

When A Pre-Lawsuit Demand Really Has Teeth: Court of Appeal Rules That Liability Insurer Must Pay More Than \$1,000,000 In Costs And Expert Fees To Man Who Lost His Leg In Automobile Accident After Rejecting Pre-Trial Offer Which Was Well Above Policy Limits And After It Rejected Pre-Lawsuit Demands Within Policy Limits

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In a case which presents an interesting twist on the rules regarding an insurer's obligation in California to settle claims within the policy limits, as well as California's Statutory Offer to Compromise Statute as found in Code of Civil Procedure Section 998, the California Court of Appeal, Second District ruled in Aguilar v. Gostischef (2013) DJDAR 13678 ("Aguilar") that a liability insurer must pay more than \$1,000,000 in "post statutory offer" costs to a man who lost his leg in a car accident after rejecting the plaintiff's pre-trial Statutory Offer which was well above the policy limits - and after the insurer had failed to respond to pre-lawsuit demands for the insurance policy limits.

The facts of the Aguilar case are this: Ed Aguilar had an automobile accident with Larry Gostischef on January 3, 2004. At the time of the accident, Gostischef was insured by Farmers Insurance Company ("Farmer Insurance") with a policy limit of \$100,000 for each person. Aguilar was injured badly and his medical costs were agreed to be \$507,718.

On February 4, 2004, March 4, 2004 and April 9, 2004, Aguilar's counsel wrote Farmers Insurance requesting information as to the policy limits and indicated that Aguilar was prepared to convey a policy limits demand once advised. Farmers Insurance never responded.

On August 27, 2004, Aguilar sued Gostischef alleging a single cause of action for personal injury. On October 30, 2004, Farmers wrote Aguilar's counsel offering to pay the \$100,000 policy limits. Aguilar's counsel then wrote a letter on February 1, 2005 arguing that Farmers Insurance was liable for a judgment in excess of the \$100,000 policy limit because Farmers Insurance had ignored three pre-litigation attempts to settle the matter within policy limits. On April 6, 2005, Aguilar made a Statutory Offer pursuant to Code of Civil Procedure Section 998 in the amount of \$700,000. Farmers Insurance again responded indicating it would settle for \$100,000.

The matter went to trial. Ultimately, after appeal, the Trial Court reinstated a judgment in Aguilar's favor in amount which was well in excess of \$700,000. Aguilar then sought \$1,639,451.14 in post offer costs pursuant to Code of Civil Procedure Section 998. The Trial Court later ruled that the \$700,000 offer was made in good faith in spite of the fact that Gostischef had little in the way of assets at the time the Statutory Offer was served.

On appeal, the California Court of Appeal noted that Farmers Insurance did not contest the fact that it could be liable for the full amount of the judgment if it failed to accept a reasonable offer to settle the matter within policy limits. [See, Comunale v. Traders & General Insurance Co. (1958) 50 Cal.2d 654; Crisci v. Security Ins. Co. (1967) 66 Cal.2d 425, 430 and Murphy v. Allstate Ins. Co. (1976) 17 Cal.3d 937, 941] The Court of Appeal then went on to rule that the Trial Court was well within its discretion to find that the \$700,000 Offer to Compromise was in good faith in spite of the lack of financial means on the part of the insured and affirmed the Judgment.

The Aguilar case is consistent with prior law which holds that a liability insurer owes a duty to its insured to settle within policy limits and can be liable for damages in excess of policy limits if there is a failure to settle on the part of the insurer. However, the Aguilar case adds a wrinkle as it also holds that the insurer can be liable for post statutory offer costs under Code of Civil Procedure Section 998 even where the Statutory Offer - during the course of litigation and served after policy limits demands were rejected - is well in excess of policy limits.

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