The reasonable demand

How to avoid receiving the pesky "unable to accept or reject" letter

By Phillip Younglove

It is common practice to send a time-limited demand to a defendant's insurance carrier upon confirmation of the applicable policy limits. When the value of a plaintiff's claim substantially exceeds the value of a defendant's insurance limits, it is preferable for the plaintiff if the carrier rejects (or neglects to accept) the demand. This is because the rejection can lead to an open policy. However, when the defendant's policy limits are sufficient to fully compensate the plaintiff, it can be difficult to convince the carrier to recognize the true value of the plaintiff's claim and tender its policy limits. This difficulty can be overcome by sending a properly prepared demand package.

Many plaintiffs' attorneys are tempted to selectively disclose information to the carrier in a demand. This often results in the carrier accusing the plaintiff attorney of "playing games." By withholding relevant information, however, attorneys are often doing themselves and their clients a disservice. At minimum, a demand for policy limits should meet the requirements of CACI No. 2334, which defines a reasonable demand as follows:

> A settlement demand for an amount within policy limits is reasonable if the defendant knew or should have known at the time the demand was rejected that the potential judgment was likely to exceed the amount of the demand based on the plaintiff's injuries or loss and plaintiff's probable liability. However, the demand may be unreasonable for reasons other than the amount demanded.

Put simply, when evaluating whether the demand should have been accepted, a reasonableness standard is applied *at the time the demand was rejected* and based on the information available to the carrier *at that time*. While this means a plaintiff's attorney does not necessarily have to disclose all relevant information in the demand, it can seriously damage any potential bad-faith claim if relevant information was withheld.

In the eventual bad-faith case, the defense attorney will point to the withheld information and claim the demand would have been accepted had that information been provided. The plaintiff's attorney's reasoning for sending a demand while withholding information will then be at issue, and the entire bad-faith case can turn on that.

Generally, this means an attorney should include all discoverable information in their possession that is reasonably necessary to evaluate the claim. Such information should address: 1) liability, 2) economic damages, and 3) non-economic damages. The demand should further 4) make an appropriate monetary demand, 5) be subject to reasonable conditions, 6) have a reasonable deadline, and 7) address any additional exposures.

These are crucial components of a reasonable demand.

Establishing liability

The first consideration for a carrier in evaluating a demand is whether its insured is liable for the damages the plaintiff sustained. Because California is a pure comparative-negligence jurisdiction, this may not take more than a theory of liability on claims in which the plaintiff's damages substantially exceed the insured's policy limits.

When that is not the case however, it is recommended to furnish the carrier with evidence supporting liability. This type of evidence can come in myriad forms beyond an admission by the defendant at the scene. Some of the most common are outlined below.

If the plaintiff was injured in an automobile accident, providing the related Traffic Collision Report is the most common way to establish liability. The officer will have noted the identities of all involved parties and the location of the incident, summarized statements from each of the parties and witnesses, and provided their own assessment of liability for the accident. Traffic Collision Reports are often replete with errors and an attorney may need to encourage the plaintiff to file a supplemental report to correct them. If a plaintiff needs to file a supplemental report, be sure to encourage the plaintiff to do so expeditiously. Then, the supplemental report can be included with the original Traffic Collision Report in the demand.

Similarly, if the plaintiff was injured by a dog bite, providing the related Animal Control Report is the most common way to establish liability. Because dog bites are strict-liability claims, the specific facts are not as pertinent as in an automobile-accident claim. If the dog owner is raising certain defenses like trespassing or provocation, however, the facts of the claim can be relevant. Frequently in dog-bite cases, the only use for the Animal Control Report is to confirm that the bite occurred and to confirm which dog attacked the plaintiff.

On claims for which no official report was created, witness statements can be an indispensable tool for proving liability. It is a rare claim in which the plaintiff and defendant recall the facts the same way, so an independent witness's recollection often carries the day. It is advisable to identify and contact all witnesses as soon as possible after the incident so their memories and recollections are fresh. Their statements can be obtained in writing or in a recorded telephone conversation (be sure to get their consent before recording) from which a transcript can be created. That transcript can then be enclosed with the demand.

