INSURANCE LAW

GETTING MORE FOR YOUR POLICY LIMITS DEMANDS

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Would you be interested in learning that you could obtain more than the liability policy limits with your policy limits demand even when the insurance carrier accepts the demand? If your answer is yes, you might find this article useful. If your answer is no, you may find that your clients are not receiving everything that they are entitled to receive from your policy limits demands.

Supplementary Coverage Provisions

Comprehensive General Liability ("CGL") policies frequently contain what is referred to as "supplementary payments" coverages. The supplementary payments coverage obligates the insurer to pay, in addition to damages and defense costs, supplementary payments. Supplementary payments typically include payment of the following:

- **costs taxed against the insured** in any lawsuit defended by the insurer;
- **prejudgment interest** awarded against the insured on the part of the judgment the insurer pays (except for any time following a policy limits settlement offer by the insurer);
- the full amount of **interest accruing after entry of judgment** against the insured;
- costs of certain bonds (*e.g.*, to release attachment of insured's property); and
- expenses incurred by the insurer and reasonable expenses incurred by the insured at the request of the insurer, including loss of earnings up to $250 per day. [CG 00 01 12 07, Sec. I, "Supplementary Payments—Coverages A and B," ¶ 1.]

The first item of supplementary payments are "costs taxed against the insured in any lawsuit defended by the insurer." For most practitioner's, the word "taxed" would imply that the costs would only be payable in a situation in which the court has ordered costs after a judgment. However, the courts have interpreted the word "taxed" in a much broader fashion. The word "taxed" has been interpreted to include monies paid in settlements that would include costs anticipated if the matter had proceeded to trial and judgment. *Employers Mut. Cas. Co. v. Philadelphia Indem. Ins. Co.* (2008) 169 Cal.App.4th 340, 349. In this case, Louis Simpson doing business as Villa Park Mobile Home Park ("Simpson") was sued for "failing to maintain" claims by 188 residents of the mobile home park. Simpson was insured by Philadelphia Indemnity Insurance Co. ("Philadelphia") and Employers Mutual Casualty Company ("Employers").

Employers defended the claims and ultimately reached a settlement with the homeowners for $3 million, allocating $1.2 million in damages and $1.8 million for plaintiffs' attorney's fees under Civil Code §798. Employers sued Philadelphia for indemnity and ultimately prevailed. Philadelphia was required to contribute approximately $164,000 in defense fees and costs and an additional $400,000 toward Civil Code §798.85 attorney's fees on the theory that they were taxed costs. Philadelphia appealed the finding and the Court of Appeal held that the trial court was correct. It rejected Philadelphia's contention that the costs were required to be "taxed," which meant only costs awarded by the court following a judgment. Since no judgment was entered against the mobile home park, its supplementary payments coverage for "taxed costs" was inapplicable. The Court of Appeal interpreted the term "taxed" to include attorney's fees that would have been awarded under the Civil Code if the matter had proceeded to trial.

Attorney's fees awarded by the court pursuant to "contract, statute, or law" are recoverable as "costs" of suit. Code of Civil Procedure ("C.C.P.") §1033.5(a)(10). Consequently, absent some policy language to the contrary, a supplementary payments provision obligates an insurer to pay attorney's fees awarded against the insured as "costs" of suit. *Prichard v. Liberty Mut. Ins. Co.* (2000) 84 Cal.App.4th 890, 912 (insurer's liability for post-judgment settlement included costs awarded against insured).

The current ISO CGL form specifically provides that the "supplementary payments" to be made by the insurer "do not include attorney's fees or attorney's expenses taxed against the insured." That provision was added for the first time in the 2007 CGL form, and no court has yet to interpret that provision. However, it is clear that the intent of the provision was to eliminate the insurer's obligation to pay court-awarded attorney's fees pursuant to the supplementary payments coverage.

Pre-judgment interest is also available under the supplementary payments coverage. Such interest can be significant in situations when the economic damages are large or a party has made a statutory offer to compromise that was rejected and the ultimate settlement exceeded the statutory offer to compromise.

