2020 CLM Focus Conference
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Virtual Conference

The Risks Inherent in Delayed Offers to Settle a Catastrophic Case

The Duty to Settle

Insurers who are defending their insureds in third-party litigation, have a duty of good faith to timely respond to all settlement offers on behalf of their insureds. The duty of good faith is different from state to state. In most cases, plaintiffs counsel makes an offer to settle within policy limits. In many cases, the offer is time limited. Sometimes the opportunity to settle comes pre-suit, sometimes early in the suit and other times mid-suit.

An insurer, defending its insured, must timely respond to a policy limit demand or risk having the insured either settle or proceed to verdict resulting in a settlement or a verdict in excess of available policy limits. Then, plaintiff and the insured enter into an agreement, sometimes referred to as a Covenant Not to Execute, in which the plaintiff agrees not to execute the judgment or settlement against any of the insureds assets, other than the liability insurance policy. The insured assigns to the plaintiff all rights and responsibilities under the liability insurance policy. The plaintiff then pursues a claim (sometimes in a supplemental proceeding and sometime in a separate lawsuit) for bad faith claim handling. Standing in the "shoes" of the insured, the plaintiff, as assignee of the insured, seeks the full amount of the settlement or verdict, irrespective of the policy limit. Thereby, plaintiff is seeking to recover in excess of the policy limit, seeking extra-contractual damages based upon the insurers breach of the duty of good faith claim handling, premised upon the insurers failure to settle the case within policy limits when presented with the opportunity to do so.

However, there are growing instances of plaintiffs waiting until mediation to declare that plaintiff is no longer willing to accept policy limits, even though an offer to settle within policy limits has never been made. Plaintiffs then either demand an amount in excess of the policy limits to settle or proceed to verdict and seek to recover from the insurer the entire verdict, irrespective of policy limits.

***Powell* Rule:**

The Third District Court of Appeals in *Powell v. Prudential Property & Casualty Insurance Company*, 584 So.2d 12 (3rd Dist. Fla. 1991), held that an insurer has an affirmative duty to initiate settlement negotiations, where the insured's liability is clear and the claimant's damages serious, such that a

judgment in excess of the policy limit is likely and that a settlement demand is not a prerequisite to bad faith – breach of duty to settle.

Does an insurer have the duty to initiate settlement negotiations where its insured's liability is clear?

The issue of whether an insurer has an affirmative duty to initiate settlement negotiations where its insured's liability is clear, and the claimant's damages are so serious that a judgement in excess of the policy limit is likely has not been decided by many courts. Plaintiffs will rely on *Powell* Rule which arose from the Florida Appellate Court decision of *Powell v. Prudential Property and Casualty Insurance Company*, 584 So.2d 12 (3rd Dist. Fla. 1991), which holds that an insurer has an affirmative duty to initiate settlement negotiations where the insured's liability is clear and the claimant's injuries are serious such that a judgment in excess of the policy limit is likely.

The duty to initiate settlement negotiations arises when the opportunity to settle is clear

In *First Acceptance Insurance Company of Georgia v. Hughes*, 305 Ga. 489 (2009), the Georgia Supreme Court addressed the issue of whether an insurer's duty to settle arises when it knows or reasonably should know that a settlement within the insured's policy limit is possible or *only* when the injured party presents a valid settlement offer to settle within the insured's policy limits. In holding that the offer to settle within the policy limit is a prerequisite to a claim for tortious breach of contract (failure to settle) or breach of contract, the Court explained that there was sound reasoning for conditioning the duty to settle upon presentation of a valid offer to settle, stating:

> If an offer to settle within the policy limit is not a prerequisite to a tortious failure to settle suit, each insured will attempt to prove the essential elements of his case – that the insurer could have settled the case within the policy limit by introducing after the fact testimony of the injured party that he would have settled within the policy limit if the insurer had offered the limit or engaged in aggressive settlement negotiations. This testimony – what the injured party would have done had the facts been different – would be unreliable because it is speculative. In addition, this testimony in a number of cases might be the result of collusion between the insured and the injured party and would therefore be unreliable because it would self-serving. *Delacey v. St. Paul Fire and Marine Insurance Company*, 947 F.2d 1536, 1553 (11th Cir. 1991).

