“OPEN, Sesame!”

A look at the nuances of litigation that can result in the lid being taken off the policy

By Mark Algorri and Carolyn Tan

All personal injury lawyers will undoubtedly face the unfortunate case of signing up a client who has suffered astronomical damages, only to be disappointed with a defendant carrying minimal policy limits. Many assume nothing more can be done except to wait for the carrier to deliver the measly draft upon receipt of your demand letter. You are then left to explain to your client that the case has come to a bitter end and both of you walk away disappointed.

Upon confirmation of a defendant’s policy limits, it is common practice to send a written, time-sensitive demand letter to the carrier, along with pertinent information, such as the accident investigation report, loss of earnings documents and medical records. If the carrier fails to accept your demand and you secure a judgment in excess of your offer, the carrier may be held accountable for the total judgment. (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654.)

Traditionally, the only hope of “opening” an inadequate policy, that is, obtaining more than the policy limits, is to wait for the carrier to mishandle the claim by unreasonably rejecting your demand and exposing its insured to excess liability. This surfaces during the underlying case, where the carrier either realizes its sins, or after your client receives an excess verdict against their insured. After an excess judgment has been rendered, the insured can assign his rights to your client in an exchange for a covenant not to execute, or even better, a stay of execution.

Although it is rare for a carrier to overtly conduct itself in such a reckless manner, there are also more subtle ways for the carrier to open itself up to a potential bad-faith claim. Provided you define the parameters of negotiation and the terms of acceptance from the onset of the claim, you may be able to recover what your client deserves.

Demanding disclosure

If you believe you have an excess case on your hands, immediately send a letter of representation to the defendant’s carrier, demanding the disclosure of the policy limits within a reasonable amount of time, such as 15 days. If available, include the police report and any medical specials you have to date. Make it clear that upon receipt of the policy-limits information, your client is prepared to make an offer capable of acceptance. The next move is theirs. Any unreasonable delay may provide you with ammunition to open the policy.

Many carriers will ignore your request and stall with multiple letters stating that they are “evaluating your claim,” “need your client’s statement,” or “are awaiting a demand package.” Where liability is at issue, they will claim that they need further time to conduct an investigation. Hardly ever will they immediately disclose the limits and may assert, whether true or not, that their insured has not given them permission to release this information. The smart carrier will cooperate and provide the policy information or request an extension in which to comply.

The carrier may later argue that Insurance Code section 791.13 and the holding in *Griffith v. State Farm Mut. Auto Ins. Co.* (1991) 230 Cal.App.3d 59, protects a policyholder’s privacy and prevents disclosure of the policy limits absent the insured’s consent. However, if you have a policy-limits case, logic and case law dictate that the carrier’s duty to settle necessarily requires such disclosure if it, in fact, offers the policy. Even section 791.13(g) allows disclosure when “[o]therwise permitted or required by law.”

Importantly, a standard liability policy gives the carrier the unfettered discretion to settle a case for policy limits, *even without the insured’s consent* (with the exception of professional-liability policies). The insurer is entitled to take control of the settlement negotiations and the insured is precluded from interfering. Not only is the insured’s consent unnecessary, it is “usually superfluous.” (*Fiege v. Cooke* (2004) 125 Cal.App.4th 1350, 1354.)

If a settlement were dependent on the insured’s permission to disclose the limits, a carrier could indefinitely sit on its opportunity to settle, falsely blaming its insured for stalling. This would place the claims authority in the hands of a lay insured which we know is ludicrous on its face. If the insured continues to refuse disclosure, it is the carrier’s duty to keep the insured apprised of the situation and fully inform her of all relevant issues, including excess exposure. (See *Heredia v. Farmers Insurance Exchange* (1991) 228 Cal.App.3d 1345, 1360 (internal citations omitted.)

