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Demand letters leveraged to extract big settlements

PLAINTIFFS' LAWYERS use *Holt* demands to make insurers pay more than policy limits

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PERSUADING INSURANCE companies to pay more than their policy limits when their customers are sued in accident cases has become an art form in the 22nd floor office of plaintiffs' attorney Ben C. Brodhead of Brodhead Law.

From his perch above the Cumberland Mall area, Brodhead explained how he does it, retrieving documents on a half dozen oversized computer screens arranged around his massive desk.

Here's a recent example: Last month, USAA paid $1 million on a $25,000 policy insuring a man and his stepdaughter who were sued for injuries from a wreck on Interstate 20 in which the stepdaughter drove into the back of the plaintiff's car.

The deal began May 24, 2010, with a carefully crafted six-page letter to USAA, the defendant's insurance company, saying Brodhead's client would settle if USAA paid the policy limit for the accident.

The letter stated in all capital letters: "THIS IS A TIME LIMITED DEMAND, AND, AT 5 P.M. EST ON WEDNESDAY, JUNE 16, 2010, THIS OFFER WILL BE WITHDRAWN AND WE WILL OBTAIN AN EXCESS JUDGMENT AGAINST YOUR INSURED WHICH WILL, IN TURN, PROVIDE YOUR INSURED WITH A CLAIM AGAINST USAA INSURANCE PURSUANT TO *SOUTHERN GENERAL INS. CO. V. HOLT*, 262 Ga. 267, 416 S.E. 2d 274 (1992)."

The letter goes on to say, "Please be aware that our demand for policy limits is not negotiable and that ALL conditions of the demand must be met by the specified time."

When USAA didn't agree to the demand by Brodhead's deadline, he added a bad faith claim.

"The big story here is the fact that they paid the bad faith on it," Brodhead said. "These aren't common things," he said, referring to settlements above policy limits.

Yet for Brodhead, the recent $1 million settlement following an unmet *Holt* demand is neither his first nor his largest. Brodhead estimates he's handled about 40 of them since he graduated from Harvard Law School in 1997. This year alone, he said, his clients have won or settled for $17 million above policy limits.

The biggest take in this series came in July, when Brodhead's client settled a car crash personal injury case for $7 million on a $100,000 policy with Liberty Mutual.

When the Georgia Court of Appeals issued the underlying *Holt* decision in 1991, then-Judge (and now Georgia Supreme Court Justice) George H. Carley wrote a partial dissent, saying: "Under the majority opinion, policy limits are meaningless in the fact of a '*Holt* letter.' I cannot agree."

Carley also objected to expecting the defense attorney to accept the injuries and bills detailed in the demand letter. He quoted the Fourth District Court of Appeals of Florida "in rejecting an excess verdict claim under similar facts," stating: "Since when does one party to a lawsuit have to accept at face value the medical information furnished by the other party without even an inquiry?"

Holt used regularly

Plaintiffs' lawyers use *Holt* demands regularly around Georgia to leverage policy limit settlements. For example, Jeffrey P. Shiver, Alan J. Hamilton and T. Michael Flinn used a *Holt* demand to secure a $1 million policy settlement of a motorcycle crash injury case in September. James L. Creasy III and Lloyd N. Bell used a *Holt* demand to secure a $1 million policy limit settlement from RCA Insurance in a dram shop wrongful death case last year in Cobb County.

Holt demands have also been used as a basis to force insurance companies to pay when a verdict exceeds policy limits. For example, Jay L. Drew won a $50,000 verdict in Barrow County last April in a case against a defendant with a $25,000 Mercury Insurance policy.

Ben Brodhead has made 'bad faith' claims when insurers miss deadlines.

Stephen G. Lowry and Jed D. Manton won a $240,000 verdict last December in Chatham County against a defendant whose insurer, Allstate Liability Insurance, had refused a $100,000 policy limit demand.

F. Bradford Wilson Jr. won a $253,000 verdict in Bibb County last month against his client's insurance company, State Farm, in a case where the defendant driver who hit the plaintiff had no insurance. State Farm answered the case as the uninsured motorist coverage carrier. Although State Farm is appealing the verdict, Wilson is moving forward with a bad faith claim because State Farm rejected his earlier time-limited demand to settle for the $75,000 policy limit.

These kinds of cases involve two trials: One in which a verdict is reached, and a second for a bad faith claim against the defendant insurance company. The first trial determines the amount of the judgment. The second one determines who has to pay it and why, according to Brodhead, who has given continuing legal education seminars recently on the subject of insurance bad faith

claims and how to make insurance companies pay more than policy limits.

Brodhead explains in the paper he wrote for his CLE seminars: "If the plaintiff wins a verdict significantly over policy limits, then there is a second trial in which the defendant … must prove that the insurance company is liable to pay the entire verdict because it acted in bad faith toward the defendant when it failed to pay the policy limits within the time frame offered by the plaintiff."

Brodhead's paper states that the "upside" for the plaintiff's lawyer is that "the second trial presents a very non-sympathetic defendant insurance company that has to justify why the entire verdict should be imposed on its insured when the insurance company had the duty and opportunity to protect the insured. Specifically, at the time of the second trial, a substantial verdict already exists and someone will be required to pay it."

