

ORIGINAL

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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CATHY A. GATTERSON
CLERK, U.S. COURT OF APPEALS

JESUS ANGUIANO, an individual,

Plaintiff-Appellant,

v.

ALLSTATE INSURANCE COMPANY, an
Illinois corporation,

Defendant-Appellee.

No. 97-56704

D.C. No. CV-97-01690-WMB

MEMORANDUM¹

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., Chief District Judge, Presiding

Argued and Submitted October 8, 1999
Pasadena, California

Before: B. FLETCHER, D.W. NELSON, and BRUNETTI, Circuit Judges.

Third party claimant Jesus Anguiano ("Anguiano"), a passenger injured in a car driven by the insured, Louis Romero ("Romero"), appeals the district court's grant of summary judgment in favor of Allstate Insurance Company ("Allstate").

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Anguiano sued Allstate for breach of its duty of good faith and fair dealing to its insured Romero under an assignment from Romero to Anguiano. We have jurisdiction under 28 U.S.C. § 1291. Reviewing the district court's grant of summary judgment de novo, we reverse. See Paresi v. City of Portland, 182 F.3d 665, 667 (9th Cir. 1999).

I.

On December 17, 1994, Anguiano was involved in an automobile accident while traveling as a passenger in a car driven by Louis Romero. Anguiano was rendered a quadriplegic as a result of the accident. At the time of the accident, Romero and his parents were insured by Allstate. The policy provided liability coverage of \$15,000 per passenger, \$30,000 per accident, and an additional \$1,000 in medical payments coverage.

Shortly after the accident, Allstate determined that Louis Romero, its insured, was 100% responsible. Allstate also decided that the Romeros were potentially exposed to damages in excess of their policy limits due to the severe physical damage suffered by Anguiano. Therefore, Allstate initially made a full policy limits offer to Anguiano's mother, Graciela Campos ("Campos"), shortly after determining that the Romeros were exposed to liability in excess of their policy limits. Campos

did not accept Allstate's offer, stating that she needed additional time to consider her options. Allstate failed to communicate any of the details of this conversation to the Romeros.

On April 21, 1995, Campos contacted Allstate's adjuster, Barbara Meza, and attempted to accept Allstate's full policy limits offer. Meza again reiterated that Allstate would be willing to settle the claim for \$16,000; however, Meza injected additional terms into the agreement including the requirement that the settlement be structured in order to account for Anguiano's minority status. While it is clear that Campos did not accept those additional terms, her deposition testimony demonstrates that she counteroffered by indicating her willingness to settle the claim for \$16,000 in cash. Allstate rejected that offer and failed to contact the Romeros regarding Campos' settlement offer.

Campos employed an attorney and on June 16, 1995, he sent a letter informing Allstate that it could settle the claim for \$16,000 but that the check must be received within five days. Meza responded to the letter two days after its expiration date. As a result, she was informed by Anguiano's attorney that the acceptance was not timely and thus they would not consummate a settlement with

Allstate. Allstate also failed to inform the Romeros about any of the details of this second offer.

On August 24, 1995, Anguiano filed a complaint against the Romeros in California state court. On September 23, 1996, a stipulated judgment was entered against the Romeros and in favor of Anguiano in the amount of \$8 million. The stipulation assigned all of Romero's claims against Allstate to Anguiano in exchange for a covenant not to execute the judgment against the Romeros.

On February 10, 1997, Anguiano filed a complaint against Allstate in California state court asserting the Romeros' bad faith claims against Allstate. The action was subsequently removed to federal court on diversity grounds. On November 7, 1997, the district court granted Allstate's motion for summary judgment. This appeal followed.

II.

Summary judgment is only proper if, upon viewing the evidence in the light most favorable to the party opposing the motion, we find that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. See Newman v. American Airlines, 176 F.3d 1128, 1130 (9th Cir. 1999). We reverse the district court's grant of summary judgment because a genuine issue of

material fact exists as to whether Allstate properly handled Campos' two settlement offers.

California law implies a covenant of good faith and fair dealing in every insurance contract. See PPG Indus., Inc. v. Transamerica Ins. Co., 975 P.2d 652, 654 (Cal. 1999). This duty extends to an insurance company's insureds, in this case the Romeros. See Moradi-Shalal v. Fireman Fund Insurance Cos., 758 P.2d 58, 68 (Cal. 1988) (In Bank). Anguiano's cause of action arises because Romero assigned his claims against Allstate to Anguiano. Allstate's treatment of Campos, therefore, is relevant only insofar as the company's actions towards Campos exposed the Romeros to liability over and above the limits of the Allstate policy.

