



Alerts

According to the California Court of Appeals, An Attorney's Failure to Disclose Lack of Professional Liability Insurance Renders Fee Division Agreement Unenforceable

February 17, 2020

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Hance v. Super Stores Industries, 2020 Cal. App. LEXIS 60 (Cal. App. Ct. Jan. 23, 2020)

Brief Summary

A pair of plaintiffs' class action attorneys, who were seeking court approval of a settlement agreement in their case, had a dispute over the division of fees. One argued he should be compensated in accordance with an alleged written agreement for the division of the fees, while the other argued the agreement was unenforceable.

After the trial court awarded attorney fees and divided the fees in accordance with the written fee agreement, the California Appeals Court reversed, holding the written fee agreement was unenforceable because the attorney seeking to enforce it had failed to disclose to his clients that he lacked professional liability insurance in violation of former Rule of Professional Conduct 3-410.

Complete Summary

In January 2012, attorney William Margolin referred a client to Steven D. Waisbren, an experienced labor law attorney, to potentially represent the client in an action against his employer. Waisbren concluded that the case had the potential to become a class action. Waisbren had limited experience with class actions, so he brought attorneys Scott A. Miller and Kelly Ann Buschman into the case. Thereafter, two additional class representatives were added. The clients signed representation agreements drafted by the attorneys that provided attorney fees under the agreements would be shared among the attorneys according to agreements among them. However, none of the representation agreements with the clients disclosed that Waisbren did not have professional liability insurance. The case settled in 2016, and the attorneys moved the trial court for approval of a settlement of the action, including an award of attorney fees and a division of the award among co-counsel. At that time, Miller challenged the written fee division agreement as unenforceable, based on the fact that Waisbren did not disclose his lack of professional liability insurance to

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the clients. The trial court rejected Miller's argument and entered an order enforcing the attorneys' fee division agreement and awarded Waisbren 30 percent of the fee, Margolin 15 percent of the fee, Buschman 5 percent of the fee and Miller the remaining 50 percent of the fee, as stipulated in the agreement.

On appeal, the California Appeals Court held that the representation agreements were unenforceable, as to Waisbren's share, because he failed to disclose to any of the class representatives in writing that he lacked professional liability insurance, in violation of former Rule of Professional Conduct 3-410. Indeed, neither the representation agreements nor the attorney fee division consent forms, which the class representatives signed, mentioned that Waisbren did not have professional liability insurance. The Appeals Court remanded the case back to the trial court to determine whether Waisbren was entitled to be compensated under the equitable doctrine of *quantum meruit*, and if so, how much he should recover.

Significance of Decision

This decision illustrates that, in California, an attorney's failure to disclose to the client that he or she does not have professional liability insurance—in violation of former Rule 3-410 of the Rules of Professional Conduct—will render the attorney's fee agreement with the client unenforceable. In such a scenario, an attorney's only recourse is to seek compensation under the equitable doctrine of *quantum meruit*.