



Taking the lid off the policy

Here are the initial steps you must take if your case is worth more than the policy limits

By GREG BENTLEY

As plaintiffs' lawyers, we are familiar with the term "taking the lid off" or "opening up" the policy. But in practice, what does it mean and how is it accomplished? The issue arises in personal injury cases where the plaintiff has incurred damages that exceed the available policy limits of the defendant. With a few exceptions and pursuant to general contract principles, the insurance company is contractually obligated to pay damages up to the liability limits if it refuses to timely accept an offer to settle within the policy limits. So, if your case is worth more than the policy limits, what should you do?

Confirm insurance coverage

The first thing is to determine all coverages available for this loss. Send a letter advising the carrier of your representation and ask that the carrier provide confirmation of *all* available limits providing coverage for this loss (including excess and umbrella coverages). Advise the carrier that your client suffered significant injuries including, but not limited to

Let the carrier know immediately that you wish to give the carrier an opportunity to settle the case for the policy limits and in order to do so, you are requesting that the carrier provide this information. Refer the carrier to *Boicort v. Amex. Assurance Co.* (2000) 78 Cal.App.4th, 1390, and its holding that the failure to provide this information exposes the carrier to bad faith.

Your initial letter should include a request for a *certified copy* of the policy(s) providing coverage(s) along with a *declaration* from the insured affirming under penalty of perjury that the insured was not in the course and scope of his/her employment at the time of the accident. You need to

investigate all aspects of potential coverage for your client, so make sure to do your homework on this one. Look at the police report for information regarding ownership of the vehicle – employer, company or someone other than the driver? If so, you need to inquire and investigate. Look at the time of day the accident occurred – work hours? Call or have your investigator call the adverse driver to inquire as to where he/she works, and was he/she in the course and scope of employment at the time?

If the police report indicates that your client suffered significant injuries, enclose a copy of the report in your initial letter with a specific reference to the nature and extent of the injuries. For instance, if your client was airlifted from the scene to a trauma center with notations of brain injuries, immediately put the carrier on notice of this significant event with a sentence or two as follows: "We have enclosed a copy of the police report for your review. As you will note, Ms. Perfect suffered significant injuries in this accident, including, but not limited to a traumatic brain injury, fractured pelvis, fractured femur and facial lacerations. She was airlifted from the scene and taken immediately to the Really Good Trauma Center where she was hospitalized for 2 weeks. We are in the process of obtaining her medical records and will send them to you upon receipt." You want to immediately put the carrier on notice of the significant injuries at the earliest opportunity. If you have photographs of the injuries or of the damage to the car, send those as well in the initial letter.

Gather documentation regarding harms and losses

Gather the police report, ambulance report, fire department report, 911 tapes, witness statements, scene and vehicle

photographs, medical records, billing statements and loss of earnings documentation necessary to prove your case. Do this immediately.

Get client's consent to demand the policy

If the value of your client's case is in excess of what you determine to be the available policy limits and you intend to demand the policy limits, get your client's written consent to this demand as there is a chance the carrier will accept the offer. Discuss the contractual limitations of policy limits and the process of demanding the policy. Explain the consequences of the carrier not accepting the offer to settle within the policy limits. Explain the process of taking the lid off the policy. Remember – in many if not most situations, a defendant may seek bankruptcy protection for an adverse judgment above the policy limits. It is important that the client is fully informed.

Offer to settle within policy limits

Once you have gathered all evidence, you are ready to send out the "Offer to Settle Within Policy Limits."

The following tips should be followed.

- Send *certified mail*, return receipt requested.
- Expressly refer to it as an *Offer to settle the matter within the policy limits*. It needs to be in your heading. You need to refer to it specifically in the body of the letter.

Make it *clear and unequivocal*. Here is a sample intro:

Please accept this letter as a formal demand for settlement on behalf of Jenny Perfect ("Jenny"), a minor. As you are aware, this office represents Jenny in regards to her claims against your



insured for the injuries she sustained in the accident of January 1, 2010. Jenny has suffered, and continues to suffer, substantial injuries as a result of the accident caused by your insured.

As stated in your March 1, 2010 letter, your insured's policy limits under his automobile policy are \$250,000/\$500,000 plus a \$1,000,000 applicable umbrella policy.

Accordingly, the applicable policy limit is \$1,250,000. The purpose of this letter is to make a *clear and unequivocal offer* to settle within policy limits of the insurance covering your insured. This offer is being made when the liability of your insured is clear as defined under California law. This offer will expire by its own terms on *May 1, 2010, at 5:00 p.m. Pacific Standard Time*. The damages sustained by Jenny, as discussed below, are well in excess of the policy limits, and if this case proceeds to trial, a verdict in excess of policy limits is likely. Nevertheless, because of the limited policy limits available to your insured, our client has authorized us to make this demand to settle her claim against your insured for the applicable policy limit of \$1,250,000.

