Developments in Excess Judgment Liability

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Is a Demand Within Limits Necessary?

Qualified yes in about half the jurisdictions addressing the issue

- Traditionally and logically, the impetus for settlement comes from the plaintiff. He is the one seeking recovery and therefore has the burden of stating just what it is that he wants. A feigned lack of interest in settlement by a defendant is a widely recognized negotiating ploy. We see no reason why use of this technique should excuse the plaintiff from stating his demand.

  Puritan Ins. Co. v. Canadian Univ. Ins. Co., 775 F.2d 76, 82 (3d Cir. 1985) (PA law).

Texas

Three conditions for *Stowers* liability:

> (1) the claim against the insured is within the scope of coverage;
>
> (2) **the demand is within the policy limits**; and
>
> (3) the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment.

American Physicians Insurance Exchange v. Garcia, 876 S.W.2d 842, 849 (Tex. 1994).

But some facts permit liability anyway

- E.g., blanket refusal to disclose limits. *Boicourt v. Amex Assurance Co.*, 78 Cal. App. 4th 1390, 1392 (2000):
  - A blanket rule against precomplaint disclosure of policy limits creates a conflict of interest between liability insurers and their insureds. First, the insurer saves some money on administrative costs by never having to contact its policyholders to obtain the necessary authorization for disclosure. Second, the insurer gains a tactical advantage vis-a-vis the claimant by forcing the claimant to make any prelitigation offers "in the dark." … [T]he essence of bad faith in the liability insurance context is the insurer's elevation of its own parochial interests over the insured's at the *expense* of a policy limits settlement--that is, preferring its own interests over the insured's when there is a conflict of interest between them ….
- E.g., failure to act reasonably when claimant seeks information about other sources of payment. *Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 8-9 (Fla. 2018).

Other Jurisdictions Do Not Require Demands

- The duty to consider the interests of the insured arises not because there has been a settlement offer from the plaintiff but because there has been a claim for damages in excess of the policy limits. This claim creates a conflict of interest between the insured and the carrier which requires the carrier to give equal consideration to the interests of the insured.... [T]he duty to settle arises if the carrier would initiate settlement negotiations on its own behalf were its potential liability equal to that of its insured.

- *Coleman v. Holacek*, 542 F.2d 532, 537 (10th Cir. 1976) (Kansas law)

Standard Where Demand Not Required

- While insurer has defined duties (e.g., proper handling of defense, advising insured about excess judgment risks and settlement opportunities, investigation of facts, fair consideration of settlement demands, these duties
  - are not a mere checklist. An insurer is not absolved of liability simply because it advises its insured of settlement opportunities, the probable outcome of the litigation, and the possibility of an excess judgment. Rather, the critical inquiry in a bad faith is whether the insurer diligently, and with the same haste and precision as if it were in the insured's shoes, worked on the insured's behalf to avoid an excess judgment. "[T]he question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the 'totality of the circumstances' standard." Further, it is for the jury to decide whether the insurer failed to "act in good faith with due regard for the interests of the insured." *Harvey*, 259 So. 3d at 7.

Claimant's Conduct Secondary Concern

- "[T]he focus in a bad faith case is not on the actions of the claimant but rather on those of the insurer in fulfilling its obligations to the insured." *Harvey*, 259 So. 3d at 11.
- "While this Court has stated that 'there must be a causal connection between the damages claimed and the insurer's bad faith,' this Court has never held or even suggested that an insured's actions can let the insurer off the hook when the evidence clearly establishes that the insurer acted in bad faith in handling the insured's claim." *Id.*

But It Is Possible To Avoid Going to a Jury

- *Eres v. Progressive American Insurance Go,* 998 F.3d 1273 (11th Cir. 2021) (FL law).

Nibbling Around the Edges: When is it Actually a Demand Within Limits?

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What are the goals?

* Settling cases early
* Settling cases within limits
* Protecting Insureds

The answer is no. What are the questions?

Must there be a demand?

Must it be in an amount less than the policy's limit?

Must the facts be straightforward or comprehensible?

To disclose or not to disclose: the original conflict

Disclosing the limit invites a policy limit demand which protects the insured.

Not disclosing limit protects the insurer because without a cognizable policy limit demand, the limit remains firmly in place.

Bad faith law is “improvisation” by courts to solve the conflict.

Inflection points

Even if there was no demand at all, were there signs that the claimant was interested in discussing settlement?

Even if the demand is not within one policy's limits, is it within the combined limits of multiple insurers on the risk?

Was the demand reasonable?

Was the insurer unreasonable?

Bonus points: can a demand be reasonable if the insurer acts reasonably in trying to accept it and somehow settlement still isn't achieved?

We’re living on Planet Bingo now

Bingo hall in London suffers fire loss caused by handheld gaming devices.

The device distributor’s insurer, AIG, settles the bingo hall’s claim.

Subrogating AIG demands excess of limits from designer’s carrier, Burlington. Demand letter invites “discussions and negotiations or mediation”.

Also Burlington disclaims – but that’s another story.

Life on Planet Bingo, aka at a Bazaar

The dispositive issue? That the demand came from a subrogee!

Expert testimony that

* a demand excess of limits "offers a very clear invitation to negotiate a settlement for less than that amount …."
* there is a "very well-known industry custom in such subrogation claims of" settling for limits after demanding more than limits.

Applications?

Limited to subrogation claims?

If a claimant's attorney settled 3 earlier cases with the same insurer for less than the original demand, does that constitute a "very clear indication" or an industry custom?

Does this encourage claimants to inflate their demands to create a pattern and practice record when they settle for less?

March 2021 was a good month for failure to settle decisions

To potentially give rise to a bad faith claim

- The demand must be reasonable and
- The insurer must act unreasonably in failing to accept it.
- Failing to accept a reasonable demand does not constitute bad faith *per se.*

Other Issues

Oral Demand

Does the demand need to be in writing?

The Trouble with Towers

Does a “within limits” demand include excess insurance?

Making Up the Difference

Can an insured offer to pay part of the demand to satisfy the “within limits” requirement?

Breaching the Duty to Defend

Does breach of the duty to defend automatically expose an insurer to excess exposure?

Questions?