POLICY LIMIT DEMANDS - PART II: A VIEW INTO THE OTHER ROOM

November 2017

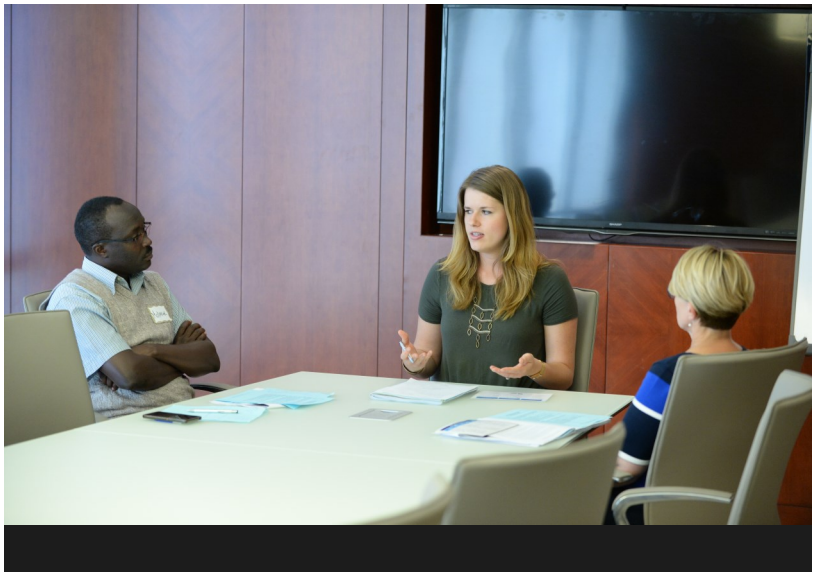
Negotiations during mediation can be a bit like playing poker – you know what is in your hand (what you are willing to offer, or accept, to settle) but you are not sure what is in your opponent's hand. When mediating a policy limits demand case, all eyes are on one number – the policy's limits – and the insurance company wants to know whether plaintiff intends to hold firm for the policy limits, or whether he or she will agree to take less. The plaintiff and his or her attorney come into mediation wondering whether the policy limits will be tendered at the end of the day, or whether the final offer will be for something less. At some point during the negotiation process, each side usually asks the same question – what is really going on in the other room? This article is intended to provide information that will help you understand what might be influencing your opponent's negotiation strategy. My hope is that these insights will allow you to consider things from your opponent's perspective as a way for both sides to reach an acceptable resolution of the case.

By Richard A. Huver

Having litigated civil cases for nearly 30 years, I realize no two cases are alike. Each case, and frankly each client, has their own strengths and their own weaknesses. There are risks on both sides. Figuring out what any case is potentially worth is far from an exact science and involves more moving parts than we can address here. The ultimate determination of value is usually defined by the jury's verdict, but if you tried the same case 10 times, you could get 10 different verdicts. The only certainty about trial, of course, is the uncertainty of the outcome, a fact confirmed by a cursory review of any weekly jury verdict report.

Before we address what might be influencing your opponent's negotiation strategy, there are a number of basic considerations to keep in mind.

Is this Really a Policy Limits Case?



I realize this is the proverbial $50,000 question. As discussed in Part I of this series (POLICY LIMIT DEMANDS VS. MEDIATION CONFIDENTIALITY) however, keep in mind that the duty of good faith and fair dealing requires an insurance company to accept a demand for policy limits only if, "in light of the victim's injuries and the probable liability of its insured, the ultimate judgment ***is likely to exceed*** the amount of the settlement offer." (***Johansen v. California State Auto. Ass'n Inter-Ins. Bureau*** (1975) 15 Cal.3d 9, 16. (Emphasis added.)

