Miller, Fink, Jacobs, Glaser, Weil & Shapiro (2001) 91 CA4th 859, 864, 110 CR2d 903. This case presents the unusual circumstance in which a FEHA action is found to be frivolous as to one defendant but not the other, the latter of whom incurred, was liable for, and paid all the fees. Under these circumstances, the trial court did not abuse its discretion in refusing to award the fees. An attorney fee award to the supervisor, who did not incur or pay fees, would benefit only the employer, which was not entitled to fees on its own account. Further, the employer did not show that it incurred any significant fees on the supervisor's behalf that it would not have incurred anyway.

Insurance Litigation

Bad Faith

Insurer required to pay benefits under increased coverage limits for "extended replacement cost" policy.

Major v Western Home Ins. Co. (2009) 169 CA4th 1197, ___ CR3d ___

The insureds purchased an "extended replacement cost" homeowners policy from the insurer in 2001. This policy provided that, in the event of any covered loss to the insureds' home, the insurer would repair or replace the home "up to a specified percentage over the policy's limits of liability"—in this case, 125 percent. Under the terms of the policy, the insureds property was to be inspected to determine the replacement cost. However, this inspection did not occur until after the insurer issued the policy. The inspector's report indicated that the replacement cost was substantially more than the amount listed in the policy.

The insureds' home was burned to the ground in 2003. After months of inaction by the insurer, the insureds hired counsel and filed suit. After the insureds hired counsel, the insurer discovered the discrepancy between the stated coverage limits and the replacement cost stated in the inspector's report. The insurer then increased the coverage limits to match the amounts determined by the inspector. Nonetheless, the insurer delayed several months in paying benefits under the "other structures" coverage for a pool and spa. Additionally, the insurer refused to pay supplemental personal property benefits on the grounds that the receipts supplied by the insureds were faxed and unreadable. At trial, the insurer admitted the receipts had been mailed, not faxed. The insurer argued that the increased policy limits were a "courtesy benefit," and thus unenforceable. The insureds argued that the increase was required by the parties' contract. A jury awarded the insureds $1.3 million for economic, noneconomic, and punitive damages and attorney fees. The insurer appealed.

The Fourth District Court of Appeal affirmed. Substantial evidence supported the findings that the additional coverage was not "courtesy benefits" but increases in coverage dictated by the terms of the policy, requiring the insurer to cover the $30,000 personal property claim. *Busch v Globe Indus.* (1962) 200 CA2d 315, 19 CR 44. The insureds were entitled to recover noneconomic damages because (1) they made a threshold showing of "some financial loss" and (2) the award is not excessive because the punitive damages amount is reasonably related to the economic damages award in a ratio of 2 to 1. *Gourley v State Farm Mut. Auto. Ins. Co.* (1991) 53 C3d 121, 3 CR2d 666. Finally, substantial evidence supports the award of punitive damages. Tortious acts were committed by the insurer's claims representative, who by virtue of her "substantial discretionary authority" to pay or deny claims was a managing agent of the insurer, and thus the insurer was responsible for her actions in handling the insureds' claims. The ratio of punitive damages to tort damages (including *Brandt* fees—*i.e.,* attorney fees incurred to recover on a wrongfully denied fire insurance claim) was only slightly more than 1 to 1, which is a reasonable ratio. See *Brandt v Superior Court* (1985) 37 C3d 813, 210 CR 211; *Textron Fin. Corp. v National Union Fire Ins. Co.* (2004) 118 CA4th 1061, 13 CR3d 586.

COMMENT: This case has a few pieces of gold and a few rocks in it, including the following:

It is often said that bad faith exists when the delay or denial of benefits is unreasonable or without proper cause. This has led some to argue that "without proper cause" means something more than unreasonable conduct. But, as this court explains, "[i]f the insurer 'without proper cause' (i.e., unreasonably) refuses to timely pay . . . its conduct is actionable as a tort." *Major,* 169 CAth at 1210.

