114 Pacifica, Suite 250, Irvine, CA 92618-3321
(949) 341-0400 – phone (949) 341-0444 – fax

www.rodolfflaw.com
info@rodolfflaw.com

Quick Links:

Volume 4, Issue 4

Costs: Another Reason Not Disclosing Policy Limits Is Risky

Making, accepting or rejecting pretrial settlement offers under California's Code of Civil Procedure Section 998 ought to be simple and straightforward. Still, litigants and appellate courts continue to find new and perplexing wrinkles.

In the most recent example, a Court of Appeal has ruled that an insurance company must pay an auto accident plaintiff more than $1.6 million in litigation costs and interest because the company rejected as unreasonable a Section 998 settlement offer from a plaintiff who knew the offer far exceeded the defendant's policy limit. The appellate court in effect held that the plaintiff's offer was reasonable because the insurer had refused repeatedly to disclose the limit amount before the lawsuit was filed, even though the company did disclose it later.

The insurer, Farmers Insurance Exchange, failed to show that the driver "acted in bad faith under all the circumstances of this case when he made a section 998 offer in excess of the policy limits," the court held in *Aguilar v. Gostischef*.

An insurance company "is playing with fire when it refuses to disclose policy limits," the appellate court said, quoting an earlier opinion.

The plaintiff had lost his leg in the accident. Before filing suit, his attorney asked Farmers three times to reveal the policy limit so he could propose a settlement at that amount. "Farmers did not respond" each of the three times, the appellate court noted.

When the plaintiff sued, Farmers finally announced that the limit was $100,000 and also informed the plaintiff's attorney that its insured had no assets and lived on his Social Security benefits. It made a Section 998 offer at $100,000. The plaintiff countered with a $700,000 offer, arguing that "Farmers would be liable for an excess judgment because Farmers ignored three attempts to settle the matter within policy limits." The defense rejected that settlement offer.

After a jury trial, the plaintiff ended up with a judgment of $2.3 million. He asked for $1.6 million in costs and interest, which the trial court largely granted.

The appellate court held that even though the plaintiff knew the policy limit was only $100,000, his offer to settle for $700,000 was reasonable and made in good faith, given what he knew at the time. What he knew was that in some situations, “an insurer that refuses a reasonable offer of settlement within policy limits” may end up on the hook “for the resulting judgment without regard to policy limits,” as Farmers acknowledged in a brief.

The appellate court specifically refused to consider whether Farmers might be liable for the excess judgment here. But irrespective of whether the plaintiff succeeds on that issue, the insurer failed “to show it was unreasonable for [the plaintiff] to believe Farmers may be liable for a judgment in excess of policy limits,” the court held.

Therefore, the trial court did not abuse its discretion in awarding costs and interest under Section 998.

Two Courts Tell Why It Matters Who Signs Arbitration Clauses

For many years now, many businesses have required customers to sign contracts containing arbitration clauses. Arbitration is faster, cheaper and more predictable than a jury trial. Lawmakers promote it, and courts generally favor it.

Still, courts do demand certain minimum requirements. For instance, the person being forced from court into arbitration should be the person who signed the arbitration agreement. Two California Courts of Appeal in different parts of the state published opinions on the same day this fall making just that point.

Both cases dealt with seriously ill patients being admitted to skilled nursing facilities, a situation in which disputes over arbitration clauses aren’t uncommon. But as one of the appellate courts noted in disposing of a portion of the arbitration proponent’s argument, “These principles are not, of course, confined to the setting of the nursing facility.”

In one of the cases, *Goldman v. Sunbridge Healthcare LLC*, a 61-year-old stroke victim checked into a nursing home, where he apparently fell a half-dozen times, eventually breaking his hip. Following surgery, he moved to a different facility, where his hip became dislocated. After another hospital stay, he returned to the second facility, but while there, his surgical staples were not removed on time. They became infected, and he died.

His wife had checked him into the facilities and signed their forms.

In the second case, *Young v. Horizon West Inc.*, an 88-year-old woman had a stroke, spent a week in the hospital and then stayed 10 days at a nursing facility. While there, she contracted genital herpes after apparently being raped by a nurse’s aide.

Her daughter had signed the admission forms.

Facing lawsuits, the various facilities filed motions to compel arbitration. The trial courts denied the motions, and the appellate courts affirmed the rulings.

In both cases, the patients had earlier signed advance healthcare directives allowing spouses to make medical decisions for them. But those agreements only took effect when their personal physicians determined they lacked the capacity to make such decisions themselves. Neither doctor had done so.

Thus neither the elderly woman’s daughter in *Young* nor the man’s wife in *Goldman* had any legal right to make health decisions for their loved ones, the courts held.

For instance, although the wife had signed a nursing home document describing her as her husband's legal representative, "There was no such person as [his] legal representative at the time Judy signed the … arbitration agreement," the court found. "Thus, the signature in that capacity was a mistake."

The fact that she was his wife didn't give her the power to make decisions for him. "The status of marriage cannot not substitute for the act of conferring agency to a spouse."

In *Young*, the court noted that the elderly woman's advance directive would have given her husband, not her daughter, authority to make medical decisions. In any event, it wouldn't have allowed making legal decisions, such as agreeing to arbitration.

The facilities argued that because the daughter in effect represented herself as her mother's agent when she signed the admission forms, she had "ostensible authority" as her agent. The court held, however, that only actions by a supposed principal — the mother in this case — can give her purported agent any authority.

Ultimately, both cases turn on a basic principal of arbitration agreements, described in 2007 appellate decision:

"Although California has a strong policy favoring arbitration, our courts also recognize that the right to pursue claims in a judicial forum is a substantial right and one not lightly to be deemed waived. Because the parties to an arbitration clause surrender this substantial right, the general policy favoring arbitration cannot replace an agreement to arbitrate."

Barry L. Rodolff

The founder and president of The Rodolff Law Firm, APC, Barry L. Rodolff, is a highly experienced lawyer who has been assisting clients faced with civil litigation for more than two decades. Mr. Rodolff developed his skills with two well-respected defense firms, Schell & Delamer, and Haight, Brown & Bonesteel. He also worked in-house at Travelers Insurance Company, representing a variety of insured companies in many types of litigation. His clients have ranged from small businesses to multinational corporations. Mr. Rodolff brings extensive experience and knowledge in the defense of litigation involving premises liability, business, product liability, personal injury, employment, construction defect, and intentional torts.