

Insurance Bad Faith

Some Considerations In Addressing Time-Limit Demands

by
Ryan K. Hilton

Butler Pappas Weihmuller Katz Craig LLP

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Commentary

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[Editor's Note: Ryan K. Hilton, Esq., is a partner with the law firm of Butler Pappas Weihmuller Katz Craig LLP, which has offices in Tampa, Chicago, Philadelphia, Charlotte, Mobile, Tallahassee, and Miami. Comments in this article are those of the author and not his law firm or Mealey's. Copyright © 2013 by the author. Responses are welcome.]

Liability insurance carriers should be prompt and proactive when they receive a time-limit demand from a claimant. Time is usually not on the carrier's side when it comes to these settlement communications. There may be many issues and conditions the insurer must address and resolve in a limited amount of time. Far from exhaustive, below are some things that an insurance carrier may want to consider with a time-limit demand.

I. Thoroughly Review The Time-Limit Demand

One of the first things to determine is the demand's response deadline. This may seem like a straightforward proposition; however, sometimes it is not clear when the response is actually due. For instance, the demand letter may say that "tender of the policy limits is due within 20 days." The phrase "due within 20 days" creates an ambiguity because it is unclear if the response is due 20 days from the date of the letter or 20 days from the date of receipt of the letter. Carriers should never assume the latter. Additionally, carriers should be mindful of the date of the letter in relation to when the carrier received it. The *modus operandi* of some plaintiffs' attorneys is to date a letter, but not actually send the letter until a few days later. If there is any uncertainty about the deadline, the carrier should immediately contact the claimant's attorney to clarify the actual deadline and memorialize those

communications in writing. If the claimant's attorney fails to communicate with the carrier about this, the carrier should proceed with caution by assuming that the deadline is the earlier date.

Another consideration is the identity of the person(s) or entity(ies) the claimant is willing to release. This can be an issue where multiple insureds may be responsible for an accident, such as in situations involving permissive drivers where the owner of the vehicle or employer of the driver may also be liable for the accident under various liability theories. In these situations, problems can arise where the demand letter only references one of the two insureds who may be legally liable for the accident. Sometimes this may be an oversight by the plaintiff's attorney, while other times it is intended. Carriers should not assume that the settlement offer contemplates releasing all of the insureds when it is unclear. Carriers should therefore clarify early on who the claimant is willing to release and memorialize that in writing. The carrier will then have to decide whether it can and should settle if one of the insureds might be left out of the settlement.

II. Assess The Conditions Of The Demand

A. What Does The Response Entail?

Early on a carrier should assess and understand what needs to occur by the response deadline. If the demand requires "tender" of the policy proceeds by a given date, the carrier must understand what that means. In Florida, "tender" typically means more than a mere offer to tender the requested materials by the given deadline.¹ It does not mean that the carrier simply has to communicate its acceptance of the settlement offer by the given deadline.²

If the demand requires "acceptance" by a given deadline, that may mean that the carrier only has to say that it accepts by that date. However, the carrier should clarify with the claimant's attorney what "acceptance" means if it is not clear from the demand letter.

B. Are Affidavits Of The Insured(S) Required?

Many plaintiffs' attorneys will require the insured to complete an insurance affidavit, financial affidavit, or both before the given deadline, particularly in situations where the injuries are significant. This can create logistical issues. For example, if the insured is a truck driver, it can be difficult to track down the insured to complete an affidavit in front of a notary public before the deadline given the insured's mobile lifestyle.

Another issue is that, most often, the plaintiff's attorney will not provide a form affidavit for the insured to complete. A carrier should contact the claimant's attorney and ask for a form affidavit. There are situations, however, where the attorney will leave it to the insurance carrier to prepare the affidavit. Carriers should be careful in preparing an affidavit because the demand letter may require specific information and use specific phraseology. If time permits, the carrier should provide a proposed affidavit to the claimant's attorney and ask if it is acceptable before the deadline. If the attorney does not respond, the carrier should probably ensure that the affidavit mirrors exactly what the demand requires to preclude any possibility of a counteroffer, assuming the jurisdiction follows the "mirror image" rule.³

Where the demand requires an affidavit from the insured, the carrier should explain that to the insured and provide an affidavit for the insured to review and sign. Insured corporations may be understandably reluctant to complete a financial affidavit. In any event, the insurance carrier should explain to the insured that completing the affidavit is a condition of the settlement and that the insured may want to retain personal counsel to advise the insured about the affidavit requirement. The insurance carrier cannot control whether the insured ultimately signs the required affidavit(s), but the carrier can control communicating with the insured about it and giving the insured the option to complete the affidavit(s) in a timely manner.