At a minimum, in a negligent or tortious failure to settle case, the injured person (on an assignment) or insured must show that settlement was possible – that the case could have been settled within the policy limit and that the insurer knew or reasonably should have known of this fact. *Kingsley v. State Farm Mutual Automobile Insurance Company*, 353 F.Supp. 2d (N.D. Ga. 2005). Said differently, to find liability for refusal to settle, there must be something the insurer was required to refuse. *Id.* Obviously, a demand within the policy limit is the best evidence. *Id.*

In the Texas Supreme Court case of *Phillips v. Bromley*, 288 S.W.3d 876 (2009), the Court held that in order for a duty to settle to arise, there must be coverage for a third-party claim, a settlement demand within the limit and reasonable terms such that an ordinarily prudent insurer would accept the settlement demand, when considering the likelihood and degree of the insured's potential exposure for an excess

judgment. Only when those conditions coincide and the insurer negligently fails to settle, will the insurer be liable for the entire amount of the judgment. *Id.*

Some courts refuse to recognize a duty until an offer is made

Kansas law is also instructive. In *Wade v. Emcasco Insurance Company*, 483 F.2d 657, 2007 U.S. App. LEXIS 8227 (10th Cir. 2007) (applying Kansas law), the Court explained that the cause of action for failure to settle is meant to protect the interest of the insured by requiring the insurer to conduct litigation, including settlement negotiations as if the insurance contract had no policy limit. It is not meant to create an artificial incentive for third-party claimants to reject otherwise reasonable settlement offers that are within the policy limits. That would turn the cause of action for failure to settle on its head, by holding an insurance company liable where it eventually offered to settle a claim for the policy limit, where the claimant rejected the offer precisely to manufacture a lawsuit against the insurer for bad faith refusal to settle.

Some courts look to the conduct of the insured and of the plaintiff

As to Florida law, post-*Powell* Appellate Court decisions, as well as recent dissenting opinions by the Florida Supreme Court support arguments for why the focus of a determination of bad faith should not be solely on the insurer's conduct – that the injured person and the insured's conduct should also be considered and that where no reasonable juror could find that the insurer acted in bad faith, summary judgment should be granted, as a matter of law. *Berges v. Infinity Insurance Company*, 896 So.2d 665, 680 (Fla. 2004); *Valle v. State Farm Mutual Auto Insurance Company*, 2010 U.S. Dist. LECIS 27735 (S.D. Fla. 2010) (summary judgment for the insurer because no reasonable juror could find that State Farm acted in bad faith where the insurer offered to settle and the claimant refused the offer); *Novoa v. Geico Indemnity Company*, 542 Fed. App. 794 (11th Cir. 2013) (summary judgment for insurer because insured failed to show a causal connection with insurer's conduct and claimed damages – where the insured declined every offer Geico made and never made a settlement proposal); *Welford v. Liberty Insurance Corporation*, 190 F. Supp. 3d 1085 (N.D. Fla. 2016) (summary judgment for the insurer because with consideration of insured's conduct, (misrepresenting her insurance coverage), no reasonable juror could conclude that the insurer's conduct caused the excess verdict); *Barnard v. Geico General Insurance Company*, 2011 U.S. Dist. LEXIS 568, affirmed, 448 F. App'x 940 (11th Cir. 2011), (summary judgment granted for the insurer, in part because it was clear that the insurer made every attempt to settle for the policy limit despite the injured party's inexplicable evasive behavior); and *Novoa v. GEICO Indemnity Company*, 542 F. App'x 794 (11th Cir. 2013)(summary judgment for the insurer finding it hard to believe how the insurer acted in bad faith when it offered to pay everything it possibly could under the policy).

