Some New Developments in the Insurance Bad Faith World!

By Guy O. Kornblum

Let's take a break from the more discreet topic of trial practice and strategy and talk about some critical developments in the insurance bad faith world.

I have been involved in that world for several decades. I tried the first two insurance first party bad faith cases in California in the early 70's when I was a defense lawyer. I was an insurance defense lawyer then, and changed hats to the plaintiff side twenty years later, which is now a part of my practice.

In these years I have seen a few major changes:

- In 1979, the California Supreme Court decided *Egan v. Mutual of Omaha Insurance Company,* 24 Cal.3d 809, which confirmed that the duty to "thoroughly" investigate a claim was a part of the "good faith" requirements of any insurer.
- In the early 80's California adopted the regulations found in 10 California Administrative Code section 2695.1 et seq. which defined further the wide scope of an insurer's duty to investigate (§ 2695.2(k), and also the nature and extent of that duty (§ 2695.7(d)).
- In 1988, the California Legislature amended Civil Code section 3294 and added section 3295 to more specifically define "malice, oppression or fraud" as a basis for a punitive claim, and it also added the requirement that a punitive claim had to meet the burden of "clear and convincing" evidence rather that the ordinary burden of proof.

In the past few months there have been new developments which altered the bad faith landscape and frankly, made it different for lawyers handling claims of insureds against insurers in third party "failure to settle" cases in which policy limits demands are made *before* a personal injury or wrongful death action is filed.

The enactment of California Code of Civil Procedure Chapter 3.2, Sections 999–999.5, titled "Time-Limited Demands," went into effect January 1, 2023. These sections will apply to demands made after this date. It applies to causes of action and claims covered under automobile, motor vehicle, homeowner, or commercial premises liability insurance policies for property damage, personal or bodily injury, and wrongful death claims.

Claimants' time-limited settlement demands often seek the available policy limits and are usually referred to in the industry as "policy limits demands," though theoretically they could be for an amount below limits. The demands must be reasonable, and the rejection must be unreasonable, in order to subsequently impose extracontractual liability on an insurer for bad faith failure to settle. (*Pinto v. Farmers Ins. Exchange* (2021) 61 Cal.App.5th 676.)

For certain types of claims and policies, Section 999 imposes several new criteria that a *pre-suit* demand must comply with to be considered a reasonable offer to settle within policy limits.

Claimants must carefully draft Section 999 demands to meet the procedural requirements of the new section, or their pre-suit demands will not be a basis to later impose liability in excess of the policy limits on the tortfeasor's insurer. These additional requirements are, theoretically, designed to constrain and limit bad faith claims. However, because Section 999 makes it clear how to make a reasonable demand, where to send it and how much time must be provided, it can also be viewed as a road map. If used correctly, Section 999 demands may be a tool for claimants and policyholders to more easily establish that a reasonable pre-suit offer to settle was made. And because Section 999 also creates new requirements for how insurers must respond, it may also make it easier to prove that the basis for the insurer's rejection of a demand was unreasonable — thus exposing the insurer to liability in excess of the policy limit.

Here is a quick summary of how it now works.

Guy O. Kornblum is the principal in Guy O. Kornblum, APLC, with offices in San Francisco, where Mr. Kornblum has practiced for over 45 years. He is Certified in Civil Trial Law by the National Board of Trial Advocacy. He has been trying civil cases his entire career and has taught at Hastings College of the Law, where he obtained his law degrees. Once on the defense side, he has been a plaintiff's lawyer for the past 25 years. He also is an expert witness in insurance claims and legal malpractice cases. His firm handles a wide variety of civil cases, especially challenging personal injury and insurance related cases. kornblumlaw.com/

A time-limited demand that does not substantially comply with the terms of Section 999 shall not be considered to be a reasonable offer to settle the claims against the tortfeasor.

The new law requires a time-limited demand to be in writing, labeled as a time-limited demand or containing reference to section 999, and contain material terms, which include the following:

- The time period in which the demand must be accepted shall be not fewer than 30 days from date of transmission of the demand, if transmission is by email, facsimile, or certified mail; or not fewer than 33 days, if transmission is by mail.
- A clear and unequivocal offer to settle all claims within policy limits, including the satisfaction of all liens.
- An offer for a complete release from the claimant for the liability insurer's insureds from all present and future liability for the occurrence.
- The date and location of the loss.
- The claim number, if known.
- A description of all known injuries sustained by the claimant.
- Reasonable proof, which may include, if applicable, medical records or bills, sufficient to support the claim.

The demand must be sent to:

- The email address, or physical address, designated by the liability insurer for receipt of time-limited demands for purposes of the law if an address has been provided by the liability insurer to the Department of Insurance, and the Department of Insurance has made the address publicly available. The Department of Insurance shall post on its website the email address, or physical address, designated by a liability insurer for receipt of time-limited demands for purposes of this chapter.
- The insurance representative assigned to handle the claim, if known.

So once the insurance company receives a time-limited demand, how must the insurer respond?

- The recipients of a time-limited demand may accept the demand by providing written acceptance of the material terms outlined in the law in their entirety.
- The new law also states that an attempt to seek clarification or additional information, or a request for an extension due to the need for further information or investigation made during the time in which to accept a time-limited demand, shall not, in and of itself, be deemed a counteroffer or rejection of the demand.
- Under the law, if, for any reason, an insurer does not accept a time-limited demand, the insurer shall notify the claimant in writing of its decision and the basis for its decision. This notification shall be sent prior to the expiration of the time-limited demand, including any extension agreed to by the parties, and shall be relevant in any lawsuit alleging extracontractual damages against the tortfeasor's liability insurer.

The consequences from a failure to follow this procedure is as follows:

- Under the law, in any lawsuit filed by a claimant, or by a claimant as an assignee of the tortfeasor, or by the tortfeasor for the benefit of the claimant, a time-limited demand that does not substantially comply with the terms of Section 999 shall not be considered to be a reasonable offer to settle the claims against the tortfeasor for an amount within the insurance policy limits for purposes of any lawsuit alleging extracontractual damages against the tortfeasor's liability insurer. However, this section of the law does not apply to a claimant not represented by counsel.

The new law provides a framework for insurers, insureds, and claimants to issue and respond to time-limited, policy-limit demands, and the requirements to set up insurers for liability beyond the policy limits in pre-suit communications by establishing time periods for the insurer to respond to the demands, and the information that must be included in the demands.

So, beware if you are looking to hook an insured defendant's insurer for the entire judgment in a third party case that has not yet been filed and you are thus in a pre-suit status. ■