The "letter perfect" policy limit demand letter

Writing an effective demand letter can lead to a faster, better settlement or make it easier to "open up" defendant's policy limits

By Ronald J. Cook

One of the most useful yet least understood tools available to a plaintiff's attorney is a policy limit demand. A timely and well executed policy limit demand can either settle a case for the most the client could ever practically realize, or can force an insurance company to pay the entire verdict even if that number exceeds the defendant's policy limit because the insurer failed to settle the case within the policy limit when it had the chance. Make no mistake, this exercise is intended to provide the insurer the opportunity to protect its insured from an excess verdict.

Contrary to popular belief, a policy limit is not automatically "open" the instant a policy limit demand is rejected. An "open limit" depends on many factors, chief among them, whether a "reasonable insurer" would have paid the limit knowing what the carrier knew or should have known at the time a policy limit demand was declined. Only if the answer to that question is "Yes," will the insured (or the plaintiff's attorney via a post trial assignment of rights) be in a position to compel the insurance company to pay more than the stated policy limit. However, that only happens after the insurer loses a separate "bad faith" lawsuit.

Get client's consent to make policy limit demand

Needless to say, before you ever demand the limit, you need to get the client's consent to settle for policy limit. That entails giving up the right to pursue personal assets since payment of the policy limit requires a full and final release of all claims. Discuss every detail with the client and secure their consent to settle for the policy limit in writing or send a letter confirming their permission along with the details of your conversation. It is usually a good idea to perform an asset search in advance. Examples abound of attorneys who secured a policy limit settlement only to later face a disgruntled client who complains that the settlement was insufficient.

What if you don't know the policy limit?

How can you make a pre-litigation policy limit demand if you don't know the limit? The easy answer is to have your client ask the adverse party (attorneys should not contact prospective litigants directly), or simply ask the insurance company to reveal the policy limit. In many cases, the claims person will voluntarily reveal the limit in the interest of settling the case.

However, many carriers refuse to disclose the limit in reliance on *Griffin v. State Farm Mutual Auto Ins. Co.* (1991) 230 Cal.App.3d 59, 65-68, which holds that policy limits are technically confidential and cannot be revealed without the insured's consent. Smart carriers go and get consent. Stubborn ones claim their hands are tied. They are wrong. In *Boicourt v. Amex Ins. Co.* (2000) 78 Cal.App.4th 1390, 1392 the court held it can be bad faith to neglect to seek the insured's consent to disclose the limit since a failure to do so inhibits the chances of the case settling within the policy limit.

When you really want to settle the case early because the client needs the money, doesn't want to litigate, or because liability is weak but the damages are big, write a letter telling the carrier about *Boicourt.* More often than not, the insured gives consent to disclose the limit so the case will settle. If the insurance company refuses to consult the insured, you are well on your way to establishing unreasonable conduct on the part of that insurance company.

If, despite your best efforts, you remain in the dark, your only options are to file suit and get the limit in discovery, or demand the full value of the claim, or the policy limit, whichever is less. Be fully prepared to get very little if the policy limit is small.

Standards applied to insurance company's evaluation of a policy limit demand

Insurance companies are obligated to look for opportunities to settle claims within the policy limit. Liability insurers must accept a policy limit settlement offer when the amount of the judgment is "likely" to exceed the policy limit. Factors such as limits imposed by the policy, a desire to reduce the amount of future settlements, or a belief that the policy does not provide coverage may not affect the insurer's decision whether a settlement offer is reasonable. (*Johnson v. California State Auto Assn. Inter – Ins. Bureau* (1975) 15 Cal.3d 9). In deciding whether

to settle the liability claim "the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. (*Miller v. Elite Ins. Co.* (1980) 100 Cal.App.3d 739, 756). "In determining whether a settlement offer is reasonable an insurer may not consider the issue of coverage. [citation] rather, the only permissible consideration in evaluating the reasonableness of the settlement offer…is whether, in light of the victim's injuries and probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Blue Ridge Ins. Co. v. Jacobson* (2001) 25 Cal.4th 490, 498).