'Happy' about missed deadline

Avoiding going to trial at all and using the *Holt* demand to achieve settlements above policy limits is perhaps what is most notable about Brodhead's success in the past year. In every case, whether it has settled or been tried, the process turned on a "very clear, very specific time-limited demand that tells them exactly what they have to do and doesn't have any wiggle room," Brodhead said. "It's hugely important. Drafting the demand letter really is the whole crux of the case."

While some *Holt* demand letters might be a page or two, Brodhead's go on for five or six. He doesn't just set a deadline for payment of the policy limits settlement; he gives an exact time of day and specifies that payment must be received by that point, not just mailed. He also details the facts of the case and the expenses and injuries incurred.

In the recent USAA settlement, the case stemmed from a back injury requiring surgery for Laverne Browne after her 1992 Toyota Camry was hit from behind by a 1998 Volvo S70 driven by Yamileth K. Jaramillo and owned by her stepfather, Darryl V. Thorne. Representing Browne, Michael J. Miller of Miller & Hightower in Douglasville, brought Brodhead into the case before sending the *Holt* demand.

As he has done in other cases, Brodhead said, he "ghost wrote" the demand letter for the referring attorney. Then, the day after the deadline passed without receipt of payment, Brodhead sent a letter to the insurance company saying the deadline had expired and "all offers of settlement and compromise are hereby withdrawn."

However, shortly after the deadline, a check for the policy limit of $25,000 arrived. Brodhead sent the check back with another letter explaining that the postmark on the envelope showed it wasn't mailed until the day after the deadline. "Accordingly, we have returned the check to you with this letter. For your records, we also have enclosed a copy of the envelope; however, we have kept the original envelope as evidence for any future bad-faith claims that may be advanced against USAA," the letter stated.

Asked in the interview if he truly wanted the insurance company to meet the policy limits demand, Brodhead replied, "We were happy when they missed the deadline."

During the case, Brodhead then filed the personal injury suit claiming past and future medical expenses in excess of $105,000 and lost wages in excess of $10,000, plus other damages for pain and suffering—and attorney fees— because "defendants have acted in bad faith, have been stubbornly litigious and have caused plaintiff unnecessary trouble and expense."

Later, Brodhead filed with the Douglas County State Court an offer to settle for $1 million. Ultimately, USAA agreed. Defense attorneys Matthew J. Ashby and Cannon C. Alsobrook of Savell & Williams—who declined to comment on this case—accepted the offer in a Sept. 15 letter and delivered the $1 million check on Sept. 29. Brodhead dismissed the suit with prejudice on Oct. 4.

Despite the missed deadline, Brodhead said, "I would be the first one to say that USAA did what it was supposed to do and protected their insured."

What is a 'gotcha'?

This strategy might not always work, according to insurance defense attorney Matthew G. Moffett of Gray, Rust, St. Amand, Moffett & Brieske. For one thing, some claims adjusters are more savvy than others in evaluating a *Holt* demand letter. In the USAA case, the claims adjuster—who didn't return a call for comment—was located in San Antonio, Texas, and may not have been familiar with Georgia law, although the requirements were clearly spelled out in the letter.

Standard operating procedure, Moffett said, would dictate that the letter go promptly to the lawyer. "When I get one of these, I send it to the insurance company and the insured. I ask them to read it and call and talk about it," Moffett said. "Then I remind both of the state of the law in Georgia. The bottom line is the insurance company has to act reasonably in response to a demand in light of the evidence."

The conversation comes with a warning. "I tell the insurance company that if they do not want to pay their limits, if the case results in a judgment for more than the limits, they might be on a witness stand under oath answering the question, 'Were you reasonable?'"

If the insurance company does not want to pay the policy limits, Moffett said he wants to know why. "I make them convince me," he said. And sometimes they do convince him. But, he added, "There's always a risk when you turn down a policy limit demand that a judge might enter a judgment for more than that. The defense is simply, we were reasonable at the time given the evidence we have."

The test of reasonableness goes both ways, however. Moffett suggested a judge might not look favorably on a plaintiff's lawyer who returns a check because it was received a day late. "If I were a judge, I would not determine that to be bad faith or evidence of gross negligence," Moffett said. "Why is 24 hours not a 'gotcha'?"

Brodhead's view is that a 20-day time limit is reasonable, while a five-day limit would not be. In seminars he holds on *Holt* issues, Brodhead cautions trial lawyers not to create unreasonable demands lest they risk creating case law that would make such demands more difficult or impossible in the future. "Please do not create bad precedent by sending a five-day demand," Brodhead states in a paper he wrote for his CLE seminars.

Brodhead cites this section from the *Holt* opinion: "Nothing in this decision is intended to lay down a rule of law that would mean that a plaintiff's attorney under similar circumstances could 'set up' an insurer for an excess judgment merely by offering to settle within the policy limits and by imposing an unreasonably short time within which the offer would remain open."

But Brodhead's success in settlements means he avoids a court testing what is reasonable. Again, the key is the demand letter. "If the insurance company fails to pay as required, the terms in the settlement letter need to be so clear that the insurance company's own attorneys will tell it that it should have met the demand and that it now need to pay over limits rather than challenge the demand," Brodhead states in his seminar notes.

"The simple rule here is that there needs to be enough information provided so that the insurance company's own attorneys will think the insurance company was unreasonable for failing to pay the demand." DR

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