How likely is an excess verdict in your case? There are multiple possibilities. A difficult liability case with the potential for damages well in excess of the policy limits presents a unique challenge. A 1 in 10 chance for a plaintiff's verdict might not justify insisting on, or paying, the policy limits, whereas a case with a 50/50 chance of going either way might. How much the verdict could exceed the policy limits is another factor to consider. A case with an upside potential of $100-150,000 over a $1,000,000 CGL policy might not create a significant enough risk to justify paying the limits. Likewise, an injury claim with a $20,000 or even $25,000 verdict potential on the high end may not present a compelling enough reason to trigger payment of the $15,000 policy limits. There is a point at which the risk of losing, or the likelihood of winning, an excess verdict tips the scales one way or the other. You need to make the assessment about where your case falls.

The Value Of A Case Is In The Eyes Of The Evaluator

What any given case is worth depends, in part, on who you ask. A group of plaintiffs' lawyers would probably give opinions on verdict and settlement values within a reasonably similar range. The same would likely hold true for a random sampling of defense lawyers and claims adjusters. However, it is just as likely there would be a gap – maybe significant – between the two ranges of values.

Beyond the influence advocacy inherently plays in valuing cases, there are other factors at work. Historical anchoring biases, for example, can affect opinions on value. If you are always starting high or always starting low in negotiations, these may have an implicit influence on your valuation. Valuations can change over time - the value early on might be very different from the value at the time of mediation or even trial. Valuation is a fluid process, influenced by what you know at any given point in time. Some cases get better with time, others get worse. If a large component of the case involves general damages, valuation can be particularly challenging with a wide disparity of opinions. These variables can serve as unconscious anchors supporting your position that the case is, or is not, worth the policy limits.

Settlement Value vs. Trial Value

Finally, there is the obvious difference between settlement value and jury verdict value. By definition, settlement is a compromise with both sides giving up the opportunity to find out what a jury would decide in exchange for the certainty of resolution. As such, there is no reason for the defendant to settle the case near the top of the possible outcomes at trial any more than it is reasonable for the plaintiff to settle the case at or near the worst possible outcome. When you talk to your client about the prospects for a big loss or a big win in preparing for mediation, try to avoid anchoring yourself or your client to their best possible outcome at trial.

With these preliminary thoughts in mind, here is a look at what might be going on in your opponent's room.

Decision Making Considerations in the Defendant's/Insurance Company's Room

If you made a policy limits demand that is not being paid by the insurance company, there could be more nuanced issues at play than you think.

- **More Information Is Needed To Document The File**

  Every decision by an adjuster or supervisor is subject to being audited – and that means being criticized. Settlement authority usually needs the consent of someone – or a committee – beyond just the adjuster at your mediation. Therefore, a recommendation to pay the policy limits requires more support than just your policy limits demand. Since every adjuster must document their decision, perhaps they need more information. Saying there is a large economic loss, or that your client suffered greatly, is not enough. Bolster your client's claims with documentary support, anticipated testimony, photographs, maybe even a preliminary expert report if necessary. Insurance companies see plenty of claims with outrageous demands that turn out to be untrue or unsupported. Your case is not one of those, so give the insurance company what they need – it may result in payment of the limits.

- **The Adjuster Wants Or Needs To Meet Your Client**

  If discovery has not been completed, there is a chance the insurance adjuster and/or defense counsel want the opportunity to meet your client. There is a benefit to putting a face to the person they have read about. Even if your client has been deposed, a personal meeting with the insurance adjuster might make a difference. Does your client have a compelling story to tell? If so, suggest a meeting or be prepared for the request. You can work with the mediator on an acceptable protocol for the meeting. Is it just a meet and greet or do you want your client to speak? Do you want to ask some questions or will you allow the adjuster to do so? The meeting might be the last thing the adjuster needs before recommending payment of the policy limits.

- **The Insurance Company Needs Ratification From The Mediator**

  There are cases where defense counsel and/or the adjuster may be close to recommending payment of the limits but would benefit from the independent evaluation of the mediator. Help the mediator help you by giving him or her all information needed to justify paying the policy limits. And please share your briefs with the defense counsel/ adjuster. It is more important than you might think, particularly in these policy limits cases.

