



2019 Construction Conference
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Crunch Time: Handling the Policy Limits Demand

I. Identifying a Limits Demand

By Insurance Adjuster

We will be looking at demands within limits from the insurance carrier perspective. Issues that the carrier needs to take into consideration include coverage issues related to the loss, representation, costs of defense, case law in support of insurers on this issue, a finding in excess of limits, risk, trial counsel, having sufficient information to make a meaning decision and evaluation. The carrier may consider retaining a coverage attorney to review the policy, to review the underlying handling re initial notice, diligence of the carrier and counsel; strengths and weaknesses of the policy, opening of the policy and need / justification for further investigation. Carrier and coverage counsel need to look at the initial file handling, request for information, medicals, statements, police report, medical bills and see if the carrier has sufficient information to make a meaningful decision.

Identifying a limits demand by adjuster is determined by the timing, identifying the limits (exhaust inquiry), and the consideration of other plaintiff(s)/claimant(s). The timing in pre-litigation demand made to the adjuster. The timing in litigation demand, communicated by counsel. Identifying the limits (exhaust inquiry) in pre-litigation and in-litigation. In pre-litigation the duty to seek authority from the insured and in-litigation discovery responses reveal limits. Consider 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:

- Timing
- Identifying the limits exhaust inquiry
- Consideration of other plaintiff(s)/claimant(s)

By Defense Counsel

We will be looking at demands within limits from the defense attorney's perspective. Issues that the defense attorney needs to consider include: the tri-party relationship between the carrier and the client. The client's demands and concerns re requesting the carrier fund any settlement within limits. Conversely, the carrier, from a conservative perspective, wants the analysis to conclude that the request is premature, not an excess finding. Adverse counsel now argues that a limits demand that is rejected places defense counsel, within the tri-party relationship, in a conflict. In short, that counsel's failure to recommend anything within limits is a conflict and NOT in the insured's best interests. We will discuss the defense attorney's ethical obligations to both the carrier and the insurer in this setting and how to manage expectations on both sides.

We will also be addressing coverage issues related to the loss, representation, costs of defense, case law in support of insurers on this issue, a finding in excess of limits, risk, trial counsel, having sufficient information to make a meaning decision and evaluation. The carrier may consider retaining a coverage attorney to review the policy, to review the underlying handling re initial notice, diligence of the carrier and counsel; strengths and weaknesses of the policy, opening of the policy and need / justification for further investigation. Carrier and coverage counsel need to look at the initial file handling, request for information, medicals, statements, police report, medical bills and see if the carrier has sufficient information to make a meaningful decision.

Identifying the limits demand can also be done on the defense counsel side. Defense counsel should not label a limits demand a "policy limits demand". If you are identifying a limits demand on the defense counsel side, you need to understand what a limits demand is. By having the basic understanding of what the demand for the limits it will be easier to also understand the demand within the limits – or the will to understand the demand less than the limits.

On the defense counsel side when understanding the limits demand having a sense of urgency will dictate higher actions. For example, the higher urgency one has for written discovery, the higher chance action will be taken. The higher urgency you have for the use of investigators, the higher chance action will be taken. The higher urgency you have for an early deposition(s), the higher chance action will be taken. The higher urgency you have for immediate retention of experts, the higher chance action will be taken. The higher use you for an IME, the higher chance action will be taken.

Force and Effects of Limits Demand

1. By Defense Counsel

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

2. By Insurance Adjuster

When handling a policy limits demand the force and effects of a limits demand is done differently by defense counsel and by insurance adjusters. When dealing with the force and effects of a limits demand by the adjuster focus on the 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.

II. Application

Hypothetical Application

Plaintiff Counsel sends letter to carrier when claim in non-litigated asking for disclosure of “policy limits”. Adjuster communicates request to insured but does not get permission to disclose policy limits. Adjuster relays the same. Plaintiff files suit and serves. Carrier retains defense counsel. Plaintiff immediately voluntarily sends medical records suggesting a traumatic brain injury – GCS 15; questionable LOC; CT of head at ER; treatment for headaches and anxiety – from slip and fall at age 30 and \$20,000 in meds 6 months post 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; sub-rosa, recommendation of experts including neuro/neuropsychic to review records. In advance of deadline to respond to 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. counteroffer).

Handling the Small Limits Policy

How to handle the small limits policy with 25k, 100k, 300k, and 500k. How to handle the small limits policy by immediate investigation, tendering limits, and negotiating without rejecting the demand.

III. Time Limit Settlement Demands and 998 Offers

Time Limit Settlement Demands

Time limited demands can come in many forms. Further, the same apply in any kind of case and/or setting. The carriers that handling construction need to be aware of limits demands and exposure re direct insureds, wraps, and OCIPS. The time limit

demand can be orally via a telcon, can be orally at a mediation, can be via an email, via formal documents and offers.

998 Offers

California Code of Civil Procedure 998

Either party can make an offer to its opponent and the opposing side can accept or reject the offer or it expires. The primary purpose of section 998 is to encourage the settlement of disputes prior to trial or arbitration.

There are many requirements for a valid 998 offer. The offer must satisfy three principles: (1) it must be in writing; (2) it must state the terms and conditions of the proposed judgement or award; (3) it must contain a provision allowing the offeree to accept the offer by signing a statement to that effect.