

ETHICS, BAD FAITH, AND POLICY LIMITS – A MALLORCA POT POURRI

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I. INTRODUCTION.

A pot pourri is a mixture of dried petals and spices placed in a bowl to perfume a room. It is also a mixture of things: a medley.¹ I haven't been to Mallorca, but I understand that it is an island of flowers and spices, and so I decided to do a paper that is a pot pourri, a medley.

A. ETHICS.

RPC 1.5 sets forth the rules of professional conduct relating to attorneys fees. As all of us know, the rule sets forth certain factors to determine a reasonable fee and discusses contingent fees. However, the rule recently changed regarding a division of fee between lawyers who are not in the same firm. RPC 1.5(e)(1) provides that a division of a fee between lawyers who are not in the same firm may be made only if:

- (i) The division is in proportion to the services provided by each lawyer or each lawyer assumes joint responsibility for the representation;
- (ii) The client agrees to the arrangement including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (iii) The total fee is reasonable

What is new to RPC 1.5 is that the client must agree to the fee division between lawyers, and the agreement must be confirmed in writing. Attached as Exhibit 1 is a copy of our firm's Attorney Association Agreement, which has the client sign off on the share of attorney's fees each lawyer will receive. Attached as Exhibit 2 is our firm's Attorney Referral Agreement, which contains a similar provision.

¹ Oxford English Dictionary.

B. BAD FAITH.

Each time I do an Assignment of Rights in a bad faith case, I consult with other lawyers and uncover new ways to draft the agreement better. Attached as Exhibit 3 is a copy of a recent Assignment of Rights. I am indebted to David Beninger and John Budlong for their contributions to this document.

One thing that is unusual about the document is that we entered into an agreement to settle the tort case, stipulate to a judgment, and assign rights. However, we gave the insurance company 30 days to step in, open its policy limits, and thereby protect its insured. However, we put a 10-day deadline for the insurance company to turn over a copy of its adjusting file. In the right case this approach puts substantial pressure on an insurer, and may allow you to see the adjusting file before filing suit.

C. POLICY LIMITS.

I think every plaintiff's attorney is frustrated with the insurance farce that is played out regarding insurance policy limits. The insurers often refuse to disclose policy limits information voluntarily, even though the information is discoverable once suit is filed.

In *Smith v. Safeco*, 150 Wn.2d 478 (2003) David Beninger has created some case law that makes it risky for an insurer to refuse to disclose their policy limits before suit is filed.

WPI 320.05 also implies that an insurer may be obligated to disclose its insured's policy limits as a part of its duty to act in good faith. WPI 320.05 requires an insurer to make a good faith effort to settle the claim, to conduct good faith settlement negotiations sufficient to ascertain the most favorable terms available, and to determine whether the insured is willing to make the necessary contribution to the settlement amount if the settlement demand exceeds the insurer's policy limits. A copy of WPI 320.05 is attached as Exhibit 4.

We are now writing a letter to third-party insurers asking them to disclose their insurance policy limits. The letter is intended to make good use of the law in *Smith v. Safeco*, and WPI 320.05. The letter is not threatening in any way. In fact, we lay out reasons why the plaintiff needs to know the insurance policy limits in order to evaluate their future options and to engage in realistic settlement discussions. A copy of the letter is attached as Exhibit 5.

I believe that in bad faith cases, the jury is often suspicious of both the plaintiff and the insurance company. When the bad faith jury sees a plaintiff who is open, honest, and communicates a reasonable need for the policy limits information, that same jury may well decide that the insurance company is exposing its insured to great risk by refusing to disclose its policy limits.

Robert K. Dawson
April 25, 2007
Palma Mallorca May, 2007



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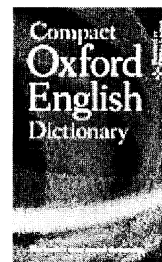
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pot-pourri

/po pooree/

• **noun** (pl. **pot-pourris**) **1** a mixture of dried petals and spices placed in a bowl to perfume a room. **2** a mixture of things; a medley.

