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That's not our policy

Lessons learned from the bad-faith front lines


Cooper

By Miles B. Cooper

The case was teed up for a post-verdict insurance bad-faith action. A formal offer to compromise under C.C.P. § 998 for policy limits, made after discovery responses were served and medical records produced. Economic losses alone over the policy limits. A good hook on liability. Multiple extensions requested – and given – on the policy limit demand.

The lawyer spoke with a colleague about the case. "Something feels off. I don't want them to accept the demand. But the fact they haven't makes me worry that I've missed something."

The colleague replied, "The defendant is a consultant. Is it possible that it is an errors and omissions policy requiring the defendant's consent to settle?" Hmmm…

Bad faith as the collectability solution

Lawyers look for cases with liability, damages, and collectability. The problem: most cases have one or two but require creativity to get the third. With catastrophic injuries, collectability is usually the issue. When considering insurance bad faith as the way to solve the collectability hurdle, consider that the carrier may simply pay the policy once the carrier has all the information. Keep the costs down before the demand. If the carrier accepts the demand, the client keeps more of the money. One must, however, give the defense enough to evaluate the demand. Don't keep costs so low that the defense can argue it lacked information to evaluate the claim.

Demand the policy

Once the defense has all the material necessary to evaluate the case – discovery responses, medical records, an explanation as to why they are liable – send the policy limit demand. The demand should ask for the "available policy limits under the $1 million Deadbeat Insurance Company policy no. 12356, as well as written confirmation that no other policies of insurance, specifically including but not limited to umbrella or excess insurance, cover this incident." This "available" language avoids later weaseling should the policy turn out to be a wasting policy – one where the available coverage is depleted by the cost of defense (see *Trial Practice*, this issue). Wasting policies are common in legal malpractice and medical malpractice cases, but can be found other places.

Be nice

There's a desire to treat 998s like time bombs. Send them off, let them expire, and BOOM! Insurance Company is on the hook. If only it were so simple. Carriers usually ask for more time. A defense lawyer who has attended any recent Association of Defense Counsel conventions may send an Objection to Formal Offer to Compromise. This pleading, not based on any code section, is a self-serving document listing a multitude of excuses – too early in the case, no expert review, you name it – for why the offer is objectionable.

So be nice. Treat the objection as a request for more time and offer another 60 days to obtain whatever they say they are missing. Offer to waive time requirements for a defense medical exam. When those 60 days are up and the defense hasn't done anything but still wants more time, be nice again. The bad-faith jurors will be able to see the kind, reasonable letters giving more time. Be nice until it's time to not be nice, as Patrick Swayze's Dalton said. You won't know when that is. Talk to a bad-faith lawyer during the process to make sure you've been nice enough for a bad-faith action to stick.

Read the policy

One commercial general liability policy is just like another, right? Not necessarily. In our case it turned out the policy was an odd variant, more akin to a medical malpractice policy than anything else. As an aside, many medical malpractice defense lawyers will take the position that the policy is not discoverable. When debunking this, cite *Irvington-Moore, Inc. v. Superior Court* (1993) 14 Cal.App.4th 733, 739. The case specifically holds an insurance policy is discoverable.

The *assume* trope

The policy had a consent provision. But consent wasn't the issue. It turned out the policy had a wasting provision. The defense did not appear to know this until the policy was produced at our request. Then, in a pivot, the defense argued the policy was not open since we demanded the $1 million policy and the amount available under the wasting provision at the time was slightly less than that. On our side: the verified defense form responses that listed the policy as $1 million with no restrictions and the defense's objections to the offer, listing a multitude of reasons the offer was invalid – but not that the offer exceeded the policy. Against us: an absence of law on this fine point

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(although a bevy of public policy). While a very strong bad-faith position, it is better to not have any part of the analysis subject to discussion.

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Back to our lawyer. Brainstorming the case with a colleague and cogitating on what might be wrong, instead of self-congratulating on all that was done right, worked. An issue was identified and dealt with well before the case's second, bad faith, stage.

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