Appellate Reports

Barickman v. Mercury Cas. Co. — *Court rejects the insurer's argument that it acted in good faith as a matter of law by making an early tender of policy limits*

By Jeffrey I. Ehrlich

Barickman v. Mercury Cas. Co.

(2016) 2 Cal.App.5th 508 (2d Dist., Div. 7.)

Who needs to know about this case: Lawyers litigating insurance bad-faith cases based on the insurer's failure to settle within policy limits.

Why it's important: Rejects the insurer's argument that because it agreed to offer its policy limits early in the process, it is entitled to judgment as a matter of law that it acted in good faith. Rather, the court finds that there was substantial evidence to support a bad-faith judgment where the insurer failed to resolve issues concerning the scope of the release.

Synopsis: Mercury's insured, McDaniel, ran a red light as she was driving while intoxicated, striking and seriously injuring two pedestrians, Barickman and McInteer. On August 4, 2010, counsel for Barickman and McInteer, Algorri, sent Mercury a letter describing their extensive injuries and enclosing a copy of the police report. On September 1, 2010, Mercury offered its policy limits of $15,000 per person. In response, Algorri requested that McDaniel provide a statement of assets to assist his clients in determining whether to accept the offer.

In late October 2010, McDaniel was sentenced to three years in prison for the accident, and was ordered to pay restitution to Barickman and McInteer of $165,000. In mid-December, Algorri informed Mercury that his clients accepted the policy-limits offer, and returned signed releases, in which he had inserted explanatory language concerning the $15,000 payment, which stated, "This does not include court-ordered restitution." Mercury took months to decide whether to accept this language. In discussions with Algorri, he made it clear that the purpose of the language was to ensure that the release did not wipe out his clients' rights to recover their court-ordered restitution. He was not stating that McDaniel would not receive a credit toward the restitution she owed in the amount of the settlement proceeds.

Algorri imposed a final deadline of January 7, 2011 for Mercury to respond concerning the releases. Mercury requested a further extension that day, and on January 10, 2011, Mercury declined to accept the additional language, asking Algorri to reconsider whether the matter could be resolved without the added language.

On January 13, 2011, Barickman and McInteer sued McDaniel for their personal injuries. In August 2012, the personal-injury action was settled with a stipulated judgment in favor of McInteer for $2.2 million, and in favor of Barickman for $800,000. McDaniel assigned her rights against Mercury for a covenant not to execute.

Barickman and McInteer sued Mercury as McDaniel's assignee in April 2013, and the parties agreed to have the case tried by a referee in a bench trial under Code Civ. Proc. section 638. The referee found that Mercury had breached the implied covenant of good faith and fair dealing by refusing to accept the releases as proposed by Algorri.

Relying primarily on language from *Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, Mercury argued that it acted in good faith as a matter of law because it timely (nine weeks after the accident) offered McDaniel's policy limits to Barickman and Mcinteer. According to Mercury, the only reason the case did not settle was Algorri's insistence on the unacceptable additional language he had drafted, not its failure to offer McDaniel's policy limits. The court rejected this argument, finding that "Mercury reads far too much into the holding and analysis in *Graciano*." In *Graciano*, the insurer was held to have acted in good faith as a matter of law because it offered its policy limits within the deadline set by the insured, and the court found that it had done "all within its power to effect a settlement."

By contrast, in this case, although Mercury initially acted in good faith by offering its policy limits, there were disputed factual issues on the issue of whether Mercury did all within its power to effect a settlement in light of how the dispute about the language of the release was handled. The court noted that Mercury was urging it to find that, "an insurer that at one point acted in good faith during settlement negotiations has fully discharged its obligations under the implied covenant and has no further responsibility to make reasonable efforts to settle a third party's lawsuit against its insured. Mercury cites no authority for that rather remarkable proposition."

The court held that the referee could properly conclude that Mercury's refusal to accept the release as amended by Algorri or, at least, to present to Barickman and Mcinteer in a timely fashion a revised release that included both Algorri's language and his explanation of its meaning (for example, by inserting after Algorri's addition, "and does not affect the insured's right to offset") was unreasonable.

Martin v. Yasuda

(9th Cir. 2016) __ F.3d __2016 WL 3924381.

