

# WASHINGTON CASE UPDATE

## Covenant Judgments Set a Floor, Not a Ceiling

**From the Desk of Kyle Riley: Division One of the Washington Court of Appeals recently considered the effect of a covenant judgment on the available damages against an insurer in a bad faith claim. Is the sky the limit or does a covenant judgment restrict recovery?**

**Claims Pointer: A covenant judgment does not limit a claimant's recovery against an insurer for bad faith. The jury can award additional damages, above and beyond those agreed to in a reasonable covenant judgment. The covenant judgment is merely a floor for the jury's award.**

case in point...

*Miller v. Kenny*, --- P.3d ----, 2014 WL 1672946 (Wash.App. Div. 1)

Ryan Miller (Miller), Ashley Bethards (Bethards), and Cassandra Peterson (Peterson) sustained severe injuries when the automobile they were passengers in, driven by Patrick Kenny (Kenny), collided with a cement truck. The vehicle Kenny was driving was owned by Peterson's parents and insured by Safeco Insurance Company (Safeco). The Safeco policy provided for \$500,000 in liability limits per person and per accident. In addition, there was an umbrella policy with limits of \$1 million. Kenny was also insured under his parents' policy for \$300,000.

Miller initiated suit against Kenny after Safeco refused to disclose the applicable policy limits. Shortly thereafter, Miller's counsel contacted Safeco requesting tender of the \$500,000 liability limits and drawing attention to the significant likelihood of an excess judgment. Peterson and Bethards had already sent Safeco settlement demands totaling \$1.6 million. Despite the mounting settlement demands, Safeco initially refused to tender the full \$1.5 million available, stating that, in their estimation, the injuries did not exceed the policy limits. The delay in tendering the full limits set the stage for a bad faith claim.

In a global settlement, Kenny agreed to tender the \$1.8 million insurance proceeds to Miller, Bethards, and Peterson, as well as assign to Miller his rights to sue Safeco for bad faith. In return, Miller, Bethards, and Peterson granted Kenny a covenant not to execute on or enforce any excess judgment. As a term of the covenant, the full amount of damages would be determined by stipulation or arbitration. Safeco later stipulated by order that, after receipt of the \$1.8 million insurance proceeds, \$4.15 million was a reasonable net total. Miller then brought suit against Safeco as Kenny's assignee for bad faith. At trial, the jury awarded Miller \$13 million in damages against Safeco. Safeco appealed, asserting that

Miller's award was limited to the \$4.15 million agreed to in the covenant judgment.

Citing the Washington Supreme Court's opinion in *Besel v. Viking Insurance Company of Wisconsin*, the Court of Appeals began its review by stating that an insured's recovery can exceed contractual policy limits when the insurer has acted in bad faith. The court held that a covenant not to execute, coupled with an assignment of rights and settlement agreement does not limit liability, but rather limits recovery to specific assets. The Court in *Besel* went on to state that a reasonable covenant judgment was the "presumptive measure of the insured's harm."

Safeco argued that, under *Besel*, damages for bad faith are limited to the amount agreed to by covenant judgment. Applying Safeco's rationale, Miller would only be entitled to \$4.15 million. The Court of Appeals, however, disagreed with Safeco's reading of *Besel*. The "presumptive" measure of harm is not a limitation and is, instead, added to any other damages determined by the jury. Additional damages could include damage to the insured's reputation, credit rating, and business opportunities, loss of interest, accumulation of attorney fees and costs, and distress, anxiety, and fear. Miller, as Kenny's assignee, acquired the right to sue Safeco for damages above and beyond the covenant judgment. As such, the jury was allowed to consider various elements of damage in addition to Kenny's liability to his three passengers for the stipulated amount of \$4.15 million. In light of the Washington Supreme Court's *Besel* opinion, the Washington Court of Appeals affirmed the trial court's award of \$13 million against Safeco.



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