Want to Open Up the Policy Limits on a Policy? Try Making a Section 998 Offer Above Policy Limits and You Just May Be Able to Do It

Can a pretrial California Code of Civil Procedure section 998 offer to settle above an insurer's policy limits result in opening up a policy's liability limits? Interestingly, a California Court of Appeal has said "yes" to this question under certain limited circumstances if the offer is reasonable and made in good faith. In *Aguilar v. Gostischef*, ___ Cal. App. 4th ___, 2013 Cal. App. LEXIS 816, 2013 WL 5592976 (Oct. 11, 2013) ("*Aguilar*"), the California Court of Appeal held that where an injured party rationally believed an insurer may be liable for excess judgment, and the insurer refuses to provide this third-party with the amount of policy limits when requested prior to litigation, a section 998 offer above policy limits may open up the policy to an excess judgment.

The *Aguilar* case arose out a personal injury suit following an automobile accident involving Aguilar and Gostischef. Aguilar suffered extensive injuries, including $507,718 in medical expenses, and sought to recover against Farmers Insurance Exchange, Gostischef's insurer. Farmers issued Gostischef a policy containing a $100,000 limit for each person injured. Aguilar's attorney contacted Farmers three times requesting discovery of the policy limit so as to negotiate a policy demand, but Farmers did not respond. Subsequently, Aguilar brought a personal injury action against Gostischef. A few months later, Farmers offered to pay Aguilar its $100,000 limit, and advised Aguilar that Gostischef had no real property assets and lived on Social Security. Gostischef presented Aguilar a section 998 offer to compromise for $100,000. Aguilar argued that because Farmers ignored three attempts to settle within policy limits, it would be responsible for an excess judgment. Aguilar then made a section 998 offer for $700,000, and Farmers countered by renewing its $100,000 offer. The case went to trial, and a jury ultimately awarded Aguilar $2,339,657 after a reduction for contributory negligence. Farmers obtained a judgment notwithstanding the verdict, which the Court of Appeals reversed on appeal. The trial court reinstated the judgment for Aguilar. Aguilar also sought $1,639,451.14 in costs, which included prejudgment interest beginning from the date of his section 998 offer. The trial court held that Aguilar's section 998 offer was "realistically reasonable under the circumstances" and in good faith, explaining that:

> The purpose of section 998 is to encourage the settlement of litigation without trial. To effectuate the purpose of the statute, a section 998 offer must be made in good faith to be valid. Good faith requires that the pretrial offer of settlement be "realistically reasonable under the circumstances of the particular case. . . .

The trial court awarded costs, and Farmers appealed the award. On appeal, the Court of Appeals determined Aguilar's section 988 offer was made in good faith and awarded costs. Farmers argued Aguilar's section 988 offer of $700,000 was not made in good faith because there was no reasonable anticipation of acceptance of the offer by Gostischef who lacked the financial means to pay and no reasonable expectation Farmers could be liable for the amount of the section 998 offer in light of the $100,000 policy limit.

The Court of Appeals explained that a good faith 998 offer must have had a "reasonable prospect of acceptance" in light of the information available to the parties at the time of the offer. Reasonableness depends on a two-prong determination. First, an offer is reasonable if it represents a reasonable prediction of what the defendant would have to pay the plaintiff following a trial, discounted by money received by the plaintiff before trial, and premised on the information known to the defendant at the time. Secondly, the offeree must have reason to know the offer is a reasonable.

Under this analysis, the Court of Appeals found that the trial court did not abuse its discretion in holding the section 998 offer was made in good faith. First, by refusing the disclose its policy limits, Farmers exposed itself to liability in excess of policy limits. Next, the court found that Aguilar's expectation that Farmers may be liable for damages in excess of policy limits was reasonable. Aguilar suffered demonstrable injuries beyond $100,000 and sought several times to discover Farmer's policy limits prior to litigation so he could attempt to negotiate a settlement.

The court relied on *Boicourt v. Amex Assurance Company*, 78 Cal. App. 4th 1380 (2000), which authorized an excess judgment against an insurer where the insurer refused to disclose policy limits, which closed the door on reasonable settlement negotiations. In *Boicourt*, the court held that an insurer's blanket policy of refusing to disclose policy limits in advance of litigation may give rise to a bad faith claim. *Id*. at 1392. As relevant here, the *Boicourt* court reasoned that "a liability insurer '"is playing with fire"' when it refuses to disclose policy limits. Such a refusal '"cuts off the possibility of receiving an offer within the policy limits"' by the company's '"refusal to open the door to reasonable negotiations."' *Id.*

The *Aguilar* court explained:

> Here, no evidence indicated Farmers had a blanket policy of refusing to disclose a policy limit, but there was evidence Farmers delayed, perhaps unreasonably in disclosing Gostischef's policy limit, and that delay may support bad faith liability. (*See Boicourt v. Amex Assurance Co., supra,* 78 Cal.App.4th at p. 1394.) Aguilar's letter stating that he would settle for policy limits reasonably can be understood as a settlement opportunity (regardless of whether it is ultimately determined to be such). In the current appeal, Farmers has not shown Aguilar could have no reasonable expectation of acceptance of his $700,000 offer such that the trial court abused its discretion in finding Aguilar acted in good faith.

Finally, the Court of Appeals affirmed the trial court decision that Aguilar's offer to settle in excess of policy limits was reasonable, and awarded costs.

This is a very good case for policyholders and affirms that the practice by some insurers of not disclosing policy limits upon the request by injured third-parties can give rise to liability in excess of policy limits (i.e., opening up the policy, rendering an insurer liable for an excess judgment).