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"REDUCING EXCESSIVE ATTORNEY FEES AND MAXIMIZING SETTLEMENTS TO FIRE VICTIMS"

This proposal is designed to maximize legal settlements for victims of wildfires and other natural disasters by capping excessive attorney fees on multi-million and multi-billion dollar settlements. The proposal is based on three different state statutes that limit attorney fees in order to deliver maximum benefits to injured workers and victims of medical malpractice or balance attorney fees based on case complexity.

Background on Attorney Fees

California generally follows the "American Rule" which provides that each party is responsible for paying his or her own attorney's fees. The California Supreme Court has noted that the concept is embodied in Section 1021 of the Code of Civil Procedure, which states that, except as provided by statute or agreement, the parties to litigation must pay their own attorney fees. (*21st Century Ins. Co. v. Superior Court* (2009) 47 Cal. 4th 511, 531.) The Court has further noted that with regards to recoveries by personal injury victims, the recovery allowed by statute "ordinarily does not include attorney fees incurred in bringing the lawsuit against the tortfeasor."[1] (*Id*.)

As a practical matter, this means that persons who believe they have suffered an injury must negotiate how to pay a prospective attorney for their services. Generally speaking, payment can take the form of a fixed-fee, hourly rate, or a contingency fee arrangement. Under fixed fee arrangements, the attorney agrees to represent a party for a set dollar amount. Alternatively, in hourly rate arrangements the attorney is paid a specified amount for each hour of time devoted to working on the matter. Finally, under contingency fee arrangements, the attorney receives a percentage of any recovery as payment for his or her services.

[1] In some situations, prevailing parties in certain non-tort actions also have the option of seeking attorney's fees from the opposing side, such as when the action results in the enforcement of an important right affecting the public interest. (*See* e.g. Code Civ. Proc. Sec. 1021.5.)

Regarding calculating an appropriate amount of attorney fees in a fixed-fee or hourly arrangement, the California Supreme Court has held that:

> [T]he fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate. . . . The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided.

(*Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1134) [citations omitted].)

Alternatively, for individuals unable to pay an attorney's fee or where an attorney is unwilling to accept the "fair market value" for legal services provided, potential plaintiffs typically consent to contingency fee arrangements where the attorney is entitled to a specified percentage of any damages recovered. Those percentages are generally between 33 and 40 percent of any amounts recovered.[2] That means that if an injured plaintiff recovers $10 million for their injuries, their attorney would receive up to $4 million in compensation, regardless of the number of hours actually worked on the case. While California State Bar Rule 4-200 prohibits an attorney from charging an "unconscionable fee", courts have refused to deem contingency fee agreements unconscionable even when the fee *significantly exceeds* the amount the attorneys would have billed had they taken the case on an hourly basis. (*Cotchett, Pitre & McCarthy v. Universal Paragon Corp*. (2010) 187 Cal. App. 4th 1405, 1423 [upholding a contingency fee agreement awarding attorney fees over <u>*seven times*</u> the lodestar].)

As a matter of public policy, injured individuals should be able to retain competent legal representation that does not deprive them of a significant portion of damages that were intended to make them whole. It is fundamentally unfair for financially vulnerable individuals to be forced to pay nearly half of any funds intended to compensate them for their losses while those that can afford attorneys on an hourly basis are able to ultimately pay substantially less for the same legal services. With regards to limits on attorney fees, the California Supreme Court has stated:

> statutory limits on attorney fees are not at all uncommon, either in California or throughout the country generally. In this state, attorney fees have long been legislatively regulated both in workers' compensation proceedings and in probate matters. Some states have adopted maximum fee schedules which apply to all personal-injury contingency fee arrangements; others have enacted limits which . . . apply only in a specific area, such as medical malpractice. Congress has passed numerous statutes limiting the fees that an attorney may obtain in representing claimants in a variety of settings.

(*Roa v. Lodi Medical Group, Inc*. (1985) 37 Cal. 3d 920, 926)

In the context of natural disasters, losing a large portion of the amount a court has awarded to rebuild a home or to compensate for loss of income can jeopardize the ability to rebuild home or repay debts, even if that is the purpose the court intended the award to serve. As the existence of the State Bar rule indicates, these issues are not new, novel, or unique to natural disasters. The following examples illustrate how the inequities described above have been handled in other contexts.

<u>Workers Compensation Appeals Board</u>

[2] Contingency fee arrangements can range lower (15%-20%) or higher (up to as much as 50%).

In the context of workers compensation, the Workers Compensation Appeals Board (WCAB) has issued guidelines to be followed by workers compensation judges in determining the *reasonableness* of attorney's fees in cases submitted to them for decision. The WCAB's Policy and Procedure Manual notes that while fees must be "sufficient to encourage such competent attorneys to participate in this field of practice" but that the "WCAB has seen instances where fees appear to be unreasonably low or high. The WCAB has seen, too, instances where attorneys accept sizeable fees for services which are largely unnecessary because there is little dispute and little time, effort or skill involved."[3]

To ensure adequate compensation while addressing the issue of unreasonable fees, the WCAB states that the average contingency fee should be in the range of 9 to 12 percent of the permanent disability indemnity, death benefit or compromise or release awarded. In cases of above-average complexity, a contingency fee in excess of 12 percent may be permissible while cases of below-average complexity may warrant a contingency fee as low as 1 percent. The Manual further notes that "*the WCAB emphatically rejects the theory that the applicant in such a case should pay a higher fee to provide an offset for the cases which counsel handles at a loss. There is no reason for the deserving widow, the blind, the paraplegic or other employee with a major disability to underwrite the case of the employee with a minor or questionable claim*." Thus, as a matter of statute and policy, the WCAB has elected to limit attorney's fees so as to protect the consumer while ensuring that adequate legal representation is available to those who need it.

