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## **Washington Court Holds Covenant Judgment Sets a Floor, Not a Ceiling, on Damages**

By Matthew J. Sekits, Daniel R. Bentson

Recently, the Washington Court of Appeals increased the damages available to an assignee of an insured's bad faith claims, holding that a "covenant judgment sets a floor, not a ceiling, on the damages a jury may award." In other words, the assignee can now recover damages in **excess** of the covenant judgment.

In *Miller v. Kenny* (Wash. Ct. App. No. 68594-5-1), Kenny crashed a car into a cement truck, injuring his three passengers—Peterson, Bethards, and Miller. The car belonged to Peterson's parents and was insured by Safeco. Safeco defended Kenny without a reservation of rights.

The passengers made settlement demands that exceeded Safeco's \$1.5 million policy limits and Kenny's defense counsel asked Safeco to offer the passengers the full amount available under the policy. But Safeco declined. Kenny then entered into a covenant judgment with Miller for \$4.15 million, and assigned to Miller his rights against Safeco. At a hearing to determine whether the amount of the covenant judgment was reasonable, Safeco stipulated to the reasonableness of the \$4.15 million covenant judgment. Miller then sued Safeco for bad faith and, at trial, the jury awarded Miller \$13 million in damages.

Safeco appealed, arguing that Miller's bad faith damages were capped at the covenant judgment amount of \$4.15 million. The Washington Court of Appeals disagreed. According to the court, a covenant judgment is "the presumed measure of damage only for the insured's liability to third parties." A fact finder may still award damages against the insurer for "damages personal to the insured." The court provided examples of an insured's personal damages in a bad faith action including, effect on the insured's credit rating, damage to reputation, loss of business opportunities, loss of control of the case, loss of interest, attorney fees and costs, financial penalties for delayed payments, emotional distress, anxiety, and fear. In doing so, the court greatly expanded the potential damages available to the assignee of an insured's bad faith claims.