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Insurance Bad Faith

Is The Bad Faith Claim A Part Of The Package?

by
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Commentary

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I. Introduction

In an effort to create yet another way to present a claim for bad faith against an insurance company, plaintiff attorneys have been submitting "package deal" demands on behalf of multiple claimants who have all incurred damages as a result of the same occurrence. Under this scenario, the insured is involved in an accident that results in bodily injuries to several claimants, whose injuries and damages vary greatly. At least one of the claimant's damages clearly exceeds the policy limits, but the other remaining claim(s) are less serious and are not valued in excess of the policy limits. Nevertheless, the plaintiff attorney presents a settlement demand seeking tender of the per occurrence policy limits in exchange for release of all the claims. What should the insurer do?

II. Handling of Multiple Injury Claims arising from a Single Occurrence

One of the more underdeveloped areas of the law of insurer bad faith is the handling and settlement of claims involving multiple claimants under a single policy of insurance. When multiple injury claims are presented under the same policy, insurers must decide how to apportion insurance proceeds. Earlier case law addressing bad-faith issues with respect to the settlement of multiple-claimant claims held that, in such cases, the insurer is obligated to minimize the insured's exposure and that the courts will examine the reasonableness of the settlements when determining whether the insurer acted in good faith.[1] Another important factor and long-established rule is that the insurer must exercise reasonable discretion and act in good faith and with due regard for the best interests of the insured when considering settlement of one or more of the claims.

Three different approaches are commonly used to handle this dilemma—the pro rata approach, the first to judgment approach, and the first to settle approach—thus, the insurer's duties and obligations will vary depending upon the law of the applicable jurisdiction. Additionally, some state legislatures are beginning to propose statutory guidelines which aim to provide protection to the insurer from bad faith claims provided that the insurer interpleads and/or makes a global settlement offer of the policy limits to all of the claimants.

Under the pro rata approach, the policy limits are distributed based upon the amount of damages suffered by each claimant.[2] Additionally, each pro rata settlement is limited to the maximum per person policy limit.[3] Use of the pro rata approach, however, can serve as a disadvantage to the insurer. Settlement payments are often deferred while the insurer awaits confirmation that all injury claims have been presented or awaits the running of the statute of limitations, or while the claimant awaits confirmation of the severity and/or permanency of his or her injuries. This delay can result in missed settlement opportunities, unresolved claims, and possible excess exposure.

Many jurisdictions follow a general rule that insurance companies may distribute policy proceeds on a first-come-first-served basis when confronted with multiple-claimant claims. This first-come-first-served approach is derived from two separate line of cases—first-to-judgment and first-to-settle cases. Under the first to judgment approach, policy proceeds are distributed on a first-come-first-served basis depending upon priority of the judgments entered (or about to be entered) against the insured.[4] Because this approach tends to result in a "race to the courthouse," it has become an outdated and disfavored method of handling multiple-claimant claims.[5]

The majority of jurisdictions follow the first to settle approach. This approach does not require the insurer to settle with the first claimant who presents a settlement offer within the policy limits. Instead, insurers are authorized to settle with any one or several of multiple claimants despite the fact that the settlement(s) may exhaust or reduce the available policy proceeds for the remaining claimants.[6] The insurer is afforded wide settlement discretion; however, such discretion is not without limits—each individual settlement must be fair and reasonable under the relevant circumstances and in line with the insurer's duty of good faith.[7] Some courts even require the insurers to attempt to settle as many claims as possible within the applicable policy limits.

Under Florida law, the courts have imposed a good faith standard on the insurers when handling multiple-claimant claims. To satisfy their good faith obligations, the insurers must:

> (1) fully investigate all claims arising from a multiple claim accident; (2) seek to settle as many claims as possible within the policy limit; (3) minimize the magnitude of possible excess judgments against the insured by reasoned claim settlement; and (4) keep the insured informed of the claim resolution process.[8]

Whether these duties have been breached is often a jury question. Florida courts have determined that a jury should decide whether the insurer's failure to pursue global and other settlement options was in the insured's best interests, whether the insurer's quick settlement was reasonable, and whether the insurer conducted a reasonable investigation of the facts of all the claims.[9] Courts of other jurisdictions have reached similar conclusions.[10]

One thing remains clear—there is no hard-and-fast rule with respect to the handling and settlement of multiple-claimant claims. Although the various approaches promote and encourage prompt claim handling and settlements, allegations of bad faith continue to arise from these types of claims. In general, insurers should approach each claim separately and without sole regard to the handling of prior claims.

