MEALEY'S™ LITIGATION REPORT
Insurance Bad Faith

Another Item For Your Checklist: The Bad Faith Concerns Related To Overreaching Proposed Releases

by
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Commentary

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A common scenario: claimant's counsel issues a time limit demand for policy limits and the insurer decides to accept the demand and tender the limits. Once the decision is made to accept the demand, the insurer should go through its checklist of concerns to make sure that each element of the time demand is met, while ensuring that the insured is adequately protected. The obvious items include making certain that the demanded amount is tendered within the time frame established in the demand. However, as these recent cases note, it is equally important to craft a release that is broad enough to cover the existing claims, but does not overreach to the point the claimant can argue that the insurer has made a counter offer. Specifically, the insurer should take caution to meet any of the claimant's terms related to a release and avoid tendering a proposed release that interjects additional terms not contemplated- or even needed- by the parties.

Settlements are governed by the rules for interpretation of contracts.[1] Settlements are highly favored and will be enforced "whenever possible".[2] Courts espouse an objective test to determine whether a contract is enforceable - not whether the parties meant the same thing, but whether they said the same thing as it relates to the essential terms and provisions of the settlement.[3] However, parties to a contract do not have to deal with every contingency in order to have an enforceable contract.[4] While uncertainty as to an agreement as to nonessential items will not preclude a finding of an enforceable settlement, the agreement must be sufficiently specific and mutually agreeable as to every essential element.[5]

Generally, a release is an implicit term of a binding settlement.[6] An insurer can always argue that its insured is entitled to a release upon meeting the terms of the time limit demand. The difficulty arises when the insurer submits a proposed release that can be construed to add additional terms not explicitly contemplated by the demand itself.

In *Villareal v. Eres*, a third-party, on behalf of herself and her deceased minor child, issued policy limit demand to the negligent driver's insurer.[7] The demand stated that the claimants would only sign a general release of all claims against the insured, but of no one else.[8] The insurance company timely responded by tendering the total policy limits ($20,000) along with two "proposed" releases. The cover letter for the releases asked claimants' counsel to contact the insurer if any changes were required, but that the insurer believed it had complied with all terms of the demand letter.[9] However, the release contained the flowing clause:

> The undersigned reserve(s) their right to pursue and recover future medical expenses, health care and related expenses from any person, firm, or organization who may be responsible for payment of such expenses, including any first party health or first party automobile coverage, if so entitled. *However,*

> *said reservation does not include the party(ies) released who is/are given a full and final release of all claims, including, but not limited to, past, present, or future claims for subrogation arising out of the above-referenced accident (emphasis* in original).

The claimants rejected the release, filed suit, and ultimately obtained a judgment in the amount of $10,639,585.36.[10] On appeal, the insurer argued that the releases were not essential terms of the settlement agreement and subject to alteration after the settlement had been reached. The insurer claimed that the reference to the subrogation claims was not in effect a hold harmless or indemnification agreement.[11] Further, the insurer argued that the reference to the subrogation claim was "meaningless" because it was not clear any subrogation existed and a "nullity" as to any third-parties.[12] The court held that the presence of the language and not any actual effectiveness of the language constituted a rejection of the initial unilateral demand.[13]

In *Maharaj v. Geico Casualty Co.*, the district court discussed whether the insurer committed bad faith by failing to remove indemnification language in a release at a time when the claim could have been settled for policy limits.[14] In *Maharaj*, the insured caused a roll-over accident, resulting in injuries for the driver and a foot amputation for her child. The policy at issue provided $10,000 per person and $20,000 per accident bodily injury coverage. In less than a month after the accident and within three days of receiving a 30 day time limit demand, the insurer tendered two checks in the amount of $10,000 each and proposed releases to the claimants' counsel.[15]

The releases provided contained hold harmless and indemnification clauses. The representative for the insurer testified that this was the clause the insurer had been using in its release and was inserted to protect the insurer from any additional claims that might arise after the release was signed.[16] The claimants' counsel wrote to the insured and explained that the tender was unacceptable due to the indemnification clause and the inclusion of property damage.[17]

