

Aguilar v. Gostischef (2013) 220 Cal. App. 4th 475

998 offer to settle, in excess of insurance policy limits, is not made in bad faith where the offeror could reasonably believe that the insurer may be liable for an excess judgment.

FACTS AND PROCEDURAL POSTURE

On January 3, 2004 Aguilar and Gostischef were involved in a motor vehicle accident. Aguilar incurred over \$500,000 in medical bills, among other damages. Gostischef was insured by Farmers Insurance Exchange (Farmers). Before filing a suit, Aguilar's counsel made three attempts to get Farmers to disclose the policy limit so that Aguilar could make a policy limits demand. Farmers did not disclose the policy limit, and Aguilar eventually filed suit.

Once the suit was filed, Farmers made a 998 offer of \$100,000 – and disclosed that amount as the policy limit. Aguilar rejected that offer, and eventually made his own 998 offer for \$700,000. Aguilar's counsel, in a letter to Farmers, argued that Farmers may be liable for an excess judgment because Farmers had ignored repeated attempts to settle the case within the policy limits. Farmers rejected the offer, and again offered \$100,000. At trial, Aguilar prevailed, obtaining an award of \$2.3 million. Farmers obtained a judgment notwithstanding the verdict, but this was reversed on appeal.

Once Aguilar's \$2.3 million judgment was reinstated, he moved for \$1.6 million in costs. In its motion to tax, Gostischef argued that Aguilar's 998 offer was not made in good faith, as it exceeded the policy limits. The trial court disagreed, taxed only \$5,900 of the \$1.6 million, and awarded the remainder. Gostischef appealed.

DISCUSSION

Farmers argued that Aguilar's offer could not be made in good faith where Aguilar had no reasonable expectation that the defendant could accept when he did not have the means to pay, and no reasonable expectation that Farmers could be liable for any amount in excess of the \$100,000 policy limit. (The question of Farmers' liability in excess of the policy limits is currently being litigated.)

The court explained that a 998 offer is made in good faith where the offer carries with it some reasonable prospect of acceptance. Whether the offer is reasonable depends on the information available to the parties as of the date the offer was served. The offer should be a reasonable prediction of the amount of money the defendant would have to pay following a trial, discounted by an appropriate factor for receipt of money by the plaintiff before a trial. If a reasonable attorney or judge would place the offer within a range of reasonably possible results, the prediction is reasonable. Finally, the offeree must know (or reasonably should know) the information on which the offeror based the offer. Only with such knowledge, can the offeror reasonably expect the offer to be accepted.

The court found that Farmers failed to show that Aguilar was unreasonable in believing that Farmers may be liable for an excess judgment. Farmers delayed in disclosing the policy limits, and that delay could be the basis of bad faith liability. Furthermore, Aguilar had indicated his belief that Farmers might be liable for an excess judgment well in advance of his 998 offer.

Held: The order awarding costs is affirmed.