III. Package Deal Settlement Demands Under a Single Policy of Insurance

Suppose a mother and her two children (Child A and Child B) are involved in an automobile accident, in which they all sustain injuries. The mother's injuries are catastrophic, Child A's injuries are serious and permanent, and Child B's injuries are relatively minor. The tortfeasor maintains a policy of liability insurance with policy limits of $100,000 per person and $300,000 per occurrence. The claimants present a "package deal" settlement demand for the $300,000 per occurrence policy limits, which is contingent upon settlement of all three claims. Upon valuation of the claims, the insurer tenders $100,000 to settle the mother's claim, $100,000 to settle Child A's claim, and $10,000 to settle Child B's claim. The claimants rejected the settlement tender and filed suit. Did the insurer have a duty to accept the settlement offer in an effort to avoid potential excess exposure to the insured? Did the insurer commit bad faith when it refused to settle all three claims as a "package deal" where the value of two of the claims exceeded the policy limits but the value of the remaining claim was less than the policy limits?

The few courts that have addressed this particular issue have rejected it as a means of creating bad faith liability. In general, courts have held that, if one claimant's damages exceed the policy limits and another claimant's damages are less than the policy limits, the claimants may not pool their claims together and later attempt to subject the insurer to bad faith liability after rejection of the claimants' combined settlement offer for the amount of the per occurrence or per accident policy

limits.[11] In support of such conclusion, courts have stated that the clear and unambiguous policy language that provides for a specific "per person" and "per occurrence" limit means exactly what it says—the amount of recovery for "each person" is the stated "per person" amount; i.e., the maximum amount of recovery for each injured claimant is $10,000 when presenting a claim under a 10/20 policy.[12]

Clark v. Hartford Accident & Indemnity Company[13] involved a lawsuit which arose out of an automobile accident wherein Frances Clark sued for personal injuries, Virginia Clark (the daughter) sued for personal injuries, and Glen Clark (Frances Clark's husband) sued for property damage to his vehicle and medical expenses incurred as a result of injuries to his wife and daughter. The tortfeasor's insurance policy provided coverage of $10,000 per person / $20,000 per accident, as well as $500 for property damage.[14]

The plaintiffs' attorney submitted one demand letter, demanding $50,000 for Frances Clark's injuries, $3,500 for Virginia Clark's injuries, and $10,000 for Glen Clark's claim for medical expenses and loss of services. The liability insurer offered a total of $10,000 to Frances and Glen Clark for the claims arising from the personal injuries of Frances Clark. This per person limit was offered on several occasions, and the plaintiffs refused each time. Instead, the plaintiffs offered to settle all three of the claims for the sum of $20,000 (the per occurrence limits). The insurer declined, but again offered $10,000 for all claims arising through Frances Clark's injuries. The plaintiffs refused to accept anything less than $20,000 for all three claims. After trial, a judgment was entered in favor of the plaintiffs: $40,000 for Frances Clark's injuries, $2,500 for Virginia Clark's injuries, and $500 for the property damage incurred by Glen Clark. Subsequently, Frances and Glen Clark brought suit against Hartford for bad faith failure to settle.[15]

The *Clark* court noted that, under the terms of the insurance policy, $10,000 was the maximum amount that the insurer could be liable for the personal injury claim of any one person (this included Frances Clark's personal injury claim and her husband's claim for loss of services and medical expenses).[16] Frances Clark never offered to settle her claim for $10,000, and she refused the insurer's offers to tender such amount. Accordingly, the court determined that the plaintiffs' offer to settle all three claims for the $20,000 per occurrence policy limits was not an offer to settle Frances Clark's claim within the per person policy limits. Instead, it was an attempt to set up a "trust fund" for the plaintiffs to divide as they deemed expedient. Under such facts, the insurer's refusal to settle all of the claims for the $20,000 per occurrence policy limits could not constitute as a basis for a bad faith failure-to-settle claim.[17]

Rosell v. Farmers Texas County Mutual Insurance Company[18] involved an automobile accident wherein Mr. Wood's vehicle struck Alicia Downs' vehicle. Mr. Wood was insured under a policy of $10,000 per person/$20,000 per occurrence. Prior to trial, the insurer offered to settle Alicia's bodily injury claim for $10,000 and Mrs. Rosell's (Alicia's mother) claim for emotional distress for $5,000. The plaintiffs declined, and demanded the $20,000 per occurrence policy limits—i.e., $10,000 per claim. The insurer refused to offer the full policy limits. At trial, judgment was entered in the amounts of $55,000 for Alicia's injury claim and $5,625.00 for Mrs. Rosell's emotional distress claim.[19]

