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PERSPECTIVE

Special considerations for minimum insurance policy settlements

By Jessica Detering and Alexandra Selfridge

The existence of the tripartite relationship between insured, insurer and defense counsel is a prevailing concept in insurance defense, as are the duties between the three parties. These obligations stem from the basic principle that an attorney employed by the insurer to represent the insured owes the insured the same obligation of good faith and fidelity as if the insured had retained the attorney personally and, more importantly, the attorney's primary duty is to further the best interests of the insured.

Therefore, within the tripartite framework, even in the best circumstances, defense counsel is in the difficult position of protecting the interests of an insured while maintaining close ties with the insurer. When it comes to insurance policies whose coverage provides for the minimum limits specified in section 16056 of the California Vehicle Code — commonly known as a "15/30 policy" — however, complications arise within that relationship which require special consideration from both defense counsel and insurer so as to avoid potential bad faith exposure. This is particularly apparent when entering settlement negotiations.

Statistics gathered by the Insurance Information Institute show that since 2013, the average amount liability insurers paid for a policyholder's responsibility to others for bodily injury has surpassed $15,000.00 per claim. Under California law, the implied covenant of good faith and fair dealing requires the insurance company, among other things, to make reasonable efforts to settle a third party's lawsuit against the insured. Breaching this covenant exposes the insurer to a potential lawsuit by the insured to recover damages proximately caused by the insurer's breach. $15,000, while a large sum to many, can easily be surpassed by medical specials alone in seemingly innocuous collisions. Defense counsel should be well versed in medical billing, jury trends, accident reconstruction, and biomechanical engineering in order to evaluate the matter before entering negotiations when there is little flexibility to settle within the policy.

The law in California is unsettled as to whether the insurer's failure to initiate settlement negotiations or to make an offer to a third-party claimant can constitute bad faith when the claimant never made a settlement demand. When there has been a settlement demand made by an injured third party, however, an insured's claim for bad faith based on an alleged refusal to settle within the policy limits first requires proof that said offer was reasonable and within the policy limits.

A settlement demand meets this element if: (1) its terms are clear enough to have created an enforceable contract resolving all claims had it been accepted by the insurer; (2) all of the third-party claimants have joined in the demand; (3) it provides for a complete release of all insureds; and (4) the time provided for acceptance did not deprive the insurer of an adequate opportunity to investigate and evaluate its insured's exposure.

The two elements that most often come into play which require special consideration for minimum policies are the second and fourth: the joinder of all parties and timing.

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The first hurdle is with regard to the number of claimants. An insurer must attempt to settle the matter in such a way as to avoid exposing the insured to personal liability on any of the claims. Barring special circumstances, the number of potential claimants stemming from an automobile collision is generally known and limited. A simple conversation with the insured and reading of the traffic collision report, if generated, would provide such knowledge. A piecemeal settlement, which is not barred as a practice, can quickly exhaust $15,000 policy limits thereby opening the insurer to a bad faith claim for "unreasonable" earlier settlements. Consequently, what could be a simple and quick settlement could be dragged on due to a claimant holding out or disappearing during negotiations.

Second, the reasonableness of a settlement offer is dependent on facts known or available to the insurer at the time of the proposed settlement, and whether there was time to adequately investigate and evaluate the exposure. In a perfect world a settlement demand would fully lay out the damages of the claimant or plaintiff; i.e., complete medical records, earnings losses, expert reports, etc.; however, this is generally not the case and information comes in piecemeal throughout the claims process and, if litigated, discovery.

This all becomes further complicated when a wrongful death occurs. In California, there is an outstanding question as to whether the "one-action rule" applies to pre-litigation settlements of wrongful death claims. Therefore, an insurance company must weigh the competing considerations of tendering the limits to avoid "opening" the policy, versus the inability to tender the policy due to potential unknown wrongful death claimants.

Defense counsel, as always, is an advisor to the insurer and to the insured concerning the potential consequences of litigation, but this advice becomes paramount once sufficient information is known. Even setting aside the costs of moving forward through trial, there is the risk that a matter will exceed minimum policy limits if causation and damages are established.

Taking out the highest and lowest awards, the median range of reported verdicts and settlements for neck and back injury cases resulting from collisions throughout California in the last five years, according to Westlaw, ranges from $17,250 to $696,500. Counsel must therefore continuously reevaluate the case as it develops, while keeping the limits in mind, and advise of their analysis through consistent communication between the insured, insurer, and themselves.

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