SANDBERG PHOENIX

BAD FAITH BLOG

As Luck Would Have It: Evidence Insured Would Reject a Settlement Offer Excused Insurer from Notifying Insured of Such Offer

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If a tree falls in the woods, and no one is around to hear it, does it still make a sound? If a claimant offers a settlement, and the insured would have rejected it *had she known of the offer*, is it bad faith? The Ninth Circuit said no. Rejecting a settlement without contacting the insured is never wise, but if evidence shows the insured would have rejected such an offer, a valid bad faith claim may not exist for lack of injury.

Blankenbaker v. Progressive Cas. Ins. Co.

Blankenbaker was driving on the interstate in California when a sudden sandstorm decreased visibility. *Blankenbaker v. Progressive Cas. Ins. Co.*, 620 F. App'x 579, 580 (9th Cir. 2015). Blankenbaker stopped behind a large truck and was struck by another vehicle. *Id*. Blankenbaker and the Shipleys, passengers in his vehicle, were seriously injured; Mrs. Blankenbaker, another passenger, was killed. *Id*. The other driver was Ingram, insured by Progressive under a $30,000 auto policy, who was also seriously injured along with her passenger, Jarrett. *Id*. All injured parties sought redress from Ingram. *Id*.

The Blankenbakers (father and children not involved in accident), the estate, and the Shipleys (collectively "Plaintiffs") offered to settle for the policy limits, but Progressive refused unless Jarrett also released her claims. *Id*. Progressive did not inform Ingram of the offer, but Plaintiffs' counsel later did. *Id*. at 581. Ingram insisted Progressive not settle until Jarrett released her claims. *Id*. Plaintiffs ultimately filed suit and received a verdict of $2.3 million. *Id*. at 580. Ingram exchanged her right to a potential bad faith claim for agreement not to execute on the judgment against her, and Plaintiffs brought this suit against Progressive. *Id*.

Progressive filed a motion for summary judgment, which the District Court granted. *Id*. The District Court reasoned Progressive would not have been able to accept the offer without Jarrett's release, and because Ingram would have rejected the offer had she known, she suffered no injury. *Id*. Plaintiffs appealed, arguing Progressive acted in bad faith by failing to notify Ingram of the offer. *Id*. at 581.

The Ninth Circuit acknowledged genuine disputes of material fact did exist in this case. *Id*. However, it held no reasonable jury could find for Plaintiffs, as Ingram suffered no damages. *Id*. The majority noted that the record lacked "even a scintilla of evidence indicating Progressive's failure to provide Ms. Ingram notice…caused the alleged injury." *Id*. at 583 n.4. Rather, the evidence suggested Ingram had no intention to settle because she believed herself to not be at fault, as well as judgment-proof. *Id*. at 581-82. The court was also not bothered by the fact this evidence came about after the settlement had initially been rejected, stating the negotiations were ongoing throughout the process. Id. at 581.

The dissent could not overlook the timing issue. *Id*. at 582 (Gould, J., dissenting). The dissent found Ingram's retroactive statements "indicating a disinclination to accept the offer" to be an impermissible inference in favor of the moving party. *Id*. The argument the record lacked evidence suggesting Ingram would settle did not impress Circuit Judge Gould; he noted that "nine days [elapsed] before anything in the record suggests Ms. Ingram had even arguable knowledge of such an offer." *Id*. at 583. Citing precedent, the dissent argued once the offer expired it was too late to remedy the situation by gathering the insured's rejection; that it is not the ends, but the means that demand good-faith dealings. *Id*. at 582-83 (citing *Anguiano v. Allstate*, 209 F.3d 1167, 1169-70 (9th Cir. 2000)). The majority offered a counter, accusing the dissent of not being able to see the forest for the trees: "The dissent appears to conclude a material issue of fact exists as to causation merely because a material issue of fact exists as to whether there was a breach of the duty to communicate." *Blankenbaker*, 620 F. App'x at 582, n.4.