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ATTORNEYS AT LAW

THE FINE ART OF DECIDING NOT TO SETTLE WITHIN POLICY LIMITS: PART ONE

THE PROBLEM

> *You are defending your insured in a motor vehicle case with a $300,000.00 policy limit. The Plaintiff's injuries are fairly severe (several fractures and a hospital stay) and there is some work loss and other consequential damages. The case is venued in a middle-of-the-road jurisdiction, and liability for the accident is questionable — a jury may well apportion some fault to both parties.*
>
> *Until now, the Plaintiff's only settlement demand has been $650,000.00. But in today's mail you receive a 30 day time limit settlement demand for the $300,000.00 policy limit, after which, the letter continues, the Plaintiff's lawyer is going to take the case to verdict and seek an assignment of bad faith rights from your insured against you in the event of an excess verdict.*
>
> *You have almost all of the relevant medical and work loss records, but no depositions have been taken. What to do?*

If those of you in the claims and claims management business had a nickel for every time this scenario (or one similar to it) crossed your desk, you would no longer need to be in the claims or claims management business and, consequently, would not have to worry about it. But until

that kind of hazardous duty pay somehow materializes, you are stuck on the horns of a dilemma.

> *An excess verdict, in this example is possible, you believe, but it is equally possible that the case could come in at $200,000,00, maybe less. Heck, if the jury finds the plaintiff more than 51% at fault (using Pennsylvania law as an example), the Plaintiff is going to take $0. So the decision is taken: despite the urgings, and veiled threats, of both the Plaintiff's lawyer, and your insured's personal lawyer (policy limit demands indeed make strange bedfellows), you are going to decline to pay the demand, and move forward for now with the litigation.*

In this two-part post, we are going to examine the decision not to settle your insured's tort case within policy limits. How it should be done, when it should be done, whether it should be done, and why it should be done or not done, not necessarily in that order. In Part One, we will take a broad, 50,000 – foot look at the issue, and then in Part Two, we will drill down into some of the particulars.

THE BIG PICTURE AND RULES OF THE ROAD

Obviously, the decision not to protect an insured and settle a tort case against him or her is a major one with major consequences: It potentially exposes the insured to excess, and potentially personal liability, which defeats the purpose, your insured believes, of paying for insurance in the first place. Not settling prevents financial and emotional closure of a rather unpleasant experience for one of your customers. And perhaps most importantly, if declining a policy limits demand is not done properly, with reasonable basis, it exposes the insurer to extra contractual damages via a bad faith claims in the event the underlying tort verdict exceeds the policy limits.

Doing business in this territory can be a risky place to go.

While all of these things are true, there are other less thought of elements which also operate in the background:

- Despite what every Plaintiff's lawyer would like you to believe, an excess verdict is not a ***res ipsa loquitur*** or ***per se*** establishment of insurance bad faith. An excess verdict is nothing more than an entre' for an insured or his assignee to attempt to make out a bad faith case, which is a far cry from a final finding. Do not let a Plaintiff's bad faith lawyer standing at home plate holding an excess verdict convince you he or she has already hit a home run. He or she has not.

- Reasonable offers of settlement less than policy limits are often made, and rejected, followed by a verdict in excess of the policy limits. It happens, and it often times happens even in the absence of insurer bad faith. If the amount of the offer and the amount of the verdict are reasonably close (I use this vague term intentionally), and there is a reasonable, documented rationale for either making a sub-limit settlement offer and/or declining to pay a limits demand, a finding of bad faith against the insurer is not a foregone conclusion.

So how should the decision to pay or not to pay a limits demand be made?

THE ART AND SCIENCE OF THE DECISION NOT TO SETTLE WITHIN LIMITS

There is a reason this post was not titled, "*The Fine Art of Not Settling Within Policy Limits*." The title contains an extremely important verb: "***Deciding***." An insurer's ***decision*** to reject a policy limits demand against its insured must be just that: a decision. The decisional aspect of not settling within limits implies a whole host of items comprising a decision – making process, which encompasses legal and factual information-gathering, deliberation, analytics, examination of comparable injuries and cases, and consideration of other relevant factors.

The decision not to settle within limits must be an informed one — it cannot be one which is knee-jerk, emotional, or irrational. It cannot be one made simply on the basis that the insurer would rather not pay. Stated simply, the decision, if made, must be made properly. The decision – making process must not only be a thorough one; it must be one where the reasoning behind it is documented so that it is re-traceable at a later time . We will examine the specifics of this decision making process in Part Two of this post.

