Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
June 2013 Issue

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Insurance strategies for mediation and settlement

A look at the fundamental insurance issues that arise at mediation

Insurance is the engine that drives the settlement. In 95 percent of the mediations I have participated in over the years, insurance coverage, bad faith, duty to defend and insurance-defense issues are frequently the catalysts for settlement. The bottom line is that insurance controls the settlement dynamic, and the ultimate decisions regarding the timing and amount of settlements are almost always made by insurance companies.

In light of these undisputed facts, one would imagine that all plaintiffs' attorneys would be experts on insurance coverage principles. After all, if insurance companies are ultimately paying your mortgage or childrens' college fund, one should understand how insurance works. However, in my experience, most plaintiffs' lawyers do not have anywhere near the level of expertise they should have in order to meaningfully negotiate with insurance companies at mediation.

Ultimately, a plaintiffs' lawyer with an extensive understanding of insurance law and insurance principles is an extremely powerful negotiator. A significant factor in settlement at mediation is understanding the psychology of insurance carriers. Further, in many circumstances, insurance coverage issues will make or break a settlement. Being able to specifically address insurance coverage issues – perhaps even by way of a separate mediation brief on insurance issues – can be dispositive to settlement.

This article will survey and summarize some of the fundamental insurance issues that arise at mediation and impact on settlement of personal-injury cases. Further, this article will provide specific advice and strategies for dealing with common insurance issues. It is my hope that the article will provide a roadmap for plaintiffs' lawyers to settle more cases at mediation.

Timing of mediation

The first issue is when is the best time to conduct mediation and try to settle cases involving insurance companies. Every plaintiff's attorney dreams of the "early mediation," that settles a case with minimal effort. But it is extremely rare for an insurance company to ever pay top money for settlement without going through the litigation process. In light of this reality, in order to have a meaningful mediation yielding maximum value, the mediation should, in virtually every case, be held at the later stages of litigation.

Insurance adjusters deal with facts, not potentialities. Most carriers will not provide a true bottom line until they have completed all discovery and have conducted an analysis of the experts on the other side. If your case does have experts, the most meaningful mediations are those where the actual expert's reports are prepared and attached to the mediation brief. Even if those experts have not yet been deposed, if their opinions are set in stone and are communicated to the other side, the carrier will know what that expert witness will say at trial and can adjust its analysis of the case accordingly.

Conversely, if a mediation is held too early, the mediation brief will merely consist of arguments and contentions and will not be able to incorporate factual evidence and documents. That will not be persuasive to the line adjuster or even supervisor, who must always justify the payment of money with detailed analysis, frequently with reports from defense counsel and defense experts. The adjuster must "paper the file" or their judgment in paying a settlement will be later questioned.

In addition, the carrier and defense counsel must put the plaintiff's lawyer and plaintiff "through the paces." There is no free lunch for plaintiffs. Moreover, many plaintiffs and their counsel get impatient or even give up during the lengthy litigation process. Insurance companies understand this psychology, and seek to exploit it.

Ultimately, however, it is fundamental that "trial dates settle cases." Savvy trial judges know this, and will frequently manifest it in denying motions to continue trial. This principle is borne out by the many settlements that are literally achieved on the "courthouse steps," or on the eve of trial. A pending date with 12 jurors puts enormous pressure on both parties. Plaintiffs suddenly get very realistic in their expectations. Insurance carriers revert to the true, inner self – being risk averse and conservative.

A corollary to this fundamental rule is that the most effective way to achieve settlement is if plaintiff's counsel has extensive trial experience. One of the key questions that an insurance company will ask is whether the plaintiff's lawyer or law firm has a track record of conducting actual trials in front of a jury. If the plaintiff's lawyer or firm lacks a track record of jury trials, the defense insurer will feel no fear or pressure of an adverse trial outcome, and the case may not settle.

Settlement is a powerful weapon in the arsenal of the trial lawyer. It is one of the true ironies of litigation that the best settlements come from the lawyer who is an expert at trials and has prepared his case for trial. The trial lawyer who prepares his case for trial is the lawyer who gets the best settlements.

Choosing the right mediator

Once the decision is made to go to mediation, it is critical to choose the right mediator. There are many excellent mediators in California. There are very

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few mediators, however, who have significant insurance expertise.

