

## How to Handle Cases with Potential Excess Verdicts

**James A. Kee, Jr.**  
**Kee & Selby, LLP**  
**1900 International Park Drive**  
**Suite 220**  
**Birmingham, AL 35243**  
**(205) 968-9900**

- An Insurer can be held liable for failure to settle within its Insured's policy limits based on negligence or bad faith. However, mere failure to settle alone does not automatically equate to negligence or bad faith.

Factors to be considered by a court/jury in determining whether an insurer was negligent:

- Did the insurer use ordinary care and prudence in evaluating and acting upon settlement opportunities?
- Anticipated range of verdict
- Strengths and weaknesses of all evidence to be presented on either side
- History of the geographical area in similar cases
- Appearance, persuasiveness and appeal of the plaintiff, insured and witnesses

*State Farm v. Hollis*, 554 So. 2d 387 (Ala. 1989)

Factors to be considered by a court/jury in determining whether and insurer is guilty of bad faith for failure to settle:

- Was there a full investigation of the facts of the case?
- Was there an incompetent or dishonest evaluation of the underlying case?
- Did the Insurer properly analyze the strength of its Insured's position in the underlying case from both a liability and damages standpoint?
- Did the Insurer place its interests ahead of its Insured's?
- Was the Insurer's refusal to settle related in any way to the existence of reinsurance?
- Did the Insurer establish appropriate reserves to settle the case?
- Did the Insurer (a) fail to respond to settlement offers, (b) delay responding to settlement offers or (c) fail to explore settlement possibilities when it would have been prudent to do so?
- Was there an opportunity to settle the case within policy limits?
- Did the Insured request settlement within policy limits?
- Did the Insurer fail to keep its Insured advised of relevant facts and developments?
- Was the amount of risk to the Insured, if the case was not settled, disproportionately large when compared to the risk to the Insurer?
- Did the Insurer take its own counsel's advice?

- Did the Insurer act in an arbitrary, inflexible manner, indifferent to the consequences to the Insured?
- Did the Insurer properly react to adverse developments?
- Did the Insurer request some third party to contribute to the settlement before it offered its own policy limits?
- Was the Insurer defending under a reservation of rights?
- Any other factors tending to establish or disprove bad faith

*Carrier Express, Inc. v. Home Indemnity Co.*, 860 F.Supp. 1465 (N.D. Ala. 1994)

- A demand within policy limits is not necessarily a prerequisite to recover for negligence or bad faith

### **Damages**

- Compensatory damages are recoverable where an insurer negligently or in bad faith refuses to settle a case within policy limits. These damages may include economic loss (the difference between the verdict and policy limits) and sometimes mental anguish or emotional distress.
- Punitive damages may also be awarded for bad faith where there is proof by clear and convincing evidence that the insurer consciously or deliberately engaged in oppression, fraud, wantonness or malice.

### **Advice of Counsel**

- As set forth above, advice of counsel may be considered along with other factors in determining whether an insurer committed bad faith, but it is not always an absolute defense to negligence or bad faith.

### **Excess Insurers**

- A primary insurer does not owe a duty of good faith to an excess insurer with respect to the settlement of a lawsuit against an insured. Thus, an excess insurer cannot sue the primary carrier for refusing to settle within its policy limits when the verdict exceeds those limits and reaches the excess insurer's coverage.<sup>1</sup> *Federal Ins. Co. v. Travelers Cas. & Surety Co.*, 843 So. 2d 140 (Ala. 2002). Nevertheless, it is always a good idea to keep the excess insurer informed of the facts and settlement negotiations, especially where an excess verdict is likely.

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<sup>1</sup> This is the law in Alabama, but some states recognize such a duty, including Florida, California, Indiana, Maryland, Michigan, Minnesota, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania and West Virginia.

## **Practical Suggestions**

- Whether or not you are defending under a reservation of rights, always write the insured at the outset and advise them of the possibility or likelihood that a verdict will exceed their policy limits, if there is any chance that a verdict might exceed policy limits.
- Always thoroughly investigate the claim and the nature and severity of the plaintiff's injuries.
- Keep the insured informed of all case developments, including all settlement demands and offers. (Both the insurer and the retained counsel should do so).
- What to do when you receive a "hammer" letter (a demand to settle within policy limits)
  - Review and analyze your file
    - Has the case been properly investigated and evaluated?
    - Has the insured been kept informed?
    - Note any deficiencies or problem areas

Acknowledge the demand to the insured/insured's counsel. Advise that the company has been provided evaluation and analysis by the insured's counsel and has evaluated the case as well