CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Pacificare of California v Bright Medical Associates 9/2/11

Good Faith Settlement (CCP section 877.6; Joint Tortfeasors; *Tech-Bilt* Standards

Pacificare is a licensed healthcare service plan under California's Knox-Keene Health Care Service Plan Act of 1975 , arranging health care for subscribers or enrollees, and paying for or reimbursing part of the cost for health services, in return for a periodic charge paid by the subscribers or enrollees. Bright Medical Services is a health care provider Pacificare hired to provide health care services to its subscribers. Bright is required to complete utilization reviews, to determine when particular services are medically necessary, and thus covered under the plan. Pacificare delegated this function to Bright, but retained final authority to determine whether Bright's physicians should provide a particular service.

Elsie Martin was diagnosed with a cerebral aneurysm in August 2009. Her doctors at Bright felt they lacked the expertise to treat the condition and referred her to an out-of-network specialist at USC Medical Center. A neurosurgeon there saw Elsie in September 2003 and recommended treatment. Bright did not approve the recommended treatment until mid-December 2003, despite multiple requests. Bright approved the request only after requiring Elsie to undergo what the neurosurgeon characterized as an unnecessary angiogram. After receiving the approval, the recommended treatment was scheduled in February, 2004. Elsie's aneurysm burst in January, and she died after being removed from life support.

Elsie's heirs, the Martins, filed suit against Pacificare in April 2005. They did not name Bright or any of its physicians. Plaintiffs alleged Pacificare had a nondelegable duty to assure timely care to its subscribers, and also alleged it had a defective review process. Pacificare cross-complained against Bright, seeking indemnity. During jury selection, Bright settled with the Martins for $300,000, conditioned on a finding that the settlement was in good faith. The trial court granted the motion, and dismissed Pacificare's cross-complaint. Trial proceeded against Pacificare and upon the close of plaintiff's case, a non-suit motion by Pacificare was granted. Pacificare then timely appealed the court's ruling on the motion for good faith settlement.

Pacificare argued to the Fourth District Court of Appeal, Division Three, that the trial court lacked authority to make a determination because Pacificare and Bright did not share joint liability for the Martins' damage. It also claimed the trial court abused its discretion in granting the motion because it failed to consider Bright's indemnity liability to Pacificare for attorney fees incurred in defending the Martins' claim. The Justices began their opinion by reviewing Code of Civil Procedure section 877.6.

"Any party to an action in which it is alleged that two or more parties are joint tortfeasors ... shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors …" Section 877.6(a)(1) "A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor … from any further claims against the settling tortfeasor … for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." Section 877.6(c)

> The term "joint tortfeasor" has been construed broadly to apply not only to those who act in concert in causing an injury, but generally to joint, concurrent and successive tortfeasors, and even more generally to all tortfeasors joined in a single action whose acts or omissions concurred to produce the sum total of the injuries to the plaintiff. (*Topa Ins. Co. v Fireman's Fund Ins. Companies* (1995) 39 Cal.App.4th 1331) To be a joint tortfeasor, a party need not be found liable in tort. (*Hartford Accident & Indemnity Co. v Superior Court* (1995) 37 Cal.App.4th 1174) Allegations that two or more parties are joint tortfeasors satisfies the statutory requirement. Any joint tortfeasor who settles with a plaintiff is entitled to have the trial

court determine if the settlement is in good faith regardless of "whether the tortfeasors acted in concert to create a single injury, or successively to create distinct and divisible injuries." (*Bob Parett Construction, Inc. v Superior Court* (2006) 140 Cal.App.4th 1180)

Pacificare contends Health and Safety code section 1371.25 barred recovery against it, as the statute abolishes any joint liability it may have shared with Bright for the delays in Elsie's medical care and therefore renders any liability several only. It argues the Martins pursued their claims against it exclusively on a nondelegable duty theory that it was liable for Bright's malfeasance in performing the utilization review. The 4th DCA noted that the Martins' nondelegable duty theory against Pacificare was not the only basis on which they sought to hold it liable. They also alleged Pacificare agreed to oversee any function it delegated to a third party and to remain accountable for the timely and proper performance of all delegated functions. Plaintiffs alleged it breached the duty of good faith and fair dealing it owed Elsie by unreasonably implementing a defective utilization review process, "that fails to offer continuity in the provision of medical treatments and services…"

Bright pointed out the Martins' direct liability theories against Pacificare, and the trial court questioned whether Pacificare's exposure was completely derivative of Bright's conduct. The Justices found that Pacificare failed to cite any specific evidence or authority showing the plaintiffs' direct liability theories lacked merit as a matter of law. Bright did not have to prove Pacificare acted as a joint tortfeasor, because allegations to that effect are sufficient. Pacificare also argued that section 1371.25 specifically excludes a plan from liability for the acts or omissions of entities contracting with the plan, or from the costs of defending others. Here, however, by alleging both Pacificare and Bright committed acts or omissions contributing to the delays in Elsie's health care, the Martins alleged Pacifcare and Bright were jointly and severally liable for the damages the delays caused. Liability arises from Pacifcare and Bright's own acts or omissions and makes both potentially responsible for the full amount of the Martins' damages. Section 1371.25 does not prevent Pacificare from being jointly and severally liable with Bright if they both contributed to the Martins' damages.