In my experience, it is highly preferable to select a mediator with extensive insurance experience and understanding, as well as expertise in the particular area of law at issue in the mediation. There are many reasons for this. However, one need go no further than a reading of this article. Given the prevalence of insurance issues that permeate mediation and the settlement process, it would be truly ironic if the one person who is to effectuate and facilitate such settlement was a novice in insurance issues. Such a neutral will be unpersuasive when dealing with the insurance company because he or she is unable to communicate effectively with the carrier or its counsel. Accordingly, a plaintiff's lawyer should conduct significant due diligence and make sure that the mediator being selected has extensive insurance backgrounds and experience.

The mediation brief

Many lawyers fundamentally misunderstand and fail to appreciate the critical power of the mediation brief to the settlement process. Specifically, the mediation brief is the one chance that plaintiff counsel has of communicating directly with the decision makers at the insurance company prior to trial. Such communication is unfiltered by anything that the defense lawyer can do.

Success in mediation is based on leverage. Leverage is acquired through information that is conveyed to the other side. The most powerful and effective way to convey that information is through a detailed, thorough and persuasive mediation brief. Without a powerful and persuasive mediation brief, you will never be able to maximize your settlement results.

A successful mediation brief has numerous procedural and substantive requirements.

• ***Procedural considerations***

With respect to procedure, there are a number of critical procedural factors.

First, it is critically important to serve the mediation brief on the insurance company and the defense well before the mediation. One week before the mediation is the absolute minimum. Two weeks or more is the optimal time. The reason is simple. If you want your brief to be persuasive and to be considered by the decision-makers for the opposing party, you must give them sufficient time to read, analyze, critique and digest your brief.

Further, the more significant your case, the busier are the individuals on the other side who will be considering your arguments. Therefore, you must consider the frequently busy schedules of the decision-makers on the other side. There is no worse mistake than walking in on the day of mediation and handing a brief to the mediator and the other side. Your brief will fall on deaf ears.

Second, your mediation brief must have a highly professional appearance. It sends a strong message to the other side about your level of competence and attention to detail. You are trying to impress upon the other side that you will be a powerful force and opponent at trial. A brief full of misspellings, unpersuasive arguments or incomplete thoughts sends exactly the wrong message. Conversely, a persuasive, well-edited and highly polished mediation brief sends a message to the other side that your approach at trial will be equally powerful.

Even matters such as formatting and copying are important in communicating your message of strength. Rather than using staples or fasteners, I will frequently use spiral binding or other sophisticated printing techniques to bind the brief in order to give the document the most professional look possible.

When serving the brief on the other side, you should make multiple copies for the service. If you go through the expense of putting together a highly polished mediation brief and merely allow the other side to make their own photocopies, you'll be eliminating much of the "shock and awe" effect of receiving an expensively bound brief.

Estimate the number of parties, counsel and insurance carriers on the other side; make multiple copies, and have them delivered by hand to counsel. For example, a simple rule is to make ten copies of the mediation brief for opposing counsel so they can in turn be delivered to the relevant decision-makers. Remember, this is your opportunity to have an "ex parte" communication with the insurance adjuster on the other side. Given that they will be personally reviewing your work, it pays to put your best foot forward by preparing a professional copy of the mediation brief, as opposed to having defense counsel's photocopy department make rough copies.

• ***Substantive considerations***

The extensive amount of time you spend preparing such a brief will pay dividends many times over if the brief is successful in persuading the other side to adjust their settlement position in a meaningful manner. By way of example, in a recent case, our office spent over six weeks writing a brief in a personal injury case. That brief ended up containing 82 pages of text, plus 300 pages of exhibits. The case ultimately settled in seven figures. I am absolutely certain that our 82-page mediation brief, when compared to the 11-page brief prepared by the defense, made a huge impression on the insurance companies on the other side and motivated their decision to settle the case at top value.

Equally important, substantively, are the facts and information one shares with the opposing party. First and foremost, the concept of a "confidential" mediation brief is completely contrary to meaningful mediation. Defendants are especially fond of submitting confidential mediation briefs. In my opinion, that is a fundamental mistake. It is obviously impossible to motivate a plaintiff to lower its demands based on weakness and shortcomings in its case if the defense does not share such an analysis with plaintiff. It is almost as if those defendants have no desire to settle.