Further, an insurer’s duties to its insured include the duty to promptly investigate and process a claim, and to attempt to effectuate a prompt and fair settlement. (Ins.Code, § 790.03 (h)). The implied covenant of good faith and fair dealing obligates the insurer to accept reasonable settlement demands within the policy limits whenever there is a substantial likelihood of a recovery in excess of the limits. (*Comunale, supra,* 50 Cal.2d at p. 659.) Where there is great risk of a recovery beyond the policy limits, and settlement within policy limits is the most reasonable choice, the insurer should settle the claim. The insurer must conduct itself as though it were liable for the entire amount of the judgment. (*Crisci v. Security Ins. Co. of New Haven, Conn.* (1967) 66 Cal.2d 425.) Therefore, a carrier’s right of settlement control, axiomatically, allows the disclosure of the

policy limits if it is necessary to facilitate a policy-limits offer and subsequent settlement. This obligation to protect the insured by fulfilling its duty to settle should trump any privacy rights, and, in fact, is in accordance with the privacy clause in section 791.13(g).

An even stronger case for bad-faith conduct is when the carrier has a "blanket rule" of refusing to contact its policyholders to determine whether they want their limits disclosed, thereby preventing them from ever giving permission. Such was the case in *Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, which held that a blanket rule against pre-litigation disclosure creates a conflict of interest between the insurer and insured. The insured is left to worry about the uncertainty of litigation, while the insurer selfishly saves on administrative costs, and gains a tactical advantage by forcing the claimant to make pre-litigation offers "in the dark." (*Id.* at p.1398.) If the carrier has this type of blanket rule which elevates its own interests above its insured, it may not even matter whether a formal settlement demand was made in order to pursue a bad-faith claim upon obtaining an excess verdict.
(See *id.* at p. 1399.)

If the carrier fails to disclose the limits within the requested time, or within a reasonable time period if further investigation is warranted, you should file suit and commence discovery. The carrier will be forced to formally disclose the limits in response to Form Interrogatory 4.1. (*Superior Ins. Co. v. Superior Court* (1951) 37 Cal.2d 749.) If indeed the limits are low relative to your damages and you have at least a plausible liability argument, you may still be able to reject a belated policy-limits offer on the grounds that
it missed its opportunity to settle pre-litigation. (*Critz v. Farmers Ins. Group* (1964) 230 Cal.App.2d. 788, 798.)

Therefore, your bad-faith claim will hinge on your assertion that the carrier's failure to disclose the limits prevented your client from making an informed offer capable of acceptance. The merits of your claim will boil down to the following:

• Did the insurer timely contact the insured to request disclosure of the limits?
• Did the insurer sufficiently inform the insured of settlement discussions and the possible ramifications of not disclosing the limits?
• Did the carrier have any rules or guidelines on pre-litigation disclosure of their insured's limits or a general policy of not contacting the insured for permission to disclose the limits?

This information will form the basis of your claim and will likely be found in the carrier's claims file, manuals, training materials, and correspondence between the adjusters and insured, which you can obtain during discovery in the bad-faith suit.

Drafting an offer-to-settle

Another avenue for obtaining recovery above the policy limits is post-negotiation, when the carrier's draft and release do not comply with the terms of your demand letter. Therefore, your demand (or more appropriately termed "offer-to-settle") should convey clear, but reasonable, deadlines and requirements which the carrier is capable of accepting, thereby initiating a settlement contract.

An offer-to-settle and its acceptance by the carrier are governed by basic contract law. (*Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524 (applying contract law to interpretation of release).) While the "mirror image rule" (requiring the acceptance to "mirror" the terms in the offer) has been modified in the Uniform Commercial Code governing exchange of goods, it should fully apply in the insurance venue as between a carrier and third party under common-law contract principles.

Therefore, if the carrier wishes to accept your client's offer by way of the release, it must necessarily include acceptance of the reasonable terms set forth in the offer. If the carrier refuses to agree to those terms or issues a release that does not conform to your offer, their response is not an acceptance and you can later argue that they missed their settlement opportunity.

A practical offer-to-settle should include the following terms:

• The settlement draft be made payable to only your client and law firm

Most carriers have the nasty habit of including non-permissible payees on the settlement draft, such as private healthcare providers and spouses. They are not the claimants and it is reasonable for you to demand that the draft be payable only to your client and your firm, subject to the resolution of any mandatory liens. Inclusion of gratuitous payees stalls the negotiation of the draft by creating a dispute between the lienholder and your client. There will be a delay in obtaining the money because you must determine whether the payees have viable claims, and if they do, they will need to sign the check. The carrier strategically makes a float on the promised settlement funds through this delay.

