



# Weekly Law Resume

A Newsletter published by Low, Ball & Lynch  
Edited by David Blinn and Mark Hazelwood



WEEKLY LAW RESUME™

Issue By: DAVID L. BLINN

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## Insurance—Duty to Indemnify—Reasonable Settlement Offer

*Donald DeWitt v. Monterey Insurance Company, et al.*

Court of Appeal, Fourth District (March 13, 2012)

The failure of a liability insurer to perform its implied duty to accept a reasonable settlement offer of a covered claim gives rise to a claim by the insured against the insurer for breach of the covenant of good faith and fair dealing, or a "bad faith" claim, based on the insurer's refusal to settle the third-party claim. This case considered a plaintiff's burden of proof on the duty to indemnify in connection with a claim that the carrier failed to accept the defense of the action or to accept a settlement offer.

Lisa Capelletti owned an apartment complex in San Diego. Ron Hammett was the property manager. On December 31, 2001, a New Years' Eve party was held at the property. Erica Howard, a minor, got a ride to the party with Paul Peterson, also a minor. While on the ride back, Peterson lost control of his vehicle and rolled it several times. Howard sustained permanent injuries. She sued Peterson, his family, Capelletti, Hammett and Donald DeWitt. She alleged that DeWitt was the "onsite property manager," and that he had sold admission to the party, and furnished alcohol to minors, including Peterson, who became "obviously intoxicated." She alleged Capelletti and Hammett were liable for hiring DeWitt and not monitoring his activities.

At the time of the incident, Capelletti had a \$1,000,000 liability policy with Monterey Insurance Company. It named her employees as additional insureds, "but only for acts within the scope of their employment by you." Monterey defended Capelletti and Hammett, but after conducting

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an investigation, concluded DeWitt was not covered under the policy and Monterey did not defend him in the underlying action. Howard obtained a default judgment against Hewitt for \$4,697,318. Subsequently, Howard's attorney sent a letter to Monterey, requesting the policy limits of \$1,000,000 for settlement of her claims against Capelletti, Hammett and DeWitt. Howard claimed that Monterey had breached its duty to defend DeWitt. Monterey refused the settlement offer. Subsequently, Capelletti and Hammett settled out for \$50,000. Thereafter, Monterey attempted to intervene in the action and set aside the default against DeWitt. It was unsuccessful. Monterey then settled the judgment against DeWitt for \$3.5 million.

DeWitt filed an action against Monterey for breach of contract and breach of the covenant of good faith, alleging that Monterey's failure to defend him and to accept a reasonable settlement offer had resulted in a judgment against him, and that he suffered damages including attorneys' fees, bad credit and emotional distress. DeWitt succeeded on a motion for summary adjudication to establish that Monterey had owed him a duty to defend against Howard's claims. The trial court ruled that during the pendency of the Howard action, there was "a possibility of coverage" under the policy.

The case went to trial, and DeWitt wanted the jury to receive a jury instruction (CACI 2334) on whether an insurer had committed bad faith by unreasonably failing to accept a reasonable settlement demand within policy limits. The trial court refused to give the instruction, noting that CACI 2334 stated in its own directions that it was for use in a case where the insurer has assumed the duty to defend the insured. DeWitt argued that since the court had already ruled that there was a duty to defend, Monterey could not contest the issue of whether there was a duty to indemnify. DeWitt refused to provide the jury with any instructions on the issue of whether the carrier had a duty to indemnify DeWitt (i.e., whether the actual claim was covered). Under the modified instruction given by the judge, the jury found that the carrier had not unreasonably refused to defend DeWitt, and a judgment was entered in the carrier's favor. DeWitt appealed.

On appeal, the Court of Appeal noted past cases had long since determined that in the absence of actual coverage for a claim, a carrier could not be found liable for failing to accept a

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third party's settlement offer. Further, although the instruction indicated that CACI 2334 was only to be used when the carrier had assumed the defense of its insured, case law also made clear that if a carrier had a duty to indemnify its insured, it would be liable for any damages flowing from its failure to accept a demand within policy limits. Here, Dewitt had not established that the carrier had either assumed its defense, or alternatively, that there was a duty to indemnify. The trial court had only ruled on the duty to defend, and that there was a potential for coverage. There had been no determination of actual coverage for the claim. Without a determination that the claim was actually covered, it was proper for the court to refuse to give an instruction on the carrier's refusal to accept the settlement offer.

## COMMENT

Although a carrier refuses coverage at its own risk, it is not exposed to a bad faith claim for refusal to accept a settlement offer if it ultimately prevails on the issue of whether there was coverage for indemnification of the claim.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/D057887.PDF](http://www.courtinfo.ca.gov/opinions/documents/D057887.pdf)

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