C. Is A Liability Insurance Disclosure Request Included?

Florida has a liability insurance disclosure statute, which requires liability insurers that issued policies in Florida to provide detailed information about the subject liability policy in a statement under oath and by providing a copy of the policy.⁴ Georgia has also adopted a liability insurance disclosure statute that is similar to Florida's.⁵

Plaintiffs' attorneys in Florida usually request insurance disclosure in their initial letter to the carrier about their representation of their client in relation to the accident. However, sometimes plaintiffs' attorneys will condition their client's demand upon the insurer complying with the insurance disclosure statute. Under these circumstances, insurers that do not comply with a statutory disclosure request may face adverse consequences such as a failed settlement opportunity. In *Cheverie v. Geisser*,⁶ the court found that no settlement was reached because the offer to settle was contingent upon the insurer providing the disclosure information and the insurer did not do so. Likewise, in *Schlosser v. Perez*,⁷ the court found there was no settlement because the insurer did not strictly comply where compliance with the statute was a condition of settlement. Sometimes, plaintiffs' attorneys will slightly modify their request for insurance disclosure, departing from the actual statutory language. Insurers should be careful to track what the claimant is asking for and provide that information under those circumstances because Florida follows the "mirror image" rule.⁸

D. Release Issues

Plaintiffs' attorneys usually do not provide a release with their client's demand. The attorneys typically leave it up to the insurance carrier to draft of the release. This can create potential problems for a multitude of reasons. Carriers may, for instance, include hold harmless and indemnity language in a release, which the plaintiff's attorney may view as a counteroffer. Sometimes, the attorney will specifically state in the demand that he or she will not accept hold harmless and indemnity language. Under those circumstances, a carrier should not include that type of language in any proposed release, although it can happen with an inattentive carrier. A good rule of thumb to follow is to keep

the proposed release simple, while making it clear to the plaintiff's attorney that it is a "proposed" release.

III. Communicate With The Insured About The Demand

The insurance carrier must communicate with the insured about the pending time-limit demand and keep the insured advised of the status of the claim.⁹

IV. Assess The Insured's Liability And The Claimant's Damages

A. What Liability Theories May Apply?

Determining the insured's liability for the accident can sometimes be complicated. The carrier must understand what theory of liability may apply to the insured. If the insured is an active tortfeasor, this analysis may be easy. However, if the insured was not involved in the auto accident, he or she could be vicariously liable depending on the state's law. Florida, for instance, imposes strict vicarious liability to owners of vehicles under the dangerous instrumentality doctrine.¹⁰ California also imposes vicarious liability to owners but under an "owner liability" statute.¹¹ On the other hand, in Georgia, the mere ownership of a vehicle, without more, is insufficient to establish the owner's liability for the negligence of another driver, but when an owner of a vehicle maintains the vehicle for the use and convenience of his family, that owner may be held liable if the owner had the right to exercise such authority and control that it may be concluded that an agency relationship existed between the owner and the family member with respect to the use of the vehicle.¹²

It is important therefore for the carrier to understand the relationship of the insured parties and the theories of liability that may apply to them. A carrier should not insist on releasing an insured who is not legally liable for the accident at issue because that may create a counteroffer.

B. Determining Potential Additional Insureds

Liability issues can also be complicated in certain situations, such as in trucking accidents because often there are many persons and entities involved. For example, a named insured trucking company may hire an owner-driver to drive a tractor for it under the named insured's USDOT placard, while the insured trucking

company leases the trailer from another entity. Determining who may be liable for the accident under the federal and state trucking laws and who qualifies as additional insureds under the policy can be a complex endeavor.

C. Assessing The Claimant's Damages

Understanding and appreciating the claimant's injuries is important. The demand package may not contain all of the claimant's medical records and bills. The carrier must determine early what it needs to assess the claimant's damages. If there are missing records and information, it may be reasonable for the insurer to request additional records and information from the claimant's attorney. The claimant's pre-accident medical records could be highly relevant, especially in a soft-tissue-injury situation. Such requests should occur very early and not right before the expiration of the demand.

A carrier should also be careful in requesting the additional records so the claimant does not view the request as a counteroffer. Plaintiffs' attorneys will sometimes oblige the request by agreeing to their client signing medical authorization forms so the insurer can obtain additional records. Plaintiffs' attorneys will other times refuse by stating that the carrier has enough information. The carrier will then need to decide whether it absolutely needs the additional records and information.

