



2017 CLM & Business Insurance Construction Conference  
October 9-11, 2017  
San Diego, CA

## Handling the Policy Limits Demand

This presentation will focus on protecting the policy! Plaintiffs are always making efforts to “open a policy.” Plaintiffs argue that any demand within limits that is rejected by a carrier exposes that carrier, and not the insured, to extra contractual exposure. Plaintiff’s argue that the carrier is in far more superior position, has a far greater understanding and valuation of a loss than an insured. Thus, if the carrier fails to take an insured out of harm’s way, when the carrier has an opportunity to do the same, and the result is in excess of the limits – the carrier has rejected that demand (again, within limits) at its own peril.

Conversely, carriers argue that a policy is NOT simply opened by making a demand within limits that is rejected – that a carrier is exposed to extra contractual damages if that carrier fails and refuses to pay a claim or demand within policy when it has sufficient information to just the same.

### I. Identifying a limits demand (By Adjuster)

This seminar will educate both the claims professional and the insurance defense counsel on how to properly, under the CA Fair Claims Act, and decisional law, digest, react and respond to a third party demand for an amount up to the limits of the policy. The claims professional and insurance defense counsel will learn what is a “limits” demand, interacting with the adjuster, and defense counsel, the third party, and the insured. The claims professional and legal counsel will learn how to identify a limits demand - the adjusters handling and interacting with the third party demand for the limits of the policy. Education will be focused on the timing in pre-litigation demand made to the adjuster, communication with counsel, understanding the force and effect. Consideration of other plaintiff(s)/claimant(s) perform of investigation, determine applicable Statutes of Limitations, determine per person/ per occurrence VS per occurrence/ general aggregate and tendering the limits / how to protect carrier and insured.

Identifying a limits demand can take many forms as it applies to the carrier:

- Timing

How to address the demand based on the timing. If it is right at filing, on the eve of trial; If early in the case do you have “sufficient information in which to make a meaningful determination?” Defining what that means. How it applies in this setting re ethical requirements owed to the client (and potentially to the 3<sup>rd</sup> party). Do you have to make an offer? What should the file say re valuation, what? Why, value, basis, legal input.

- Carriers

How to evaluate the case, based on what? What the file should include

- Umbrella policies – force and effect on limits demands

Is it an actual policy limits demand? What are the limits? Have we fully disclosed all coverage? Do we have to?

- Potential “other” claimants

Is it an actual valid limits demand? Are there other potential claimants out there? Force and effect of the same on the policy

- Identifying the total limits, potential prior exhaust inquiry/confirming the same

Is it an actual limits demand? Was there a prior loss within that policy period? Have you exhausted all efforts to identify coverage via the client and broker?

- Consideration of other related issues

## II. Identifying a limits demand (By Defense Counsel)

Defense counsel should not label a limits demand as a “policy limits demand”. If defense counsel is identifying a limits demand on the defense they need to understand the force and effect of the same in a future 3<sup>rd</sup> party bad faith claim, exactly what is a limits demand, investigating the limits demand etc., By having the basic understanding of what the demand for the limits is it will be easier to also understand the demand within the limits – or the willingness to understand that a demand for less than the limits – is also a “within” limits demand. On the defense counsel side when understanding the limits demand having a sense of urgency will dictate higher actions. For example, the higher urgency defense counsel has for written discovery, the higher chance action will be taken to fully understand the force and effect a demand and the exposure related to the same. If there is not an urgency on the front end, defense counsel will likely place the carrier in a difficult if not impossible position in evaluating the limits demand, having sufficient information in which to make a decision. The higher urgency defense counsel has for the use of investigators, the higher chance meaningful action with regard to valuation will be taken. The higher urgency defense counsel has for an early deposition(s), the higher the chance meaningful action will be taken as to the facts and circumstances associate with liability and damages and the value and evaluation of the same. The higher urgency defense counsel has for immediate retention of experts, background investigation, the higher chance for meaningful action as to the necessary valuation. The higher urgency defense counsel has for an IME, the higher chance action will be taken.

Identifying a limits demand from the attorney perspective – what can the attorney tell and NOT tell the carrier re handling, exposure and client demands:

- Communication with client

Client demands that the carrier pay the limits – force and effect and addressing the same. Disclosure of the demand to the carrier?

- Role of Counsel in this conflicted position

Is there an actual conflict? Plaintiff’s counsel often argues that there is such conflict.

- Timing

How to address the demand based on the timing. If it is right at filing, on the eve of trial; if early in the case do you have “sufficient information in which to make a meaningful determination?” Defining what that means. How it applies in this setting re ethical requirements owed to the client (and potentially to the 3<sup>rd</sup> party). Do you have to make an offer? What should the file say re valuation, what? Why, value, basis, legal input.

- Carriers

How he or she can or will evaluate the case, based on what? What the file should include – demand that the carrier has input regarding valuation.

- Umbrella policies – force and effect on limits demands

Is it an actual policy limits demand? What are the limits? Have we fully disclosed all coverage? Do we have to?

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### **III. Force and Effects of Limits Demand (By Counsel)**

Consider the size and impact of every case in conjunction with the policy limits from day one – let the carrier know if there is a potential that the underlying facts and circumstances, with the right attorney, in the right venue, based on the available limits could be considered a policy limits case.

