CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Aguilar v Gostischef 10/11/13

998 Offer to Compromise; Good Faith Offer; Realistically Reasonable

Plaintiff Aguilar was involved in an accident with Defendant Gotischeff, a Farmers insured. Gostischef had policy limits of $100,000. Aguilar sustained the loss of his leg, and had reasonable and necessary past medical expense of $507,718. One month after the accident, plaintiff's counsel wrote Farmers requesting discovery of the policy limit. Farmers did not respond. Five weeks later, counsel again inquired as to the policy limit amount, and again, no response was received. A third inquiry a month later received the same lack of response. Four months later, suit was filed on plaintiff's behalf. A month later, Farmers offered to pay the policy limit. The offer was followed with a CCP section 998 offer of the limits on Gostischef's behalf.

Ninety days later, just after the year anniversary of the accident, counsel for plaintiff wrote Farmers, stating that it would be liable for an excess judgment because it ignored three attempts to settle the matter within policy limits. Sixty days later, Aguilar's counsel made a 998 offer to settle the case for $700,000. Farmers responded with another offer to settle for the $100,000 policy limit. The case proceeded to jury trial. Jurors awarded plaintiff $4,679,314, reduced by contributory negligence of plaintiff to $2,339,657. Following an unsuccessful appeal of a motion for judgment notwithstanding the verdict, plaintiff filed a cost bill in the amount of $1,639,451, an amount which included prejudgment interest based on the 998. Defendant moved to tax costs, arguing that the 998 offer presented by plaintiff was not made in good faith.

The trial court concluded the offer by plaintiff was made in good faith, because it was realistically reasonable under the circumstances of the case. The

trial court taxed costs in the amount of $5,903 and awarded the remainder. Farmers then challenged the costs award on appeal. It argued that the section 998 offer was not made in good faith because there was no reasonable anticipation of acceptance of the offer by Gostischef who lacked the financial means to pay and no reasonable expectation Farmers could be liable for $700,000 in light of the $100,000 policy limit. The Second Appellate District, Division Eight began its opinion by explaining the relevant principles in determining whether a section 998 offer was made in good faith.

Good faith requires that the pretrial offer of settlement be realistically reasonable under the circumstances of the particular case. The offer must carry with it some reasonable prospect of acceptance. Whether the offer is reasonable depends upon the information available to the parties as of the date the offer was served. If the offer is found to represent a reasonable prediction of the amount of money a defendant would have to pay plaintiff following a trial, premised upon information that was known or reasonably should have been known by the defendant, and if an experienced attorney or judge, standing in defendant's shoes, would place the prediction within a range of reasonably possible results, the prediction is reasonable. If so, it must also be shown that plaintiff's information was known or should have been known to defendant. The second test is necessary because the section 998 mechanism works only where the offeree (defendant) has reason to know the offer is a reasonable one. If the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer. (*Whatley-Miller v Cooper* (2013) 212 Cal.App.4th 1103)

The Justices evaluated the factual record and determined plaintiff had conveyed an interest in settlement within policy limits just a few months after the accident. Farmers made no response to any requests for the policy limits amount. Farmers acknowledged in its opening brief that as a general rule an insurer that refuses a reasonable offer of settlement within policy limits by an injured third-party claimant is liable to the insured for the resulting judgment without regard to policy limits. The Justices continued that regardless of whether plaintiff prevails in his lawsuit to recover the judgment against Farmers, the carrier failed to show it was unreasonable for plaintiff to believe Farmers may be liable for a judgment in excess of policy limits.

Plaintiff counsel's letter stated: "…we entreat you to get permission from your insured to disclose the policy limits, provide them to us in the form of a certified policy and declaration, so that we can then immediately demand policy limits. Please favor us with a reply within the next two weeks." The DCA concluded this letter may be interpreted as a genuine offer to settle; it was not necessarily a ploy to set up a bad faith case as Farmers argues. Whether it should be interpreted as genuine or a ploy is beyond the scope of the appeal.

Citing *Boicourt v Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, the Justices noted that court held that an insurer's blanket policy of refusing to disclose policy limits in advance of litigation may give rise to a bad faith claim. The *Boicourt* court reasoned that when a liability insurer cuts off the possibility of receiving an offer within the policy limits by the company's refusal to open the door to reasonable negotiations, the carrier is "playing with fire." Here there is no evidence indicating Farmers had a blanket policy of refusing to disclose a policy limit, but there was evidence Farmers delayed, perhaps unreasonably delayed disclosing Gostischef's policy limit, and that delay may support bad faith liability. Plaintiff's letter can be understood as a settlement opportunity. Farmers has not shown plaintiff could have no reasonable expectation of acceptance of his $700,000 offer such that the trial court abused its discretion in finding plaintiff acted in good faith. (*Culbertson v R.D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704)

The final step in determining whether an offer was reasonable is to determine the information known to Farmers. The evidence shows that plaintiff revealed his position that Farmers may be liable for an excess judgment well in advance of his 998 offer. Thus, although Farmers vigorously disputes the excess claim and although Farmers position may ultimately be meritorious, Farmers fails to show that the trial court abused its discretion in concluding plaintiff acted in good faith in requesting $700,000, which as the trial court noted, was less than one-third of the ultimate recovery.

The order awarding costs is affirmed.

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