— **ORIGIN** originally denoting a stew made of different kinds of meat: from French, 'rotten pot'.

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BABYLON 6

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ATTORNEY ASSOCIATION AGREEMENT

INTRODUCTION: [Referring attorney] currently represents [client]. [Referring attorney] requests that DAWSONBROWN^{PS} represent [client], and DAWSONBROWN^{PS} agrees to represent [client].

MATTER: [Client] was harmed as a result of _____, which occurred on [date].

LEGAL SERVICES: DAWSONBROWN^{PS} agrees to associate with [referral attorney] in the representation of [client] for the above matter. _____ shall act as lead counsel.

DAWSONBROWN^{PS} shall provide the following legal services to client: [describe].

[Referring attorney] shall provide the following legal services to client: [describe].

ATTORNEYS FEE: The fee charged to client will be as set forth in the [date] fee agreement with client. Of the fee charged to client, _____% will be paid to DAWSONBROWN^{PS}, and _____% will be paid to [referring attorney].

COSTS ADVANCED: [Referring attorney] has advanced costs on client's case in the amount of \$_____. Further costs advanced shall be paid as follows: [describe].

APPLICATION OF CASE PROCEEDS: Case proceeds shall be applied first to the costs advanced by [referring attorney], and DAWSONBROWN^{PS}, and then to the attorneys' fees as set forth above.

DISPUTE RESOLUTION: In the event that a dispute arises between [referring attorney] and DAWSONBROWN^{PS}, the dispute shall be resolved by arbitration.

DAWSONBROWN^{PS}

[Referring Firm]

By: _____

By: _____

Date: _____

Date: _____

CLIENT CONSENT: Client agrees to this Attorney Association Agreement, including the share of attorneys fees each lawyer will receive.

CLIENT: _____

DATE: _____

CLIENT: _____

DATE: _____

ATTORNEY REFERRAL AGREEMENT

INTRODUCTION: [Referring attorney] currently represents [client]. [Referring attorney] requests that DAWSONBROWN^{PS} represent [client], and DAWSONBROWN^{PS} agrees to represent [client].

MATTER: [Client] was harmed as a result of _____, which occurred on [date].

LEGAL SERVICES: DAWSONBROWN^{PS} agrees to assume full representation of [client] for the above matter. [Referring attorney] shall not be obligated to provide any further legal services on client's case after [date].

ATTORNEYS FEE: The fee charged to client will be as set forth in the [date] fee agreement with client. Of the fee charged to client, ___% will be paid to DAWSONBROWN^{PS}, and ___% will be paid to [referring attorney].

COSTS ADVANCED: [Referring attorney] has advanced costs on client's case in the amount of \$_____. DAWSONBROWN^{PS} shall advance all further costs on client's case and [referring attorney] shall not be obligated to advance any further costs on client's case.

APPLICATION OF CASE PROCEEDS: Case proceeds shall be applied first to the costs advanced by [referring attorney] and DAWSONBROWN^{PS}, and then to the attorneys' fees as set forth above.

DISPUTE RESOLUTION: In the event that a dispute arises between [referring attorney] and DAWSONBROWN^{PS}, the dispute shall be resolved by arbitration.

DAWSONBROWN^{PS}

[Referring Firm]

By: _____

By: _____

Date: _____

Date: _____

CLIENT CONSENT: Client agrees to this Attorney Referral Agreement, including the share of attorneys fees each lawyer will receive.

CLIENT: _____

DATE: _____

CLIENT: _____

DATE: _____

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THE HONORABLE _____

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

		No.
Plaintiff,		
v.		
		SETTLEMENT AGREEMENT AND ASSIGNMENT OF RIGHTS, JUDGMENT AND COVENANT
Defendants.		

I. PARTIES

1. The parties to this agreement are Plaintiff _____ and her Court Appointed Guardian Ad Litem _____ (“Plaintiff”), and _____ (“Defendant”).