If counsel sees an issue at the outset – move!!! Policy limits demands become a bigger issue in bigger cases. Defense counsel, at the outset of a large loss, must take immediate action to commence discovery and get as much information as he/she can in order to put counsel in the best position to digest and evaluate an early limits demand. The force and effect of a limits demand by counsel focuses on timing, communication and response/recommendation, basis of opinion, and post expiration of demands. The timing of the counsel depends on the impact of the demand being before completion of discovery and expert designations. The communication and response/recommendation by counsel; is the communication with the carrier and the communication with the client, ruling out other insurance policies and excess, insufficient information to make informed decisions, obligation of counsel to make informed decisions, obligation of counsel to make informed decision based on the facts and law.

### **IV. Force and Effects of Limits Demand (By Adjuster)**

Same analysis as above. A carrier has to set reserves. It is important to look at all aspects of a case when setting reserves. Each case has a different value every day based on the discovery and facts learned as it relates to comparative fault, pre-existing injury or damage, future case, gravity of facts and circumstances. The carrier must be cognizant that he/she could expose the policy to extra contractual exposure if the carrier does not meaningfully move on investigating a loss.

Carrier should direct counsel to get to discovery asap and understand the exposure and need to get information on an expedited basis in order to be prepared for a short leash demand. When handling a policy limits demand the force and effects of a limits demand is done differently by defense counsel than that of insurance adjusters. There is great risk in not being prepared for a limits demand as it relates to the underlying file and extra contractual exposure.

When dealing with the force and effects of a limits demand by the adjuster focus on immediate internal investigation. Review of the police report, review of all documents from adverse, articulating a request as to all needed information from adverse early to place the carrier in a position to properly evaluate the loss – i.e., Health Insurance Portability and Accountability Act of 1996 (HIPPA) release, witnesses and contacts, photos, list of all medical providers, details re all incurred medicals, all paid, unpaid medicals, liens, emergency room (ER) records, paramedic records, potentially an independent medical examination (IME). Consider early retention and timely retention of counsel, communications with insured, timely response, and post expiration of demands. When the adjuster is focusing on the timely retention of counsel this is by the coverage counsel and/or defense counsel. The adjuster will then communicate with the insured in order to notify all of the parties. The adjuster will have a timely response to ensure a timely request extension, accept demand, and/or communicate reasoned offer. The adjuster will then talk into consideration the post expiration of the demands: the demands over the policy limits and refusal to mediate without offer over limits, continue timely investigation, communicate reasoned offer, and Plaintiff's later return to policy limits demand or below; proceed to trial with Plaintiff attempting an excess judgement; or settlement in excess.

## **V. Hypothetical Application**

Plaintiff Counsel sends letter to carrier when claim is still in non-litigated status and asking for disclosure of "policy limits". Adjuster has certain CA Fair Claims requirements. Carrier CANNOT unilaterally disclose the information. Carrier has obligation to confer with the client re disclosure and why – force and effect of disclosure without authority; why and potential negative effect on the carrier – how the carrier can get around the need to disclose in comparisons to the risk and exposure to the carrier (say small \$25k limits, well in excess of exposure and failure to get authority).

How to document the same communication to the client/or efforts re same in file and then the disclosure – what can and should be disclosed (not underwriting).

Plaintiff files suit and serves. Carrier retains defense counsel. Plaintiff immediately voluntarily sends medical records suggesting a traumatic brain injury – guaranteed conveyancing solutions (GCS) 15; questionable loss of consciousness (LOC); computed tomography (CT) of head at emergency room (ER); treatment for headaches and anxiety – from slip and fall at age 30 and \$20,000 in meds 6 months post day of life (DOL); and loss of earnings. At the same time Plaintiff sends a demand letter to carrier asking for "policy limits" and deadline of 3 weeks. The policy limits are \$1 million. Counsel immediately communicates the demand to carrier confirming demand is for "policy limits" (not a policy limits demand). Counsel also communicates the demand to client. Counsel confirms to both that it will proceed with immediate investigation and seek an extension to demand. Counsel propounds written discovery; subpoena of records; social media search; background investigation; subroa, recommendation of experts including neuro/neuropsych to review records. In advance of the deadline to respond to the demand, counsel provides reasoned analysis based on facts and law to client and carrier. Counsel also provides draft proposed responded letter confirming insufficient information to make an informed decision and proposed response (e.g. counter offer). Counsel communicates that it has insufficient information to evaluate the case at the level of the demand. Counsel is clear as to what he or she has, does not have, need for etc. at this infantile stage re the demand and evaluation.

Similarly, the carrier internally identifies the valuation of the case based on specifics re his/her own internal investigation, retention of counsel, documents and information gained from counsel, force and effect of the same and counsel's overall valuation of the case.

Carrier can/should always consider an offer in conjunction with the demand based on the information available to substantiate his or her position re value.

## **VI. Handling the Small Limits Policy**

Carriers with small limits and minimal early damages always stand the risk of extra contractual damages for failure to make a timely payment on a reasoned demand within limits – remember that the demand does NOT HAVE TO BE for the limits (\$25k) – if the demand is for \$15k, that is considered a demand within limits. Thus, both the carrier and the defense counsel must be cognizant of risks for failure to resolve a case early that has “potential” for future damages, surgery, exposure that could open a policy at a later date. The limited policy and how to handle the small limits policy – i.e., 25k, 100k, 300k, and 500k. How to handle the small limits policy by immediate investigation, tendering limits, and negotiating without rejecting the demand. Calculated risks and evaluation of same to avoid extra contractual exposure.