The insurer then sent amended proposed releases, with a cover letter asking if they were acceptable and asking claimants' counsel for his proposed releases if they were not.[18] The new releases had no reference to the property claim; however, they still contained the hold harmless and indemnification clause. The insurer also failed to follow-up with these releases for some period of time.[19] The claimant's mother eventually signed the release for her claim alone, against her attorney's advice.[20]

The attorney brought suit on behalf of the minor child and obtained a net judgment of $6,942,000. He then commenced the lawsuit against the insurer for bad faith. The insurer moved for summary judgment, claiming that Plaintiff had presented no realistic opportunity to settle. The Plaintiff responded by claiming that the inclusion of the indemnification language constituted bad faith and the opportunity to settle was a fact issue.

The court ruled that there was a fact issue related to the indemnification language. If, the jury were to believe the testimony of the attorney that the claims representative told him he was unwilling to remove the indemnification clause, it could find that the refusal to remove this language bad faith.[21]

A similar case from the month before reached a similar result.[22] In *Prushansky*, the intoxicated insured driver caused a six car accident, resulting in the death of one party. The insurer advised the claimant's counsel of the policy limits ($100,000 per person). The insurer tendered the $100,000 bodily injury limits along with the proposed release. This release also contained an indemnification and hold harmless provision.

The claimant's counsel wrote and spoke with counsel hired by the insurer to resolve the various remaining claims and asked that the language be removed. There were several conversations and letters from each side. Defense counsel asked the insurer agree to amend the release. About the same time, however, claimant's counsel learned about the insured's intoxication and advised he would no longer accept the settlement at the time.[23] As a result the revised release was never sent to claimant's counsel. Suit was filed resulting in a judgment of $2,150,000.[24]

The insurer then filed a declaratory judgment action and moved for summary judgment. The court noted a factual question of whether the insurer refused to remove the indemnity language the court also noted that there was a factual question of whether the insurer was only negligent in the handling of the release or whether it acted in bad faith.[25]

When responding to a time limit demand, the proposed release should be narrowly tailored to meet the terms of the demand and just broad enough to protect the interests of the insureds. As these recent cases demonstrate, releases that contain additional terms, including hold harmless and indemnification provisions can complicate the potential settlement and lead to possible claims of bad faith.

Endnotes

1. *See* Robbie v. City of Miami, 469 So. 2d 1384, 1385 (Fla. 1985).
2. *Id.*
3. *Id., relying on* Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp., 302 So. 2d 404, 407 (Fla. 1974).
4. *Id.*
5. *See* Williams v. Ingram, 605 So. 2d 890, 893 (Fla. 1st DCA 1992).
6. *See* Mercury Ins. Co. of Fla. v. Fonseca, 3 So. 3d 415, 417 (Fla. 3d DCA 2009); Erhardt v. Duff, 729 So. 2d 529, 530 (Fla. 4th DCA 1999); Nichols v. Martell, 612 So. 2d 657, 658 (Fla. 3d DCA 1993).
7. 128 So. 3d 93 (Fla. 2d DCA 2013).
8. *Id.* at 96-7. The demand also noted that the claimants would satisfy all valid liens out of the proceeds of the settlement.
9. *Id.* at 97.
10. *Id.* at 95.
11. *Id.* at 97.
12. *Id.* at 99.
13. *Id.* at 100.
14. 2014 WL 552987 (S.D. Fla. Feb. 12, 2014).
15. *Id.* at *1.
16. *Id.* at 2.
17. *Id.* at *2.
18. *Id.* at *4.
19. *Id.* at *4.
20. *Id.* at 84.
21. *Id.* at *11.
22. Government Employees Ins. Co. v. Prushansky, 2014 WL 47734 (S.D. Fla. Jan. 7, 2014). This decision involved the same insurer, counsel for defendant, and district court judge.
23. *Id.* at *6.
24. *Id.* at *8.
25. *Id.* at *11. ■

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