The law "does not require claimants against insureds to begin settlement overtures with letter perfect offers to which insurers need only to respond "yes" or "no." An insurer's duty of good faith would be trifling if it did not require an insurer to explore the details of a settlement offer that could prove extremely beneficial to its insured [evidence supports the conclusion that the insurance company ignored the offer, "as a calculated gamble on which only its insured could lose."] (*Allen v. Allstate Ins. Co.* (9th Cir. 1981) 656 F.2d 487, 490.) If the insurer fails to accept the settlement offer without seeking clarification of its terms, it cannot later avoid the consequences by claiming the offer was uncertain. (*Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 708). (See also, Justice Croskey's exhaustive analysis in *Archdale v. Amer. Intern. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449).

Essential elements of a policy limit demand letter

The starting point for opening the limit is a rock solid demand letter which will help you avoid the pitfalls that frequently provide insurers with a viable argument that the policy limit demand was defective and therefore does not open the policy. These guidelines apply when the case is already in litigation, and are even more important when making a pre-litigation effort to settle the case.

The following is a checklist of important considerations when preparing a policy limits demand letter:

1. *Convince the carrier this is a liability case*

The first step in establishing the reasonableness of a policy limit demand is to convince the insurance company (and a judge/jury who may ultimately read this letter in a subsequent bad-faith case), that liability is either clear or reasonably clear such that any reasonable insurance company would pay the policy limit to avoid financial ruin for its insured. This includes attaching copies of police reports, investigation reports, witness statements, the identities of witnesses by address and telephone numbers so that insurance company can interview them, photographs or videotape, and anything else that proves a prompt settlement is prudent and reasonable. Keep in mind that at this point the insurance company is either unaware or just barely aware of the existence of the claim and has not yet retained counsel or investigators. Make it appear that settlement is a no-brainer. The better your argument, the more likely it is the case will settle or the policy will be opened.

There is some strategic decision making involved. You may have to decide if you want to disclose your work product. If there is devastating evidence you would prefer to sit on, just know that if the insurer proves you had it and held it back when making the demand, you are potentially "gift wrapping" an argument that if the carrier knew, it would have paid the limit.

2. *Damages will exceed policy limit*

Provide the insurer with a complete array of the claimant's damages including medical reports and records, x-rays if applicable, wage loss verification, business income records, photographs of injuries or damages, and anything else a that a reasonable insurance company would need to know to conclude the damages will likely exceed the policy limit. Even if the plaintiff is still treating and full medical specials damages are unknown, if the medical bills and general damages are already approaching or above the limit, it is not premature to make a policy limits demand. Against a $15,000 policy limit, an emergency room visit alone can often exceed the policy limit.

When is a demand "reasonable"? Case law suggests a settlement demand is "reasonable" if it is equal to or less than the sum of the products of each possible outcome of a case and the probability of that outcome occurring. For instance, in *Miller, supra* a $5,000 settlement was reasonable as a matter of law when the insurer assessed damages at $11,000 and the insured's liability was a 50 percent certainty. Conversely, in *Isaacson v. CIGA* (1988) 44 Cal.App.3d 775, 794, a $500,000 settlement demand was not reasonable where the insured's maximum exposure of $750,000 was only a 50 percent possibility. Hence, the duty to pay the policy limit can arise when the policy limit is extremely low, the damages are extremely high, and there is only a small chance of proving liability (e.g., 3 out of 10 times a case hits for $500,000 against a $50,000 policy limit). One commentator suggests a one percent chance of getting hit for a $10 million verdict should result in policy limit settlement of $100,000.

3. *Demand must offer a full and final release of all claims*

The demand letter must make clear that the plaintiff is offering a full and final release of all claims in exchange for payment of the policy limit. In fact, absent a full and final release of all claims, an insurance company cannot agree to pay. The offer must be unequivocal and therefore should not contain any built-in contingencies or variables. For instance, a policy limits demand is inconsistent with a companion demand that the defendant provide an asset declaration. This raises the possibility that even if the carrier accepts the demand, the plaintiff could still

back out. Barring proof that the case definitely would have settled in its entirety, the policy limit will not be open. (See generally, *Coe v. State Farm Mut. Auto. Ins. Co* (1977) 66 Cal.App.3d 981, 992-993 – approval by third party defeats "open limit" claim). Finally, the demand must resolve all claims against all insureds by all claimants. [Caution: settlement that requires minor's compromise approval might not qualify].