Medical Injury Compensation Reform Act (MICRA)

Another example of legislation to protect injured consumers from the impacts of excessive attorney's fees is the Medical Injury Compensation Reform Act (MICRA). Pursuant to MICRA, contingency fees in actions for injury or damage against a healthcare provider based upon professional negligence are limited as follows:

- Forty percent of the first $50,000 recovered.
- Thirty-three percent and one-third percent of the next $50,000 recovered.
- Twenty-five percent of the next $500,000 recovered.
- Fifteen percent of any amount on which recovery exceeds $600,000.

(Bus. Prov. Sec. 6146.)

The California Supreme Court has noted that the above

> decreasing sliding-scale approach has been recommended as the preferable form of regulation by a number of studies that have examined the question. As a report of an American Bar Association commission explained: '[In] order to relate the attorney's fee more to the amount of legal work and expense involved in handling a case and less to the fortuity of the plaintiff's economic status and degree of injury, a decreasing maximum schedule of attorney's fees, reasonably generous in the lower recovery ranges and thus unlikely to deny potential plaintiffs access to legal representation, should be set on a state-by-state basis.' For just these reasons, the Legislature could rationally have determined that this aspect of the statutory scheme would promote the fairness of attorney fees. The sliding scale schedule certainly does not unconstitutionally impinge on a malpractice victim's right to counsel.

[3] Policy and Procedural Manual, Workers' Compensation Appeals Board (https://www.dir.ca.gov/wcab/wcab_policy_proceduremanual/Policy_andProcedure_Manual.pdf), pg. 62.

(*Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal. 3d 920, 929-930.) As such, the practical effect of the above limits are to increase the amount of the recovery that goes to the injured person as opposed to diverting larger sums to their attorneys.

It should also be noted that while other aspects of MICRA have been subject to recent and ongoing controversy, those debates were limited to other aspects of the law. For example, when Proposition 46 (2014) sought to increase MICRA's cap on non-economic damages, the measure did not attempt to change the existing limits on attorney's fees. In fact, the ballot pamphlet argument in favor expressly stated: "Proposition 46 retains the current limit on attorneys' fees in medical negligence cases." On the other hand, the arguments in opposition noted that because attorneys get a set percentage of any award, by increasing the permissible amount of damages "malpractice lawsuits and trial attorney awards will skyrocket." Voters' clearly rejected such an increase with nearly 67 percent of Californians voting against the measure.

Other measures of attorney fees

In addition to the above-discussed provisions, it is important to note that one objective measure of the appropriate compensation for attorneys is to look to how much the Department of General Services (DGS) charges other state agencies for legal services. Per the DGS 2016-17 Price Book, other state agencies are charged $257 per hour for staff counsel services needed to conduct administrative hearings. Similarly, DGS provides legal advice hourly services to state departments on matters including but not limited to, public record requests, adjudication of bid protests, legal advice to new and ongoing programs, and issuing legal opinions at a rate of $170 per hour.

Limits on contingency fees in cases of natural disaster

As a matter of public policy, Californians who have suffered injuries as the result of natural disasters deserve the same level of protection from excessive attorney fees as other injured plaintiffs—such as those in the worker's compensation and medical negligence contexts. The above examples demonstrate that fees can be capped at a level that ensures robust legal representation while ensuring that plaintiffs are not denied more of their recovery dollars than necessary under the circumstances.

The following proposal builds upon the above time-tested provisions to ensure that victims of natural disasters, such as wildfires or floods, are able to use funds awarded to them by a court to rebuild their homes and lives as opposed to diverting large percentages to trial attorneys.

Using the workers compensation model as a starting point, the proposal outlines levels of compensation for non-complex cases such as those based on inverse condemnation,[4] and for more complex cases that require attorneys to prove additional elements. Both models rely on the tiered approach that was recognized as preferred approach by the California Supreme Court. However, each approach also provides more generous attorney compensation than is currently allowable in worker's compensation cases to ensure that sufficient legal assistance is available to those who are victims of disasters.

Non-complex case model (If Inverse Condemnation is Preserved):

- Ten percent of the first $500 Million recovered.
- Eight percent of the next $500 Million recovered.

[4] Note that an inverse condemnation actions differ from tort actions in that liability is assigned *without a determination of fault* if the public work was a substantial factor which caused damage to property. As a result, those cases are widely recognized as less complex than traditional cases involving tort liability.

- Five percent of any amount on which recovery exceeds $1 Billion - $2 Billion.
- One percent of any amount over $ 2 Billion.

Complex-case model (If a reasonable standard is adopted):

- Twenty-five percent of the first $500 Million recovered.
- Twenty percent of the next $500 Million recovered.
- Fifteen percent of any amount on which recovery exceeds $1 Billion - $2 Billion. (Bus. Prov. Sec. 6146.)
- Fiver percent of any amount of $2 Billion.

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