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The Devil is in the Details: Navigating Policy Limit Demands to Avoid Malpractice Exposure

It's late Friday afternoon before a holiday, and you decide to leave early to get a head start on the long weekend. The office mail delivery is behind schedule and arrives after you leave. In your mail is a lengthy settlement demand letter in a personal injury case for which you have recently been retained by an insurance company to represent its insured. The letter arrived by certified mail. It demands payment of the full $500,000 limit of liability of your client's insurance policy, in exchange for a release. The letter specifies that the demand will remain open for ten days. Buried on page fifteen of the letter is a requirement that all communications regarding the demand be in writing.

You take a much-needed extra day off, and return to the office on Tuesday. The demand letter is waiting for you on your desk. You have only done a preliminary analysis of the claim but, based on your initial review, you believe the case likely warrants an early policy limits settlement. The plaintiff's injuries are significant (as reflected in the partial medical records enclosed with demand), it is likely that your client will be found at least partly responsible for the accident, and the $500,000 limit will be reduced by what are likely to be significant defense costs. Nevertheless, you think it prudent to complete your analysis and obtain additional documentation before making any recommendation to the client and the client's insurer.

The short timeframe for accepting the demand also seems extremely unreasonable, particularly given the holiday weekend and that the demand arrived by snail mail with no copy by email. Your client has also been very difficult to reach; you still haven't been able to connect with her other than an initial short phone call. You will also have to confirm that your client's insurer is amenable to paying the full limit at this early juncture, and you believe it is likely that the insurer will want to obtain the claimant's full medical records before it is willing to pay the policy limits.

In light of all of these issues, you decide to give the claimant's counsel a call to request the claimant's full medical records and to ask for a short extension of time to respond to the demand. You finally reach counsel after leaving several voicemail messages. As you begin to speak, counsel abruptly interrupts to tell you that the demand is off of the table. Counsel explains that the demand expressly stated that all communications be in writing, and your multiple telephone communications constitute a rejection of the demand. Counsel tells you that the claimant will not engage in any further settlement discussions and intends to take the matter to trial.

You are in shock. Can leaving voicemails for an opposing counsel regarding a demand really constitute a rejection of the demand? The short (and scary) answer is "yes." That was in fact the exact scenario at issue in a recent Georgia case. In *White v. Cheek*, 859 S.E.2d 104 (Ga. Ct. App. 2021), the demand, which was communicated in a twenty-two page single-spaced letter, with sixteen footnotes, included within its many requirements that all communications regarding the demand be in writing. The insurer left the claimant's attorney several voicemail messages asking for more information. The insurer ultimately sent a letter accepting the demand and enclosing a check for the full settlement amount within the specified timeframe. The claimant's attorney rejected the insurer's acceptance based on the insurer's failure to comply with the demand's terms that all communications be in writing. Although the court concluded that the insurer's request for more information did not constitute a counteroffer, the court held that the insurer had violated the express terms of the demand by communicating through telephone calls vs. in writing. The court concluded that the failure to comply with this express term constituted a rejection of the demand.[1]

Although the result in *White* is incredibly harsh, and not all courts would agree with *White's* holding, the case does not stand alone. Cases from other jurisdictions likewise have held that any actions taken in response to a settlement demand that do not strictly comply with the demand's terms, *i.e.,* any response which is not a "mirror image" of the demand, constitute a rejection of the demand. For example, in *Schlosser v. Perez*, 832 So.2d 179 (Fla. Ct. App. 2022), the claimant's daughter was injured in a car accident caused by an insured driver. The claimant sent a settlement demand for the policy limit along with a statutory request for insurance information. The insurer sent the claimant a check for the full policy limit but did not include a response to the request for insurance information, and the claimant's attorney returned the check. The claimant later filed suit against the insured, and the insured argued that there had been a valid settlement. The court disagreed, holding that no settlement had been reached because the insurer did not comply with the claimant's disclosure request.

Similarly, in *Reppy v. Winters*, 351 S.W.3d 717 (Mo. Ct. App. 2011), the claimant was injured in a car accident caused by an insured. The claimant demanded the insured's policy limit of liability to resolve the claim. The demand was accepted, but the acceptance letter from the insured's counsel to the claimant's counsel stated that the insured's counsel was proceeding "with the understanding that [claimant's counsel] will be responsible to indemnify our client, his insurer, and our office for liability for any type of lien." The claimant rejected the acceptance and filed suit against the insured. The Missouri Court of Appeals held that the parties had not reached a settlement because indemnification was not a term included in the original offer. Accordingly, the statement regarding indemnification in the response letter constituted a counteroffer and a rejection of the initial demand.

