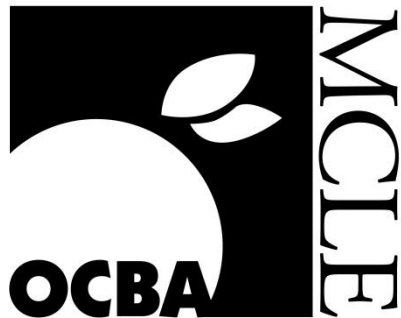

ORANGE COUNTY BAR ASSOCIATION

**BUSINESS LITIGATION and INSURANCE LAW
JOINT SECTION WEBINAR**

**Bad-Faith Refusal to Settle: Anatomy of a Claim and a Possible
New Paradigm Under California Law**



Thursday, May 26, 2021

May 2021



NEWcases

of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

Todd E. Lundell*

Sheppard, Mullin, Richter & Hampton LLP

S T A T E

Arbitration—Right to Disqualify Arbitrator Cannot Be Waived by Contract

CCP § 1281.91(b) gives parties the right to disqualify a proposed arbitrator based on the arbitrator’s initial required disclosures. In *Roussos v. Roussos*, 60 Cal.App.5th 962 (2021), the court of appeal held that parties cannot waive this statutory right by designating a specific arbitrator in their arbitration agreement. There, the arbitration agreement provided the parties “stipulate and agree not to contest that Judge John P. Shook will arbitrate all issues with binding authority” over them. After the trial court compelled arbitration of a dispute over control of two corporations, Judge Shook served a disclosure report that disclosed he had participated in two arbitrations involving the parties and their lawyers. One of the parties (Ted) then served a notice of disqualification under section 1281.91(b), but Judge Shook denied the disqualification request and the trial court confirmed an award over Ted’s objection. The court of appeal reversed, holding that “[a]s the proposed neutral arbitrator, Judge Shook was legally required to make the disclosures set forth in his disclosure report, and Ted had an absolute right to disqualify him without cause.” The court further held “the parties to an arbitration agreement cannot contract away their statutory right to disqualify an arbitrator pursuant to section 1281.91.” The court reasoned that it “would be contrary to the intent of the Legislature” to allow the parties to contractually limit their ability to object to an arbitrator.

Attorneys—Breach of Fee Agreement

In the absence of a valid fee agreement, an attorney may recover only a “reasonable fee” for services rendered. Until now, however, there has been no clear standard for determining what fees are recoverable where the parties have entered into the requisite fee agreement and the client breaches by refusing payment. In *Pech v. Morgan*, 61 Cal.App.5th 841 (2021), the court of appeal filled this gap by holding that “when an attorney sues a client for breach of a valid and enforceable fee agreement, the amount of recoverable fees must be determined *under the terms of the fee agreement*, even if the agreed upon fee exceeds what otherwise would constitute a reasonable fee under the familiar lodestar analysis.” (Emphasis in original.) The court emphasized that “to be enforceable, the fee agreement cannot be unconscionable” and the attorney’s performance “must be consistent with the implied covenant of good faith and fair dealing.” The court relied heavily on a 1993 opinion by the State Bar’s Committee on Mandatory Fee Arbitration, which the court found “sensibly balances the competing interests that arise when a client breaches a fee agreement by refusing to pay an agreed upon fee.”

Evidence—Admissibility of Expert Declaration in Opposition to Summary Judgment Motion

The court of appeal’s decision in *Michaels v. Greenberg Traurig, LLP*, 62 Cal.App.5th 512 (2021) is a must-read regarding the distinction “between the trial court’s gatekeeping function at a motion in limine, and, the trial court’s role in ruling on the admissibility of the expert witness who offers a declaration in opposition to a summary judgment motion.” As the court explains, in ruling on a motion in limine to determine the admissibility of expert testimony for purposes of a trial, “the trial court does not view the evidence in the light favoring either party.” By contrast, “[i]n ruling on the admissibility of evidence in a summary adjudication motion, the trial court liberally construes the evidence in favor of the party opposing the summary adjudication motion.” And this liberal construction applies “in ruling on both the admissibility of expert testimony and its sufficiency to create a triable issue of fact.” (Internal quotation marks omitted.)

