

BAD FAITH BLOG

# Ninth Circuit Finds California's Genuine Dispute Doctrine Does Not Bar Bad Faith Judgment Against Excess

AUTHOR: MEGHAN SHOLY, ANTHONY MARTIN

LMA North America, Inc. (LMA) sued National Union for breach of contract and bad faith after defendant refused to either contribute \$3.75 million towards the settlement of counter-claims asserted by LMA'S competitor, Ambu, or take over the defense of the trade disparagement and false advertising claims. After settling the underlying claims above the \$1M primary coverage, LMA asked National Union to pay the balance of the settlement or assume the defense. After the settlement was finalized, National Union agreed to assume the defense. LMA claimed in the coverage and bad faith case that National Union acted in bad faith. The district court denied National Union's motion for summary judgment and entered judgment for LMA on the jury's verdict in favor of LMA on the breach of contract and bad faith claims while rejecting the punitive damages claim. The Ninth Circuit affirmed the contract and bad faith judgments.

*Teleflex Medical Incorporated v. National Union Fire Insurance Company*

Plaintiff LMA had a \$1 million primary policy with CNA and a \$14 million excess policy with National Union. In 2007, LMA filed a patent infringement suit against its competitor, Ambu. Ambu filed trade disparagement and false advertising counterclaims.

After four years of litigation, LMA and Ambu mediated and entered a settlement agreement calling for LMA to pay Ambu \$4.75 million. The settlement was contingent upon CNA and National Union agreeing to fund the settlement. CNA quickly committed its \$1 million limit.

Rather than agreeing to fund the remainder, National Union asked LMA's counsel, Stephen Marzen to update the litigation evaluation previously submitted. That update was prepared and sent roughly one month later. LMA requested a prompt response the day the update was sent and again a week later. A little later, LMA again requested a response and informed National Union that under the California appellate court holding in *Diamond Heights*, National Union's options were to (1) accept the settlement, (2) reject it and take over the defense, or (3) reject it and refuse to undertake defense, leaving plaintiff the option of pursuing reimbursement in a subsequent action. That same day, National Union sent a list of questions to Marzen about the proposed settlement between plaintiff and Ambu. After Marzen replied to the questions and restated National Union's options on March 29, National Union declined to consent to the settlement a week later.

LMA then sent National Union a request for defense on April 13 and 14 and stated that absent a prompt response, it would finalize the settlement. When National Union did not reply, plaintiff finalized the settlement on April 18 and notified National Union. On April 21, National Union stated it would take up the defense if LMA could undo the settlement. LMA responded that it could not and sued National Union claiming breach of contract and bad faith. National Union moved for summary judgment, arguing that it had a right to veto the settlement under its "no voluntary payments" and "no action" clauses.

The district court denied National Union's motion for summary judgment because the *Diamond Heights* ruling stated an excess insurer waives its rights under a no action clause when it rejects a reasonable settlement and also fails to offer to undertake the defense. Further, the court decided a reasonable jury could conclude that National Union unreasonably delayed responses to plaintiff's requests. The jury found for the plaintiff on the breach of contract and bad faith claims. The district court entered judgment in plaintiff's favor for \$6.08 million.

National Union appealed stating the judgment on the bad faith claim should be vacated because (1) the district court did not instruct the jury on the genuine dispute doctrine and (2) argued it acted reasonably because a genuine dispute existed about the application and viability of *Diamond Heights*. On the first issue, the Ninth Circuit upheld the district court's decision not to instruct the jury on the genuine dispute doctrine because the doctrine is subsumed within the standard jury instructions for breach of the covenant of good faith and fair dealing, an instruction which was given to the jury. On the second issue, the court rejected National Union's challenge to the bad faith claim based on the sufficiency of the evidence. The court found the jury could rationally conclude National Union acted unreasonably by refusing to take over the defense or to approve the reasonable settlement, based on California law set forth in *Diamond Heights*. The Ninth Circuit also found the district court's attorney's fees award was proper. That court did not abuse its discretion by apportioning 10 percent of the unsegregated attorney's fees to the bad faith claim (*Brandt fees*) when it was undisputed the bulk of attorney time was devoted to the applicability and viability of *Diamond Heights*.

The Ninth Circuit reviewed at length whether *Diamond Heights* is the law in California. That discussion itself demonstrates why National Union took the position it did. Even so, the Ninth Circuit's ruling supports the viability of *Diamond Heights* and clarifies the applicability of California's genuine dispute rule. Until the Supreme Court of California states *Diamond Heights* is no longer viable, the Ninth Circuit seems ready to apply and follow it. When there is a jury question regarding the genuineness of the coverage dispute, the jury's decision governs. The Ninth Circuit ruled "a jury could reasonably conclude not only that the settlement was reasonable, but also that any dispute about coverage was less than genuine." Although there was evidence supporting the contrary ruling, there was sufficient evidence to support the jury's bad faith verdict. California attorneys and insurance claims professionals need to read and heed the *Teleflex* ruling.