In the event there are no witnesses or official reports, be sure to canvass the area around the incident to identify any cameras that may have recorded the incident. Surveillance footage of the incident can make liability clear. A copy of the surveillance footage can then be included with the demand.

Proving economic damages

A defendant is responsible for compensating a plaintiff for the economic damages the plaintiff sustains as a result of the defendant's negligent conduct pursuant to Civil Code section 1431.2, subdivision (b)(1). It is important for the demand to include information to establish these damages, which can be significant.

Medical bills are typically the most substantial economic damages an injured plaintiff will incur. A trip to the hospital alone can result in more medical expenses than a defendant's entire liability insurance policy can cover. Providing the carrier with the billing from the hospital visit alone can sometimes be enough information to settle the claim.

A plaintiff who is unable to work due to their injuries can also pursue the defendant for their lost earnings. Many plaintiffs desire to pursue this claim but fail to obtain the documentation necessary to support it. While the bar for plaintiffs to obtain lost wages is not particularly high, as laid out in CACI No. 3903C, the specific amount lost does require evidence.

Thus, be sure to obtain documentation from the plaintiff's employer explaining the plaintiff's job duties, time missed, and rate of pay in addition to notes from their physician putting them off work. Keep copies of these throughout the claim and submit them with the demand, as insurance carriers commonly reject loss of earnings claims without evidence a physician placed the plaintiff off work.

A plaintiff can also sustain substantial out-of-pocket expenses that don't fit in any standard category. For example, a single mother who undergoes a course of chiropractic therapy might incur substantial childcare costs because of the time she has to spend treating. It is advisable to check whether a plaintiff is incurring out-of-pocket expenses throughout their claim so receipts can be provided with the demand as well.

Proving general damages

Often, the most substantial portion of an award to a plaintiff is the award for their general damages. These are subjective by nature, and at the stage of a claim in which the demand is submitted, it can be difficult to fully flesh out a plaintiff's general damages.

One of the best tools available to an attorney for demonstrating what their client has gone through is their medical records. The subjective complaints noted in their reports can be a powerful weapon in demonstrating the plaintiff's pain and suffering and loss of enjoyment of life. The total amount of dates of service and duration of each of their appointments further demonstrates the inconvenience they have endured as well. Be sure to include reports for each date of service the plaintiff attended in the demand.

Medical records can also cut *against* the reasonableness of the demand by undermining causation. If the records mention pre-existing injuries to a body part the plaintiff is claiming was injured in the accident, it can cause the carrier to be "unable to accept or reject" if that pre-existing injury is not properly addressed. The attorney should thoroughly review the plaintiff's records and provide prior medical records demonstrating the extent of the pre-existing injury with the demand. This provides the carrier with sufficient information to evaluate and respond.

As the adage says, "A picture is worth a thousand words." Photographs of the plaintiff's visible injuries are invaluable in demands, as the carrier will not have the benefit of seeing them in person at this stage in the claim. Showing scarring, lacerations, and other visible injuries can help the demand be successful.

When the client's mood or memory has been affected, it can be useful to have a family member or close friend write a declaration describing the changes they have witnessed since the injury. These declarations can bring the plaintiff's claim to life and are most useful in claims involving catastrophic injuries or traumatic brain injuries.

Including sufficient documentation in the demand is only half of the battle, however. Many demands are unreasonable because of what they request, not because of what they include.

Demanding the right amount

While any amount of money can be demanded in exchange for the settlement of the plaintiff's bodily-injury claim, it is often prudent to demand the policy limits of the applicable liability limits of insurance. A demand that asks for more than this can be found unreasonable, thus supporting the carrier's position it was "unable to accept or reject" it.

The plaintiff can also demand contribution from the defendant over and above their insurance limits, but few defendants are capable of paying any substantial sum. It is advisable to evaluate the defendant's financial situation, including any assets they own, before sending a demand to the carrier.

Additionally, the demand is an offer with terms and conditions. The language an attorney includes in it must be precise. Do not send a blanket "demand for policy limits" and expect the insurance company to piece together what is being demanded. Identify the types of insurance that are being demanded. Is this a demand for the driver's insurance and/or the vehicle owner's? Does the demand include any applicable umbrella policy they may have purchased? If the driver was in the course and scope of employment, does the demand include any commercial policy the employer may have? In short, be specific. It is generally advisable to err on the side of caution by demanding *all* applicable liability limits of insurance. And it is critical to make sure that you are offering to settle with all insureds under the policy.

