POLICY LIMIT DEMANDS VS. MEDIATION CONFIDENTIALITY: PART 1

BY RICHARD A. HUVER

Is the lid off the policy? That question has undoubtedly been asked by plaintiff and defense lawyers alike. Whether an insurance company has a duty to accept a policy limits demand is generally an individualized question dependent on many factors, including the timing of the demand, the information available on both liability and damages, and the likelihood of a verdict in excess of the policy limits. Evaluating how these factors apply to a demand made during the claim process or litigation is one thing. But what happens if the policy limits demand is made incident to or during a mediation?

In the first article of this two-part series, we look at the interplay between policy limit demands and mediation confidentiality. Assume for this discussion that plaintiff, whose claim is likely worth more than the available policy limits, opens with a policy limits demand during the mediation, or such a demand is set to expire at the end of the mediation. What happens if the insurance company makes an opening offer for less than the policy limits, even if they believe the case may be worth more than the policy? Does such an offer breach the insurance company's duty to accept a reasonable settlement offer? Can the plaintiff and his or her attorney walk out of the mediation if the policy limits are not immediately tendered, confident the lid is off the policy? To answer these questions in the mediation scenario, we must first answer a different question: is evidence of the insurance company's opening offer even admissible, particularly in a subsequent bad faith lawsuit?

DUTY TO ACCEPT A REASONABLE SETTLEMENT OFFER

An insurance company's duty to accept a policy limits demand is well-established in California. The duty of good faith and fair dealing implied in all contracts, including insurance policies, requires that an insurer not expose their insured to personal liability for a judgment in

excess of the policy limits.[1] In evaluating the reasonableness of a policy limits demand, the insurer must consider, among other things, "whether, 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."[2] Where there is a "substantial likelihood" of a recovery in excess of the policy limits, the insurer is ordinarily obligated to accept the policy limits demand, unless there are compelling reasons to the contrary.[3]

MEDIATION CONFIDENTIALITY

California's strict mediation confidentiality is also well established. Generally speaking, anything said or exchanged "for the purpose of, in the course of, or pursuant to mediation" is inadmissible as evidence and is not subject to discovery.[4] There are a few, narrow exceptions to the statutes, and only one of those could possibly be considered to apply here: i.e., where application of confidentiality would lead to an "absurd result," thereby undermining the statutory purpose.[5]

Over the years, efforts have been made to discover and/or introduce evidence of conversations or communications during a mediation for purposes of subsequent litigation. Examples include in a legal malpractice action, or in support of a motion for sanctions alleging an attorney's bad faith conduct during mediation. Such efforts have been repeatedly rejected by the courts, even those based on the "absurd result" exception, because of the near absolute scope of mediation confidentiality.[6]

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[1] ***Communale v. Traders Gen. Ins. Co***. (1958) 50 Cal.2d 655, 659

[2] ***Johansen v. California State Auto. Ass'n Inter-Ins. Bureau*** (1975) 15 Cal.3d 9, 16.

[3] ***Murphy v. Allstate Ins. Co***. (1976) 17 Cal.3d 937, 941.

[4] California Evidence Code §§1115, 1119, et seq.

[5] ***See Cassel v. Superior Court*** (2011) 51 Cal.th 113, 127-28.

[6] ***See***, ***e.g.***, ***Foxgate Homeowners' Assn. v. Bramlea Cal., Inc***. (2001) 26 Cal.4th 1, 17-18.

INTERSECTION OF THE DUTY TO SETTLE AND MEDIATION CONFIDENTIALITY

How does the combination of California's bad faith case law and mediation confidentiality statutes impact the scenario above? Is evidence of the insurance company's implicit rejection of the policy limits demand with its opening offer for something less admissible? Or are all offers made, including the opening offer, protected by mediation confidentiality, even in a subsequent bad faith lawsuit? Put another way, does an insurance company's duty of good faith and fair dealing to its insured outweigh California's mediation confidentiality statutes? The answers appear to be no, yes, and no.

First, evidence of an insurance company's offer made "in the course of, or pursuant to mediation" is not discoverable nor admissible to establish a rejection of the policy limits demand. Hoping the court will carve out an exception here is highly unlikely, given Supreme Court holdings of a "near categorical prohibition against judicially crafted exceptions to the mediation confidentiality statutes..."[7]

Second, even though an insurance company's offers during mediation are inadmissible in a bad faith lawsuit, this does not lead to an unfair result. Few attend a mediation expecting the opening demand or the opening offer to be accepted. Mediation is a process. Negotiation strategies take many different forms and are as varied as the participants. Parties may ultimately decide to settle for the policy limits or they may decide to settle for less. A plaintiff who truly believes his or her case is worth more than the policy can simply reject any offer for less during mediation. And if the insurance company believes the value of the claim is likely worth more than the policy limits, it can accept the demand before it expires and the case is resolved.

Therefore, unless the California Legislature decides to carve out a new exception to mediation confidentiality that specifically addresses this particular scenario, for purposes

[7] ***Amis v. Greenberg Traurig LLP*** (2015) 235 Cal.App.4th 331, 333.

of the present question, what happens in a mediation, stays in a mediation. And that may not be a bad thing after all.[8]

Policy limit demands play out in mediations all the time, whether the limits are $15,000 or $1,000,000. How each party handles the matter is highly case-specific. Parties should recognize, however, that offers and demands during mediation remain confidential, which is consistent with the public policy reasons for mediation in the first place.

In Part II of the series, I will discuss realities, practicalities, and strategies you should consider when mediating potential policy limits cases.

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Successful mediations require someone who understands the legal and practical issues at play, who appreciates the nuances of the process, and who listens to and acknowledges the myriad of interests and personalities at play. Through his 30 years of litigation experience and leadership roles; Richard developed the skills and expertise necessary to serve as a successful mediator for your case. As a mediator, Richard has handled cases in a variety of fields and specialties, including business, real estate, employment, and personal injury. From the simple to the complex, and from the cooperative to the contentious, Richard has the experience, the temperament and the skills that are needed to help parties resolve their disputes in an expeditious and professional manner.

[8] There is a pending proposal by the Law Review Commission to create an exception to absolute mediation confidentiality for purposes of subsequent legal malpractice lawsuits.