- List the specific dollar amount along with the policy number in the caption.
- Time limit identified in the caption and body of the offer.
- Be reasonable – we like 30 days.
- The letter should provide a *detailed analysis of liability and damages*. Leave no doubt!
- Confirm the ramifications of failing to settle would expose the insured to an adverse judgment. Cite the law.

Know the law

As a general rule, the duty of good faith and fair dealing requires a third-party liability insurer to settle a lawsuit against its insured when there is a *clear and unequivocal offer* to settle within policy limits and liability is reasonably clear. (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654. The rule is generally referred to as the *Comunale Rule*.)

• *Comunale Rule*

[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty. The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim.

(*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659 [citation omitted].)

• *Crisci v. Security Ins. Co. – failure to meet the duty to settle.*

Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing.

(*Crisci v. Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 430.)

• *Prudent Insurer Test*

In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer.

• *Johansen v. CSAA – likely to exceed the policy limits.*

[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is *likely to exceed* the amount of the settlement offer.

(*Johansen v. California State Auto. Assoc. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [internal citation omitted].)

• *Johansen – Good faith, mistaken belief in noncoverage – not a defense.*

[A]n insurer's 'good faith,' though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer.

(*Johansen, supra*, 15 Cal.3d at p. 16 [internal citation omitted].)

• *Johansen – It's the failure to settle that matters.*

The decisive factor fixing the extent of [the insurer's] liability is not the refusal to defend; it is the refusal to accept an offer of settlement within the policy limits.

(*Johansen*, 15 Cal.3d at 17.)

• *Rappaport-Scott v. Interinsurance Exch. of the Auto. Club – Responsible for entire judgment*

The covenant of good faith and fair dealing implied in every insurance policy obligates the insurer, among other things, to accept a reasonable offer to settle a lawsuit by a third party against the insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. The insurer must evaluate the reasonableness of an offer to settle a lawsuit against the insured by considering the probable liability of the insured and the amount of that liability, without regard to any coverage defenses. An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. An insurer's duty to accept a reasonable settlement offer in these circumstances is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble – on which only the insured might lose.

(*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 836 [53 Cal.Rptr.3d 245], internal citations omitted.)

See Next Page



CACI Instructions helpful

CACI 2334 – Refusal to accept reasonable settlement within policy limits

Exposed Insured claims that he was harmed by Mean Insurance Company's breach of the obligation of good faith and fair dealing because Mean Insurance Company failed to accept a reasonable settlement demand in a lawsuit against Exposed Insured. To establish this claim, Exposed Insured must prove all of the following:

1. That Injured Plaintiff brought a lawsuit against Exposed Insured for a claim that he alleged was covered by Mean Insurance Company's insurance policy;
2. That Mean Insurance Company failed to accept a reasonable settlement demand for an amount within policy limits; and
3. That a monetary judgment was entered against Exposed Insured for a sum greater than the policy limit.

Policy limits" means the highest amount available under the policy for the claim against Exposed Insured.

A settlement demand is reasonable if Mean Insurance Company knew or should have known at the time the settlement demand was rejected that the potential judgment was *likely to exceed the amount of the settlement demand based on injured plaintiffs injuries or loss and Exposed Insured's probable liability.*

CACI 2337 – Factors to consider in evaluating insurer's conduct

In determining whether Mean Insurance Company acted unreasonably or without proper cause, you may consider whether the defendant did any of the following:

- (e) Did not attempt in good faith to reach a prompt, fair, and equitable settlement of Injured Plaintiff's claim after liability had become reasonably clear.

Now what?

If the carrier fails to timely accept the policy-limits demand, and the carrier is providing a defense to its insured, you must obtain a judgment against the insured. If the judgment exceeds the policy limits, you have likely ripened a claim on

behalf of the insured that the carrier breached its duty of good faith by refusing to settle within policy limits. That claim can be assigned to your client, who can then pursue it.

If the carrier is not defending, different rules apply – chiefly that the insured can settle the case without taking it to judgment.

In either event, you must obtain an Assignment of Rights and Covenant Not to Execute from the insured in order to recover in excess of the policy limits.



Bentley

Greg Bentley is a partner at Shernoff Bidart Echeverria Bentley, specializing in the representation of consumers on a wide variety of cases, including insurance bad faith and catastrophic personal injury and wrongful death claims.

He is a member of the American Board of Trial Advocates and sits on the Executive Committee of the Board of Directors of the Consumer Attorneys of California.