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Ninth Circuit's Amended Opinion Concludes No Evidentiary Foundation for Requested Jury Instruction on Affirmative Duty to Settle

October 11, 2012

The United States Court of Appeals for the Ninth Circuit has held in an amended opinion that, under California law, a federal district court did not abuse its discretion in denying a claimant's requested jury instruction allowing the jury to consider the insurer's failure to reach a settlement with the claimant as evidence in evaluating whether the insurer breached the implied covenant of good faith and fair dealing owed to the insured. *Du v. Allstate Ins. Co.*, 2012 WL 4748679 (9th Cir. Oct. 5, 2012). In the amended opinion, the court also withdrew its prior holdings (1) predicting that California law imposes an affirmative duty on the insurer to effectuate settlement, even in the absence of a settlement offer or demand, where liability is reasonably clear and where there is a substantial likelihood of recovery in excess of the insurer's policy limits, and (2) rejecting the applicability of the "genuine dispute" doctrine to the duty to settle third party claims.

A driver, the policyholder, caused an accident with another vehicle during which all four occupants of the other vehicle were injured. After the accident, the driver's insurer corresponded with a number of lawyers who in succession represented the injured passengers. The passengers made no settlement offer or demand until nearly a full year after the accident. Following unsuccessful settlement attempts, one of the passengers brought a personal injury action against the insured driver and received a jury verdict of $4,126,714.46. The insurer paid the per passenger policy limit of $100,000 to partially satisfy the judgment. In exchange for a covenant not to execute, the insured driver assigned his bad faith claim against his insurer to the

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passenger.

The injured passenger then filed suit against the driver's insurer, alleging that the insurer breached the implied covenant of good faith and fair dealing. At trial, the district court rejected the passenger's proposed jury instruction that the jury "may consider whether the [insurer] did not attempt in good faith to reach a prompt, fair, and equitable settlement of [the passenger's] claim after liability [of the insured] had become reasonably clear." The district court denied the instruction based on its conclusion that, under California law, an insurer has no duty to initiate settlement discussions in the absence of a settlement demand from a third-party claimant and because the court found no factual foundation for the instruction. After a jury verdict in favor of the insurer on the bad faith claims, the passenger appealed.

In its original opinion, the court of appeals held that "an insurer has a duty to effectuate settlement where liability is reasonably clear, even in the absence of a settlement demand." The court reasoned that the "conflict of interest that animates the duty to settle exists . . . regardless whether a settlement demand is made by the injured party." Accordingly, the court of appeals concluded that the district court had applied the incorrect legal standard in rejecting the proposed jury instruction. The court also rejected the insurer's argument that the "genuine dispute" doctrine precluded bad faith liability, holding that the doctrine, which insulates an insurer from bad faith liability for failure to settle a claim where the insurer's obligations are "unsettled," does not apply to the duty to settle third party claims. The court of appeals nevertheless held that the district court did not abuse its discretion in denying the passenger's requested jury instruction because there was insufficient evidence to support the proposed instruction.

After the insurer filed a motion for reconsideration, the court of appeals issued an amended opinion in which it withdrew its prior holdings on the affirmative duty to settle and the genuine dispute doctrine. The court instead resolved the appeal in favor of the insurer solely on the narrower grounds that the district court did not abuse its discretion in denying the injured passenger's requested jury instruction regarding the duty to settle. In so holding, the court concluded that there was no evidence to suggest that the insurer was obligated to make a settlement offer earlier than it did, once it received information documenting the injured party's medical costs, and therefore the passenger's jury instruction was not warranted.

The opinion is available here.