

Does a Conditional Release Constitute Bad Faith?

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USA | August 23 2024

In *Brodowy v. Progressive Direct Ins. Co.*, the Ninth Circuit affirms the district court's granting of Progressive Direct Insurance Company's ("Progressive") motion for summary judgment as to claims alleging bad faith and violations of Montana's Unfair Trade Practices Act ("UTPA"), as well as a claim for punitive damages. No. 23-35621, 2024 WL 3451014 (9th Cir. 2024).

In its opinion, the Ninth Circuit discusses the claimants' argument that Progressive's inclusion of a release with its payment of the policy limits constitutes a violation of UTPA and bad faith. Significantly, the Ninth Circuit held that Progressive's inclusion of an optional release was not used to leverage a settlement, which is prohibited under Montana law. As such, Progressive did not violate UTPA and did not act in bad faith. The Ninth Circuit also determined that the claim for breach of the implied covenant of good faith and fair dealing was a non-issue as the claimants were third-parties who do not have a contractual relationship with Progressive, and the claim for punitive damages was effectively moot.

CASE OVERVIEW

Brodowy arises from a catastrophic motorcycle accident that occurred on September 24, 2019. Specifically, Mr. Brodowy was riding his motorcycle to work when Progressive's insured driver, Ms. Burkstrand, did not see him approaching and pulled out in front of him with her motor vehicle. Ms. Burkstrand's vehicle collided with Mr. Brodowy, who suffered a severe spinal cord injury that left him paralyzed from the chest down. Shortly after the accident, Mr. Brodowy was life flighted to the University of Utah Hospital in Salt Lake City.

At the time of the accident, Ms. Burkstrand's vehicle was insured through Progressive with \$25,000 per person / \$50,000 per accident Bodily Injury ("BI") policy limits. In less than a month, Progressive reached the conclusion that liability was 100% on Ms. Burkstrand and the medical expenses were going to exceed the policy limits. On October 22, 2019, Progressive's adjuster sent a letter to Mr. Brodowy's home in Montana that advised Progressive would pay the policy limits as a full and final settlement of Mr. Brodowy's claims.

A couple of months later, the adjuster sent an email to follow up on the offer to settle the BI claim for the available limit of \$25,000. Ms. Brodowy sent an email in response, accepting the offer.

Thereafter, Ms. Brodowy asserted a loss of consortium claim and made a demand for the additional \$25,000 BI policy limits, despite the fact that such a claim is derivative of Mr. Brodowy's claim for which only the \$25,000 per person limits were available. Regardless, Progressive decided to pay Ms. Brodowy's loss of consortium claim, agreeing to tender the full \$50,000 per accident limits.

Progressive mailed the Brodowys a letter that included a release along with the check for the \$50,000 policy limits that was made out to both Mr. & Ms. Brodowy. Progressive's cover letter advised the Brodowys as follows: "Please be advised that the settlement is not contingent on you signing the release, and the payment can be processed without the release being executed."

Mr. & Ms. Brodowy subsequently filed a lawsuit against Progressive alleging Progressive "failed to address its *Ridley* obligations, misrepresented the available coverage, benefits, and limits, and attempted to leverage [Mr. Brodowy's] individual claim in trying to settle [Mr. Brodowy's] claim."

Both Progressive and Mr. & Ms. Brodowy moved for summary judgment on various grounds and the U.S. District Court for the District of Montana granted summary judgment in favor of Progressive as to all counts asserted by Mr. & Ms. Brodowy.

On appeal, the Ninth Circuit held, in pertinent part, that Progressive did not violate the UTPA or commit bad faith by including an optional release with its payment of policy limits. As stated above, Montana law prohibits leveraging payment with conditional releases. *See High Country Paving, Inc. v. United Fire & Cas. Co.* 454 P.3d 1210, 1215 (Mont. 2019) (prohibiting conditional releases where the "only reason" to support the conduct is leveraging); *Shilhanek v. D-2 Trucking, Inc.*, 70 P.3d 721, 726-27 (Mont. 2003). The district court further pointed out that the Brodowys identified no Montana authority prohibiting optional releases like the one here. "And in this case, Progressive clearly indicated that the Brodowys were not required to sign the release in order to receive payment."

Separately, the Ninth Circuit held that Progressive's inclusion of Ms. Brodowy on the optional release did not violate the UTPA or constitute bad faith by stating, "[a]s the Brodowys recognize, Montana law provides that any derivative claims [Ms. Brodowy] would assert based on [Mr. Brodowy's] injury would be subject to the same 'per person' limit under the policy."

In terms of the Brodowys' common law claim for breach of the covenant of good faith and fair dealing, the Ninth Circuit held that such a claim lacks merit simply because there is no underlying contract between the parties that would support this claim. *Citing Cate v. First Bank (N.A.) Billings*, 865 P.2d 277, 280 (Mont. 1993) ("We conclude that because no contract, express or implied, existed ... there could be no breach of the covenant of good faith and fair dealing.").

The issue of punitive damages was effectively rendered moot.

RESULT OVERVIEW

The Ninth Circuit's decision clarifies that an insurer may include an "optional" release along with its payment to settle a claim; however, the insurer must be mindful that any attempt or appearance that the settlement is being conditioned on the execution of a release could result in a bad faith claim. Here, Progressive included a cover letter with the settlement check and release, which specifically stated, "[p]lease be advised that the settlement is not contingent on you signing the release, and the payment can be processed without the release being executed."

The Ninth Circuit's decision underscores the necessity of having clear communication and transparency with all claimants regardless of jurisdiction. For instance, if Progressive had not included the cover letter that clearly advised that the settlement was not contingent upon the execution of the release, the case may have had a different result.

Separately, Progressive's decision to tender the additional \$25,000 was later used by the Brodowys in their allegation that Progressive acted in bad faith by not accurately advising of the coverage available under the policy. Although the Ninth Circuit sided with Progressive, it is important to note that Progressive was not obligated to tender the additional

\$25,000. Ms. Brodowy's claim was derivative of Mr. Brodowy's claim, capping the per person policy limits at \$25,000. Again, in these circumstances it is paramount that the insurer communicate its decision to provide such additional coverage with an adequate explanation in writing in order to preclude the argument that the insurer misrepresented the total benefits available under the policy.

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