Litigation—998 Offer—Validity of Acceptance

CCP § 998(b) requires a valid offer to compromise to include “a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted.” As a result, courts have consistently held that a party’s failure to accept a 998 offer that lacks an acceptance provision does not trigger any of section 998’s cost-shifting provisions. In *Mostafavi Law Group, APC v. Larry Rabineau, APC*, 61 Cal.App.5th 614 (2021), the court faced a related question of first impression: “whether the purported acceptance of a section 998 offer lacking an acceptance provision gives rise to a valid judgment.” The court held it did not, reasoning that “where a section 998 offer is invalid based on its failure to satisfy all of the statutorily required elements, there is nothing for the receiving party to accept in the first place.” (Cleaned up.)

Litigation—Fees for Enforcing Judgment

CCP § 685.040 authorizes the recovery of attorney’s fees incurred for enforcing a judgment “if the underlying judgment includes an award of attorney’s fees to the judgment creditor” But what if the judgment includes a provision entitling the prevailing party to attorney’s fees, but does not actually award any fees because no cost bill requesting such fees was ever filed? In *Guo v. Moorpark Recovery Service, LLC*, 60 Cal.App.5th 745 (2021), the court of appeal held the enforcing party was still entitled to its fees for enforcing the judgment. “The judgment in this case provided for an award of fees; it just did not specify an amount.” In so holding, the court disagreed with the implicit decision to the contrary in *Imperial Bank v. Pim Electric, Inc.*, 33 Cal.App.4th 540 (1995).

Torts—Negligence—Duty to Protect Against Injuries Caused by Third Parties

Courts have struggled to create a consistent framework for determining the circumstances under which a defendant has a legal duty to protect a plaintiff from injuries caused by third parties. The California Supreme Court in *Brown v. USA Taekwondo*, 11 Cal.5th 204 (2021) granted review to resolve conflicts between the courts of appeal on this issue, and ultimately held “whether to recognize a duty to protect is governed by a two-step inquiry.” First, “the court must determine whether there exists a special relationship between the parties or some other set of circumstances giving rise to an affirmative duty to protect.” Second, courts must “determine whether relevant policy considerations counsel limiting that duty.” Doing so requires courts to consider the factors described in *Rowland v. Christian*,

69 Cal.2d 108 (1968), including, among other things, “the foreseeability of the harm to the plaintiff,” “the moral blame attached to the defendant’s conduct,” and “the extent of the burden to the defendant and consequences to the community of imposing a duty.” The Supreme Court clarified, however, that those *Rowland* factors “do not serve as an alternative basis for imposing duties to protect,” but rather must be used “to determine whether the relevant circumstances warrant limiting a duty already established”



Jason Fowler
Daniel Eli

PAYNE & FEARS

Jared De Jong

**BAD FAITH FAILURE TO SETTLE:
ANATOMY OF A CLAIM**

WHERE ARE WE GOING?

Analysis of an Open Policy Claim From
the Demand through the Trial to the Bad
Faith Case and Everything in Between

DISCLAIMER

The content in this presentation should not be construed as legal advice.

It is solely for an educational/informative purpose.

**THE UNDERLYING
PERSONAL INJURY CASE:**

**MOTORCYCLE VS. AUTO
COLLISION**

OCTOBER 24, 2007













42220 10th Street West, Suite 109, Lancaster, CA 93534 661.949.2595 Fax 661.949.7824

R. Rex Parris
Robert A. Parris
Stephen K. McIntroy
Howard S. Blumenthal
Ashley N. Parris
Jason F. Fowler
Alexander K. Wheeler

December 13, 2007

CERTIFIED MAIL RETURN RECEIPT REQUESTED

POLICY LIMIT/TIME LIMIT DEMAND

Dear Sir or Madam:

Please be advised, our office represents Christopher and Kimberly Potter for injuries and damages sustained in a collision with Jesus Remedios Avalos-Tovar on October 24, 2007. The purpose of this letter is to convey our clients' offer to settle their personal injury claims against your insured(s) in exchange for payment of your insured(s) policy limit of coverage for this collision. The intent of this letter is to afford your company the opportunity to settle this claim and eliminate any possibility of excess exposure to your insured(s).

