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The Fine Art Of Deciding Not To Settle Within Policy Limits: Part Two

In Part One of this post, we examined a hypothetical time-limit settlement demand against an insured for policy limits and contemplated the decision not to pay the demand. In Part Two, we examine the specifics behind an insurer's decision not to pay a time-limits demand.

In the first half of this post, we saw that the decision not to pay must be an informed and deliberate one. Here are some of the nuts and bolts to that decision-making process:

Err on the Side of Paying

This may strike you as an awfully odd first element of the decision not to pay a policy limits demand — actually leaning toward paying it — but stay with me for a second. If you follow this rule first and foremost, all of your decisions not to pay a policy limits demand are going to look much, much better.

Perhaps it's best to explain this one through the use of some numbers, looking back at the hypothetical policy limits demand of \$300,000 we set up in Part One of this post. If the case is not worth more than \$150,000 after research and analysis, that is one thing, and a refusal of the demand of \$300,000 is most likely supportable. But if your considered judgment is that the case is worth \$285,000, for example, be wise: protect your insured and pay the \$300,000. If your reasoning leads you to believe that there is a 70–80% chance of a verdict of \$350,000 or more, pay the \$300,000 and get your insured's name on a release.

Never flirt with disaster on the close ones. It is not worth the downside. Enough said.

Have a Thorough, Reliable, Claims Valuation/Vetting Process

This will mean everything to you if you pass on a policy limits demand and are later faced with a verdict in excess of policy limits. If you are going to successfully defend a bad faith claim based on the excess verdict, a thorough, valid, reliable case valuation process will oftentimes save you from a follow-on bad faith verdict. Without one, you are likely facing an uphill and most likely unwinnable battle.

What comprises a thorough, reliable, claims process? Investigation. Analysis. More Investigation. More Analysis. The basic blocking and tackling is what we are talking about here — recorded interviews, medical records, police reports, wage and employment records, medical exams, depositions, discovery, etc. The more information considered, the better.

Legal research into the liability aspects of the case, jury verdict research from the applicable venue, and similar case-valuation research is also extremely helpful. If the venue you are in routinely shows verdicts in the high six-figure amounts for multiple fracture automobile accident cases, refusing to pay the demand of \$300,000 is obviously going to be much harder to justify.

Do the homework. And make the decision to pay or not to pay the limits demand depending on what your homework shows.

Thoughtful deliberation by more than just a single claims professional is crucial as well — collective wisdom and decision-making is a great help to successful bad faith defense. For an extra layer of protection, especially in high value cases, it never hurts to ask independent, outside counsel for a complete evaluation of liability, damages, and a case valuation. It is time and money well spent.

Document Your Thorough, Reliable, Claims Valuation/Vetting Process

The best and most intricate case workup and evaluation will be of no use to you in a bad faith case if you cannot reconstruct the thought processes of your claims professionals leading up to the decision not to pay a policy limits demand. All of the major aspects of the process should be reflected in either the claims file and/or the claims notes for use at a later time in the event of an excess verdict.

The settlement negotiations themselves should likewise be documented, including notes following telephone calls and correspondence from your counsel to the Plaintiff's counsel declining the demand and, more importantly, explaining the rationale for declining the demand, whether it be because liability is questionable or the value of the injuries to not justify, based on your research, the amount of the settlement demand.

If you feel the demand is premature because, for example, depositions have not yet been taken in the case, spell that out in your negotiations and, if appropriate, ask for additional time or to hold negotiations open. If there is missing information you need from the Plaintiff or his lawyer, document making requests for that information, as well as any failures on the part of your counterparts to provide that information, and how that impacts your ability to evaluate the demand.

In other words, leave a very good trail of breadcrumbs.

Conclusion: Is It Better to be Right or Reasonable?

There is likely no tougher decision in the insurance claims business than the decision of whether or not to pay a policy limits settlement demand on behalf of an insured. A great deal rides on making the right call. So the process used in arriving at that decision is of utmost importance.

Whether it is better to be right or reasonable is a trick question — of course it is always best to be both. When it comes to the decision not to pay a policy limits settlement demand, however, you cannot always be right. But you can always be reasonable, by sticking with the right process, and that will keep you out of the worst kinds of trouble.



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