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An important asset

Collecting damages when the defendant is underinsured


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By Miles B. Cooper

The lawyer sat with the client. Almost every case is tragic. This one was doubly so. The client not only suffered serious injuries, he then found out the elderly defendant maintained very little insurance. Since the client did not own a car or maintain a non-owner operator auto policy, he did not have underinsured motorist coverage. Time to get creative.

Collectability

All cases require the tripod's three legs – liability, damages, and collectability. The first two can sometimes be shored up, but the last tends to be immutable. You can't collect when there's no money, honey. In a typical injury case, one first looks to the defendant's insurance. What are the limits, and is there an umbrella policy? While demanding the policy limit information, one simultaneously determines whether the client has underinsured motorist coverage. That helps the lawyer and client know what the bare minimum might be. One has to remember that underinsured coverage is far broader than one might think. It applies where there is a vehicle strike – meaning physical contact with a vehicle. That can be riding as a passenger in another person's car. More often, it involves a vehicle hitting a pedestrian, bicyclist, e-scooter-rider, or whatever next disruptive transport mode that manifests overnight like 17-year cicadas. Even if a client does not own a car, the client may have a non-owner operator policy or might still be on a parent's or other's policy.

But wait, there's more!

We find ourselves not just helping clients in the moment but also promoting the hell out of insurance for future events. The collectability exploration is the time to discuss this. Our recommendations include increasing underinsured motorist coverage and obtaining non-owner operator auto policies for car-free households. We recently priced non-owner policies and found they were in the $400 a year range for a $300,000/$500,000 policy of underinsured coverage. We also recommend an umbrella policy with an underinsured motorist rider. The rider must be specifically requested – UIM coverage is not standard with an umbrella. We also priced umbrellas with UIM riders: roughly $250 per year for $1 million and $800 per year for $5 million. Rounded out with renters' or homeowners' insurance, one is protected from one's own mistakes *and* covered for others' vehicle-involved errors.

Getting personal

Why discuss insurance? Because the alternative – personal assets – is challenging. Most cases are emotionally charged business transactions. An injured party receives insurance money. Insurance companies were purpose-built for this, some adjusters' overly personal attachment to insurance money notwithstanding.

The discussion changes dramatically when the defendant is confronted with the hard reality that the money may be the defendant's own. Thinking about parting with years of hard work, equity, heirs' inheritance – it is terrifying. That makes it all the more difficult, and is why personal assets, absent malfeasance, are typically a last resort.

Preliminary and more detailed asset research

The first step is a preliminary asset search. These can be conducted through West, Lexis, or other databases. Also, most county recorders now have pretty good online interfaces. This can be a free or low-cost way to check on the defendant's property ownership and mortgage. These are tip-of-the-iceberg searches, however. To get a more complete picture, a professional asset investigator is worth the investment. Having this performed before a sit-down with the defense helps insure transparent dialogue. When they fail to fully disclose and one responds, "What about the safe deposit box in Podunk, Idaho?" it telegraphs one's preparedness.

Engage professionals

Defendants also attempt to hornswoggle with bankruptcy threats or allegations that funds are protected through trusts. We can do some of our own research on these saber rattles, but will engage bankruptcy or estate counsel to help us. Counter defendants' arguments with a cogent letter from a professional knocking down these defenses.

Creative approaches

An asset discussion tends to require more creativity than simply screaming, "Bring me everything!" An unfortunately all too common fact pattern is the elderly driver, who should have given up driving long ago, who causes great harm. Assuming that person is a homeowner, there will usually be significant equity. And with the high cost of California living, this can be a very meaningful asset. At the same time, the individual will not want to have to move out to resolve the case. In this situation, one can evaluate offering a life estate to the defendant. The defendant stays in the home but it goes to the client when the defendant passes away. Every asset discussion is different. But working together with a creative mediator, and being open, can improve the chances of resolving things as best as possible for all involved.

Outro

Back to our lawyer and client. Fast forward two years. After detailed asset work and two very challenging mediation sessions, a resolution. Assets changed hands. And the client was made as whole as possible under challenging circumstances.

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