In *Egan v Mutual of Omaha Ins. Co.* (1979) 24 C3d 809, 169 CR 691, the court held that an award of punitive damages requires that the conduct in question have been done by an officer, director, or managing agent. It then defined a managing agent for an insurance company to be a person who had authority to deny a claim without supervision. Thereafter, CC §3294 was amended to include the managing agent requirement. Some defendants have since argued that the description in *Egan v Mutual of Omaha Ins. Co., supra,* of what constitutes a managing agent for an insurer is no longer valid, having been superseded by the statutory amendment. Here, the court again confirms that *Egan* is still the test.

In many property damage cases, insurance companies require the insured to provide receipts for the purchase of damaged property. In fire cases, this is often quite difficult when the house and any receipts that might have been kept have been destroyed. The court here confirms that there is no requirement that an insured submit actual receipts to be entitled to benefits.

This court holds that emotional distress damages can only be attributable to economic losses and must be reasonably related to those losses. There must be an actual denial of benefits. It holds that there can be no emotional distress damages for simply a delay in benefits. This makes no sense to me. It would suggest that someone whose claim of $1 million was delayed for 4 years has no emotional distress claim, but the person whose claim for $1 is denied is entitled to make such a claim. Of

course, there are many ways to generate sufficient economic damages, the most obvious of which are interest, attorney fees, and even costs of litigation.

But the court goes on to state that there must be some reasonable relationship between the emotional distress damages and the economic damages. It also states that the only conduct that can support emotional distress damages is the conduct leading to the economic losses and not all the bad faith conduct. Again, this makes no sense to me at all. The only reason for requiring economic loss is that the courts have created a line in the sand for cases permitting emotional distress damages. That line is the suffering of economic losses. This is to satisfy public policy concerns about permitting emotional distress claims in all cases. However, once the line is crossed, there is no need to further limit those damages by requiring that they be somehow compared to the economic losses. The court cites no authority for this new requirement.

The court completely falls off a cliff when it claims that only the tort damages may be used when assessing whether the ratio between punitive damages and compensatory damages is excessive. It claims that the court may look at only the compensatory damages awarded for the tort claim and not the contractual damages. This is wholly illogical.

Let's look at an example. Presume an insurer denied $1 million in benefits and was forced to pay the $1 million at trial. In addition, the jury awarded $100,000 in compensatory damages. The court's language suggests that the ratio of punitives to compensatories may only be compared to the $100,000. That is simply not the law. The $1 million was also denied in a tortuous manner and is recoverable in tort. However, the fact that the damages amount is also recoverable in contract does not mean that it is not relevant to the punitive damage award. In fact, it was the insurer's malicious, oppressive, or fraudulent intention not to pay these damages that served as the basis of the bad faith tort and thus the punitive damages. The test under *State Farm Mut. Auto. Ins. Co. v Campbell* (2003) 538 US 408, 155 L Ed 2d 585, 123 SCt 1513, is the relationship of the punitive damages to the harm suffered by the plaintiff—not merely the additional harm that may be awarded as damages under tort law.—*Arnold R. Levinson*

COMMENT: With a little judicial sleight of hand, or perhaps just engaging in revisionist history, the Fourth District has turned back the clock on the definition of "managing agent" under CC §3294, returning us to the days when the acts of a claims adjuster were sufficient in themselves to expose the insurer to punitive damages liability. While I'm as big a fan of retro as the next guy, this is not a happy development.

Thirty years ago, in *Egan v Mutual of Omaha Ins. Co., supra,* the California Supreme Court held that punitive damages could be awarded against an insurance company based on the tortious acts of its claims adjusters. Relying on the Restatement (Second) of Torts—which conditions corporate liability for punitive damages on the acts of someone employed in a "managerial capacity"—the court adopted the following analysis (*Egan,* 24 C3d at 822):

> The determination whether employees act in a managerial capacity . . . does not necessarily hinge on their "level" in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy. When employees dispose of insureds' claims with little if any supervision, they possess sufficient discretion for the law to impute their actions concerning those claims to the corporation.

