

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REGINA POLSELLI	:	CIVIL ACTION
	:	
Plaintiff	:	NO. 91-1365
v.	:	
	:	
NATIONWIDE MUTUAL FIRE	:	
INSURANCE COMPANY	:	
	:	
Defendant	:	

MEMORANDUM AND ORDER

December , 1998

Plaintiff, Regina Polselli, suffered a fire loss and filed a claim with defendant, Nationwide Mutual Fire Insurance Company, for damage to real property, loss of personal property and additional living expenses. When Nationwide failed to pay any benefits to her, Polselli filed suit for those benefits alleging breach of contract and bad faith conduct, pursuant to 42 Pa. Cons. Stat. Ann. § 8371 (West Rev. Supp. 1998). Just prior to trial, the parties settled the breach of contract action and proceeded to trial on the bad faith claim. Polselli prevailed on the bad faith claim and was awarded \$90,000 in punitive damages.

The issue now before the court is plaintiff's claim for attorney fees under § 8371.¹ The Court of Appeals has concluded that when a plaintiff prevails on a claim for bad faith conduct pursuant to §8371, the plaintiff may recover attorney fees against an insurer for time spent prosecuting the bad faith claim itself, in addition to those fees attributable to prosecuting the

¹The statute refers to "attorney fees." I will therefore use this designation throughout rather than "attorney's fees" or "attorneys' fees."

underlying breach of contract claim.² See Polsell v. Nationwide Mut. Fire Ins. Co., 126 F.3d 524, 532 (3d Cir. 1997). The Court of Appeals has emphasized that a trial court in a § 8371 action “may” assess attorney fees against an insurer upon a finding of bad faith, but it need not award such fees. The decision to assess attorney fees against an insured upon a finding of bad faith is wholly within the discretion of the trial court. See id. at 537.

The Court of Appeals also noted that if the district court, through its punitive damages award, intended to both punish the defendant and make plaintiff whole, there is no need to award attorney fees. If so, the district court would merely indicate how much of the punitive damages award was attributable to attorney fees and reduce the assessment of attorney fees accordingly. It directed the district court to “specify which portion of the final award is attributable to punitive damages under section 8371(2) and which portion is attributable to attorney’s fees under section 8371(3).” Id. at 539.

In making my original award of \$90,000 as punitive damages against the defendant, I did not allocate any portion of this amount to attorney fees. The entire amount of the award was intended to punish the defendant as I anticipated that there would be a separate award for attorney fees under the statute. I will, therefore, not allocate any portion of the \$90,000 award of punitive damages as attorney fees, as requested by the defendant, and am not now precluded from exercising my discretion to assess additional attorney fees. Long after I awarded punitive damages, Nationwide argued for the first time that the statute did not allow the award of attorney

²This court has already assessed attorney fees in the amount of \$46,470 against Nationwide for the time plaintiff’s counsel spent litigating the breach of contract claim. That decision has been affirmed on appeal and Nationwide has already made payment. See Polsell, 126 F.3d at 533.

fees on the time spent litigating the bad faith claim, but only the breach of contract claim.

Although its argument was belated, defendant was successful in convincing me that the statutory language dictated this result; however, it was not successful in convincing the Court of Appeals.

I am, therefore, free to assess attorney fees if, in my discretion, I feel it is appropriate. I do.

Pennsylvania has authorized the imposition of attorney fees in litigation of this nature. The

statute authorizes both punitive damages and an assessment of attorney fees. See 42 Pa. Cons.

Stat. Ann. § 8371(3). The conduct of the defendant, in my judgment, was frivolous, unfounded

and outrageous. The effect of defendant's conduct on plaintiff was egregious. I awarded

punitive damages solely to punish the defendant. Given the wealth of the defendant, the amount

of punitive damages could reasonably have been much higher. Plaintiff did not and could not

make any claim for compensatory damages. Under these circumstances, I have little trouble in

concluding that I should exercise my discretion to award attorney fees to the plaintiff as

authorized by the statute.

