



CLM 2021 Focus: Diversity, Equity & Inclusion, Management Liability, Medical Malpractice, Product Liability, Professional Liability, Transportation, Claims & Litigation Management Conference
October 19-20, 2021
Chicago, IL

Incomplete Demands: What to do with a Legally Deficient, Statutory Demand?

I. Attack of the Demands

There has been a noticeable rise in the use of policy/time limit demands by plaintiffs. Far too often, these demands are legally deficient and fail to comply with the statutory requirements as set out by the governing jurisdictions (whether by statute or case law). While these demands are often legally deficient, insurers must make the determination as to the appropriate response to such demands. Against the backdrop of such insurer evaluations, the evolving attitudes of various jurisdictions to such demands and, more generally, bad faith, will undoubtedly be a key consideration in evaluating the propriety of the demand.

Understanding the characteristics of policy/time limit demands

While the specific requirements of policy/time limit demands vary by jurisdiction, they largely contain similar general requirements. First, the demand must be within the available limit(s) of the applicable insurance policy(ies). Second, the demand must contain a thorough explanation of the liability and damages that justifies the demand. Third, the demand must provide an unconditional release in exchange for an insurer accepting to demand. Finally, the demand must contain a reasonable period of time for the insurer to respond to the demand.

Policy/time limit demands are intended to facilitate a resolution of an underlying litigation. However, this "facilitation" comes as the cost of creating the threat of bad faith and thus, the potential for exposure to the insurer above policy limits. In addition, these demands can often create a rift between the insured and insurer as a result of their divergent interests, thereby further hindering a reasonable settlement.

Understanding the judicial standard for bad faith

While most jurisdictions may vary on the standards for adjudicating bad faith claims in the context of a policy/time limit demand, there are some broad similarities. When evaluating whether an insurer was appropriate in rejecting a demand, the standard is generally the likelihood of a plaintiff's verdict and a resulting award in excess of the policy limits. This is typically a question of fact for a factfinder (jury). In conducting this evaluation, the factfinder will examine what the insurer knew and the efforts it undertook to evaluate these questions. Notably, an insurer is not guilty of bad faith simply because of the outcome. The majority rule is that the insurer must give equal consideration to the insured's interests when evaluating a settlement opportunity.

II. Rise of legally deficient policy/time limit demands

Understanding the characteristics of incomplete/insufficient demands

Incomplete/insufficient demands are typically in direct contravention of one or more of the standard requirements of a "proper" policy/time limit demand. First, such demands may not be within policy limits. Second, the demands contain limited or no explanation of liability and/or damages. A proper demand should contain a detailed account of the circumstances of the underlying litigation and be supported by accident/crash reports, medical records, and other documentary evidence. The explanation found in an insufficient demand is limited to a basic recitation of the known facts and an assertion of liability without any support.

Third, the release offered in such demands is limited in scope and does not fully absolve an insurer from further liability if the demand is accepted. Finally, the insufficient demand contains an unreasonable deadline for acceptance of that demand that is outside what is statutorily prescribed (for example, 48 hours instead of 30 days).

III. Prevailing judicial attitudes regarding bad faith

Florida

In Brink v. Direct Gen. Ins. Co., 2021 WL 129931 (M.D. Fla. Jan. 14, 2021), in denying insurer's MSJ, Court held insurer could be found to have acted in bad faith by failing to inform its insureds of the time limit demand and failing to respond to said demand.

Georgia

In Am. Guarantee & Liab. Ins. Co. v. Liberty Surplus Ins. Corp., 835 F. App'x 447 (11th Cir. 2020), the Court held under Georgia law, the safe harbor is not available when the insurer responds to a settlement demand by attaching conditions within its own control.

Colorado

In Yale Condominiums Homeowner's Association, Inc., Plaintiff, v. American Family Mutual Insurance Company, S.I., Defendant, 2021 WL 1222518 (D. Colo. Apr. 1, 2021), the Court established that "industry standards" determine the reasonableness of an insurer's conduct. The Court added, "[u]nreasonable conduct cannot be established by virtue of a mere disagreement of value between the insured and insurer."

California

In Planet Bingo LLC v. The Burlington Ins. Co., ---Cal.App.5th --- (March 18, 2021), the Court held the failure to settle based on pre-suit offer to settle subrogation claim demanding amount in excess of policy limits supported bad faith claim based on opportunity to settle within policy limits. The Court found "...the existence of an opportunity to settle can be shown by evidence other than a formal settlement offer."

The Court continued by pointing out where a demand in excess of limits is made, an insurer cannot assume there is no opportunity to settle within the policy limits. Particularly in cases where the insured's liability could exceed limits, the insurer should determine whether opposing counsel was trying to settle within limits.

IV. Considerations when approaching incomplete/insufficient demands

As judicial attitudes continue to evolve as to bad faith and the corresponding treatment of incomplete/insufficient demands, an insurer is faced with a myriad of potential options to respond to the demand. One potential approach is for the insurer to treat the demand as if it was legally sufficient. In other words, all demands, regardless of sufficiency, are evaluated and responded to appropriately. The sufficiency of the demand is an issue to be addressed, if appropriate, as part of the prepared response to such demands.

Typically, the optimal protocol should include the following:

- 1) Thorough investigation throughout the life of the case;
- 2) Timely documentation of the claim file with pertinent information;
- 3) Prompt and timely communications with the insured (preferably written);
- 4) Seeking the advice of counsel (defense/coverage/monitoring) and acting on said advice (when appropriate);
- 5) Obtaining a timely and complete evaluation (preferably written) from counsel (when appropriate);

For an insurer, the effective and efficient implementation of these considerations into a formal process can be an important and effective tool in addressing policy/time limit

demands. By synthesizing a process that treats all policy/time limit demands as legally sufficient, an insurer can help to avoid being the victim of the ambiguity and shifting judicial attitudes on bad faith.