Because, in the court's view, the actions and authority of the claims adjusters in question "necessarily result[ed] in the ad hoc formulation of policy" (*Egan,* 24 C3d at 823), they were acting in a managerial capacity sufficient to impute their actions to the insurers for purposes of awarding punitive damages.

Shortly after *Egan,* the legislature amended CC §3294(b) to specifically address the liability of corporations based on the acts of their employees. Significantly, as the California Supreme Court later acknowledged, the purpose of the amendment was "to avoid imposing punitive damages on employers who were merely negligent or reckless and to distinguish ordinary respondeat superior liability from corporate liability for punitive damages." *White v Ultramar, Inc.* (1999) 21 C4th 563, 572, 88 CR2d 19. More specifically, the legislature's intent was "to limit corporate punitive damage liability to those employees who exercise *substantial independent authority and judgment over decisions that ultimately determine corporate policy.*" 21 C4th at 573 (emphasis added). In other words, as the statute suggests, a "managing agent" is someone who is akin to an "officer" or "director" in terms of responsibility for or influence over corporate policy. 21 C4th at 573.

While not disapproving *Egan,* and even citing it with approval in a few instances, the *White* court's analysis makes plain that the test for "managing agent" under CC §3294 is significantly more demanding than the test for "managerial employee" announced in *Egan.* Indeed, it was widely thought that the amendment to §3294 was largely a reaction to the too-lenient standard adopted in *Egan.* In any event, in the decades since *White,* trial courts have routinely dismissed punitive damages claims when the insured has failed to show approval or ratification by someone considerably higher in the chain of command than the claims adjuster assigned to the claim, because claims adjusters simply don't have the "independent authority and judgment over decisions that ultimately determine corporate policy," as required by *White. White,* 21 C4th at 573.

Enter *Major v Western Home Ins. Co., supra.* In a rather remarkable leap of logic, the court holds that the employee of a third party claim administrator qualifies as a "managing agent." This is so, in the court's view, because the insurer had delegated its claim handling functions to the third party and because the employee in question, Ms. Dare, was the "regional manager/supervisor/claims adjuster" of the third party administrator; managed, supervised, and trained a number of its employees; and "oversaw the claims operation." 169 CA4th at 1220. Moreover, and "most important" to the court's analysis, "Dare personally assumed the claims handling of the Majors' claim" and "exercised substantial discretionary authority to pay or not pay benefits owing to the Majors." 169 CA4th at 1220. Although these facts might justify imposing liability under *Egan,* they hardly demonstrate "authority over decisions that ultimately determine corporate policy," as required by *White.* Apparently aware of this inconvenient reality, the court's only response is to quote *White*'s explication of the "managing agent" test and then to assert that *White* holds that

"claims managers that exercise substantial authority to pay or deny claims exercise 'substantial discretionary authority over decisions that ultimately determine corporate policy.'" 169 CA4th at 1221. Unfortunately for the *Major* court, *White* says nothing at all about "claims managers" or "pay[ing] or deny[ing] claims"—small wonder, since it's a wrongful termination case—and the *White* court's actual holding and analysis simply cannot be reconciled with the *Major* result.

That said, there is good news for carriers in *Major*. In analyzing the insured's claim for noneconomic damages, the court reaffirms that bad faith is essentially an invasion of the insured's property interests and that emotional distress is compensable as incidental damage flowing from the insurer's failure to pay. As a consequence, "emotional distress damages must be tied to actual, not merely potential, economic loss," and "[t]he delayed payment of benefits, standing alone, without resulting economic damages, is insufficient to support an award of emotional distress damages." 169 CA4th at 1215. Moreover, once an insured has made a threshold showing of some financial loss to support an emotional distress award, "the amount of emotional distress damages is still tied to the amount of economic damages," 169 CA4th at 1216; thus, an emotional distress award can be sustained only if and to the extent the insured's emotional distress was the result of specific economic loss caused by the insurer's bad faith conduct. To the extent the insured suffered emotional distress as a result of other bad faith actions that did not result in economic loss, that distress is not compensable in a bad faith action.