4. *Loss of consortium/wrongful death claims are included*

If the claimant is married, make sure the letter agrees to release any loss of consortium claim that might accompany a lawsuit. In wrongful death cases, you need to likewise provide the assurance that payment of the policy limit will satisfy the claims of any and all parties who could conceivably make a wrongful death claim.

5. *Liens included in demand*

The demand letter should also make clear that if the policy limit is paid, the claimant will be responsible for the payment/reimbursment/compromise/satisfaction of any and all liens, including medical, wage, workers' compensation, property or attorneys fees' liens that could be asserted the insured. One of the most common defenses raised by insurance companies after they fail to settle within limits is the fact that the demand was silent about satisfaction of liens thereby exposing the insured to the possibility of double payment. Close off this possibility by making it clear in the body of the demand letter that the insurance company and/or its insured will have no exposure to any third-party liens. Make it equally clear that no third party has to approve any settlement. (See, *Coe*, *supra*).

6. *Set a deadline to accept the demand*

One of the most important and often contentious components of a policy limit demand is the deadline to accept. The letter should include a deadline and it should be highlighted in bold lettering so there is no confusion. Here again, reasonableness is the key. The reasonableness of the deadline depends on the facts of the case. If a lawsuit has not yet been filed and the statute of limitations is not about to run, sufficient time is needed for the insurer to review the demand letter and verify the facts contained therein. Conversely, a one-day deadline was deemed reasonable when the trial started the next day (*Kelly v. British Commercial Ins. Co.* (1963) 221 Cal.App.2d 554), and a one week deadline five weeks after accident was reasonable because the company's investigation was completed. (*Critz v. Farmers Ins. Group.* (1964) 230 Cal.App.2d 788, 798, disapproved on other grounds (1967) 66 Cal.2d 425). If negotiations have been ongoing for months and the carrier already knows everything it needs to know, a shorter deadline may be appropriate. Bottom Line – Set a deadline that is fair and would appear that way to a trier of fact.

7. *Request for a deadline to be extended*

Insurance companies usually complain the deadline is too short and they need more time. In anticipation of this excuse, it is advisable to address the subject up front. Consider including a procedure to request an extension in the demand letter. Tell the insurer that no reasonable request for more time will be rejected; however, any request must be supported by specifics. The insurer must state precisely what additional facts, witnesses, authorities or information the insurance company needs that cannot be accessed by the original deadline. Tell the carrier that generic pleas that "I need more time," without more, will be rejected.

This preemptive move communicates fairness on your part, but also forces the insurer to justify why it couldn't complete its evaluation sooner. Remember that you will see their claims file in the bad faith case. If that file shows the insurer did nothing but ask for more time before the deadline, your refusal to budge will not be unreasonable. Conversely, if despite the carrier's best efforts, key information was missing, your refusal to grant an extension may doom your argument that the policy limit is waived. Saying "No" carries consequences.

Agreeing to an extension is another strategic decision dictated by the circumstances. Some argue that it is never a good idea to give an insurance company more time since the goal for many is to entice the insurance company to reject the demand. At a minimum, a blown deadline creates leverage to settle the underlying case. When deciding to either grant or reject a request for more time you should consider an unreported Northern District trial court decision where Judge Jenkins concluded that an insurance company's request for more time demonstrated the carrier's effort to comply and the plaintiff attorney's summary rejection of the extension request was unreasonable. The policy limit was held, NOT waived. (See *Wallace v. Allstate Ins. Co.*, 1999 WL 51822; aff'd 221 F.3d 1350 (9th Cir. 2000)).

