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Lawsuit balloons from $100K to $7.2M

SLOW NEGOTIATIONS on the part of insurance company help plaintiff's attorney land seven-figure settlement in car wreck case

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AN INSURANCE CARRIER'S foot-dragging during settlement negotiations in a personal injury case helped plaintiff's attorney Ben C. Brodhead III land a $7.2 million settlement for his client—on a Liberty Mutual policy with a $100,000 limit.

At the beginning, this didn't look like a seven-figure case. It involved a multicar, rear-end auto collision so low-impact that it's hard even to see any damage in photos of the plaintiff's vehicle. As Brodhead puts it, his client got "a bumper scuff." Not only that, the client drove himself away from the accident scene after telling police he had no injuries.

"He thought he was just going to be sore," said Brodhead. But his client, 35 at the time of the accident and a healthy, athletic man who'd run the Peachtree Road Race, began experiencing neck pain soon after the collision and went to see a chiropractor. His symptoms progressed "to the point where he was having significant pain going down his legs that was giving him difficulty in walking," Brodhead said. "Within six months, the condition had progressed to the point where he was losing his ability to walk without assistance."

The story of how this case grew from a $100,000 settlement demand to a settlement that guarantees the plaintiff $4 million up front, then about $7,000 a month for life—which, under annuity tables predicting lifespan indicate the total value of the settlement will be about $7.2 million—turns on the potential for a bad faith breach of contract claim that the insured driver could have filed against Liberty Mutual.

A representative with Liberty Mutual's public relations department said the company did not have a comment.

Demand to bad faith

Bad faith claims can happen, for example, when an insurer refuses to settle for the policy limit, and a jury returns a verdict in excess of that limit—meaning the insurer has exposed the person it was supposed to be protecting to liability.

James M. Roth at The Roth Firm, who brought in Brodhead to consult with him and later to take over as lead counsel, made the first $100,000 demand for Liberty Mutual to settle. At Roth's urging, the client saw an orthopedic surgeon at Emory who found herniated discs all along his cervical spine, which runs from the base of the skull to shoulder-level. The physician recommended surgery to release the pressure on the spinal cord.

Roth said he demanded $100,000—the limits of the policy—about a year after the October 2008 accident. In his demand letter, he said, he told the carrier he thought the value of the case was actually in excess of $300,000. He said he also pointed out that although the plaintiff only had $27,000 in medical bills to that point, his injuries were severe and he was facing imminent surgery.

"Once I got into it, my goal was to maximize the value of the case," said plaintiff's attorney Ben Brodhead.

"I really did bend over backwards trying to get them to pay the contracted amount, the $100,000," Roth said. "We knew it was a serious case but we didn't know how bad it was at the time."

According to Brodhead, the client was at risk of permanent neurological dysfunction affecting the area "from his brain to his toes."

Roth gave Liberty Mutual 30 days to accept the settlement offer. Instead, the carrier asked for more information,

including the plaintiff's work history and medical records for the last five years.

"This is the basics of bad-faith insurance law," said Brodhead of Roth's letter. He pointed out that the 30-day time limit was important for making the argument that the insurer failed to pay because of bad faith rather than because it didn't have time to do so. "You make sure you give the insurance company full information and every opportunity to pay."

He explained that under *Southern General Insurance Co. v. Holt*, 262 Ga. 267 (1992), if an insurer chooses not to protect its insured—in the context of Brodhead's case, that would have been by settling for the $100,000 policy limit—and the case goes to trial, the carrier may be liable for the full amount of a verdict against its insured even if that verdict exceeds the policy limits.

In November 2009, the client had surgery on an emergency basis: a $140,000 procedure designed to remove a portion of the bone to make more room for the spinal cord. That same month, Brodhead filed suit in DeKalb State Court.