VERIFY DEFENDANT'S INSURANCE LIMITS BEFORE MAKING THE POLICY LIMITS DEMAND

Most attorneys recognize the importance of determining the policy limits of insurance policies covering the defendant. The amount of the policy limits is such a significant fact that one case has held that an insurance carrier's refusal to reveal the policy limits prior to litigation can serve as a basis for a claim of breach of the implied covenant of good faith and fair dealing if the insurance carrier failed to seek permission from its insured to reveal the information. *Boicourt v. Amex Assurance Company* (2000) 78 Cal.App.4th 1390. The court in *Boicourt* held that no formal settlement offer was required to establish a claim for bad faith by the insured against his insurance carrier.

Many practitioners will serve Judicial Council Form Interrogatories and document requests to obtain insurance information from a defendant. Defense attorneys frequently provide a minimum amount of information in response to the Judicial Council Form Interrogatories concerning insurance coverage. In addition, defense attorneys will frequently object to producing the actual insurance policy and will provide only a copy of the declaration page. These positions are without merit. The entire insurance policy is discoverable by way of a request for production of documents. *Irvington-Moore, Inc. v. Superior Court* (1993) 14 Cal.App.4th 733, 741. You will be unable to determine whether supplementary payments coverage applies or is available to your

situation without having the actual policy. Declaration pages do not generally provide information about supplementary payments coverage.

Supplementary payments coverage is also in most personal liability policies and is not limited to commercial policies. Although insurance carriers are prohibited by Insurance Code §790.03(h)(1) from misrepresenting insurance coverage, that situation frequently occurs because everyone focuses simply on the liability limits and pays no attention to the supplementary payments coverage portion of the policy.

MAKING MORE OUT OF YOUR POLICY LIMITS DEMANDS

In your next case, insist that the defendant produce the actual policy. If you believe that your case exceeds the policy and you are authorized to make a policy limits demand, make a statutory offer to compromise pursuant to C.C.P. §998. Under that statute, judgment is entered pursuant to the terms of the offer. Do not follow the typical course of inserting a term that "each party shall assume their own costs and attorney's fees." Why give away that portion of coverage under the defendant's insurance policy? Insert in your policy limits demand the actual liability insurance policy limits and include a provision that judgment shall be entered and that plaintiff shall also recover its costs of suit to be determined by the court.

Many attorneys believe that such a demand is ambiguous and would be unenforceable. However, there is a Judicial Council Offer to Compromise form. If you were to review the Judicial Council form for the statutory offer to compromise under C.C.P. §998, you will see a box to be checked to include costs to be awarded under C.C.P. §1032. (See Judicial Council form CIV-090.) Consequently, it is unlikely that your demand would ever be considered ambiguous.

The use of a statutory offer to compromise is frequently used in uninsured and underinsured motorist arbitration situations. The Supreme Court has held that an uninsured motorist arbitration was subject to the provisions of C.C.P. §998. Furthermore, the costs awarded are covered by the supplementary payments coverage of the liability policy. In *Pilimai v. Farmers Ins. Exchange Co.* (2006) 39 Cal.4th 133, the Supreme Court required Farmers to pay the uninsured motorist award plus costs awarded, which brought the total award in excess of the "maximum liability provision" of Insurance Code §11580(b)(4). The Supreme Court distinguished between the "maximum liability limit," which limits the liability of the insurer under the policy, from a "losing party" that is properly subjected to costs in addition to the status of the insurer as a litigant. In summary, the supplementary payments coverage should allow you to recover your costs in addition to the uninsured or underinsured motorist recovery.

CONCLUSION

In conclusion, if you have a case in which your client has been damaged and the damages exceed the liability insurance policy limits of the defendant's policy, take the time to obtain the policy, review it and determine if there are other coverage benefits that can be obtained from the defendant's insurer when you make your policy limits demand. Costs, interest and statutory or contractual attorney's fees can be recovered under the supplementary payments coverage. Your client should not be required to bear the costs of court filing fees, subpoena fees, deposition expenses, court reporter fees and other costs that are recoverable under C.C.P. §1032 when the defendant's insurance policy will provide coverage and reimburse your client for those expenses. Take the time to do the investigation, review the policy and make what is truly a "policy limits demand."