From my perspective, the most fruitful way to a successful mediation result is to share your best and most persuasive arguments with the other side. The only exception is if you truly have some strong and powerful facts or arguments (such as a damaging sub rosa tape) that the other

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side is not yet aware of. In that case, I would encourage a separate, confidential mediation brief discussing such issues. For example, in a recent multi-million dollar insurance bad-faith case, we obtained information through private investigation that the claim adjuster who had committed the bad faith in question was formerly an attorney who had been disbarred for fraud and perjury.

Along similar lines, too many mediation briefs are long on argument, contention and hyperbole, but short on actual facts. Insurance adjusters have a built-in BS detector built up over years and decades of handling claims. You must overcome that inherent skepticism. A powerful mediation brief should also systematically set forth all evidence and documents in the case. Furthermore, factual assertions and legal arguments in the brief should be supported by specific reference to an appendix of exhibits. If there are evidentiary issues relating to such evidence, these issues should be addressed in the brief in order to persuade the other side that the evidence will indeed be presented to the jury.

One of the most difficult aspects of any mediation is proper evaluation of the settlement value of a case. Perhaps the most powerful tools for determining settlement value are verdicts and settlements from similar cases. A good mediation brief will include a detailed analysis of related verdicts and settlements from other similar cases, together with copies of the actual verdict and settlement forms. Those related verdicts and settlements will remove some of the guesswork from estimating the settlement value of a case. More importantly, it will emphasize to the risk-averse insurance company some of the worst downsides of not settling the case and going to trial.

Fundamental insurance issues

There are many critical insurance issues that may face a plaintiff's attorney at a mediation, especially in high-value cases where there are multiple defendants and multiple policies. While it is difficult to address all such possibilities, here are some of the key issues for plaintiff's lawyers.

In cases involving a continuous loss that has occurred over a number of years, it is important to make sure that all insurers that insured the defendant from the time the loss began have been given notice of the claim, because California applies the "continuous injury" trigger of coverage, in the context of a third-party liability policy, "bodily injury" or "property damage" that is continuous or progressively deteriorating so that such "bodily injury" or "property damage" is potentially covered by all policies in effect during the period when the injury or damage occurred. (*Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 685-689.) Under the "all sums' rule adopted in *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 55-57, an insurer on the risk when continuous or progressively deteriorating property damage or bodily injury first manifests itself is required to indemnify the insured for the whole of the ensuing damage or injury. Recently, in *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 202, the Supreme Court held that absent an antistacking provision in the policy or a statute that forbids stacking, policy limits can be stacked.

It is important to get copies of all of the defendant's potentially applicable policies for all potentially applicable policy years, and not just the most recent policy, because there may have been significant changes that have been made in coverage, even if the policies have been issued by the same insurer. For instance, many insurers have recently eliminated coverage for attorney's fees awarded against the insured by excluding attorney's fees from the definition of "costs" under the supplementary payments provision of their general liability policies, but earlier applicable policies may still cover such fees.

In cases involving intentional acts by an insured which would not be covered because of an intentional acts exclusion or Insurance Code section 533, it is important to emphasize the separate liability of innocent co-insureds in light of the holding in *Minkler v. Safeco Ins. Co. of America* (2010) 49 Cal.4th 315, 319, that under a policy containing a "separate insurance" clause, each insured's coverage should be analyzed separately.

If there are excess/umbrella policies involved, it is important to determine what underlying policies need to be exhausted in order for each excess/umbrella policy to come into play. The "horizontal exhaustion" rule requires all primary insurance to be exhausted before an excess insurer must drop down to defend an insured, including in cases of continuing loss. The "vertical exhaustion" rule allows an insured to seek coverage from an excess insurer as long as the specific underlying insurance policy or policies identified in the excess have been exhausted. Under California law, unless the excess insurance describes the underlying insurance policy and only agrees to cover a claim when that specific underlying insurance policy is exhausted, the horizontal exhaustion rule applies and all primary insurance must be exhausted before an excess insurer must drop down to defend an insured, especially in cases of continuing loss. (*Padilla Construction Co., Inc. v. Transportation Ins. Co.* (2007) 150 Cal.App.4th 984, 986-987.)