We are offering all the information you need to evaluate our clients' claim(s) (i.e.: written statement, interview, deposition, IME, medical authorization). If you want our clients' statements, please let us know, and we will arrange a meeting between you and our clients in our office as soon as possible. If you choose to depose our clients' or send them to a doctor of your choice, we will be governed by the applicable provisions of the Code of Civil Procedure regarding depositions and defense medical exams. We will also consider your request for an MRI or other such diagnostic studies that are reasonably required for you to evaluate our clients' claims.

If you need to meet with our clients or send our client to a doctor, contact us at least ten days prior to the proposed date. We will make all reasonable efforts to accommodate your schedule.

Page 3

LOSS OF EARNINGS

Our client also sustained loss of earnings as a result of this collision. Christopher Potter is employed by Department of Air Force as a Recruiter. His employer's address is 44509 Valley Central Way, Lancaster, CA 93534. The telephone number is 661-948-8227.

TERMS OF SETTLEMENT

If you choose to accept our settlement offer, we require the following: (Note: You can send documents to us 45 days after the expiration date of this demand if, prior to its expiration, you agree in writing to settle for the policy limits.)

- (1) A signed, sworn statement from your insured driver stating whether that driver was performing an employment-related task at the time of the collision and the exact nature and purpose of your insured's activities at the time of the subject collision, including the identity of any person or entity for whom your insured was acting at the time of the collision, if any. If your insured driver was in the course and scope of employment or acting as an agent of another, this policy limit offer is revoked. The statement must identify your insured's employer. (Note: We reserve the right to require a further detailed declaration from your insured to verify your representations regarding any agency or employment issues, at our discretion.)

A signed, sworn statement from your insured owner and driver, if different, stating they carry no other liability policies providing coverages for this claim. If there are additional applicable liability policies, this policy limit offer is revoked.

Proof of your insured(s) liability policy limit.

Offer is made in writing, we require a written acceptance. A "verbal tender" of policy limit is not acceptable.

Settlement will expire at 5:00 p.m. thirty (30) days from the date of this letter, this letter. In the event you fail to accept our settlement offer within this thirty days will bring this claim to trial and look to your insured(s) to pay the entire amount to policy limits.

page 4

This offer only applies to persons or entities insured under the policy. Any release we subsequently receive from you that attempts to release non-insureds from liability will be treated as a counter-offer.

We know if you offer your insured(s) liability policy limits, you need to make sure your insured(s) are protected from additional claims. To this end, our settlement offer includes the release of any statutory liens, survivorship claims, or Worker's Compensation liens your insured(s) may be responsible for as a result of this collision. Further, we realize that any action taken against any other responsible party not covered under your policy may result in a judgment against your insured(s) on a cross-complaint for equitable indemnity. Therefore, we reserve the right to take action against your insured(s) on their proper and timely acceptance of this offer can be conditioned upon the court's judgment in the good faith of this settlement pursuant to C.C.P. §877.6. Please note that time with regard to this provision and that you are responsible for filing the application for settlement within thirty days of acceptance of this offer.

We want to allow you the opportunity to investigate our clients' claims and simply settle. If you believe this settlement offer is unclear or you have concerns or questions about this offer, please contact us for clarification. We strongly advise you to respond to this offer without delay.

response to, Case Manager, Mark Ensing, who continues to assist you for your attention to this matter and we look forward to hearing from you.

Sincerely,

R. REX PARRIS LAW FIRM

Stephen K. McIntroy
Attorney at Law



42220 10th Street West, Suite 109, Lancaster, CA 93534 661.948.2595 Fax 661.948.7824

December 13, 2007

R. Rex Parris
Robert A. Parris
Stephanie K. McElroy
Howard S. Blumenthal
Ashley M. Parris
Jason P. Fowler
Alexander R. Wheeler

LOSS OF EARNINGS

Our client also sustained loss of earnings as a result of this collision. Christopher Potter is employed by Department of Air Force as a Recruiter. His employer's address is 44509 Valley Central Way, Lancaster, CA 93534. The telephone number is 661-948-8227.