In determining the amount of the attorney's fees in a bad faith action, the Court of Appeals directed me to be guided by Pa. R. Civ. P. 1716.³

³The Court of Appeals did not note in its opinion that Rule 1716 applies only to class actions. See Polselli, 126 F.3d at 532. It is, therefore, unclear whether the Court of Appeals was aware that Rule 1716 was not a rule of general application. Neither party urged the application of Rule 1716 in this court. I had previously applied what I thought was a more analogous Pennsylvania statute which permitted borrowers and debtors who prevail in usury actions against their lenders to recover a "reasonable amount for attorney's fee[s]" and directed the court to consider:

1. The time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the case.
2. The customary charges of the members of the bar for similar services.
3. The amount involved in the controversy and the benefits resulting to the client or clients from the services.

The factors to be considered under Rule 1716 are as follows:

1. The time and effort reasonably expended by the attorney in the litigation;
2. The quality of the services rendered;
3. The results achieved and benefits conferred upon the class or upon the public;
4. The magnitude, complexity and uniqueness of the litigation; and
5. Whether the receipt of a fee was contingent on success.

Pa. R. Civ. P. 1716.

The parties have agreed that 195.6 hours were spent litigating the bad faith claim (excluding the attorney fee litigation). See Defendant’s Answer to Plaintiff’s Motion to Reassess Attorney’s Fees, at ¶ 2. They have also agreed that the billing rate of \$300 per hour is reasonable for plaintiff’s counsel. See id. at ¶ 3. Thus, the lodestar amount for litigating the bad faith claim (which encompasses the first two factors of Rule 1716) is \$58,680. See Pennsylvania Env’tl. Defense Found. v. Canon-McMillan Sch. Dist., 152 F.3d 228, 231-32 (3d Cir. 1998) (explaining method for calculating lodestar fee award).

Polselli seeks an enhancement of the lodestar fee under the third factor of Rule 1716 for a benefit “conferred upon the class or upon the public.” She contends that two rulings in this case, that the defendant’s failure to provide an advance payment to an insured can be evidence of bad faith, and that the defendant’s failure to determine the amount of the loss promptly can also be

-
4. The contingency or the certainty of the compensation.

Pa. Stat. Ann. tit. 41, § 503 (West 1992).

The difference between these factors and those in Rule 1716 is, perhaps, a fine point, except as to the additional factor in Rule 1716 relating to “benefits conferred upon the class or upon the public,” which, in a class action, takes the place of “benefits resulting to the client or clients.”

evidence of bad faith, are unique holdings. She points out that other courts have determined that an insurer must promptly pay the undisputed amount of a loss but that no other courts have determined that an insurer must promptly determine the undisputed portion of the loss. I conclude, however, that these rulings were based on the facts and circumstances of this case only and are not definitive enough in this regard or unique enough to be of substantial public benefit in other cases. I will, therefore, not enhance the lodestar amount on this basis.

The fourth factor of Rule 1716 deals with the “magnitude, complexity, and uniqueness of the litigation.” Clearly, this litigation was not of unusual magnitude or complexity. It was, however, unique in that it was one of the first claims litigated under § 8371. In order to avoid any double counting of this factor with the fifth factor, I will consider the uniqueness of the litigation along with my analysis of the fifth factor.

Rule 1716 finally directs the district court to consider whether plaintiff’s attorney accepted the case on a contingent basis. The Court of Appeals thus determined that a court may enhance a fee under Pennsylvania law to reflect the risk of non-payment assumed by the plaintiff’s attorney in accepting the case on a contingent fee basis “to the extent that the enhancement (1) reflects the contingent risk of the particular case and (2) is not based on factors already considered in calculating the lodestar amount.” PolSELLI, 126 F.3d at 527. The district court may enhance the fee under the fifth factor of Rule 1716 but is not required to do so. In evaluating an enhancement for the contingency of plaintiff’s attorney’s compensation, given the uniqueness of this litigation as previously described, I will not consider any factors that have already been taken into account in calculating the lodestar amount, such as a high number of hours because of the difficulty of the case or a high hourly rate because the case required the

skills of someone who ordinarily bills at such a rate.⁴

The Court of Appeals also noted that the district court should consider “whether the attorney was able to mitigate the risk of nonpayment.” Id. at 535. It pointed to the possibility that in a suit seeking substantial damages, the risk of a contingency fee contract is mitigated because the risk of non-payment is balanced against the prospect of compensation substantially in excess of the lodestar amount. That factor is not present in this case because neither the prospect nor the reality of the contingency payment in this action could substantially exceed the lodestar amount.