'Maximize' the case

"Once I got into it, my goal was to maximize the value of the case," Brodhead said, explaining his strategy for convincing the insurer to pay up. "We started by making sure that we would get interest running and making sure that we would get attorneys' fees at the conclusion of the case … through the Georgia Unliquidated Damages Interest Act at O.C.G.A. § 51-12-14."

That code section, he said, says that if you make an offer for a certain amount and it is not paid within 30 days, interest starts running on the demand if you get a verdict in excess of the demand. He also said he made an offer of judgment under O.C.G.A. § 9-11-68, which says that if a demand is not paid within 30 days and the verdict is at least 125 percent of the demand, the plaintiff also may collect attorney's fees and costs of litigation.

His first demand: $1 million, in May 2010.

Liberty Mutual, he said, didn't even respond. At that time, the company was represented by John Calhoun "Cal" Harris Jr. of the Law Office of James C. McLaughlin. Brodhead said Harris essentially served as Liberty Mutual's in-house counsel on this matter at that time. Harris declined to comment on the suit because he was not the lawyer who ended up resolving the matter for Liberty Mutual.

Brodhead then began gearing up for litigation, taking depositions of the parties and the physicians involved.

The defense, he said, argued that the plaintiff's spinal problems were caused by a pre-existing condition—the plaintiff has a congenitally narrow spinal canal with some deterioration—rather than the accident. The defense, Brodhead said, also argued that a car accident the plaintiff had been in two years earlier also had caused the damage.

"In spite of those, all the doctors agreed unequivocally that the injuries and ongoing symptoms were caused by the subject collision," Brodhead said, explaining that an MRI of the spine showed significant hydration in the disc material, while an older injury would have shown desiccation of the disc material.

In December 2010, Brodhead made a new demand—this time for $3.5 million.

"After we made the $3.5 million demand, they finally offered their policy limits of $100,000 … and they did it as an offer of judgment, meaning that if they won the case and were able to show that the injuries were not related, not only would the plaintiff lose, the plaintiff would also have to pay their attorney fees and costs.

"We declined the offer," Brodhead said.

By March, Brodhead said, Liberty Mutual switched from in-house counsel Harris to outside counsel, Scott D. Huray at Carlock Copeland & Stair, to represent the defendant driver. Liberty Mutual also hired Brent J. Kaplan at Isenberg & Hewitt as its own outside counsel. Kaplan referred comment to Huray, who did not return a call about the case.

The next month, in April, Brodhead made another demand, this one for $5.5 million. He said the insurer rejected the demand and proposed mediation; Brodhead said no. He said Huray and Kaplan asked for more time to review documents and depose experts—a process Brodhead said could take months. He offered another deadline, just days away, and said if they couldn't settle, he'd proceed to trial and any further settlement demands would start at $7.5 million.

In a letter from Brodhead to Kaplan dated May 17, Brodhead writes: "Liberty Mutual's current advertising campaign centers around the commitment: 'Responsibility, what's your policy?' Liberty Mutual's insureds caused … severe and permanent injuries. … 'Responsibility' is taking care of the harm you cause. … Since no 'responsibility' has actually been shown by Liberty Mutual's insureds and we will have to force 'responsibility' upon Liberty Mutual's insureds, we will show no sympathy or remorse in our efforts to collect judgment."

The point, Brodhead said, was to get the insureds—who by this time had hired their own counsel, James N. "Jay" Sadd at Slappey & Sadd—to put pressure on Liberty Mutual.

Kaplan, Brodhead said, eventually wrote back, saying that Liberty Mutual would settle.

Sadd said that while the settlement reduces any damages his clients could claim, their dealings with Liberty Mutual may not be over. Speaking generally and not about his clients or this case, he said, "Once the possibility of a judgment is eliminated, the other damages are the insureds' accumulation of attorneys' fees to get the insurance company to do what it should otherwise have done on its own, and then litigation expenses."

Pressure to resolve a case by the insureds is something Brodhead credited with boosting the settlement. Without that, he said, "The case itself might not have had this much value."