The parties do hereby enter into the following Settlement Agreement with Assignments of rights, Stipulated Judgment and Covenants (herein referred to as “Settlement Agreement”).

1 **II. PURPOSES OF SETTLEMENT AGREEMENT**

2 2. The purposes of this Settlement Agreement are to (a) provide for a
3 settlement with prompt payment of the applicable insurance proceeds and other sums to
4 Plaintiff for her medical, rehabilitation and other needs, and to assure adequate
5 compensation for the harm she has sustained; (b) to protect Defendant’s personal savings,
6 property, assets, credit and reputation from further judgments and verdicts in favor of
7 Plaintiff; (c) to afford protection to Defendant from having to make payments and
8 execution on judgments in excess of the insurance limits; and (d) to minimize the costs,
9 delays, stress and uncertainties of continued litigation, to Defendant, his business
10 interests, and to Defendant’s family, and to Plaintiff.

11 **III. RECITATIONS**

12 3. The injuries and damages in this case were caused by a fire that occurred
13 on _____. _____ was seriously burned in the fire. _____ was 16
14 months old at the time.

15 4. At the time of the fire, Defendant _____ was the owner and landlord
16 of the house located at _____ in Seattle, Washington, where the fire occurred, and
17 where _____ was burned.

18 5. Defendant had a duty under State Statute RCW 59.18.060 to maintain the
19 premises to substantially comply with any applicable code, statute, ordinance, or
20 regulation governing the premises’ maintenance or operation, including providing a
21 written notice to all tenants disclosing fire safety and protection information. The

1 landlord or his or her authorized agent must provide a written notice to the tenant that the
2 dwelling unit is equipped with a smoke detection device as required in RCW 48.48.140.

3 Defendant did not comply with the legal requirement of a written notice.

4 6. Defendant had a duty under the Seattle Housing and Building Maintenance
5 Code Ordinance number 22.206.160 to install smoke detectors on the ceiling or on the
6 wall not less than four inches (4”) nor more than twelve inches (12”) from the ceiling at a
7 point or points centrally located in a corridor or area in each housing unit and test smoke
8 detectors when each housing unit becomes vacant; and make all needed repairs or replace
9 smoke detectors with operating detectors before a unit is reoccupied. The plaintiff has
10 evidence that defendant did not comply with these requirements. Defendant also had a
11 duty to instruct tenants as to the purpose, operation and maintenance of the detectors.
12 Defendant did not comply with this legal requirement.

13 7. Defendant had a duty under the Washington Administrative Code to install
14 a specified number of smoke detectors in specified locations. The parties dispute whether
15 Defendant complied with this legal requirement.

16 8. The breach of a duty imposed by statute, ordinance, or administrative rule
17 relating to the use of smoke alarms is to be considered negligence per se according to
18 RCW 5.40.050.

19 9. In addition to the duties imposed by statute, ordinance, and administrative
20 rule, Defendant owed general duties of reasonable care to plaintiff relating to fire safety,
21 condition of the premises, and duties relating to smoke detectors.

1 10. On _____ a fire broke out in _____’s bedroom. There was no
2 operating smoke detector in the bedroom, nor in the hallway outside the bedroom.

3 11. The Plaintiff alleges that as a direct result of the lack of an operating
4 smoke detector, _____ was severely burned.

5 12. _____ has incurred medical bills of over \$1,000,000. She will have
6 future medical bills for life related to her burn injuries.

7 13. _____ has catastrophic burn injuries which will affect her for life.

8 14. Because of her burn injuries, the Plaintiff alleges that _____’s ability
9 to earn an income will be negatively impacted.

10 **IV. TERMS AND CONDITIONS**

11 The terms and conditions of the Settlement Agreement between the parties are as
12 follows:

13 **A. Consideration:** Defendant agrees to pay to _____ the sum of
14 \$_____ as follows: \$_____ is to be paid in cash by _____. A
15 sufficient number of condominium units of _____ in _____, Washington will
16 be placed for sale to yield the remaining payment to Plaintiff of \$---. Owners will execute
17 a Deed of Trust in favor of the “_____ Set Aside Trust,” placing her in first
18 position. As to any units unsold after 140 days of today’s date, Defendant will reduce the
19 asking price for each unit by 10% each month thereafter until Plaintiff has received the
20 full balance owing of \$_____.

