

ALERT

Washington Appellate Court Holds Reasonable Covenant Judgment Sets Floor, Not Ceiling, for Bad Faith Damages

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The Washington Court of Appeals, applying Washington law, has held that the amount of a reasonable covenant judgment sets the floor, not the ceiling, for the damages a jury may award in an insurance bad faith case. *Miller v. Kenny*, 2014 WL 1672946 (Wash. Ct. App. Apr. 28, 2014).

The underlying action arose out of an automobile accident in which three passengers were injured when their vehicle collided with a truck. The driver was covered by the vehicle owner's automobile insurance policy. One of the injured passengers brought suit against the driver, and each of the passengers made settlement demands to the insurer. The driver demanded that the insurer tender its policy limits, but the insurer offered only the limits of a primary policy and did not offer the limits of an umbrella policy until a few months before trial.

Shortly before the trial date, the driver reached a settlement with the three passengers for all of his available insurance proceeds. The driver assigned to the plaintiff passenger his rights to sue the insurer for bad faith in exchange for a covenant not to execute or enforce an excess judgment against him. The insurer stipulated to an order finding that \$4.15 million was a reasonable amount for the covenant judgment. At the trial on the assigned bad faith claims, the passenger moved for partial summary judgment establishing that the amount of the covenant judgment was only the minimal amount of harm for which the insurer could be liable. The trial court granted that motion, and the jury awarded \$13 million to the passenger.

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On appeal, the insurer contended that the jury should not have been permitted to award damages exceeding the amount set by the stipulated covenant judgment. The Court of Appeals disagreed and held that the damages to the insured are presumptively *at least* the amount of a covenant judgment, and that this amount is added to any other damages found by the jury. Because bad faith is a tort, the court reasoned, an insured would not be limited to economic damages. The court suggested that the insured's other damages might include the potential effect on his or her credit rating, damage to reputation, loss of business opportunities, loss of control of the case, loss of interest, attorneys' fees and costs, financial penalties for delayed payments, and emotional distress.

The Court of Appeals also addressed a number of evidentiary issues raised by the insurer. The court observed that evidence of the insurer's reserves should not ordinarily be admissible because it is irrelevant and the insurer should be solely concerned with ensuring the company's financial stability rather than with the prospect that the amount of reserves might be used against the insurer in later litigation. The court nevertheless found admissible evidence that the insurer had set its reserves significantly higher than its initial settlement offer because this evidence showed that the insurer "had known almost from day one that its insured was exposed to much greater liability." The court further held that testimony from a claims analyst regarding incentive programs for the insurer's employees that linked bonuses to cost control was appropriately admissible to show that the insurer had an improper motive to refuse to settle for policy limits.

The opinion is available [here](#).