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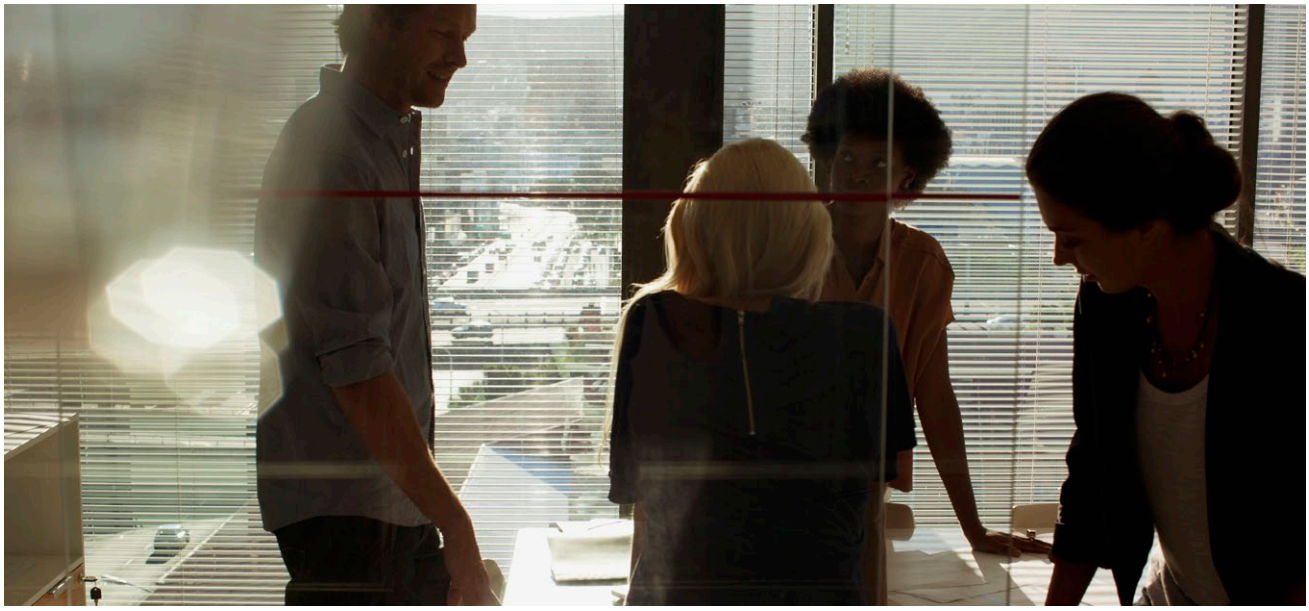
Risk management alert for Florida defense attorneys

If you are a Florida defense attorney who defends insurance companies and their insureds in personal injury matters, we want to highlight an ongoing and significant risk that could negatively impact you and your practice.



Traditionally, defense attorneys have been considered at relatively low risk for malpractice claims. Recently however, we have seen a number of high exposure claims ($1M+) against defense attorneys in Florida in which the attorneys have been induced by plaintiffs' counsel to open up an insurer's limits of liability. The claims all follow a basic fact pattern. Please read below to learn what the fact pattern looks like and what you can do to protect your firm's assets and reputation.

Typical fact scenario

The typical scenario involves a serious injury as the result of a car accident where the potential defendant has low/inadequate auto limits. The plaintiff's attorney recognizes this and attempts to maximize the injured client's recovery by inducing the carrier/defense attorney to allegedly commit "bad faith", thereby opening the insurance limits.

Generally, the carrier begins handling the file with in-house staff as the liability is clear and the case is not in suit. The difficulties start with the plaintiff's attorney requesting changes to settlement release terms commonly included in form release documents. For example, the plaintiff's attorney may request a waiver of subrogation rights, that the insurance company is excluded on the release, that standard hold harmless or broad indemnity language be excluded, or that the release includes mutuality language so the defendant releases the plaintiff from any claims. Financial affidavits may also be requested that may not be in the insured-defendant's best interest. Along with these conditions is a demand for the policy limits within a specific period of time.