Finally, in predicting that Pennsylvania would allow the enhancement of the lodestar to reflect contingency fee agreements, the Court of Appeals indicated that Pennsylvania would likely adopt a rule similar to the New Jersey Supreme Court’s decision that contingency enhancements “ordinarily should range between five and fifty-percent of the lodestar fee, with the enhancement in typical contingency cases ranging between twenty and thirty-five percent of the lodestar.” Id. at 536 (citing Rendine v. Pantzer, 661 A.2d 1202, 1231 (N.J. 1995)).

In determining the appropriate enhancement for the contingency of compensation and the uniqueness of the litigation, I note that this litigation is based upon a Pennsylvania statute which was new at the time and that there was minimal guidance in the statute and case law concerning

⁴Although she has not done so in this court, the Court of Appeals noted that plaintiff sought an enhancement to reflect the risk of contingency fee cases as a class. See Polselli, 126 F.3d at 537. The Court of Appeals rejected this request and I would not consider it if it had been advanced here. Any enhancement can only take into account the risk or contingency of compensation in connection with this particular claim.

its interpretation. As a result, many aspects of the litigation were unique and included a substantial risk of attorney non-payment. Bad faith was not defined in the statute. There was no history of similar litigation from which counsel and the litigants might infer what a reasonable fact finder would conclude both as to liability for bad faith and the appropriate punitive damages. Because the statute was new and tersely written, the defendant was able to raise a multitude of issues, which it did, any one of which may have resulted in the defeat of plaintiff's claim and the complete non-payment of attorney fees. Plaintiff incurred a substantial risk that, after substantial delay and legal costs, she would only recover for her loss of personal property and additional living expenses, and no punitive damages. Because of the substantial risk of a minimal recovery and the extensive number of hours risked by counsel with no guarantee of remuneration, I originally increased the lodestar amount by sixty percent. See Polselli v. Nationwide Mut. Fire Ins. Co., No. 91-1365, 1993 WL 479050, at * 4 (E.D. Pa. Nov. 12, 1993) (increasing lodestar amount by sixty percent). Because of the above factors, I do not find that this is a "typical contingency case." Given the recent guidance by the Court of Appeals based upon Rendine, however, I will limit the contingency and uniqueness enhancement to fifty percent of the lodestar fee, or \$29,340.

The Court of Appeals also determined that Pennsylvania courts allow attorney fees for the time spent preparing and litigating the fee petition itself unless those efforts are directed solely to benefit the attorney and not the client. See Polselli, 126 F.3d at 538. Thus, an attorney is not entitled to recover fees for the time he or she spends seeking fees on his or her behalf only. The client must have a material interest in the fee litigation. The Court of Appeals determined that this fee assessment must be determined separately from the fee assessment for the time spent

litigating the bad faith claim, and that it is highly unlikely that a contingency enhancement would be appropriate. See id.

The parties have agreed that 63.7 hours were allocated to the fee dispute. Plaintiff has established that she has a material interest in the fee litigation because a major portion of the fee assessment will be paid directly to her under her fee agreement with her counsel. The original fee agreement between plaintiff and her counsel dated January 15, 1991, called for the payment to counsel of forty percent of “the amount collected” from which counsel would also pay the public adjuster’s fee. The percentage was reduced to thirty percent by agreement between the plaintiff and her counsel on February 10, 1998, after the Pennsylvania Insurance Department ruled that the public adjuster could not receive any payment based on the assessment of attorney fees. Thus, plaintiff clearly has a material interest in the fee recoveries of her counsel and I will award her \$19,110 for litigating the fee petition, representing 63.7 hours at \$300 per hour, the agreed hourly rate. There is no basis to enhance this portion of the fee.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REGINA POLSELLI : CIVIL ACTION NO. 91-1365
 :
 Plaintiff :
 v. :
 :
 NATIONWIDE MUTUAL FIRE :
 INSURANCE COMPANY :
 :
 Defendant :

O R D E R

AND NOW, this day of December, 1998, upon consideration of plaintiff's Motion To Reassess Attorney Fees, defendant's answer and plaintiff's reply, **IT IS HEREBY ORDERED** that attorney fees in the amount of \$107,130 are assessed in favor of the plaintiff, Regina Polseli, and against the defendant, Nationwide Mutual Fire Insurance Company.

WILLIAM H. YOHN, JR., J.