If one or more of the defendants is an additional insured on another defendant's policy, there may be issues arising out of trying to settle out only the named insured or only the additional insured. The insurance company cannot settle out one insured without obtaining a release of the other insured, without the other insured's consent. (See, *American Medical International, Inc. v. National Union Fire Ins. Co. of Pittsburgh* (9th Cir. 2001) 244 F.3d 715, 720-721.) One way to settle out only the named insured or only the additional insured is to try to get the insurance company, with the consent of both the named insured and the additional insured, to offer a portion of the policy limits to settle out the named insured or additional insured.

Most professional liability policies have "burning limits," i.e., limits that are eroded by defense fees and costs. This means that by the time the parties are at mediation, the remaining limits of the defendant's "burning limits" policy will be less than stated policy limits, and a

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policy limits demand would have to be less than the stated policy limits. One way to make a policy limits demand on a "burning limits" policy is to demand the remaining limits of the policy, as long as the amount of the remaining limits is over a specified amount. Some "burning limits" policies also provide additional excess "burning limits" coverage for defense fees and costs incurred by the insured. Depending on the exact terms of the policy, it could be argued that as long as defense fees and costs are less than the excess "burning limits" coverage for defense fees and costs, the full amount of the primary limits is available. Some "burning limits" policies also provide additional coverage for attorney's fees and costs awarded against the insured. If plaintiff is entitled to attorney's fees and costs, plaintiff should consider making a demand for the primary limits plus an additional amount based on the fees and costs that plaintiff could recover.

Using insurance bad-faith principles

The "golden ticket" for settlement of cases which involve an insurance company is the threat of extra-contractual liability, or bad faith. Being able to "pop the top off the policy" is every plaintiff lawyer's dream, and every insurance company's nightmare. The following are some of the critical principles that govern bad faith in the context of settlement discussions.

California insurance law requires an insurer owes a good-faith duty to initiate settlement discussions. (See, *Garner v. American Mut. Liab. Ins. Co.* (1973) 31 Cal.App.3d 848; *Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 689; and *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 906.) In fact, California Insurance Code section 790(h)(5) requires insurers to attempt "in good faith to effectuate . . . settlements of claims in which liability has become reasonably clear." Section 790(h)(5) imposes a duty on the insurer to actively attempt to settle a claim by making, and by accepting, reasonable settlement offers once liability has become reasonably clear. (*Pray By & Through Pray v. Foremost Ins. Co.* (9th Cir. 1985) 767 F.2d 1329, 1330.)

An insurer has an implied duty to accept reasonable settlement demands on covered claims within the policy limits. (*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 40.) In deciding whether or not to settle a claim, the insurer must take into account the interests of the insured. (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658-661.) In other words, an insurer that breaches its duty of reasonable settlement is liable for all of the insured's damages proximately caused by the breach, regardless of policy limits. (*Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 725 (citing *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315 and *Comunale v. Traders & General Ins. Co., supra*, 50 Cal.2d at p. 661.)

The only thing an insurer can consider in determining the reasonableness of a settlement demand is "whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the settlement offer." (*Johansen v. California State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 16.) An insurer's good faith but incorrect belief there is no coverage is not a defense to liability for its refusal to accept a reasonable settlement demand. (*Id.*, at 15-16.)

Even though the case law talks of an insurer's liability breach of the duty of reasonable settlement, which would imply that the insurer has to have acted in breach of the implied covenant of good faith and fair dealing, an insurer may be liable for the full amount of the judgment based on breach of contract. (See *Archdale v. American Internat. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 468.)

Thus, in light of these black-letter principles, the most powerful strategy that a plaintiff can follow at mediation is to make a policy-limits settlement demand. A plaintiff must make sure that the carrier has all the facts and information to reasonably consider such a policy-limits demand, and the demand must be kept open a reasonable time, but if the carrier fails to reasonably settle a case within policy limits, it may be exposed to bad-faith liability.

The process of obtaining an assignment of bad-faith rights is outside the scope of this article; the reader should consult a learned treatise, such as the Rutter Guide on Insurance Litigation for the practice and procedure of effectuating such an assignment.

One final important point to remember is that the mediation privilege is very broad. Thus, in order to guarantee that policy-limits settlement demands are admissible in a later bad-faith trial, make sure that such settlement communications are formally made (in writing) outside of the mediation context as well.