The Woods assigned their rights to any claim against the insurer for the alleged failure to negotiate a settlement within the policy limits to Mrs. Rosell. The appellate court affirmed the trial court's granting of the insurer's motion for summary judgment because there was no bad faith cause of action. The court noted that a breach of the duty of good faith does not occur where an insurer refuses to pay the full amount of its "per occurrence" limits when there are two claims, one of which may result in an excess judgment and the other of which is within its "per person" limit.[20] The *Rosell* court noted:

> The $10,000.00 per person limit controls the maximum settlement an insurance company is required to offer each claimant. This discourages use of insurance policy per occurrence limits as "trust funds" to divide between various plaintiffs as they see fit or

> requiring insurance companies to accept "package deal" settlements from multiple claimants.

The appellate court concluded that, as a matter of law, the insurer did not commit an unconscionable act, did not fail to negotiate in good faith, and did not breach an implied warranty of good faith when it failed to pay the $20,000 per occurrence amount in settlement of *both* claims because, while Alicia's claim did result in an excess judgment, the insurer had offered to settle Alicia's claim for the per person policy limits and Mrs. Rosell's claim resulted in a judgment within the $10,000 per person limit.[21] Notably, the Fifth Circuit United States Court of Appeals also examined Texas law in *Pullin v. Southern Farm Bureau Casualty Insurance Company*[22] when addressing the following issue: Whether an insurer's duty of good faith and fair dealing toward its insured requires the insurer to ignore per person limits when negotiating the settlement of one serious bodily injury claim and several less serious ones? The Fifth Circuit concluded that there was no merit to such an argument. Instead, the argument in favor of such a duty was more like an "*ad hoc* attempt at generosity with the insurance company's money, and, while purporting to enforce a tort duty, would ignore the specific terms of the liability policy."[23]

Redcross v. Aetna Casualty & Surety Company[24] involved a bicycle versus automobile accident, wherein a mother (Donna Burkart) and her two small children (Travis and Amanda) were struck by an automobile while riding their bikes. Mrs. Burkart and her son, Travis, suffered serious and permanent injuries; however, Amanda only sustained minor injuries. The Solomons were insured by Aetna under a policy of insurance with limits of $100,000 per person and $300,000 per occurrence. Early settlement discussions revealed that the claimants would be willing to accept a "package deal" in the amount of the full $300,000 per occurrence policy limits. At all times, Aetna was willing to tender $100,000 for injuries sustained by Donna and $100,000 for the injuries sustained by Travis—a total of $200,000. However, it was Aetna's position that Amanda did not sustain serious injuries; thus, there was no basis to make a settlement offer under the policy.[25] The case went to trial and a jury returned a verdict in favor of Travis in the amount of $5,100,603.10, and in favor of Donna in the amount of $471,703.10. With respect to Amanda, the jury concluded that she did not sustain a serious injury and found in favor of the insurer.[26]

In analyzing the bad faith failure-to-settle claim, the *Redcross* court concluded that, as a matter of law, bad faith could not be established against Aetna for failing to settle the action for an amount above $200,000.[27] In reaching such conclusion, the court stated:

> [A]n insurer confronted with multiple claims arising out of the same accident is not required—in order to forestall a bad-faith settlement claim—to accept a "package deal" within the overall policy limits if, in doing so, it would be overpaying on some of the claims in order that in the other claims, as to which the insurer is ready to pay the full policy limit, the insured not be exposed to liability that exceeds the policy limit.[28]

However, the court noted that, in practice, it would not be uncommon for an insurer to consider and offer the per occurrence policy limits for purposes of reaching an equitable settlement and avoiding litigation.

In addition to the bad faith failure-to-settle claim, the Solomons asserted a bad faith claim alleging that Aetna had failed to keep them (the insureds) fully informed of the settlement negotiations. Specifically, the Solomons claimed that they were never informed or made aware of how close the action came to settlement, and that, if they had known the difference between the parties was so nominal, they would have contributed the difference to avoid the potential of an excess jury verdict. Just prior to trial, the plaintiffs were seeking $275,000 to settle the case, and Aetna had authorized a settlement of $250,000. Plaintiff counsel reported to Aetna that he believed they could reach a settlement for $265,000; thus, the negotiation settlement range was $15,000-$25,000. The *Redcross* court concluded that the insurer's alleged failure to inform the insured of the settlement negotiations was a factor to be considered in determining bad faith; accordingly, a triable issue and question of fact remained for the jury to determine.[29]

IV. Efforts to Keep the Insured Reasonably Informed

Most liability insurance policies allow the insurer to settle a claim or lawsuit within its own reasonable discretion. Generally, policies do not require the insurer to provide the insured with notice of settlement demands and do not require the insurer to obtain the insured's consent to settle. However, in the context of multiple-claimant claims, an insurer is likely to be better served if it keeps the insured informed of diminishing policy limits and any settlement efforts and negotiations. Keeping the insured informed allows them the opportunity to contribute towards a settlement in an effort to protect against potential excess exposure.

