

Release Inflexibility Leads to Multi-Million Dollar Stipulated Judgment and Bad Faith Liability

AUTHOR: SANDBERG PHOENIX

Summary: Mercury Casualty provided auto liability insurance coverage with limits of \$15,000/\$30,000 to insured driver McDaniel who, while intoxicated, ran into and seriously injured two pedestrians. Mercury investigated, offered its policy limits, and allowed the claimants' attorney to investigate McDaniel's assets, but balked at language plaintiffs' attorney added to the release to account for "court-ordered restitution." After a stipulated judgment of \$3 million against McDaniel, the pedestrians sued for breach of contract and common law bad faith, which resulted in a \$3 million judgment plus interest and costs in their favor. The California Court of Appeal affirmed the judgment.

Barickman v. Mercury Casualty Company

After the accident, Mercury very soon thereafter offered its policy limits. At the same time, McDaniel was being prosecuted criminally. Within three months she was sentenced to three years in state prison and ordered to pay roughly \$165,000 in restitution. After plaintiffs' counsel completed his investigation regarding McDaniel's assets, he agreed to the limits offer, but added to Mercury's standard release the words, "This does not include court-ordered restitution." Mercury consulted with McDaniel's criminal defense attorney who objected to the addition of that language. Mercury had multiple conversations and communications with plaintiffs' counsel over the course of several months, received oral and written clarification from plaintiffs' counsel about his added language and learned that he had no intention of trying to overrule California law which gave McDaniel an offset for the amount of restitution to the extent of the insurance payments. This information was not communicated to McDaniel's criminal defense attorney.

After multiple extensions of time to try to resolve the release language issue failed, the attorney for the pedestrians filed suit. Shortly thereafter a stipulated judgment for \$3 million was entered with an allocation of \$2.2 million to one pedestrian and \$800,000 to the other.

The bad faith action was then filed and pursued by referral of the matter for bench trial before a referee. After listening to the evidence, the referee concluded “Mercury had breached the covenant of good faith and fair dealing by refusing to accept the releases with the language added by [plaintiffs’ attorney].” The referee concluded the explanations provided by plaintiffs’ attorney were sufficient and Mercury’s adjuster’s failure to go forward with the settlement after receiving the reasonable explanations in writing from plaintiffs’ attorney represented bad faith.

The Court of Appeals reviewed the California bad faith law and its restitution law. The Court essentially found plaintiffs’ counsel’s addition of the language to the release was reasonable and, further, that his oral and written explanations should have satisfied Mercury’s adjuster. The Court stated that initially Mercury acted “in good faith by offering [the] policy limits... in exchange for a general release of all claims.” However, thereafter, “in exchange for a general release of all claims there were disputed facts, including significant issues of credibility, as to whether Mercury did all within its power to effect a settlement once [the plaintiffs] accepted that offer but proposed a slightly modified version of the accompanying release.” There was substantial evidence supporting the referee’s finding that Mercury had unreasonably rejected the policy limits demand on the terms proposed by plaintiffs’ attorney because the additional language proposed by plaintiffs’ attorney was consistent with California’s criminal restitution law. Accordingly, in light of its insured driver’s “certain exposure to substantial liability, the referee could properly conclude that Mercury’s refusal to accept the release as amended by [plaintiffs’ counsel] or, at least, to present to [plaintiffs] in a timely fashion a revised release that included both [plaintiffs’ counsel’s] language and his explanation of its meaning... was unreasonable.”

The *Barickman* case underscores the need for insurance companies to retain experienced coverage counsel when negotiating settlements involving low limits and substantial exposure to the insured. The *Barickman* opinion does not suggest experienced coverage counsel was involved during the efforts to resolve the disputed release language. The Court went to great lengths to illustrate the reasonableness of plaintiffs’ counsel’s position and the apparent ease with which the added release language could have been either explained or refined further to be acceptable to plaintiffs and to Mercury and its insured. The fact Mercury consulted with McDaniel’s criminal attorney, but failed to provide that criminal attorney with the additional explanation provided by plaintiffs’ counsel, was of little assistance to Mercury. Correspondence from the criminal defense attorney suggested that if he had been aware of all the facts, he would have told Mercury to proceed with the settlement. Mercury, instead of paying its \$30,000 per occurrence policy limits and obtaining a full release for its insured, ended up owing millions of dollars to the plaintiffs.

By Anthony L. Martin

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