784.PDF](http://www.courtinfo.ca.gov/opinions/documents/A127784.pdf)

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