Here, section 1371.25 provides for a finding of liability on the part of a plan or provider based on the doctrines of equitable indemnity, comparative negligence, contribution, or other statutory or common law bases for liability. Thus an entity that has committed an act or omission for which it is liable remains liable for that act or omission, even if it shares liability with another entity. (*Watanabe v California Physicians' Service* (2008) 169 Cal.App.4th 56) The Justices concluded that because the Martins alleged both Pacificare and Bright contributed to the delays in Elsie's health care, Pacificare and Bright are treated as joint tortfeasors under the good faith settlement statutes.

A good faith settlement must strike a balance between the competing public policies of encouraging settlements and the equitable sharing of liability among parties at fault. (*Tech-Bilt, Inc. v Woodward-Clyde & Associates* (1985) 38 Cal.3d 488) The factors the *Tech-Bilt* case identified are (1) a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability; (2) the amount paid in settlement; (3) the allocation of settlement proceeds among plaintiffs; (4) a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial; (5) the financial conditions and insurance policy limits of settling defendants; and (6) the existence of collusion, fraud, or tortuous conduct aimed to injure the interests of nonsettling defendants.

A settlement does not lack good faith solely because the settling tortfeasor pays "less than his or her theoretical proportional or fair share. Discounting a settling tortfeasor's proportional share is appropriate because a plaintiff's damages are often speculative and the probability of legal liability is often uncertain or remote. In the end, the ultimate determinant of good faith is whether the settlement is grossly disproportionate to what a reasonable person at the time of the settlement would estimate the settler's liability to be. (*City of Grand Terrace v Superior Court* (1987) 192 Cal.App.3d 1251) The party challenging a settlement's good faith bears the burden to show the settlement is so far "out of the ballpark" in relation to the *Tech-Bilt* factors as to be inconsistent with the equitable objectives of the good faith settlement statute.

Pacificare challenges the settlement's good faith by arguing Bright and the Martins settled solely to bar Pacificare's indemnity claim against Bright for the attorney fees Pacificare incurred in defending against the Martins' claims. It asserts the trial court abused its discretion by failing to consider the extent of Bright's liability for Pacificare's attorney fees. When evaluating whether the parties reached a settlement in good faith, a trial court must examine not only the settling tortfeasor's potential liability to the plaintiff, but also the settling tortfeasor's potential liability to all nonsettling tortfeasors. (*West v Superior Court* (1994) 27 Cal.App.4^{th} 1625) *West* involved a settlement where the true value to the settling defendant lay not in resolving the plaintiff's claims, but in providing a bar to the nonsettling defendants' indemnity claims against the settling defendant. Despite substantial indemnity liability, the settling defendant settled for a nominal amount in comparison to its potential liability.

Pacificare's opposition to the good faith settlement motion included a declaration explaining that it had incurred nearly $1 million in attorney fees, and would incur substantially more to conclude trial. It contended the $300,000 settlement is grossly disproportionate to Bright's indemnity liability for the fees, and thus the settlement is not in good faith. The Justices noted, however, that unlike *West*, Pacificare failed to present evidence or authority demonstrating its indemnity claim has any viability. It contends it could recover its attorney fees from Bright under the tort of another doctrine or CCP section 1021.6 because Pacificare incurred those fees solely to defend claims based on Bright's acts or omissions, rather than anything Pacificare did or failed to do. The Court pointed out that under 1371.25 Pacificare has a complete defense to all vicarious liability claims based on Bright's acts or omissions, but the statute also prevents Pacificare from recovering attorney fees it incurs in asserting that defense.

Pacificare claims under 1371.25 its right to recover attorney fees is included as part of its indemnity claim rights. The statute envisions allocating responsibility for the payment of damages when multiple parties are at fault. (*American Motorcycle Assn. v Superior Court* (1978) 20 Cal.3d 578) Pacificare bases its attorney fees claim on the theory it never faced any liability as a matter of law and any liability that existed fell solely on Bright. But Pacificare's sole liability theory is inconsistent with the joint liability theories of section 1371.25. To preserve its attorney fees claim, Pacificare would have to concede it and Bright are jointly liable for the Martin's damages. Of course, Pacificare makes no such concession.

If Pacificare shared joint liability because its own acts or omissions contributed to the delays in Elsie's health care, as the Martins alleged, Pacificare's attorneys fees claim still would fail. The authority Pacifcare relies on for its right to fees—the tort of another doctrine and the Code of Civil Procedure section 1021.6—apply only when the party seeking the fees bears no fault. (*Heckert v MacDonald* (1989) 208 Cal.App.3d832) Consequently, if Pacificare is jointly liable with Bright, it has no claim for attorney fees under the tort of another doctrine or CCP Section 1021.6.

Pacificare fails to establish a viable attorney fees claim against Bright. If the Martins sued Pacificare based on Bright's acts or omissions only, then section 1371.25 bars Pacificare's attorney fees claim. If the Martins sued Pacificare based on Bright's acts or omissions *and* Pacificare's acts or omissions, then the authorities Pacificare relies on for its attorney fees claim do not apply. Without a viable theory for attorney fees, Pacificare cannot show the trial court abused its discretion by failing to consider that claim when determining Bright and the Martins settled in good faith.

The order granting Bright's good faith settlement motion and dismissing Pacificare's cross-complaint is affirmed. Bright shall recover its costs on appeal.