Intra-insurance bad faith

In cases involving multiple insurers and multiple layers of coverage, there may be an obstinate insurer that refuses to offer its policy limits, even though insurers higher up on the coverage ladder may want to offer their limits. In such a case, it often helps to point out to the recalcitrant insurer the potential consequences of refusing to offer its policy limits. For example, a primary insurer faces the prospect of being liable for the full amount of any judgment. A primary insurer has a good-faith duty to take into account the interests of the excess insurer equally with its own and must conduct the defense of an action, including settlement negotiations, so as not to expose the excess insurer to unwarranted liability. (*Diamond Heights Homeowners Assn v. National American Ins. Co.* (1991) 227 Cal.App.3d 563, 579.) Upon paying an excess judgment, the excess insurer is equitably subrogated to the insured's rights and remedies against the primary insurer. (*Fireman's Fund Ins. Co. v. Maryland Cas. Co.* (1994) 21 Cal.App.4th 1586, 1601; see also *Continental Cas. Co. v. Royal Ins. Co.* (1990) 219 Cal.App.3d 111, 117.)

If the primary insurer unreasonably refused to settle within its policy limits, the excess insurer may recover from the primary insurer the full amount of any judgment against the insured that the excess insurer is compelled to pay, regardless of the primary insurer's policy

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limits. (*Northwestern Mut. Ins. Co. v. Farmers Ins. Group* (1978) 76 Cal.App.3d 1031, 1050; see also *Highlands Ins. Co. v. Continental Cas. Co.* (9th Cir. 1995) 64 F3d 514, 518.) Since an excess insurer that refuses to offer its policy limits may be liable for any judgment in excess of its limits, that excess insurer should be liable to the higher layer excess insurers. (See, *Kelley v. British Commercial Ins. Co.* (1963) 221 Cal.App.2d 554, 563).

Dealing with denial of coverage

I will frequently mediate cases with insurance companies after they have denied coverage for a claim, and I have taken aggressive steps in obtaining a default judgment or assignment of bad-faith rights. In those circumstances, I have maximum leverage against the carrier in mediation, assuming the underlying PI case is significant and the coverage issues are strong. The following are some of the principles involved when the carrier denies coverage.

If the defendant's insurer has denied coverage, it may be worthwhile to either settle with the defendant by agreeing to a stipulated judgment, with a covenant not to execute and an assignment of the insured's claims against the insurer, or obtain a default judgment against the defendant and then try to get an assignment. After obtaining the stipulated judgment or default judgment and assuming the policy in question is one that is subject to the judgment creditor statute, which all policies covering bodily injury and property damage are, the plaintiff could bring an action against the insurer as a judgment creditor under Insurance Code section 11580(b)(2) and as an assignee of any claims assigned by the insured.

An advantage of obtaining a stipulated judgment, with a covenant not to execute and an assignment of the insured's claims against the insurer, as opposed to obtaining a default judgment, is that the plaintiff can negotiate the assignment from the insured as part of the settlement. An advantage of obtaining a default judgment, with a covenant not to execute is that if plaintiff can get an assignment from the insured, the plaintiff could rely on *Amato v. Mercury Casualty Co.* (1997) 53 Cal.App.4th 825, 833, to argue that the insurer is liable for the full amount of the default judgment as damages caused by the insurer's bad faith denial of coverage, regardless of whether there is coverage for the judgment under the policy.

In obtaining an assignment of rights from the insured, the plaintiff should consider the fact that the right to attorney's fees and costs incurred in obtaining coverage is assignable, but claims for punitive damages and emotional distress damages are not. A partial assignment of the insured's assignable rights would allow the insured to keep the claims for punitive damages and emotional distress damages. Plaintiff's counsel could then seek a conflict waiver and represent both the insured and the plaintiff in one suit against the insured. A possible complication that could arise in the case of a default judgment is that the insurer could seek to set aside the default and default judgment and move to intervene.

Conclusion

As explained above, virtually every settlement of litigation involves insurance and insurance issues. A plaintiff's lawyer with an extensive understanding of insurance law and insurance principles is an extremely powerful negotiator. I hope that this article was able to provide some insight and advice on some of the fundamental insurance issues that arise at mediation and impact on settlement of personal injury cases.

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