

Insurer Needn't Cover \$3M Judgment Over Fatal Car Accident

By Hope Patti

Law360 (August 24, 2022, 3:04 PM EDT) -- Mercury Insurance has no extra-contractual liability for not settling claims that resulted in a \$3 million excess judgment against a policyholder over a traffic fatality, a California state appeals court said, finding the insurer's failure to accept a \$15,000 policy limit demand did not constitute bad faith.

The Second Appellate District **affirmed** the insurer's summary judgment win Tuesday, holding that Mercury Insurance Co. did not act in bad faith because plaintiffs Julio Palma and Miriam Cortez did not offer to settle their wrongful death claims stemming from their son Oscar Palma's death in September 2012.



A California appeals court found that Mercury Insurance does not have extra-contractual responsibility in a \$3 million judgment against an insured in an underlying wrongful death suit. (iStock.com/Army Picca)

"Because Mercury's undisputed evidence shows plaintiffs did not offer to settle their wrongful death claims, they cannot state a cause of action for bad faith refusal to settle those claims," Justice Anne H. Egerton said.

The coverage dispute dates to a 2012 accident in which Mercury policyholder Frank McKenzie was driving a vehicle that struck and killed Oscar Palma, who was riding a moped.

After the accident, counsel for Palma's estate, Carpenter Zuckerman & Rowley LLP, sent a letter to Mercury demanding that the insurer tender McKenzie's full policy limits. According to court filings, McKenzie's policy provided \$15,000 in bodily injury limits and \$10,000 in property damage limits.

Mercury tendered \$15,000 to the estate and subsequently paid \$1,070 to cover the loss of Palma's moped. The estate subsequently rejected the settlement because it demanded payment of all available policy limits, including the property damage limits, and accused the insurer of bad faith. Mercury argued that it timely tendered the bodily injury limits but was not obliged to tender the property damage limits because the claim for Palma's moped did not meet or exceed the limits.

The plaintiffs and the estate sued McKenzie for wrongful death in August 2013, and after a jury trial, the court entered a \$3 million judgment against the Mercury policyholder and in favor of the plaintiffs. McKenzie then assigned his rights against Mercury to Julio Palma and Cortez in exchange for a covenant not to execute the judgment against his personal assets, according to court filings.

Julio Palma and Cortez filed the instant action against Mercury in February 2019, asserting that the insurer acted in bad faith by failing to settle within policy limits, resulting in an excess judgment against McKenzie.

The trial court granted summary judgment in favor of Mercury in September 2020, finding that the demand letter only offered to settle the estate's survival claims and that the plaintiffs did not offer to settle their wrongful death claims.

In affirming the trial court's ruling, the panel said Mercury did not unreasonably fail to accept the plaintiff's settlement offer because none was ever made.

The justices noted that the demand letter mentioned only the estate — which did not have authority to pursue a wrongful death action — and no other claimants or heirs of Oscar Palma. The letter also stated that it would prove Palma's medical expenses through litigation if the insurer did not accept the offer, which are recoverable only in a survival action, the panel said.

Even if the demand letter had offered to settle the plaintiff's claims, Mercury did not act in bad faith, the panel added.

"Here, the undisputed evidence shows Mercury made substantial efforts to accept the Carpenter firm's offer," Justice Egerton said, noting that the insurer informed its policyholder of the offer and obtained consent to accept it and tendered its full bodily injury limits, among other things.

Mercury attempted to accept the offer, "which it would have done but for its outside counsel's inadvertent failure to deliver McKenzie's declaration," Justice Egerton said. The justice added that negligence does not support a claim for bad faith failure to settle.

"If anyone acted in bad faith, it was plaintiffs and the Carpenter firm," the justice said.

Rather than informing the insurer of its failure to provide McKenzie's declaration, Justice Egerton said the plaintiffs and firm pursued legal action knowing it would destroy McKenzie's credit and subject him to distressing and embarrassing post-judgment collection proceedings.

Peter H. Klee, counsel for Mercury, told Law360 that Tuesday's ruling demonstrates that courts will not tolerate or reward gamesmanship when an insurer makes an effort to settle. The claim, he said, could have been settled within the first couple of months had the plaintiffs not attempted to hold Mercury liable for more than the policy limits afforded."

Representatives for the plaintiffs did not immediately respond to requests for comment on Wednesday.

Justices Anne H. Egerton, Lee Smalley Edmon and Luis A. Lavin sat on the appeals panel for the California Court of Appeal, Second Appellate District.

Julio Palma and Miriam Cortez are represented by Ricardo Echeverria, Steven Schuetze, Kristin Hobbs and Reid Ehrlich-Quinn of Shernoff Bidart Echeverria LLP.

Mercury is represented by Peter H. Klee and Marc J. Feldman of Sheppard Mullin Richter & Hampton LLP.

The case is Julio Palma et al. v. Mercury Insurance Co., case number B309063, in the California Court of Appeal, Second Appellate District.

--Editing by Neil Cohen.