Who needs to know about this case: Lawyers who want to argue that the right to seek arbitration has been waived by their opponent's litigation conduct.

Why it's important: Confirms that litigation conduct that is inconsistent with the right to arbitrate will result in a waiver of the right to arbitrate under the Federal Arbitration Act, and that it is the trial judge who decides the issue.

Synopsis: Defendants (Milan) operate private colleges offering career training in cosmetology. When plaintiffs enrolled in their school, they signed a binding arbitration clause. In October 2013, plaintiffs filed a class action against Milan, arguing that it violated the Fair Labor Standards Act by forcing them to perform unpaid work as part of their training.

During a scheduling conference 14 months after the complaint was filed, the district judge asked Milan's counsel whether he intended to file a motion to compel arbitration. He answered, "We haven't made a decision about that. And frankly ... I think our view of it is we are probably better off just being here in the court with the procedures of Rule 23 and discovery and federal practice than handling it in arbitration."

On March 20, 2015, almost seventeen months after the start of the case, Milan moved to compel individual arbitration. The plaintiffs opposed the motion by arguing that Milan had waived their right to compel arbitration and that the terms were unconscionable and unenforceable. The district court denied the motion, finding that Milan had waived the right to compel arbitration. Affirmed.

First, the court held that the issue of waiver by litigation conduct is a "gateway" issue on a motion to compel arbitration, which is properly decided by the district court.

Second, it affirmed the finding of waiver. It noted that "a party's extended silence and delay in moving for arbitration may indicate a conscious decision to continue to seek judicial judgment on the merits of the arbitrable claims," which would be inconsistent with a right to arbitrate. This element can be satisfied when a party chooses to delay his right to compel arbitration by actively litigating his case to take advantage of being in federal court. A statement by a party that it has a right to arbitration in pleadings or motions is not enough to defeat a claim of waiver. The court cited cases noting that, "A party cannot keep its right to demand arbitration in reserve indefinitely while it pursues a decision on the merits before the district court" and "A reservation of rights is not an assertion of rights." Although filing a motion to dismiss that does not address the merits of the case is not sufficient to constitute an inconsistent act, seeking a decision on the merits of an issue may satisfy this element.

"Here, the defendants engaged in conduct inconsistent with their right to arbitrate. They spent seventeen months litigating the case. This included devoting "considerable time and effort" to a joint stipulation structuring the litigation, filing a motion to dismiss on a key merits issue, entering into a protective order, answering discovery, and preparing for and conducting a deposition. The defendants did not even note their right to arbitration until almost a year into the litigation and did not move to enforce that right until well after that time. Indeed, fourteen months into the litigation, they told the district judge and opposing counsel that they were likely 'better off' in federal court. We agree with the district court that the totality of these actions satisfies this element."

The court also found that the plaintiffs satisfied the element of prejudice. Although litigation conduct inconsistent with a right to arbitrate most frequently causes prejudice to the opposing party, the link is not automatic. To prove prejudice, plaintiffs must show more than "self-inflicted" wounds that they incurred as a direct result of suing in federal court contrary to the provisions of an arbitration agreement.

Arbitration is designed to provide a simpler and more expeditious system of resolving certain types of disputes — a system that values "greater efficiency and speed" over "procedural rigor." When a party has expended considerable time and money due to the opposing party's failure to timely move for arbitration and is then deprived of the benefits for which it has paid by a belated motion to compel, the party is indeed prejudiced.

> "Here, because the defendants failed to move for arbitration for seventeen months, the plaintiffs expended considerable money and effort in federal litigation, including conferring with opposing counsel regarding how to conduct the case on the merits, analyzing how to approach discovery and class certification, and contesting the defendants' motion to dismiss on the merits. As discussed above, even if the parties exchanged the same information in court as they would have in arbitration, the process of doing so in federal court likely cost far more than determining the answer to the same question in arbitration. The unnecessary, additional costs incurred by the plaintiffs as a result of the defendants' dilatory motion to compel constitute obvious prejudice.
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> Moreover, the plaintiffs have shown prejudice here because, should this case go to arbitration, they would have to

relitigate a key legal issue on which the district court has ruled in their favor. We and other circuits routinely have found this factor dispositive because the plaintiffs would be prejudiced if the defendants got a mulligan on a legal issue it chose to litigate in court and lost."


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