Because the injury clearly exceeds the policy limit and defenses are limited, the carrier will agree to pay the policy limits. Plaintiff's counsel does not provide a release with the requested terms but asks the carrier to draft the release. The carrier may not have the expertise to draft the non-standard release or may have difficulty working with the plaintiff's attorney and so they hire defense counsel. The defense attorney steps in and it may not be clear what plaintiff's counsel is requesting. We have seen policy limits demand letters that are so ambiguous that it is hard to determine exactly what is being demanded or whether the terms can be accepted. When the defense attorney tries to get clarity from plaintiff's counsel, the calls go unreturned. With the time limit demand deadline looming, defense counsel does the best he or she can and drafts a release. Unfortunately, the release has not mirrored the terms of acceptance and therefore acts as a rejection of plaintiff's demand.

Subsequently, Plaintiff's counsel waits until after the time limit set for payment of the policy limits expires and then sues the carrier for bad faith. The carrier pays beyond its limits due to allegations of bad faith (which are generally a jury question) and the severity of the injury and then turns to their hired defense

attorney for indemnification. Although this is the typical scenario, it can take on multiple permutations. Further, Florida courts are currently determining whether an insurance company that hires a lawyer to defend one of its insureds has standing to bring a malpractice claim against the lawyer.

Significantly, in Florida the situation may be even more complex as there does not have to be a demand for policy limits for bad faith to be triggered. Indeed, if liability is certain and damages will likely exceed policy limits, then the insurer has an obligation to tender limits with or without a demand. The insurer (or defense counsel) can't sit back and await a demand. Similarly, in multi-claimant situations – the insurer who does not have enough limits for all claimants has to affirmatively take action to settle as many claims as possible based on the totality of the circumstances.

Potential red flags of an impending bad faith set up

- Insurance claim with clear liability
- Serious injury
- Low or inadequate insurance limits
- Demand to settle for the policy limit
- Conditions on settlement time limit specific release language to be included or excluded
- Waiver of subrogation rights
- Exclusion of insurance company
- Mutuality language to be included
- Exclusion of hold harmless language and request for financial affidavits
- Plaintiff's attorney requests that the defense attorney draft the release
- Plaintiff's attorney is difficult to reach for clarification and creates unnecessary obstructions
- Carrier engages you to assist with settlement finalization due to difficulties put in place by plaintiff's counsel

Best practice: How to protect yourself and your firm

The first defense to these tactics is to be aware of what they look like. If you see some of the characteristics listed above, your antenna should go up and you should be extremely careful.

Make sure you strictly follow the mirror image rule with respect to the settlement agreement and release. Any discrepancy will be considered a rejection of the offer and not acceptance. Note that tender of policy limits is also an issue. Tender means delivery and acceptance. Agreeing to pay is not tender. Putting a check in the mail is not tender. The funds need to be delivered and accepted on the demanded date.

If the matter is in litigation look to the courts for assistance in finalizing the settlement. Document attempts to ask for clarity from plaintiff's counsel in a way that can be verified. If you become aware that bad faith is being asserted against the carrier, notify your professional liability carrier immediately as we may be able to step in and help mitigate the situation.

Finally, make sure that it is clear who you represent when you are hired by the insurance carrier. In an excess exposure situation, there may be an inherent conflict between representing both the insurance carrier and the insured. The Florida Bar Rules state that defense counsel has a duty to ascertain whether the attorney is representing both the insurer and the insured, or just the insured, and "inform both the insured and the insurer regarding the scope of representation". Rule 4-1.7(e). The best practice is for this to be in writing at the beginning of the representation. Also, in liability insurance representations, defense counsel is required to provide to the insured the Bar form Statement of Insured Client's Rights. The best practice is to have the insured sign and return this the attorney at the onset of representation so that there is no question as to who the client is. If the carrier insists that you represent both the carrier and their insured, be sure to document any potential conflict issues and communicate clearly with both parties.

Contact

Should you have any questions or wish to obtain further information regarding this risk, please feel free to contact Missy Rodriguez at mvanvurst@bbftlaud.com or Ellen McCarthy at ellen_mccarthy@swissre.com.

Swiss Re Corporate Solutions is committed to bringing you high quality risk management services and information to assist you in identifying and reducing your malpractice exposure.

We thank you for the continued opportunity to serve you.