California law requires that an insurer "take into account the interest of the insured and give it at least as much consideration as it does to its own interest" when evaluating settlement offers. Walbrook Ins. Co. v. Liberty Mutual Ins. Co., 7 Cal. Rptr. 2d 513, 521 (Cal. Ct. App. 1992) (quoting Comunale v. Traders & General Ins. Co., 328 P.2d 198, 201 (Cal. 1958) (In Bank)). As a result, the implied covenant of good faith and fair dealing imposes a duty upon insurers to give an "offer its intelligent and informed consideration; that the insurer advise the insured of any settlement offers, together with the results of its investigations; and that the

insurer give equal consideration to the interests of its insured." Cain v. State Farm Mutual Auto. Ins. Co., 121 Cal. Rptr. 200, 205 (Cal. Ct. App. 1975). A breach of any of these obligations coupled with a refusal to settle within policy limits may render an insurer liable for any judgment against its insured, including any portion in excess of the policy limits. See id.

The insurer's duty to communicate a settlement offer to the insured is particularly important when there is a conflict of interest between the insurer and the insured. See Miller v. Elite Ins. Co., 161 Cal. Rptr. 322, 331 (Cal. Ct. App. 1980). A conflict of interest arises when "an offer to settle an excess claim is made within policy limits or when a settlement offer is made in excess of policy limits and the assured is willing and able to pay the excess." Merritt v. Reserve Ins. Co., 110 Cal. Rptr. 511, 523-24 (Cal. Ct. App. 1973).

In this case, a clear conflict of interest arose between Allstate and the Romeros because as Allstate determined, the potential liability of the Romeros was well beyond the policy limits of their insurance policy because Allstate found them 100% liable for Anguiano's quadriplegic injuries. Under California law, a conflict of interest arose at the moment Campos offered to settle the excess claim (the \$8 million judgment) within policy limits, because acceptance of the settlement could

have eliminated any liability exposure to the Romeros in excess of their policy limits. See Miller, 161 Cal. Rptr. at 331-32. In contrast, the Romeros were exposed to millions of dollars of excess liability as a result of Allstate's rejection of Campos' two settlement offers.

Construing the evidence in a light most favorable to the nonmoving party, Campos made two separate offers to settle within policy limits.² However, Allstate failed to inform the Romeros about either settlement offer or any settlement negotiation details until August 24, 1995, the day that Anguiano filed a lawsuit against the Romeros in California state court. By that time, it was too late for the Romeros to exercise any influence over Allstate's decision to reject the settlement offers. See Martin v. Hartford Accident and Indemnity Co., 39 Cal. Rptr. 342, 346 (Cal. Dist. Ct. App. 1964) ("[A]n [sic] insured who is kept informed may have further information to give to the carrier; he may use powers of persuasion upon the carrier to increase its offer; he may engage counsel; he may have other courses of action open to him.").

²Allstate argues that Campos never made a counteroffer during the April 21 conversation. Therefore, Allstate contends, it had no duty to forward Campos' counteroffer to the Romeros because Campos never made an offer. However, for purposes of a summary judgment motion, we must construe all the evidence in a light most favorable to the plaintiff. Because Campos' deposition testimony indicates that she did make an offer, Allstate's argument is without merit because this is a disputed genuine issue of material fact that should be resolved at trial.

Allstate responds by arguing that it did not have an obligation to inform the Romeros about defective or unreasonable offers. Allstate contends that Campos' offers were defective because they failed to account for a Medi-Cal lien over any settlement proceeds paid to Anguiano by Allstate. The facts regarding the Medi-Cal lien are in dispute. While Campos' offers may have been defective, such a defect does not relieve the insurer of its obligation to forward all settlement offers to the insured. As a result of Allstate's failure to inform the Romeros about any of the settlement negotiations and offers, the Romeros were not given the opportunity to eliminate the lien problem and their excess liability exposure.

Under California law, Allstate's failure to inform the Romeros about Campos' settlement offers presents a genuine issue of material fact. Accordingly, we reverse the district court's grant of summary judgment.

REVERSED.