The court also affirms, much to Mr. Levinson's chagrin, that "where both contract and tort damages are awarded in insurance bad faith cases only the tort damages are considered in measuring the proportionality of a punitive damages award." 169 CA4th at 1224. Far from "fall[ing] off a cliff" in so holding, however, the *Majors* court was simply following its earlier decision in *Textron Fin. Corp. v National Union Fire Ins. Co.* (2004) 118 CA4th 1061, 1084, 13 CR3d 586. In addition, the rule makes perfect sense: Because it is only the tort claim that supports a punitive damage award, only damages awarded on that claim can be considered in determining whether the resulting punitive award satisfies due process. No matter how high the award for breach of an insurance contract, or how "tortiously" the insurer breached the contract, contract breaches are simply not the stuff of which punitive damages awards are made and, thus, are totally irrelevant to the punitive damages equation.—*Susan M. Popik*

Coverage

Trial court properly declined to stay coverage action during pendency of liability action because resolution of coverage issues did not prejudice insured in liability case.

GGIS Ins. Servs., Inc. v Superior Court (2008) 168 CA4th 1493, 86 CR3d 515

The insurance commissioner of Pennsylvania brought an action against the insured, which was insured under a professional liability policy issued by the insurer. The insured tendered the defense to the insurer, which defended until payments had reached policy limits. The insured sued the insurer for breach of contract, bad faith, and declaratory relief. The insurer filed a motion for summary adjudication. Because of the potential that the adjudication could prejudice the insured in the Pennsylvania action, the insured sought to stay the coverage action under *Montrose Chem. Corp. v Superior Court* (1993) 6 C4th 287, 24 CR2d 467. The trial court declined to issue the stay. The insured filed a petition for a writ of mandate.

The Second District Court of Appeal affirmed. In *Montrose,* the supreme court held that a coverage action, declaratory relief or otherwise, should not proceed if it might result in a factual determination that would prejudice the insured in a third party liability action. Conversely, a stay is not required if the court in the coverage action can resolve the matter without making any factual determinations, *i.e.,* the facts are undisputed or the factual determination is irrelevant to the liability action. 6 C4th at 305. In this case, the facts are undisputed in the coverage action, so the coverage issue can be determined as a matter of law.

Plaintiff, injured by uninsured motorist while on foot, was not entitled to uninsured motorist coverage under fiancee's insurance policy.

Mercury Ins. Co. v Pearson (2009)169 CA4th 1064, ___ CR3d ___

Plaintiff Pearson was an insured driver under his fiancee's policy. He sustained serious injuries when he and his fiancee were struck by an uninsured driver while walking across the street. The family of the fiancee, who died, received uninsured motorist benefits under the policy. Plaintiff also made a claim for uninsured motorist benefits under the same policy for his injuries, but was denied. Insurer Mercury filed a complaint for declaratory relief. Plaintiff cross-complained against the insurer and the insurance agent under theories of insurance bad faith and related causes of action, vicarious liability, and reformation. The insurer demurred to the cross-complaint, and the trial court sustained the demurrer without leave to amend. Plaintiff appealed.

The First District Court of Appeal affirmed. The plain language of the policy is susceptible to only one interpretation (see *Bank of the W. v Superior Court* (1992) 2 C4th 1254, 1264, 10 CR2d 538), *i.e.,* that the uninsured benefits only apply to the "named insureds, their spouses, and family members living in their household unless the accident occurred in or upon entering into or alighting from the insured motor vehicle." Plaintiff did not qualify because he was not a spouse or family member residing in the same household. Plaintiff is not entitled to relief under theories of vicarious liability or reformation because he cannot state a viable cause of action against the insurer. The insurer cannot be vicariously liable for acts of the insurance brokers because they were, in fact, agents of plaintiff and his fiancee, not the insurer. *Eddy v Sharp* (1988) 199 CA3d 858, 865, 245 CR 211. Additionally, plaintiff is not entitled to reformation based on mistake. The "Designated Persons Endorsement" clearly and ex-