

March 2005 Tort Law Column

Settlements with Insurers are Enforceable Without the Insured's Consent

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The Second District recently decided *Fiege v. Cooke*, 2004 WL 2966502. The decision was ordered published as of January 24, 2005. *Fiege, supra*, holds that a settlement with an insurance company within policy limits is enforceable under Code of Civil Procedure ("C.C.P.") §664.6 without the consent of the party. The California Supreme Court had previously declined to enforce a settlement agreement executed by attorneys for a party, holding that the term "parties" in C.C.P. §664.6 meant the litigants themselves. *Levy v. Superior Court* (1995) 10 Cal.4th 578.

Fiege, supra, now allows attorneys to record and enforce settlements to which adjusters consent during settlement conferences. Participation and consent of the insured is unnecessary when the settlement is funded by an insurer.

Facts in *Fiege*

Robert Fiege was involved in an auto accident. He brought suit against Mr. Cooke, Mr. Ellis and Mr. Wooldridge who was the driver of the car in which he was riding. The case proceeded to a mandatory settlement conference. Cooke and Ellis were insured under one policy and Wooldridge under another. These gentlemen neither attended the settlement conference nor executed any settlement documents. Adjusters and attorneys retained by defendants' insurers were present and offered a total of \$160,000 in settlement of Fiege's claims.

The settlement was entered on the record orally. Plaintiff Fiege consented orally. Defendants' attorneys orally acknowledged the settlement. However, the representatives of defendants' insurers who were present did not state anything on the record.

Fiege subsequently had second thoughts and sought to rescind the settlement. Defendants brought a motion pursuant to C.C.P. §664.6 to enforce the settlement. The trial court granted the motion and entered judgment.

C.C.P. §664.6 states as follows:

If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the

parties to enforce the settlement until performance in full of the terms of the settlement.

Appellate Analysis

The Second District Court of Appeal acknowledged the California Supreme Court's holding in *Levy v. Superior Court* (1995) 10 Cal.4th 578. The Second District recognized that none of the defendants in *Fiege* had agreed to the settlement either in writing or orally before the trial court. However, the court then referenced extensive dicta from *Robertson v. Chen* (1996) 44 Cal.App.4th 1290 as support for creating an exception in cases in which insurers fully fund settlements under policies which provide them the right to settle claims without the insureds' consent.

The court reasoned the public policies supporting the *Levy* decision were inapplicable to cases defended by insurance companies and settled within policy limits. The Supreme Court's reasoning in *Levy, supra*, was to require direct participation of the actual litigants and thereby protect against impairing their rights via imprudent settlements by themselves and/or their attorneys.

The *Fiege* court reviewed authority entitling primary insurers to take control of settlement negotiations and precluding insureds from interfering therewith. Further, the court recognized that insureds typically cannot bind insurers or prevent settlements by withholding consent. Basically, the insured is superfluous to the settlement and a benefit of his policy is minimizing his or her involvement in the action. Requiring the insured's participation is therefore meaningless.

The *Robertson* and *Fiege* courts consequently distinguish the *Levy* ruling as follows:

Since *Levy* did not involve an insurance-funded settlement, we do not read *Levy* as precluding enforcement pursuant to section 664.6 of an insurance - funded settlement reached by an authorized insurance defense counsel or adjuster when the carrier has the contractual right to settle.

Plaintiff *Fiege* argued that even assuming the *Levy* decision was inapplicable and the defendant litigants' consent was not required, the **express consent** of the insurer representatives was necessary. Apparently the attorneys for the defendants did all the talking while the settlement was recorded. The insurer representatives remained silent. There was no evidence of their consent, either written or oral. This argument also failed to dissuade the Second District. The court reviewed the transcript and concluded the following was clear from the record: (1) the insurer representatives were present; (2) they had discussed the settlement before going on the record; and (3) they had consented to the settlement. This determination was either despite the representatives' silence and/or because of it since the judge had apparently inquired on the record whether anybody disagreed with the terms or had something to add to which no one responded.

CONCLUSION

Pursuant to the decision in *Fiege v. Cooke, et al., supra*, attorneys may now reach binding settlements with insurers, in cases which are defended by the insurers and settled within policy limits, which can subsequently be converted to judgments pursuant to C.C.P. §664.6 if necessary. Defendant party litigants need not be present.

When recording terms following a settlement conference, attorneys should also state the following: (1) the settlement is being funded by insurers; (2) the amount is within policy limits; (3) insurer representatives are present with full authority for the stated settlement; (4) the insurer has sole discretion to negotiate and settle the present claim pursuant to the terms of the insured's policy; (5) the insurer representatives have consented to the stated terms; and (6) the court is requested to retain jurisdiction to enforce the settlement pending performance in full of all terms.

The foregoing should enable you to subsequently obtain a judgment consistent with the recorded settlement terms if necessary. This is true regardless of whether or not the insurer representatives remain silent while the terms are recorded.