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THE FINE ART OF DECIDING NOT TO SETTLE WITHIN POLICY LIMITS: PART TWO

In Part One of this post, we examined a hypothetical time-limit settlement demand against an insured for policy limits, and contemplated the decision not to pay the demand. In Part Two, we examine the specifics behind an insurer's decision not to pay a time limits demand.

In the first half of this post we saw that the decision not to pay must be an informed and deliberate one. Here are some of the nuts and bolts to that decision-making process:

ERR ON THE SIDE OF PAYING

This may strike you as an awfully odd first element of the decision not to pay a policy limits demand — actually leaning toward paying it — but stay with me for a second. If you follow this rule first and foremost, all of your decisions not to pay a policy limits demands are going to look much, much better.

Perhaps it's best to explain this one through the use of some numbers, looking back at the hypothetical policy limits demand of $300,000.00 we set up in Part One of this post. If the case is not worth more than $150,000.00 after research and analysis, that is one thing, and a refusal of the demand of $300,000.00 is most likely supportable. But if your considered judgment is that the case is worth $285,000.00, for example, be wise: protect your insured and pay the $300,000.00. If your reasoning leads you to believe that there is a 70-80% chance of a verdict of $350,000.00 or more, pay the $300,000.00 and get your insured's name on a release.

Never flirt with disaster on the close ones. It is not worth the downside. Enough said.

Have a Thorough, Reliable, Claims Valuation/Vetting Process

This will mean everything to you if you pass on a policy limits demand and are later faced with a verdict in excess of policy limits. If you are going to successfully defend a bad faith claim based on the excess verdict, a thorough, valid, reliable case valuation process will oftentimes save you from a follow-on bad faith verdict. Without one, you are likely facing and uphill and most likely unwinnable battle.

What comprises a thorough, reliable, claims process? Investigation. Analysis. More Investigation. More Analysis. The basic blocking and tackling is what we are talking about here – recorded interviews, medical records, police reports, wage and employment records, medical exams, depositions, discovery, etc. The more information considered, the better.

Legal research into the liability aspects of the case, jury verdict research from the applicable venue, and similar case-valuation research is also extremely helpful. If the venue you are in routinely shows verdicts in the high six-figure amounts for multiple fracture automobile accident cases, refusing to pay the demand of $300,000.00 is, obviously going to be much harder to justify.

Do the homework. And make the decision to pay or not to pay the limits demand depending on what your homework shows.

Thoughtful deliberation by more than just a single claims professional is crucial as well– collective wisdom and decision-making is a great help to successful bad faith defense. For an extra layer of protection, especially in high value cases, it never hurts to ask independent, outside counsel for a complete evaluation of liability, damages, and a case valuation. It is time and money well spent.

Document Your Thorough, Reliable, Claims Valuation/Vetting Process

The best and most intricate case workup and evaluation will be of no use to you in a bad faith case if you cannot reconstruct the thought processes of your claims professionals leading up to the decision not to pay a policy limits demand. All of the major aspects of the process should be reflected in either the claims file and/or the claims notes, for use at a later time in the event of an excess verdict.

The settlement negotiations themselves should likewise be documented, including notes following telephone calls and correspondence from your counsel to the Plaintiff's counsel declining the demand, and more importantly, explaining the rationale for declining the demand, whether it be because liability is questionable, or the value of the injuries to not justify, based on your research, the amount of the settlement demand.

If you feel the demand is premature because, for example, depositions have not yet been taken in the case, spell that out in your negotiations and, if appropriate, ask for additional time, or to hold negotiations open. If there is missing information you need from the Plaintiff or his lawyer, document making requests for that information, as well as any failures on the part of your counterparts to provide that information, and how that impacts your ability to evaluate the demand.

In other words, leave a very good trail of breadcrumbs.

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Conclusion: Is It Better To Be Right or Reasonable?

There is likely no tougher decision in the insurance claims business than the decision of whether or not to pay a policy limits settlement demand on behalf of an insured. A great deal rides on making the right call. So the process used in arriving at that decision is of utmost importance.

Whether it is better to be right or reasonable is a trick question, of course — it is always best to be both. When it comes to the decision not to pay a policy limits settlement demand, however, you cannot always be right. But you can always be reasonable, by sticking with the right process, and that will keep you out of the worst kinds of trouble.

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Dickie, McCamey & Chilcote, P.C. is a nationally-recognized law firm providing comprehensive legal expertise in a multitude of practice areas. Headquartered in Pittsburgh, Pennsylvania, and founded more than 100 years ago, the firm serves industry-leading clients across the country from offices throughout the mid-Atlantic region in Pennsylvania, Delaware, New Jersey, New York, North Carolina, Ohio, South Carolina, and West Virginia, and the Southwestern region in California. For more information: 800-243-5412 or www.dmclaw.com.