8. *Demand will not be repeated*

Along with a firm deadline, it is also a good idea to explicitly state that if the offer is not accepted, it will not be repeated. Case law is clear that insurance companies cannot expect or demand a second chance to accept a policy limits demand, although nothing can stop them from offering the policy limit after the deadline and argue that it shouldn't make any difference if the plaintiff was willing to take the same number earlier. Once the deadline expires, a claimant is under no obligation to repeat a demand or accept a policy limit at any point in the future even if it is belatedly offered. Claims representatives are often surprised that a policy limit offer made after an expired deadline won't settle the case.

The level of industry sophistication varies by carrier and by state where the carrier or claims person is based. Out-of-state carriers think "California is whacky."

9. ***No duty to remind carrier of impending deadline***

It is also advisable to specifically state that you will not contact the carrier

to remind it of the upcoming deadline, nor will you inquire as to the status of the carrier's investigation as a way of reminding it of the deadline. This plays well to a jury in the bad-faith case since carriers often argue they were set up or tricked as evidenced by the plaintiff's failure to remind it of the deadline.

10. ***Proper address/delivery confirmation***

Finally, make sure the letter is sent to the correct address and actually arrives. Delivery confirmation and/or facsimile transmission are advisable. You do not want to literally hand deliver the excuse that the insurance company blew a settlement deadline because they never saw the letter. Once it arrives, the Insurance Regulations require proper procedures be followed.

11. ***Duty to notify insured of policy limits demand***

Depending on whether or not you want the policy limit demand accepted, consider reminding the insurance company in the demand letter that it is obligated to notify its insured of the demand before rejecting it. A liability insurer has a duty to communicate to the insured any settlement offer that could affect the insured's interests (i.e. a settlement demand exceeding the policy limits), in order to allow the insured an opportunity to contribute to the settlement. (*Heredia v. Farmers Ins. Exch.* (1991) 228 Cal.App.3d 1345, 1360; see also BAJI 12.95 and CACI 2334).

Demanding the insured be notified serves two purposes: (a) the insured has the right to contribute to the settlement should the insurer decide it does not want to pay all or any part of the demand. If an insurance company allows the policy limits demand to expire or rejects it without notifying its own insured, this will go a long way towards establishing insurer bad faith; and (b) notice to the insured often results in pressure to settle, including through personal counsel, each of whom demand the policy limit be paid. In a thin liability/big damages case, a policy limit demand settles a case that might be lost at trial. The insured doesn't want to run the risk of an excess verdict, and the carrier can't take that chance. Nothing looks better after an excess verdict than a letter in the claims file from the insured "begging" the carrier to settle the case.

12. ***Catch-all***

Complete the demand letter by asking the insurer to contact you immediately if for any reason the carrier cannot accept the demand by the deadline because the letter is missing important or crucial information. Remember, you're trying to settle the case or trying to show a bad faith jury that the carrier missed a chance to do so.

Factors not relevant to duty to settle

An insurer has no duty to settle to shield its insured from exposure to uncovered risks. (*Camelot by the Bay Condo Owners Assn. v. Scottsdale Ins. Co.* (1994) 27 Cal.App.4th 33, 52). An insurance company has no duty to settle to avoid the insured's punitive damage exposure. (*Zieman Mfg. Co. v. St. Paul Fire & Marine Ins. Co*. (9th Cir. 1983) 724 F.2d 1343. Similarly, punitive damages cannot be recovered as consequential damages in a bad faith case for failure to settle. (*PPG Industries, Inc. Transamerica Ins. Co.* (1999) 20 Cal.4th 310).

Conclusion

While *Allen* and *Betts* hold that a policy limit demand does not have to be "letter perfect," you are far better off if it is. Your settlement leverage because of the risk of an "open limit," as well as your chances of success in a subsequent bad-faith action, is greatly enhanced by a demand that avoids the traditional pitfalls. Whether a policy limit demand is a "Hail Mary" on a case going nowhere, is used to get paid early without substantial litigation expense, or is made in the hopes of it being rejected, adherence to these simple rules should put you in the best position to represent your client. When in doubt, always consider how your demand letter and conduct surrounding the same will be viewed by the trier of fact in the subsequent bad-faith case.


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