A complaint that is becoming more common in bad faith litigation is that the insurer failed to advise the insured of settlement (or contribution) opportunities. Some courts have found bad faith and/or breach of contract where an insurer has failed to inform the insured of a policy limits settlement, settlement demand or some other opportunity to settle, especially if notice to the insured might have impacted an excess judgment.[30] Insurer bad faith may be found even where a demand exceeds the policy limits if the insured is willing and able to pay the amount of the proposed settlement demand.[31] Accordingly, as a practical matter when handling multiple-claimant claims, an insurer should make a good-faith effort to advise the insured of the claims evaluation, the negotiation and settlement process, and any settlement or contribution opportunities for purposes of reaching as many settlements as possible and eliminating or minimizing possible excess exposure.

V. Conclusion

Claims involving multiple or competing claims often present difficult dilemmas for the insurer as allegations of bad faith claim handling almost seem inevitable. When a single occurrence results in multiple bodily injury claims (for which the extent of the involved injuries vary greatly), the insurer is under no duty to pay more than the stated policy limits to any one claimant and the insurer has no obligation to extend the full per occurrence or per accident policy limits in an effort to protect the insured from any potential excess exposure. The per person limit controls the maximum amount that is to be extended to each injured claimant. Accordingly, courts appear to agree that insurers are not required to accept "package deal" settlement demands which propose use of the entire per occurrence policy limit as a "fund" to be divided among the plaintiffs.

Endnotes

1. Brown v. United States Fid. & Guar. Co., 314 F.2d 675 (2d Cir. 1963); Liberty Mut. Ins. Co. v. Davis, 412 F.2d 475 (5th Cir. 1969); Voccio v. Reliance Ins. Co., 703 F.2d 1 (1st Cir. 1983).

2. Christlieb v. Luten, 633 S.W.2d 139, 140 (Mo. Ct. App. 1982); Allstate v. Ostenson, 713 P.2d 733, 735 (Wash. 1986); Wondrowitz v. Swenson, 392 N.W.2d 449 (Wis. Ct. App. 1986).

3. Ostenson, 713 P.2d at 735.

4. Sampson v. Cape Indus., Ltd., 540 N.E.2d 1143 (Ill. App. Ct. 1989); Goad v. Fisher, 257 A.2d 433 (Md. 1969); David v. Bauman, 196 N.Y.S.2d 746 (N.Y. Sup. Ct. 1960).

5. Douglas R. Richmond, *Too Many Claimants or Insureds and Too Little Money: Insurers' Good Faith Dilemmas*, 44-3/44-4 TORT TRIAL & INS. PRAC. L.J. 871, 880 (2009).

6. Cont'l Cas. Ins. Co. v. Peckham, 895 F.2d 830, 835 (1st Cir. 1990) (Massachusetts law); Voccio v. Reliance Ins. Co., 703 F.2d 1, 2-4 (1st Cir. 1983) (Rhode Island law); Elliot Co. v. Liberty Mut. Ins. Co., 434 F. Supp. 2d 483, 499 (N.D. Ohio 2006) (interpreting Connecticut, Delaware, New York, Ohio, and Pennsylvania law); Gen. Sec. Nat'l Ins. Co. v. Marsh, 303 F. Supp. 2d 1321, 1325-26 (M.D. Fla. 2004) (Florida law); Farinas v. Fla. Farm Bureau Gen. Ins. Co., 850 So. 2d 555, 561 (Fla. 4th DCA 2003) (Florida law); Tex. Farmers Ins. Co. v. Soriano, 881 S.W.2d 312, 315 (Tex. 1994) (Texas law); State Farm Mut. Auto. Ins. Co. v. Murphy, 348 N.E.2d 491 (Ill. App. 2d Dist. 1976) (Illinois law); Liguori v. Allstate Ins. Co., 184 A.2d 12 (N.J. Super. Ch. 1962) (New Jersey law).

7. Farinas, 850 So. 2d at 561. *See also* Richmond, *supra*, 44-3/44-4 TORT TRIAL & INS. PRAC. L.J. at 882 ("For example, an insurer could not unilaterally

decide to pay a single claimant a disproportionate share of the policy limits because the claimant was somehow subjectively favored, or the lawyer for that claimant was exceptionally aggressive.").