TERMS OF SETTLEMENT

If you choose to accept our settlement offer, we require the following: (Note: You can send these documents to us 45 days after the expiration date of this demand if, prior to its expiration, you

This offer only applies to persons or entities insured under the policy. Any release we subsequently receive from you that attempts to release non-insureds from liability will be treated as a counter-offer.
We know if you offer your insured(s) liability policy limits, you are protected from additional claims. To this extent, you may be responsible for as a result of this offer. You will not be liable for any costs or expenses taken against any insured(s) on account of this offer.

Our offer of settlement will expire at 5:00 p.m. thirty (30) days from the date of this letter, including the date of this letter. In the event you fail to accept our settlement offer within this thirty (30) day period, we will bring this claim to trial and look to your insured(s) to pay the entire judgment without regard to policy limits.

as possible. The appointment of an independent medical examiner shall be governed by the applicable policy provisions. We will also conduct defense medical exams. We will also conduct independent medical examinations that are reasonably required for you to evaluate your claim. If you need to meet with our clients or send our client to a doctor, contact us prior to the proposed date. We will make all reasonable efforts to accommodate your schedule.

Stephanie K. McElroy
Attorney at Law

January 16, 2008

R. Rex Parris
Law Firm
42220 10th Street West, Suite 109
Lancaster, CA 93534

ATTN:

Re:

Dear

This letter will serve as a response to your Policy Limit/Time Limit Demand for the above referenced clients.

We requested the medical records from all the medical facilities you provided. We also requested loss of earnings verification from your client's employer.

Please be advised that we received a Certificate of no Records from American Medical Response. We also received partial medical records from Antelope Valley Hospital. We are still waiting to secure records from Lancaster Community Hospital, Edwards AFB Medical Center and Dr. Antebi. Also, we are waiting to secure loss of earnings verification.

Please be advised that based on the information we have received to date, we are not in a position to properly evaluate your client's injury claim and make an offer to you. We will keep you updated on the progress of securing the records. We will also advise you if we require any additional information and/or documentation.



42220 10th Street West, Suite 109 Lancaster, CA 93534 661.949.2595 Fax 661.949.7524

R. Rex Parris
Robert A. Parris
Stephen K. McElroy
Howard S. Blumenthal
Ashley N. Parris
Jason P. Fowler
Alexander R. Wheeler

January 24, 2008

RE: Our Client(s):
Your Insured:
Your Claim No.:
Date of Loss:

Dear

Thank you for your letter dated January 16, 2008, which we received by facsimile on January 22, 2008. We regret that chose not to accept our offer to settle Mr. and Mrs. Potter's claims. Given the seriousness of the injuries in this case, we believe it was exceedingly generous for our clients to allow an opportunity to investigate, evaluate, and settle the claims so as to protect their insured.

You may advise Mr. Avalos-Tovar of our clients' intention to proceed with this case without regard to the limits of his insurance policy with We intend to begin preparation of the lawsuit. Please advise us if you can accept service on behalf of Mr. Avalos-Tovar.

Thank you for your attention to this matter.

February 15, 2008

Law Offices of R. Rex Parris
963 West Avenue J
Lancaster, CA 93534

Re: Insured:
Claim #:
Date of Loss:
Claimant:

Dear Mr. Parris:

This letter will confirm our offer of \$15,000.00 for the full and final settlement of your client's bodily injury claim. This offer does represent our insured's policy limits and does include any liens associated with your client for this loss. As per your demand letter to us, our offer of policy limits will also extinguish the Loss of Consortium claim made your client's wife, Kimberly Potter. If your client decides to accept this offer, we would require that he sign the enclosed Bodily Injury Release in exchange for receiving a settlement draft. This Release, if signed by your client, would extinguish your client's right to sue our insured. In addition, as per your request we will obtain a signed statement from our insured regarding any excess insurance coverage on his vehicle involved in the loss and if he was in the course and scope of employment when the loss occurred.

Please advise your client of our offer and provide me with a response to our offer as soon as possible. I look forward to hearing from you.