Including reasonable conditions

The demand should include conditions that certain documents be provided to confirm all insurance is being identified and tendered to settle the plaintiff's claim. This protects the attorney from potential malpractice, identifies additional pockets to pursue, and triggers any potential Underinsured Motorist coverage the plaintiff may have.

Specifically, the demand should require a copy of the declarations page for every insurance policy being tendered. This helps to confirm the insurance company is actually paying the full policy.

In an automobile accident case, documentation identifying the registered owner of the defendant vehicle should be required. If the driver and the vehicle owner are different people, they may have separate insurance policies for the plaintiff to pursue.

All policy-limit demands should require the defendant to provide a declaration signed under penalty of perjury identifying all of their insurance, confirming whether they were in the scope of their employment, and asking certain individualized questions for the plaintiff's attorney to determine whether there might be additional pockets to pursue.

Note, however, that by including requests for information or declarations that can only be provided by the insured, not the carrier, you run the risk of building into the demand a defense to a failure-to-settle claim. For example, the carrier may reject the demand and later claim in a bad-faith lawsuit that it was *unable* to accept the demand because the insured was not willing to provide the requested information. Ideally, all conditions you attach to the demand should be conditions that are within the carrier's control.

A release should also be demanded, so the claim can be settled upon receipt of all documents. It is advisable to use the demand to outline the terms the plaintiff will and will not agree to in any release. Do not overstep here, as the defendant – as well as all others insured under the policy – is entitled to a full release in exchange for payment of the policy's liability limits.

Giving enough time to evaluate the demand

Policy-limit demands should be time-limited, but a reasonable amount of time must be given to the carrier to evaluate the information provided and respond. This is subjective to each claim and depends on numerous factors including the amount of information provided and the value of the claim relative to the defendant's policy limits. If the defendant's policy limits are clearly insufficient to compensate the plaintiff, the insurance company should jump at the chance to resolve the claim. On the other hand, if the policy limits are more than sufficient to compensate the plaintiff, enough time should be given to the carrier for it to fully evaluate all supporting documents provided.

Another consideration in determining how much time to give is whether this is the first demand that has been submitted. If the insurance company has received several prior demands and is provided new information demonstrating the claim is worth in excess of the policy limits, it should not require as much time to evaluate and respond as a carrier presented with an initial demand.

Addressing additional exposures

One of the primary obligations the insurance carrier has is to address all exposures to its insured, i.e., all injured parties and claims that can be asserted.

If there are more injured parties than the insurance policy limits can fully compensate, the plaintiffs often work together by sending what is called a global demand. This means they send a single demand that will settle all of their claims against the insured, if accepted.

There are other types of exposures that should be addressed in the demand. For example, if the plaintiff was married at the time of the accident, their spouse will have a claim for loss of consortium. If this claim is not addressed in the demand, it can render the demand defective and make the insurance company "unable to accept or reject." After evaluating the value of the plaintiff's claim against the defendant's insurance policy limits and defendant's ability to contribute to any settlement, the attorney should discuss whether the spouse should assert their claim for loss of consortium. If they elect not to pursue it, the demand should state the spouse will agree to waive the claim in the release.

Statutory liens should also be addressed in the demand. The plaintiff should agree to hold harmless and indemnify the defendant for any bona fide statutory lien arising from their medical treatment in exchange for a full release.

Conclusion

In sum, a plaintiff's attorney should advise the plaintiff of the available options in seeking the best possible outcome from the defendant. When the best option is to send a policy limits

demand, the plaintiff's attorney can prevent the carrier from rightfully claiming it is "unable to accept or reject" by including all (discoverable) information reasonably necessary to evaluate the claim. It is vital the demand be reasonable under the circumstances. An unreasonable demand on an excess-value claim can prevent the plaintiff from being compensated in an eventual bad-faith lawsuit, and an unreasonable demand on other claims can delay settlement.

By following these straightforward recommendations, plaintiffs' attorneys can avoid the pesky "unable to accept or reject" letter and settle more of their clients' claims.

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