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# Make them an offer they *can* refuse (in bad faith)

## *Open up the policy limits and collect it all from the insurance company*


Cooper

**By Miles B. Cooper**

In the dead zone between Christmas and New Year's, a formal policy-limit settlement demand expired. Later that year, the verdict came in, two and a half times over the insurance policy limit. The lawyer had not granted an extension to the defense to evaluate the demand. The trial lawyer called his friend, a bad-faith specialist, to talk about collecting the full judgment from the insurance company.

"Maybe. Maybe not. Let's talk for a few minutes," the bad-faith lawyer said. Not the response the trial lawyer wanted.

### The offer

You can make a policy-limit demand informally or formally. The informal way is frequently done by letter or e-mail. The formal way is with a Code of Civil Procedure section 998 offer to compromise, commonly called a 998. A 998 starts 10 percent interest on the judgment from the 998's service date if the judgment is over the 998 amount. Another substantial advantage: judges typically award expert costs incurred from the 998 service date forward. Formal or informal, an insurance company's failure to accept either demand can put the company in bad faith.

Formal demands require precision. We're focusing on the bad-faith element here, not 998 technicalities. And they are technical. It is wise to review Weil & Brown, Cal. Civil Procedure Before Trial (2013) with every 998. You don't want a 998 invalidated because the offer was imprecise.

An aside. The 998 is a great tool for the court closure crisis. The defense can't stall. Suddenly, your case is important to them – without an immediate trial date.

### The standard against which the offer is measured

Some lawyers expect the insurance company will simply write a big check if there's an offer within policy limits, followed by a verdict over the policy. Not so simple. Winning starts a second lawsuit. This action, filed against the insurance company, is the bad-faith action. In some cases, the exposure is clear. The insurance company, with some post-verdict negotiating, does write a check. It doesn't have to – but it's avoiding the additional expense of a losing rearguard action.

Bad faith defined for our purposes: the insurance company rejected an under-policy-limit, *reasonable* settlement demand.

"Reasonable" is the key term. "A settlement demand is reasonable if the insurance company knew or should have known at the time the settlement demand was rejected that the potential judgment was likely to exceed the amount of the settlement demand based on [name of plaintiff in underlying case]'s injuries or loss and the insured's probable liability." (CACI 2334). This definition leaves the defense room to maneuver.

### We show our cards

We show our cards. It is the easiest way to settle. The certainty of settlement is usually (but not always) better for a client. It also buttresses the bad-faith case. The primary bad-faith defense is that "We didn't know ____ and we didn't have enough information." (This ignores the insurance company's duty to investigate, but let's set that aside.)

Avoid the defense by providing the information. Give them medical records and discovery responses. If they request your client's depo or a DME, consider granting a short extension to the 998 to complete them. You may want to provide retained expert reports before disclosure. The defense will get them anyway, right?

Why all this trouble? Better to be able to say the company knew rather than it should have known.

### Execution: I've got a judgment. What do I do now?

A dog chases cars for years and suddenly finds he's sunk his teeth into a bumper – now what? Trials are rare. Verdicts after policy demands (and over the demand) are rarer still. You won't get a call asking how to make the check out. Instead, the insurance company gets cagey, frequently hanging the insured, the defendant, out to dry. First call – to your insurance bad-faith lawyer colleague. You're going to need the defendant to bring a bad-faith claim and assign the recovery to your plaintiff.

Third-party bad faith exists but there are significant limits that make it unpalatable in most cases. First-party bad faith adds the potential for economic loss, emotional distress, attorneys' fees and exemplary damages.

Getting to the defendant is not always easy. Start by writing a letter asking the defendant's personal lawyer to contact you. If that doesn't work, notice a debtor's examination. The defendant's carrot is a covenant to stay execution while they cooperate and use a lawyer of your choosing to pursue the bad-faith claim. If the defendant attempts bankruptcy, you can work a deal with the trustee to pursue the claim. You'll eventually get there, even if there are hurdles.

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## Resolution

Back to our lawyer's big verdict. He spoke at length with his bad-faith lawyer friend. There were some issues with the offer. Some back and forth with the insurance company. Eventually, they reached a resolution. A bit of a haircut. But far over the policy limits. Most important, closure for the client.

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