Take it to the limit

Overcoming the inherent challenges when negotiating policy limits cases


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By Miles B. Cooper

"I have good news and bad news," the mediator started, "The defense is ready to make a new offer. But they want you to move off your policy demand before I have authority to extend the offer. They say it is your move." That was true. It was the lawyer's move. But while the case had some liability issues, it was worth more than the policy. Mediation was a necessary step with this insurance carrier, but the lawyer did not want to give up any of the policy. "Let's chat," the lawyer said.

Policy cases

Whether a $50,000 or $5 million policy, at some point you'll have a case where the value, risk included, exceeds the policy. But there's a reason the policy wasn't offered before you arrived. Negotiating policy cases can be difficult. Negotiating means movement. If you can't move, you're unlikely to get a move in response. If you've ever tried the no counter counter, you've seen its chilly reception. What to do?

Start by giving them what they need

Adjusters' jobs are difficult. Every so often, their files get audited. Old files get randomly pulled and reviewed. The adjusters then get peppered with questions about why they paid so much when some item was missing. Too many missing items? They get demoted or fired. On the flipside, a big verdict also gets an adjuster called on the carpet. One cannot unlock funds without helping the adjuster (and the overworked and underpaid defense counsel) paper the file.

The best way to do this? Issue a thorough demand analysis with supporting documentation. It should answer any questions someone might have. Past verdict or settlement reports on similar cases really help too. An adjuster can point to them during an audit as fair valuation. If the adjuster wants more information, get the information. There's a secondary benefit. Should the verdict exceed the policy, the carrier has a much harder time defending the bad-faith case.

A bad-faith tangent

We've discussed bad faith in the past, and this is not a bad-faith column. But any time policy demands are discussed, bad-faith issues loom in the shadows. Remember: simply making a policy demand or formal offer to compromise under C.C.P. section 998 does not create bad faith. It is not strict liability. It is whether 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. The reality: If the underlying verdict exceeds the policy, bad-faith jurors tend to give the verdict tremendous weight. The bad-faith specialist will want the carrier to have had everything. But not having everything does not doom the bad-faith case.

Trial economics tangent

The goal may be the policy. But if the carrier won't pay the policy, obtain the best post-verdict net for the client. The best tool is a C.C.P. 998 demand prior to spending significant money on the case so that the costs – including experts – are recoverable.

Breaking the logjam

You've papered the file and considered the bad-faith implications. The carrier has offered $20,000 on a $100,000 policy. Your last demand was the policy, and it is your move. How do you obtain the full policy? One way requires foresight with the initial demand. Demand the policy plus personal contribution. Personal contribution gets attention from the carrier. Reducing the personal contribution demand is movement. It allows movement without giving up part of the policy. And when one finally has zero personal contribution, the carrier's concerns become even more pointed. This can be done in a series of settlement letters which, at the same time, provide additional information and arguments.

Another tool is to mediate with someone the carrier trusts. Sometimes the adjuster needs a neutral to tell the carrier to pay the policy. Annoying additional expense? Yes. Less expensive and more immediate than a trial? Absolutely.

If the mediator agrees that the case is worth the policy but the carrier is unwilling to budge, you have choices. One is to walk. If you are confident in the case, walking tells the carrier you're deadly serious. Another choice is a bracket or mediator's proposal. Unfortunately, that approach results in a policy haircut. Depending on the verdict risks, this may be okay. For example, if the bracket is you'd be at $99,000 if the defense was at $90,000, it might close. Likewise, if the mediator's proposal is $95,000, you may be hard-pressed to reject the offer.

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Back to our lawyer and mediator. After some discussion, the lawyer walked. The walking was followed with a 998, deposition notices, and a letter stating this was the carrier's last chance to get out for policy. The carrier's acceptance followed a little while after.

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