The one important caveat here, however, is that you must make sure that you have resolved any mandatory liens, such as those by the county, emergency room, Medicare, Medi-Cal, and worker's compensation. In these cases, a carrier has the right to name a legitimate lienholder on the draft. (*Coe v. State Farm Mutual Auto Ins. Co.* 66 Cal.App.3d 981, 994 (carrier must include necessary lienholders in order to protect insured).) It may be more efficient and prudent to request the carrier to issue two drafts. If possible, you should negotiate these liens prior to settlement in order to minimize any delay. Alternatively, some carriers will agree to put a hold-harmless agreement in the release, holding your client responsible for any outstanding liens. This is ideal in cases where you want the draft immediately, but have not yet negotiated the liens.

Should the carrier send you the draft with gratuitous payees or better, refuse to remove a gratuitous payee from the draft upon your request, you may have a viable argument that your offer was rejected.

• ***Release of only the insured(s) (and their agents, representatives, heirs, and assigns)***

Global release: The other dirty trick is issuing a global release. This effectively releases the world, not just the insured (and heirs, assigns, etc.). Although it may be easily missed upon a cursory reading, releasing "all others" can make the difference between a $15,000 case and a multimillion dollar recovery. [Note that this "global release" terminology differs from a valid "global settlement," in which the insurer tenders the policy limits to multiple claimants, who can then apportion the funds amongst themselves.]

The problem with a global release is that it cuts off claims against everyone else including other potential tortfeasors, which can cost you a bundle down the road. (*Rodriguez v. Ono* (2013) 212 Cal.App.4th 1020, 1027 (holding that a global release prevented plaintiffs from bringing an action against driver's employer).) For example, although you may intend to release only the driver, allowing your client to sign a global release may cut off a viable and profitable products-liability claim or roadway-design case. Although it is not necessary to have a slam-dunk case against the other potential defendant, you should have at least a plausible tortfeasor to bolster your argument that your client was prejudiced by the global-release language.

A carrier may send a global release for various reasons. In cases where there may be other potential tortfeasors, it is usually trying to prevent further defense costs incurred by possible future indemnity cross-complaints. However, if the carrier is worried about a later cross-complaint popping up, it can still protect its insured by securing a good faith settlement barring later claims against the insured. (Code Civ Proc., § 877.6.) Consequently, it can be argued that the carrier has not acted reasonably because it has put its own interest in saving de minimis litigation costs ahead of protecting its insured. (*Comunale, supra,* 50 Cal.2d at p.659) *(*insurer must take into account the interest of the insured and give it at least as much consideration as it does to its own.) However, if the adjuster admits to making an inadvertent mistake, the court may revise the release. (*Hess, supra,* 27 Cal.4th at p. 524) (global release did not release third-party manufacturer where adjuster and attorney demonstrated mutual mistake).)

• ***Conditional acceptance***

Finally, be on the lookout for a conditional acceptance of your client's offer. This usually manifests itself through improper indemnity language. For instance, the release may require that your client indemnify the carrier for claims subsequently made by another tortfeasor involved in the case. Acceptance of this language by your client would render the settlement hollow.

Further, as your client's representative, you must read every release carefully. Do not assume that the release has been drafted in your client's best interest. If your client signs a release and you later realize that the terms are not what you intended, a court may not always give you the benefit of the doubt. "[The parties'] 'actual intent,' for purposes of contract law, is that to which they manifested assent by executing the agreement." (*Rodriguez, supra,* Cal.App.4th at p.1027.)

Conclusion

The lesson here is that when an excess case graces your doorstep, you should timely request disclosure of the policy limits in order to give the carrier the opportunity to settle. The offer-to-settle letter should then clearly set forth specific, reasonable terms, such as the ones explained above. Upon receipt of the draft and release, if the carrier's "acceptance" does not mirror the term of your offer, you do not have to settle. Tell the carrier the deal is off and continue litigating the underlying case until you force their hand into settling for something above the policy limits, or until you get an actual judgment, presumably far exceeding the limits. If you get that winning excess judgment in the underlying case, you are ready to team up with the insured, discuss assignment, and pursue your bad-faith action.

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