Sincerely,

TRIAL NUMBER 1

TOTAL VERDICT: \$928,643
JULY 27, 2009

NEW TRIAL GRANTED

APPEAL

DEFENDANT SECRETLY SETTLES BAD FAITH CLAIM

April 4, 2012

Via Facsimile (661) 949-7524

R. Rex Parris, Esq.

Jason Fowler, Esq.

R. REX PARRIS LAW FIRM

43364 10th Street West

Lancaster, CA 93534

RE:

Dear Counsel:

We have been advised that a trial setting conference is scheduled for April 12, 2012 in Department 89. In anticipation of this hearing and so that you and your clients can further decide how you wish to proceed. I am providing you with the enclosed settlement agreement reached between _____ and Jesus Avalos-Tovar. Mr. Tovar has resolved any and all claims he might have had against his insurance carrier (and other Releasees) in consideration of receipt of \$75,000.

Under the terms of the agreement the matter was to be kept confidential until such time as others, including the court and counsel, had a need to know. This information is being provided to you at this time so that your clients and office can consider how you wish to proceed. [REDACTED] is, to my understanding, now insulated from any further claims the Potters may wish to bring against her and I understand [REDACTED] is finalizing the entry of judgment on her behalf pursuant to the Appellate opinion. It will be the decision of the Potters and your office whether it would be fruitful to incur further expense in a second trial against Mr. Avalos-Tovar under circumstances wherein Mr. Avalos-Tovar has no meaningful rights to assign to the Potters.

PLAINTIFFS' OFFER TO SETTLE

Dear Mr.

We write in regard to our recent conversation concerning the approaching trial in this matter. As discussed, we are willing to consider entering into a Stipulated Judgment with an agreement that would protect your client, Jesus Avalos-Tovar, provided that his insurance carrier, _____, also sign the Stipulated Judgment thereby agreeing to the amount of the Judgment. The amount of the Stipulated Judgment would be the total Judgment of \$908,643.00 for Christopher Potter and \$20,000.00 for Kimberly Potter that was entered by the Court on August 26, 2009, plus costs of \$120,622.35 (as documented in the memorandum of costs filed following entry of that Judgment). If _____ is willing to agree to the amount of the Stipulated Judgment, we can then work on the terms of the agreement to protect Mr. Avalos-Tovar.

Based upon our recent discussions, it is our understanding that Mr. Avalos-Tovar would be willing to enter into the Stipulated Judgment, but that you would need to confirm with _____ as to whether or not it is willing to agree to the amount of the Stipulated Judgment.

Please let us know by Friday February 15, 2013, whether or not _____ will agree to the proposed Stipulated Judgment. If you have any questions, or would like to discuss this matter further please contact our office at your earliest convenience.

Very truly yours,

R. REX PARRIS LAW FIRM



Jason P. Fowler

TRIAL NUMBER 2

TOTAL VERDICT: \$975,000

**TOTAL JUDGMENT WITH COSTS AND
PREJUDGMENT INTEREST: \$1,523,761**

MARCH 29, 2013

RECEIVERSHIP

BAD FAITH CASE FILED

ANTI-SLAP FILED

THANK YOU!

Jason Fowler • Parris Law • jason@parris.com

Daniel Eli • Parris Law • deli@parris.com

Jared De Jong • Payne & Fears LLP • jdj@paynefears.com

Three seemingly simple elements

- ▶ Lawsuit against insured “for a claim covered by” the carrier’s policy
- ▶ Insurer “failed to accept a reasonable settlement demand for an amount within policy limit”
- ▶ A “monetary judgment” entered against insured “for a sum greater than the policy limits”

CACI 2334

- ▶ Single vehicle rollover; driver was either insured or passenger who was insured as permissive driver
- ▶ Pinto's offer to settle included course-and-scope declarations and other conditions; insurer did not provide declaration from the passenger
- ▶ Holding: Instructing jury using CACI 2334 was error; lacks requirement that insurer acts "unreasonably"

**PINTO V. FARMERS INS. EXCH., 61 CAL. APP. 5TH
676 (2021).**