- **How Serious Are You Or Your Client?**

  There are cases that might be worth more than the policy limits, but the likelihood of an excess verdict is less than a sure thing. How serious are you and your client about sticking to the policy limits demand? Is there a chance your client would consider something less? Only you and your client know the answer to that question, and the insurance company wants to find out. If you are serious, you never have to lower your demand. But be prepared to try the case if the final offer is less than the policy limits.

Decision-Making Considerations In The Plaintiff's/Plaintiff's Counsel's Room

If you represent the defendant and/or the insurance company and are headed into a policy limits mediation, here are some things that might be at play in the plaintiff's room:

- **Client Expectation Issues**

  Plaintiff's counsel recognizes the likelihood of an excess verdict is not significant enough to justify the risk of taking the case to trial. But the plaintiff is not of the same mindset. Therefore, getting authority to negotiate below the policy limits may take time. In these situations, a well-informed mediator can help the plaintiff set a more realistic expectation. Sharing what you know with the mediator can help with delivering this message. But be prepared for the demand to remain at the policy limits for some time. A skilled mediator can come up with creative ways to ultimately break the impasse and move the needle toward resolution.

- **Plaintiff's Counsel Is Unaware Of Negative/Harmful Information**

  Discovery is directed at the opposing party but there are cases where it would be beneficial for the plaintiff's attorney to conduct discovery on their own client. Plaintiff's counsel may be blind to facts that negatively impact their client's case. Is there harmful evidence? Has plaintiff impeached him or herself in deposition? Are there surveillance videos undermining their claims? Has plaintiff's expert taken a contradictory position in prior testimony? If you know of these or other negative facts that affect valuation, it may be in your best interest to share them with the mediator, if not with the plaintiff. Doing so could help plaintiff and/or plaintiff's counsel make a "fair" evaluation of the claim, rather than the one they are making in a vacuum.

- **Determining Their Best Option**

  Dropping below the policy limits during negotiations may or may not be a sign plaintiff will ultimately settle for less. Some plaintiffs want to find out what the best offer is going to be at mediation and then have a discussion about the risks versus benefits of taking the case to trial. While negotiations may grind along, you likely will only find out which way the plaintiff intends to go with your best and final offer. However, even if your best offer is not accepted, there still may be ways to get the case resolved.

- **Signaling Weakness**

  Plaintiff's counsel may be concerned that coming off the policy limits will be interpreted as a sign of weakness. Even though evidence of offers or demands during mediation is not admissible in a later proceeding - even to prove bad faith – they may be unwilling to take that step. An experienced mediator can assist plaintiff and plaintiff's counsel in navigating the negotiation process to determine what your best offer is but plaintiff may not drop below the policy limits until the very end.

Let the Process of Mediation Work

As illustrated above, there is plenty going on during these policy limits mediations. Considering things from your opponent's perspective is helpful. So too is remembering that mediation itself is a process. One party, or both, may simply need to go through the "process" before they make their final decision. Insurance companies can confirm they tried to settle for less but plaintiff stood firm on the policy. Similarly, plaintiff may need to experience the process of mediation before agreeing to settle for less – mediation is their only "day in court." As frustrating as it can become, trying to rush the process usually backfires.

When negotiations turn to dollars and cents, I expect the opening demand to be for the policy limits and the opening offer to be for something less. Those are the only logical places to start. Otherwise, the policy limits would have already been tendered, or there would have been a demand for less. If you represent the plaintiff, you should not be disappointed when the opening offer is for less than the policy. There is still an opportunity to settle for the policy limits – or you and your client may decide to settle for less. Similarly, if you represent the defendant, and the plaintiff refuses to budge from the policy limits, you should not be surprised. Even though they agreed to attend mediation, that does not necessarily mean they intended to accept less than the limits.

Let the process play itself out. No experienced mediator is going to force anyone to do something they do not want to do. A skilled mediator can assist the parties in working through the process of mediation so that both sides are comfortable knowing they advocated as best they could for their respective clients. The process will let each party know exactly where their opponent stands at the conclusion of the mediation – which hopefully will be with a handshake and a resolved case.