



August 12, 2016

VIA OVERNIGHT DELIVERY

Hon. Dennis M. Perluss, Presiding Justice
Hon. Laurie D. Zelon, Justice
Hon. Stanley Blumenfeld, Justice Pro Tempore
California Court of Appeal
Second Appellate District, Division Seven
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

COURT OF APPEAL - SECOND DISTRICT
FILED
AUG 15 2016
JOSEPH A. LANE *Clerk*
D. SANDERS *Deputy Clerk*

Re: Request for Publication of Opinion:
Barickman v. Mercury Casualty Co., No. B260833

Dear Honorable Justices:

Pursuant to Rule of Court 8.1120, Consumer Attorneys of California (“CAOC”) respectfully requests publication of this Court’s opinion in *Barickman v. Mercury Casualty Co.*, No. B260833. This publication request is timely submitted within 20 days after the opinion was filed on July 25, 2016. *See* Rule of Court 8.1120, subd. (a)(3).

Statement of Interest

Founded in 1962, CAOC is a voluntary non-profit membership organization of over 6,000 associated consumer attorneys practicing in California. Its members predominantly represent individuals subjected to consumer fraud, unlawful employment practices, personal injuries and insurance bad faith. CAOC’s members have taken a leading role in advancing and protecting the rights of injured victims, consumers and employees in both the courts and in the Legislature. Many of CAOC’s members regularly handle personal injury and insurance bad faith matters similar to the underlying *Barickman* action. They, and their clients, have an abiding interest in the correct development of the law in these practice areas.

Reasons Why the *Barickman* Opinion Should Be Published

Barickman meets the standards for publication stated in the Rules of Court because it “[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions” and/or because it “[m]odifies, explains, or criticizes with reasons given, an existing rule of law.” Cal. Rules of Ct., rule 8.1105, subds. (c)(2), (3).

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In particular, *Barickman* distinguishes and/or clarifies the holding in *Graciano v. Mercury General Corporation*, 231 Cal.App.4th 414 (2014), in which the Court of Appeal also considered a claim for wrongful refusal to settle. There, the Court of Appeal stated:

[W]hen a liability insurer *timely* tenders its “full policy limits” in an attempt to effectuate a reasonable settlement of its insured’s liability, **the insurer has acted in good faith as a matter of law** because “by offering the policy limits in exchange for a release, the insurer has done all within its power to effect a settlement.”

Id. at 426 (citations omitted) (italics in original; bold added).

This Court, in its *Barickman* opinion, rejected the insurer’s attempt to take this language out of context, and declined to apply the unduly narrow and constrictive reading the insurer advanced. Instead, the Court observed that such a truncated reading “ignores the fundamental principle, articulated in *Graciano* and other cases, that, ‘[w]hen a claim is based on the insurer’s bad faith, . . . the ultimate test is whether the insurer’s conduct was unreasonable under all of the circumstances.’” *Barickman*, slip op. at 12 (citing *Graciano*, 231 Cal.App.4th at 427).

The Court then recognized that “other circumstances”—ones not present in *Graciano* as a matter of *fact*—could “raise[] a question of the insurer’s good faith either before or after it tendered the full policy limits.” *Barickman*, slip op. at 13. The Court observed that in *Barickman*, “as in many bad faith cases, the reasonableness of the insurer’s claims-handling conduct [is] a question of fact to be resolved following a trial.” *Id.* Hence, the question of the insurer’s good (or bad) faith could not be resolved “as a matter of law” in *Barickman* as it was in *Graciano*. *Id.*

Unfortunately, the “matter of law” phrasing used in *Graciano* is likely to be misconstrued, both by insurers in their handling of full policy limits offers, and by future courts considering claims for wrongful refusal to settle. Publishing *Barickman* will eliminate, or at least dramatically reduce, the possibility of such misreadings.

The problem with *Graciano*’s unfortunate chose of words is exacerbated because, while *Graciano* cited two cases in support of its “matter of law” language, neither case actually endorsed the conclusion that all “other circumstances” should be ignored, as Mercury argued on appeal in *Barickman*.

First, in *Crane*, the insurer’s “policy limits settlement offer was in good faith as a matter of law” only because, in the “context” of that particular case, a series of fact-specific, undisputed “reasons” proved it—including the fact that the insurer had made “the only kind of prejudgment

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offer countenanced by the policy.” *State Farm Mut. Auto. Ins. Co. v. Crane*, 217 Cal.App.3d 1127, 1136 (1990); see *Barickman*, slip op. at 13 n.5 (*Crane* does not “stand[] for the proposition asserted by Mercury that, regardless of any other circumstances, a timely policy limits settlement offer insulates an insurer from a claim of bad faith”).

Second, in *Boicourt*, the Court of Appeal expressly confirmed that it was “*not* saying as a matter of law” that the insurer either was, or was not, liable for wrongful refusal to settle. *Boicourt v. Amex Assurance Co.*, 78 Cal.App.4th 1390, 1399 (2000) (emphasis added). Because the particular “record and briefing” in that case failed to establish whether the insurer’s offer was timely, the Court reversed summary judgment in the insurer’s favor—even though “[a] *timely* settlement offer by a liability insurer does preclude a bad faith action.” *Id.* at 1400 (emphasis in original). Nothing in the latter caveat, however, supports Mercury’s view that a settlement offer that is timely, but otherwise inadequate under the circumstances, precludes a bad faith action. Indeed, the *Boicourt* opinion itself recognized the possibility that other circumstances—namely, the fact that the insurer had refused to disclose the policy limits—might render the insurer liable for bad faith. See *id.* at 1399-1400.

In short, neither *Crane* nor *Boicourt* established a bright-line rule immunizing an insurer from bad faith liability, as Mercury contended based on the “matter of law” sentence in *Graciano*. Hence, as this Court correctly perceived, *Graciano* did not establish or endorse such a rule, either.

Making *Barickman* a published, citable opinion will forestall potential misreadings of *Graciano*, *Crane*, and *Boicourt* in future cases.

Conclusion

For the reasons stated above, CAOC respectfully asks the Court to enter an order directing publication of the *Barickman* opinion.

Sincerely,



Kimberly A. Kralowec
State Bar No. 163158

cc: See attached proof of service

PROOF OF SERVICE

I, the undersigned, hereby declare under penalty of perjury that the following is true and correct:

I am a citizen of the United States; am over the age of 18 years; am employed by THE KRALOWEC LAW GROUP, located at 44 Montgomery Street, Suite 1210, San Francisco, California 94104, whose principal attorney is a member of the State Bar of California and of the Bar of each Federal District Court within California; am not a party to the within action; and that I caused to be served a true and correct copy of the following documents in the manner indicated below:

1. REQUEST FOR PUBLICATION OF OPINION FILED JULY 25, 2016; and
2. PROOF OF SERVICE.

By Mail: I placed a true copy of each document listed above in a sealed envelope addressed to each person listed below on this date. I then deposited that same envelope with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that upon motion of a party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

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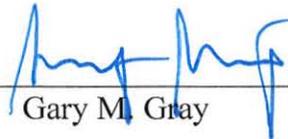
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Executed August 12, 2016, at San Francisco, California.



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