The simple fact is that in some cases the last thing claimant's counsel wants is for a policy limits demand to be accepted. Where the policy limit is low in comparison to potential damages, and liability is reasonably likely, claimant's counsel's real goal may be to "set up" a bad faith failure to settle within limits case in order to "open" the policy, rather than to obtain a settlement within limits.

As a result, it is not unusual for a settlement demand to come with a short deadline for acceptance, or in a form that is confusing or incomplete, reflecting an intentional effort by claimant's counsel to trigger an inadvertent "rejection" of the demand. Particularly where a client is underinsured, the claimant's attorney may be laser-focused on forcing a mis-step in defense counsel's response to the settlement demand, in order to attempt to set-up the client's insurer so that the claimant ultimately can seek amounts far beyond the client's policy limit of liability. What often happens in these scenarios is that the claimant refuses to engage in further settlement discussions following the "rejection" of the policy limits demand, and proceeds to obtain a verdict against the attorney's client that far exceeds the amount of the client's available insurance coverage. The finger-pointing then begins and, regardless of how reasonable the attorney's actions were, the attorney may face malpractice claims from the client and/or the client's insurer for losing the initial settlement opportunity.

In one case in which the writers were retained to represent a carrier after a limits demand with a short deadline for acceptance had expired, and where potential damages were far in excess of limits, the claimant's counsel commented: "The only time I had any concern during this entire litigation was while my policy limits demand was open. I was so worried it would be accepted. What a relief when the deadline passed with no acceptance."

1 The court in *White* was interpreting an earlier version of Ga. Code Ann., § 9-11-67.1, which was in place at the time of the demand. Based on the court's reasoning, however, its holding was premised not on the statute, but on common law principles of contract formation. Accordingly, it does not appear that the result would differ even under the current form of the statute, which was revised to provide some additional safeguards to attorneys and insurers in responding to settlement demands.

Not all cases are as clear-cut as that one. But whenever potential damages substantially exceed the insured's limit of liability, defense counsel needs to be cautious about how settlement negotiations (and especially time-limited demands) are handled. Counsel should also be particularly aware of states, such as Florida, which provide that an insurer has an affirmative duty to try to resolve matters where the insured's liability is reasonably clear, and damages potentially exceed the available insurance coverage. In those jurisdictions, the insurer can be liable for failure to settle, even where the claimant never made a settlement demand. That context is particularly ripe for gamesmanship by claimant's counsel, who may employ delay tactics in providing information regarding liability and damages, only to turn around later and reject the insurer's offer of policy limits, claiming that the offer came too late.

The cases cited above and others like them instruct that an attorney's every action in response to a settlement demand, no matter how reasonable or benign, may constitute a rejection if it does not strictly comply with the terms of the demand. An attorney's inadvertent rejection of a settlement demand could be the result of actions as simple as:

- Returning settlement documents in person vs. through the mail;
- Failing to include with an acceptance a client affidavit confirming no additional insurance coverage;
- Seeking clarification of the terms of the release;
- Requesting an extension of time for acceptance;
- Seeking additional time for payment of the settlement amount;
- Providing a form of release that has minor deviations from the terms demanded;
- Sending payment in multiple checks vs. a single check; or
- Conditioning acceptance on proof of the claimant's legal authority to sign a release.

The lesson to be drawn from *White* and similar cases is clear – the devil is in the details. When faced with a policy limits demand in a matter where the client's liability is reasonably clear and the damages justify payment of limits, it is absolutely critical that an attorney proceed carefully and with extreme caution.

We provide below some practice pointers for attorneys faced with these situations:

1. Carefully consider how potential damages compare to the available policy limits in light of the likelihood of an adverse liability finding, and whether the case at hand is one in which claimant's counsel may prefer to set up an extracontractual claim, rather than accept a policy limits settlement.
2. Make sure your client and her insurance carrier are informed of the risk of not accepting a limits demand.
3. Pay close attention to all of the specific terms of the demand, even where the requirements seem trivial or are buried in a single-spaced, multi-page demand letter.
4. Ensure a detailed understanding of the rules of the applicable jurisdiction before responding to a demand, and know what acts may be deemed a "rejection" of the demand.
5. Do not assume that the timeframe for acceptance of the demand or for payment of the settlement amount is unenforceable, simply because it is unreasonably short.
6. Respond to all requests for information and act promptly to ensure that the information can be gathered and delivered within the specified timeframe.
7. Be particularly careful in situations where the applicable policy limit of liability is a fraction of the amount of the claimed damages – these situations lend themselves to bad faith "set-ups."
8. Balance the need to obtain broad release language with the risk of inadvertently rejecting a demand.
9. Be careful using "form" releases that may not comply with all terms of the demand.
10. Always communicate clearly with clients and their insurers as to the potential consequence of a response to a settlement demand that is anything but a "mirror image" of the demanded terms.

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