And recently, in the Florida Supreme Court decision of *Harvey v. GEICO Insurance Company*, 259 So.3d 1 (2018), wherein the Supreme Court reversed the Appellate Court's ruling in favor of the insurer and remanded the case, in a dissenting opinion, Justice Canaday criticized the lower Court for failing to consider the insured, the claimant, and the claimant's attorney's conduct and relying solely on the insurer's conduct, relying on *Boston Old Colony,* wherein the Florida Supreme Court described an insurer's duty to its insured as a general duty to use the same degree of care and diligence as a person of ordinary care and prudence would use in the exercise of the management of his or her own business and enumerated certain specific obligations that an insurer is required to fulfill to meet that duty, stating:

> Good faith obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured

> of any steps that he might take to avoid same. The insurer must investigate the facts, give fair consideration to a settlement that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.

In *Old Boston Colony*, the Florida Supreme Court, considered the claimant's conduct, along with the insurer's conduct, and concluded as a matter of law, that the insurance company could not be responsible for bad faith failure to settle, where the claimant refused to settle for the policy limit, because the insurer fulfilled all of its good faith obligations, of investigating, advising, and warning and was ready and willing to settle for the policy limit.

The above is a sample of the case law that supports that an insurer should not be found to have breached its duty to settle when there was no reasonable opportunity to settle or a settlement demand within the policy limit has not been shown.

Available defenses to claims of bad faith

Insurer should assert multiple affirmative defenses, including the failure to state a cause of action to the Complaint. When failure to state a cause of action is raised affirmatively, Insurer can now move to dismiss each count for failure to state a cause of action to address the issue of whether Insurer had an affirmative duty to initiate settlement negotiations. In the Motion to Dismiss, emphasize that Insurer is seeking a ruling solely on the issue of law, with the intent that the Court will not consider any evidence so to convert the motion into a summary judgment motion, when ruling.

Consider settlement

Do not expect that the Court will dismiss all counts of the Complaint on the issue of whether a duty was owed. However, if the Court dismisses one or more of the counts, it will narrow the theories of recovery and importantly, denials create issues for appeal.

Depending on how the Court views the Motion to Dismiss each count of the Complaint, upon completion of written and oral discovery, move for summary judgment on each count, asserting that the damages claimed were neither caused by nor resulted from insurer's delay in offering the policy limit demand; rather, they were caused by opposing counsel's failure to make a policy demand, failure to accept the policy limit when offered, and decision to proceed to trial. The Motion for Summary Judgment, unlike the Motion to Dismiss will be supported by documents produced in discovery and deposition testimony. Again, it is also possible that the Court will convert the motions to dismiss into motions for summary judgment if opposing counsel adds facts to the motion to dismiss outside of the pleadings. Should that occur, the insurer will have only one attempt for a dispositive ruling on each court, rather than two.

Do not expect that the court will grant summary judgment on all counts. Therefore, if the case cannot be resolved for a reasonable settlement, the case will proceed to trial before a jury. However, while the Motions to Dismiss and Motions for Summary Judgment are pending, we recommend continuing settlement negotiations.

Damages do not come from the breach

As to the negligence count, all damages directly traceable to the wrong and arising without an intervening agency are recoverable. *Erie Insurance Company v. Hickman*, 622 N.E.2d 515 (1993). The measure of damages for a breach of contract are limited to those actually suffered as a result of the breach which are reasonably assumed to have been within the contemplation of the parties at the time the contract was formed. *Id.* Punitive damages are recoverable for a tortious breach of contract or bad faith. *Id.* Applying those general rules, it is possible that the Court, when ruling on summary judgment, based upon the facts which follow, may find that the excess verdict was not caused by insurers conduct.

Conclusions & Recommendations

Most courts require clear evidence that there was an unequivocal offer to settle within policy limits before allowing a claim for bad faith or for damages in excess of the policy limit. However, there is a trend of courts requiring insurers to make good faith offers under circumstances in which liability is clear and the damages are clearly in excess of available limits.

Recommended responses:

1. Respond to every demand
2. Consider making an ___ offer or explain why no offer is currently forthcoming
3. Solicit a demand
4. Document your claims process
5. Assert affirmative defenses
6. Always be negotiating