

Montana: Settlement Without Defending Insurer Is *Not* Presumptively Reasonable

In *Draggin' Y Cattle Co., Inc. v. Junkermier, Clark, Campanella, Stevens, P.C.*, --- P.3d ---, 2019 MT 97 (Mont. 2019), the Montana Supreme Court held that where an insurer is defending, a settlement by the insured and the claimant in which the insurer did not participate is not subject to a presumption of reasonableness. However, the Montana high court stressed that an insured may still recover for violations of the state's unfair trade practices act, irrespective of whether an insurer defended.

The Accounting Error

In 2004, Junkermier, an accounting firm, incorrectly advised its longtime customer, Draggin, that it could structure a sale of a portion of Draggin's real property to its advantage as an approved tax-deferred exchange. Junkermier closed the transaction despite a warning from Draggin's real estate attorney that the transaction would not qualify for a tax deferral. Eleven months later, Junkermier learned that the transaction was not eligible for tax deferral and notified its liability carrier, New York Marine. In February 2008, instead of informing Draggin of the mistake, Junkermier told Draggin that the transaction failed to qualify because of new tax rulings.

The Lawsuit Against Junkermier, Settlement Negotiations, and Stipulated Judgment

Draggin eventually learned of Junkermier's mistake and filed suit against Junkermier in January 2011. It claimed \$2.5 million in lost tax deferrals and \$8 million in consequential damages. New York Marine assigned counsel and defended Junkermier. New York Marine generally reserved its rights to assert that coverage was not available for fraud and punitive damage claims. The New York Marine policy carried a \$2 million liability limit.

Throughout litigation, Junkermier's assigned counsel valued the case between \$100,000 and \$350,000. After receiving a policy limits demand, Junkermier retained independent counsel. Independent counsel concluded there was a significant risk of an excess verdict and demanded settlement within policy limits. New York Marine did not settle for limits and did not confirm it would be responsible for a verdict in excess of limits. New York Marine also, at one point, erroneously advised that Junkermier's defense costs eroded limits.

After failed mediation, Draggin and Junkermier entered into a stipulated settlement for \$10 million, contingent on a hearing to approve the stipulated judgment as fair and reasonable.

New York Marine intervened to challenge the settlement's reasonableness. At the reasonableness hearing, Junkermier argued that New York Marine (1) refused to affirm coverage, effectively denying coverage, (2) failed to file a declaratory judgment action to resolve the underlying coverage issues, (3) refused an offer to settle the case for policy limits and then refused to assume the risk of an excess verdict, and (4) misrepresented its policy limits when it wrote that the policy limits were eroded by defense costs. The trial court deemed the settlement reasonable and New York Marine appealed.

Reversal by Montana Supreme Court

The Montana Supreme Court reversed. It maintained the long-standing tenet that an insurer that breaches its duty to defend will be bound by its insured's settlement and any resulting judgment so long as the settlement is reasonable and not the product of collusion. However, under Montana law, stipulated judgments are **not** an appropriate measure of damages when an insurer has



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provided a defense to the insured because the stipulated agreement cannot fairly be attributed to the insurer's conduct.

The court further articulated, however, that Montana's unfair trade practices act (UTPA) affords insureds an independent cause of action for an insurer's UTPA violations. In addition to actual damages, an insured may recover compensatory damages proximately caused by certain UTPA violations, as well as exemplary damages and attorneys' fees for litigating coverage.

Thus, when an insurer has provided a defense to its insured, a trial court may not apply a presumption of reasonableness to a stipulated agreement entered into without the consent or participation of the insurer. If the third-party claimant and the insured decide to settle without the insurer's participation where an insurer is defending, a court **may** approve the stipulated judgment as between those parties in the underlying liability case if the insured meets its burden to prove reasonableness. In such cases, the insured must pursue its separate breach of contract or UTPA claims against the insurer and will bear the burden of proving all elements of those claims, including damages. Because the lower court's reasonableness determination was based on its erroneous application of the reasonableness presumption, the case was remanded.

Concurrence: Amount of Damages Was Fully Litigated

Justice Dirk M. Sandefur concurred to emphasize the extent of evidence considered in the reasonableness hearing and his belief that the incorrectly shifted burden of proof did not prejudice New York Marine. Justice Sandefur stressed that re-litigating the damages issue under the proper burden of proof would lead to unnecessary delay and expense.