Assessing the damages together with the insured's potential liability and the policy limits is an important calculus. If, for example, the jurisdiction applies a pure comparative negligence scheme, there is a possibility that the claimant's degree of fault could greatly exceed the insured's, but settling may be the appropriate action to take. Under that scenario, it may be reasonable for the carrier to settle where the insured's liability is low (10%) but the value of the damages are significantly higher (a hospital bill of \$100,000) than the relatively low policy limits (\$10,000). Accordingly, settling for the \$10,000 policy limits may be the right course of action to take under those circumstances.

V. Assess The Potential For Liens

The claimant may have treated at a lien hospital. Most time-limit demands do not acknowledge the possibility

that liens may exist. Because over forty states have hospital lien laws, it is important to assess the potential for a hospital lien and to understand that jurisdiction's hospital lien laws.¹³ Jurisdictions vary greatly with respect to the consequences a carrier may face when impairing a hospital lien.¹⁴ Insurers should therefore be cognizant of the potential for liens.

If there are valid liens against the claimant, the insurer must communicate with the claimant's attorney about them and arrive at some type of agreement regarding the satisfaction of those liens. Failing to do so may potentially expose every party to the settlement to an impairment action.

If the claimant is a Medicaid or Medicare recipient, the insurer will have to address issues associated with those types of claims and liens.¹⁵

VI. Conclusion

Time-limit demands require prompt attention and may raise many complicated issues for the insurance carrier. It is important for the carrier to act promptly, communicate with the insured, and avoid inadvertent counteroffers. Because the laws of each state can vary significantly with respect to issues that may be implicated in relation to a time-limit demand, an insurance carrier may want to retain an attorney in that jurisdiction to assist the carrier with the various potential hoops and pitfalls that could implode a settlement opportunity.

Endnotes

1. See, e.g., *Aetna Cas. & Surety Co. v. Protective Nat'l Ins. Co.*, 631 So. 2d 305, 309 (Fla. 3d DCA 1993) (no tender occurred by the prescribed deadline because "a check in the offered amount was never actually delivered to said counsel nor was an attempt of such delivery made. . .").
2. *Id.*
3. The "mirror image" rule means that an acceptance must be identical to an offer. States that have adopted this rule include, for instance, Florida and Delaware. See *Trout v. Apicella*, 78 So. 3d 681 (Fla. 5th DCA 2012); *Ramone v. Lang*, 2006 WL 905347, at *10 (Del. Ch. April 3, 2006).
4. See FLA. STAT. § 627.4137 (2013); see also FLA. STAT. § 627.401 (2013). Florida also has an insurance liability disclosure statute that applies to surplus lines insurers, which is slightly different in that it allows surplus lines carriers 60 days to respond to disclosure requests. See FLA. STAT. § 626.9372 (2013).
5. GA. CODE ANN. 33-3-28 (2013).
6. 783 So. 2d 1115 (Fla. 4th DCA 2001).
7. 832 So. 2d 179 (Fla. 2d DCA 2002).
8. See *Trout*, 78 So. 3d at 681.
9. See, e.g., *Boston Old Colony Ins. Co. v. Guitierrez*, 386 So. 2d 783, 785 (Fla. 1980) (under Florida law, the good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same.)
10. See *Southern Cotton Oil Co. v. Anderson*, 86 So. 629 (Fla. 1920).
11. See WEST. ANN.CAL.VEHICLE CODE § 17150.
12. See *Dashtpeyma v. Wade*, 646 S.E.2d 335 (Ga. Ct. App. 2007).
13. See *Shelby County Healthcare Corp. v. Nationwide Mut. Ins. Co.*, 325 S.W.3d 88, 92 (Tenn. 2010).
14. See, e.g., *University of South Alabama v. Progressive Insurance Company*, 904 So. 2d 1242 (Ala. 2004) (the insurer's impairment of a hospital lien entitled the hospital to its entire costs of care and treatment even though the costs exceeded the amount of the prior settlement that did not include the hospital); *Shands Teaching Hosp. and Clinics, Inc. v. Mercury Ins. Co. of Fla.*, 97 So. 3d 204 (Fla. 2012) (because the insured was uncollectable, the value of the impairment of the lien was the insurer's policy limits, which was \$10,000 for bodily injury liability, even though the hospital's outstanding balance was \$28,418.20); *Shelby County Health Care Corp. v. Baumgartner*,

2011 WL 303249 (Tenn. Ct. App. 2011) (the hospital could recover only the damages that were attributable to the impairment of its lien by the insurers, in light of the fact that, had the hospital lien been honored, the hospital would have received only

one-third of the amounts paid to the claimants by the insurers).

15. This article does not address the complexities of Medicare and Medicaid liens. ■

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1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA

Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)

Email: mealeyinfo@lexisnexis.com

Web site: <http://www.lexisnexis.com/mealeys>

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