Alert
March 29, 2021

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Can a Settlement Demand Above Policy Limits Fall within Limits? A California Appellate Court Says "Yes"

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California law generally requires that an insurer reject a reasonable settlement demand within the policy limits before it can be liable for a bad faith failure to settle. *See Samson v. Transamerica Ins. Co.*, 30 Cal.3d 220, 237 (1981). But a recent California Court of Appeal (4th Dist.) decision held that a pre-litigation demand exceeding the policy limits could — under the right circumstances — provide the factual basis to assert that an insurer missed the opportunity to settle. *Planet Bingo LLC v. Burlington Ins. Co.*, E074759, 2021 WL 1034830 (Cal. Ct. App. Mar. 18, 2021).

Burlington Insurance Company's insured, Planet Bingo LLC, designed and supplied electronic gaming devices. In 2008, a fire broke out in a bingo hall in the United Kingdom owned and operated by Beacon Bingo. Security camera footage showed that the fire originated in or very near the racks where Planet Bingo's devices were stored. Beacon notified Burlington that Beacon's estimated losses totaled $2.6 million.

Beacon and Burlington conducted lengthy investigations regarding the claim. Because Beacon did not provide information to Burlington, Burlington hired its own investigator. In 2010, Burlington's investigator concluded that one of Planet Bingo's devices was the most likely cause of the fire. Nevertheless, in September 2010, Burlington concluded that Planet Bingo was not liable; that there were "coverage issues" relating to the claim; and that neither the distributor of Planet Bingo's devices, Leisure Electronics Ltd., nor Leisure's insurer seemed to be pursuing the claim.

During the ensuing nine months, Burlington conducted little further investigation. Planet Bingo complained to Burlington that it was losing business because the unpaid claim was damaging its reputation. In 2011, Burlington informed Planet Bingo that because no one appeared to be pursuing Planet Bingo for the damages, Burlington was closing its file.

Three years later, Leisure's insurer, AIG Europe Ltd., wrote to Planet Bingo advising that Leisure settled with Beacon for approximately $2.6 million. AIG demanded that amount from Planet Bingo, but stated that it would be willing to engage in alternative dispute resolution: "We are instructed to recover our client's outlay .... With the objective of avoiding the costs of litigation, our client is prepared to enter into alternative forms of dispute resolution. ... [T]he options available ... are discussions and negotiations or mediation. Please confirm which option you agree to." (Ellipses in original.)

The court noted that AIG's $2.6 million demand was more than twice the Burlington policy's limits. But Planet Bingo's expert testified that Burlington should have considered the larger context. Namely, that such an excess demand in the subrogation context actually was an invitation to settle at policy limits. Specifically, that there was an "industry custom in such subrogation claims for accepting policy limits for a full release [o]f the insured."

Burlington did not read between the lines of AIG's demand. Instead, Burlington denied coverage on the grounds that the claim arose outside the coverage territory and no suit had been filed in the United States or Canada, as required for Burlington to have a duty to defend. Subsequently, AIG filed suit in California, and Burlington defended its insured. Nine months into the suit, Burlington settled for the policy limits.

After the settlement, Planet Bingo sued Burlington, claiming that Burlington's failure to settle earlier harmed Planet Bingo. Burlington prevailed on summary judgment based on the argument that because a demand was never made at or below the policy limits, it did not have the opportunity to settle within the policy limits. (Burlington did not address the lack of an excess judgment against the insured.) The question before the appellate court was whether Planet Bingo could make a

prima facia case against Burlington when Burlington did not receive a formal demand within the policy limits.

Burlington argued that the lack of such a demand was dispositive, citing *Howard v. American National Fire Ins. Co.,* 187 Cal. App. 4th 498, 525 (2010) ("the opportunity to settle is typically shown by proof that the injured party made a reasonable settlement offer within the policy limits and the insurer rejected it"). But the court ruled that this was not the typical case. It relied heavily on *Boicourt v. Amex Assurance Co.*, 78 Cal. App. 4th 1390 (2000). There, the claimant asked the insurer to disclose the policy limits prior to filing any suit. The *Boicourt* court held that the pre-suit request to disclose available coverage limits signaled a willingness to settle for the limits, and that an insurer could be liable for failing to act on the opportunity.

The *Planet Bingo* court ruled "that the existence of an opportunity to settle can be shown by evidence other than a formal settlement offer." Planet Bingo's expert testified that AIG's excess demand to settle its subrogation claim actually signaled a willingness to settle for the limits. The court ruled that this testimony created a triable issue of material fact as to whether Planet Bingo had an earlier opportunity to settle the case within limits.

The takeaway from this decision is that where a settlement demand above limits is made on an insured, a liability insurer cannot merely assume that the demand is not an opportunity to settle within the policy limits. Especially in circumstances where the insured's liability could exceed the policy limits, the insurer should explore whether the party making the demand is actually seeking to settle within the limits.