Arkansas Association of Defense Counsel

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A Time-Sensitive Demand for Policy Limits – Now What?

As many of us have experienced, it is an interesting dichotomy when you have been hired by an insurance company to represent their insured. When the terms of an insurance policy provide it will defend the insured from suit, but shall also have the right to make such investigation, negotiation, and settlement as deemed expedient by the insurer, the insurer becomes a fiduciary to act, not only for its own interest, but also for the best interest of its insured. *See Southern Farm Bureau Casulaty Ins. Co. v. Parker*, 232 Ark. 841, 341 S.W.2d 36 (1960). Therefore, if the injured party makes a pretrial offer to settle a liablity claim for an amount within the liability policy limit, the insurer is not required to accept the offer; however, the insurer does have the duty to act in good faith if it decides to reject a pretrial settlement offer within policy limits. If the insurer does not act reasonably in rejecting a pretrial settlement offer within policy limits, takes the claim to trial and loses, and the jury returns a verdict against the insured for an amount above policy limits, the insurer may be held liable to pay the entire judgment, regardless of stated policy limits.

While the above is likely not news to this audience, you may not be aware that time-sensitive demands for policy limits are being used and abused by plaintiffs' attorneys in an attempt to set up future bad-faith claims against insurers in order to hold them liable for an excess judgment, making them monetarily responsible for an amount over and above policy limits. This practice is gaining popularity in recent years as it often forces an insurance company to make a quick decision, many times before it feels it has had the chance for a full evaluation of the case.

It often works like this. Early in litigation, plaintiff's counsel sends a demand for policy limits, which states that if the company does not offer policy limits by X date, then any later offer of limits will be "too late," the case will go to trial, and the insured will be exposed to personal liability that it would not have had if the company had settled within limits. If the insurer determines that it will not to agree to offer policy limits and later loses at trial, plaintiff's counsel has successfully positioned the insurance company for a bad faith claim.

In Arkansas, an insurer will be held liable to its insured for any excess judgment of the insured's policy limits *if* the failure to settle the claim by the insurer is due to fraud, bad faith, or nelgigence. *See McCall v. Southern Farm Bureau Casualty Ins. Co.*, 255 Ark. 401, 501 S.W.2d 223 (1973) (citing *Tri-State Ins. Co. v. Busby*, 251 Ark. 568, 473 S.W.2d 893 (1971). The burden to establish the fraud, bad faith, or negligence is upon the party claiming that the insurer should be held liable. *See id*.

In *McCall*, the appellant claimed that the insurer had been negligent in its failure to settle; however, the court disagreed. The court found that the insurer had investigated the claim and had been of the opinon that its insured was not guilty of the willful and wanton misconduct that was required in the underlying claim. 255 Ark. at 403. The insured had a personal attroney who was in agreement with the insurer's attorney that the liability was a close question, but could possibly result in a favorable jury verdict. *See id*. Finally, the insured had expressed no complaint about the preparation and defense of the case, nor had the insured been able to provide evidence to suggest a factual issue that the insurer had negligently failed to evaluate and settle. *Id*. at 403-04.

Our Supreme Court has found an insurer negligent for failing to settle within policy limits in *Members Mut. Ins. Co. v. Blissett*, 254 Ark. 211, 492 S.W.2d 429 (1973). However, there, the insurer's own attorney had suggested a top settlement amount of $5,500 after helping evaluate the case. The insurer only gave authority for $4,500. The demand from the plaintiff's attorney had been at $8,500 when the insurer stopped the authority for negotiations at $4.500. Policy limits were $10,000. The jury's verdict awarded $21,418.

The common thread in the various cases evaluating an insurer's failure to settle when there was a time-sensitive demand is the reasonableness of the insurer's actions. *See Pavia v. State Farm Mut. Auto. Ins. Co*., 626 N.E.2d 24 (N.Y. 1993) & *Clauss v. Fortune Ins. Co*., 523 So.2d 1177 (Fla. 5th DCA 1988). In both *Pavia* and *Clauss*, the insurers were able to cite specific reasons for not having accepted the demand within the time specified that were well documented. Not too long ago, in 2011, the Ninth Circuit upheld an insurer's right to conduct and complete an investigation, notwithstanding plaintiff's arbitrary time frame imposed for the insurer's response to a policy-limits demand. *See Allstate v. Herron*, 634 F.3d 1101 (9th Cir. 2011).

It is important to remember that it is only the conduct of the insurer's evaluation and investigation that is reviewed and judged, not the behavior or intent of the plaintiff's attorney making the demand. For example, case law suggests that an opposing counsel's refusal to accept a later tender of policy limits will not provide a defense in a bad faith claim. *See McKinley v. Guaranty Nat'l Ins. Co.*, 159 P.3d 884 (Idaho 2007) (where the Idaho Supreme Court held that, in light of the serious injuries involved, the insurer should have increased the tempo of the investigation to ascertain facts, communicate the results of the investigation with the insured, and discuss with the insured the pending settlement offer that could affect him); *see also Berges v. Infinitey Ins. Co*., 896 So. 2d 665) (Fla. 2004).

So, what should you do when a time-sensitive demand for policy limits hits your desk? First, you and the insurer need to review the evaluation and investigation of the case up to that point. Is there a strong question as to liability based on the law governing the underlying issue? Would it be reasonable to demand more time for discovery, or has it already been determined that policy limits will be offered at some point prior to trial regardless? If the insurer is confident that policy limits will be offered at some point prior to trial, you should advise them to go ahead and make the offer of policy limits in exchange for a release of the insured prior to the expiration of opposing counsel's demand. Even if the demand is higher than policy limits, and seeks policy limits plus an amount contributed by the insured, the insurer should at least counter with the policy limits. The basis for this recommendation is that one court has held that even though a plaintiff's demand exceeded policy limits, the insurer was not absolved from its duty to settle because it should have made a counteroffer for an amount within the policy limit in an attempt to resolve the claim against its insured. *See Rova Farms Resort, Inc. v. Investors Ins. Co*., 323 A.2d 495 (N.J. 1974). Finally, well-documented communication with the insured is vital. It will be that much more difficult for a court to uphold a bad-faith claim against an insurer if the insured has been well-informed of the insurer's evaluation of the case and has not expressed opposition or given the insurer any reason to believe there is a conflict requiring separate counsel. That said, should there become a moment at which the insurer and the insured are not in agreement, well-documented advice for them to seek separate counsel is recommended.

In summary, if you receive a time-sensitive demand for policy limits and the insurer is not prepared to tender the same, your file should be well documented as to each reason the demand was not met by its expiration, as well as reflect conversations with the insured regarding the case evaluation, status, and their ability to retain personal counsel. Taking these precautionary actions should preclude a later finding of bad faith against the insurer.

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