

# TRIALS DIGEST®

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## Insurance broker bounces check to insurance company, fails to inform policyholder

### PROFESSIONAL MALPRACTICE

Insurance Broker/Agent

### INSURANCE

Commercial Policy

### FIDUCIARY DUTY

Insurance

### SAN DIEGO COUNTY SUPERIOR COURT

*Mariscal v. Daeco Insurance Services*, Docket number: 200700065313CUBCCCTL, Central. Judge: John S. Meyer. Trial type: Jury: 7 days. Verdict/Judgment date: 7/30/2008.

### VERDICT: \$1,301,017

\$101,017 economic; \$900,000 non-economic; \$300,000 punitive damages.

The court also awarded costs in the amount of \$65,545 and pre-judgment interest for a successful CCP § 998 offer of \$65,229.

The jury apportioned 100 percent liability to defendant. Vote: 12-0. Deliberations: 2.5 hours.

### COUNSEL

Plaintiff: Robert F. Tyson Jr., Tyson & Mendes, La Jolla. Kristi Deans, Tyson & Mendes, La Jolla.

Defendant: Bruno Katz, Shea, Stokes, Roberts & Wagner, San Diego. Patrick Howe, Shea, Stokes, Roberts & Wagner, San Diego.

### FACTS/CONTENTIONS

According to plaintiff: Plaintiff Lesley Mariscal, 31-year-old owner of a children's hair salon, was the former owner of a children's gymnastics program called, Hopscotch. Plaintiff hired defendant David Ebadat (dba Daeco Insurance Services), a 41-year-old insurance broker, to obtain a \$1,000,000 commercial general liability insurance policy.

In April 2005, plaintiff sold Hopscotch. Thereafter, the buyer sued plaintiff on several grounds arising out of the sale of Hopscotch, including failure to obtain insurance coverage. Plaintiff tendered the lawsuit to Nautilus Insurance Company, the insurer on the policy obtained by defendant. Nautilus declined plaintiff's tender and advised plaintiff that her insurance policy was canceled for failure to pay premiums, and, even if the policy had not been canceled, the claim would not be covered.

Plaintiff alleged defendant took her money and allowed her insurance policy to lapse. Evidence was presented at trial showing defendant had bounced numerous checks out of his client trust account, including a check to Nautilus to pay for the Hopscotch policy. Furthermore, before the closing on the sale of Hopscotch, defendant faxed plaintiff a certificate of liability insurance, misrepresenting that plaintiff had an insurance policy for \$1,000,000, when defendant had known for two months that the policy was cancelled for defendant's failure to make payment.

Defendant denied liability and damages caused by his conduct.

### CLAIMED INJURIES

NA

### CLAIMED DAMAGES

According to plaintiff: Plaintiff suffered both economic and non-economic damages as a result of defendant's conduct. In particular, plaintiff was forced to file for bankruptcy because she was unable to defend the lawsuit arising out of the sale of Hopscotch.

Plaintiff sought \$8,885 in attorney fees for defending the lawsuit brought by the buyer of Hopscotch; \$92,132 in attorney fees related to plaintiff's bankruptcy proceeding; and \$245,641 related to lost profits from Hopscotch. Plaintiff further sought \$1,000,000 in non-economic damages.

### SETTLEMENT DISCUSSIONS

According to plaintiff: Plaintiff's initial demand was \$700,000. On February 20, 2008, plaintiff served a CCP § 998 offer for \$949,000.

Defendant served a CCP § 998 offer of \$47,000 prior to trial.

The day before trial, defendant offered \$200,000 to settle the case. Plaintiff demanded \$400,000 to settle the case.

While the jury was deliberating, defendant offered \$250,000. Defendant then offered a high/low settlement,

wherein the jury returned a verdict but the high awarded would be no greater than \$400,000, and the low would be no less than \$50,000. Plaintiff countered with a high/low settlement of \$1,000,000/\$200,000. Defendant did not respond.

Defendant asked the jury to award approximately \$8,000 in closing argument and to apportion fault to plaintiff and Nautilus.

#### EXPERTS

Plaintiff: Elliott C. Rothman, insurance broker/agent, Professional Practice Insurance Brokers Inc., Los Angeles (949) 729-0777. Paul Zimmer, C.P.A., economist, San Diego (619) 687-2600.

Defendant: Gene P. Irizarry, insurance claims adjuster, San Diego (760) 518-3128. Cary P. Mack, C.P.A., economist, LECG, San Diego (619) 687-0001. Alan VanDerhoff, J.D., bankruptcy expert, San Diego (619) 299-2050.

#### COMMENTS

According to plaintiff: The jury cited that defendant never accepted responsibility for his actions or the damages caused to plaintiff. The jury recognized the serious harm caused by defendant's fraud and carelessness.

The insurance carrier for defendant was CNA Insurance.

It was anticipated that defendant would file post-trial motions.