8. Marsh, 303 F. Supp. 2d at 1325 (citing Farinas, 850 So. 2d at 560-61, and summarizing the insurer's good-faith duty when handling a multiple-claimant case).

9. Farinas, 850 So. 2d at 561.

10. *See* Brown v. United States Fidelity & Guar. Co., 314 F.2d 675 (2d Cir. 1963); Liberty Mut. Ins. Co. v. Davis, 412 F.2d 475 (5th Cir. 1969). *But see* DeMarco v. Travelers Ins. Co., 26 A.3d 585 (R.I. 2011) (determining that, as a matter of law, the insurer had acted in bad faith when it refused to consider the claimants' settlement offers, relied on the claimants to negotiate with each other and reach a global settlement, and refused to make any unconditional individual settlements until after the claim had been reduced to a judgment).

11. *See* Stephen S. Ashley, Bad Faith Actions Liability & Damages, § 4:19: *Insurer's Duty in Case of Multiple Claimants and Multiple Insureds*. *See also* Roberie v. Southern Farm Bureau Cas. Ins. Co., 185 So. 2d 619 (La. App. 1966) (where a death claim exceeded the policy limits but an injury claim did not exhaust the policy limits, the insurer was not required to allocate the unexpended portion of coverage (from the BI claim) to the death claim, and the insurer was not able to combine the two $10,000 per person limits so as to afford the insured maximum protection under the $20,000 per occurrence limit).

12. Standard Acc. Ins. Co. of Detroit, Mich. v. Winget et al., 197 F.2d 97 (9th Cir. 1952); Mannheimer Bros. v. Kansas Cas. & Surety Co., 184 N.W. 189 (Minn. 1921).

13. 457 S.W.2d 35 (Tenn. Ct. App. 1970).

14. *Id.* at 36-37.

15. *Id.* at 37-38.

16. *Id.* at 39. *See also* Standard Acc. Ins. Co. of Detroit, Mich. v. Winget et al., 197 F.2d 97 (9th Cir. 1952) (interpreting the language of a 10/20 policy and concluding that the $10,000 per person limit clearly and unambiguously limited the insurer's liability to $10,000 for each injured person); Mannheimer Bros. v. Kansas Cas. & Surety Co., 184 N.W. 189 (Minn. 1921).

17. Clark, 457 S.W.2d at 39-40.

18. 642 S.W.2d 278 (Tex. App. Texarkana 1982).

19. *Id.* at 279.

20. *Id.* at 280 (citing Clark, 457 S.W.2d 35; Roberie v. Southern Farm Bureau Cas. Ins. Co., 185 So. 2d 619 (La. App. 1966); Winget, 197 F.2d 97).

21. *Id.* The *Rosell* case is referenced in Bad Faith Actions Liability & Damages, § 4:19: *Insurer's Duty in Case of Multiple Claimants and Multiple Insureds*, for the following proposition: "If one claimant's damages exceed the policy limits and the other's damages fall short, they may not pool their claims and later subject the insurer to liability for bad faith for rejecting a combined settlement offer equal to the insurer's per occurrence coverage."

22. 874 F.2d 1055 (5th Cir. 1989).

23. *Id.* at 1057-1058.

24. 260 A.D.2d 908 (N.Y. App. Div., 3d Dept. 1999).

25. *Id.* at 909-910.

26. *Id.* at 910.

27. *Id.* at 912.

28. *Id.* at 911.

29. *Id.* at 913-914.

30. *See* Redcross, 260 A.D.2d 908; Anguiano v. Allstate Ins. Co., 209 F.3d 1167 (9th Cir. 2000). Notably, the *Redcross* court stated that "an *inference of bad faith* may arise even though the claimant's settlement offer equals or exceeds the policy limits, if the insured is not informed of their right to contribute to the excess in order to achieve a settlement [cites omitted]." Redcross, 260 A.D.2d at 911 (emphasis added).

31. *See* Roberie, 185 So. 2d 619 (finding that the insurer negligently breached a duty to the insured when it failed to advise the insured of its policy position and failed to inform the insured of opportunities to settle in excess of the policy limit (thus, allowing the insured to consider such option and render his own acceptance or rejection)); Levier v. Koppenheffer, 879 P.2d 40 (Kan. App. 1994) (finding breach of good faith duty when insurer failed to advise the insured of its high valuation of a claim and the policy limit settlement offer and failed to invite the insured to contribute towards settlement). ■

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