21

1 The Defendant further agrees to place additional real estate in a “_____ Set
2 Aside Trust,” including but not limited to the remaining, unsold, _____, commonly
3 known as _____, _____, Washington and/or other property sufficient to fund
4 the trust with equity, over and above any other encumbrances, equal to \$_____.

5 Owners will execute a Deed of Trust in the amount of \$400,000.00 in the aggregate in
6 favor of the _____ Set Aside Trust. The terms of the Set Aside Trust are set forth
7 in a separate document titled “_____ Set Aside Trust”. If Defendant reasonably
8 cooperates in all aspects of this Settlement Agreement, Plaintiff shall release the
9 encumbrances when the assigned claims are concluded. The question of whether
10 Defendant reasonably cooperates shall be submitted to binding arbitration before
11 _____, or if he is unable or unwilling to serve, then before _____.

12 If the arbitrator determines Defendant has not reasonably cooperated, then the trust shall
13 be immediately authorized to foreclose on all its deeds of trust.

14 **B. Assignment or Execution:** In further consideration, Defendant agrees to
15 cooperate with and assign to _____ all rights, privileges, claims, causes or chose of
16 action that he may have against his insurers or affiliated companies, and their agents.

17 This assignment includes but is not limited to, all of Defendant’s privileges, protections,
18 claims, causes or chose of actions arising out of the _____ fire, or handling of the
19 claims or suit related thereto, as well as arising out of the insurance contract, obligations,
20 investigation, evaluation, negotiation, defense, settlement, indemnification, along with
21 any claims, cause or chose of actions for bad faith, negligence, malpractice, breach of

1 contract, fiduciary breach, Consumer Protection Act, punitive damages and/or any other
2 claims. To the extent any of the above cause or chose of actions is not assignable, then
3 those assets are available for execution.

4 **C. Determination of Judgment:** The parties agree to have the full amount of
5 Plaintiff's damages caused by the _____ fire, and judgment for those damages,
6 determined by stipulation and approved as reasonable by the Court. The parties agree that
7 the reasonable value of the full damages sustained by _____ is \$17,000,000.00 and
8 hereby stipulate to entry of judgment against Defendant for that amount. Defendant and
9 his counsel _____ agree to provide to the Court such evidence, opinion, and
10 support for this determination as may be appropriate at any reasonableness hearing to be
11 conducted with regard to this stipulated amount, and to execute all documents necessary
12 for entry of judgment in this amount.

13 Defendant's insurer shall be notified of any reasonableness hearing and offered an
14 opportunity to participate and offer evidence in support of its position.

15 In the event the Court does not find the sum of \$17,000,000.00 to be reasonable,
16 then the parties agree to use good faith efforts to reach a stipulated judgment as to the
17 amount of Plaintiff's damages, and to obtain a reasonableness finding by the Court. If the
18 parties are unable to reach an agreement on the reasonable amount of Plaintiff's damages
19 within twenty (20) days, unless extended by agreement, then the parties agree to submit
20 that issue to arbitration, without further delay or discovery, before Greg Bertram, or if he
21

1 is unable or unwilling to serve, then before Joanne Tompkins. Such sum will then be
2 resubmitted for a reasonableness finding by the Court.

3 **D. Court Approval of Minor's Settlement:** All details of this settlement on
4 behalf of a minor Plaintiff shall be disclosed to the Court in a SPR 98.16W hearing to
5 approve the settlement of the legal claims of _____ against _____, and the
6 Court shall review and approve the amount and terms of the settlement, and all
7 disbursements there from.

8 If the Court does not approve the minor's settlement pursuant to SPR 98.16W,
9 then the parties mutually release each other from all terms and conditions of the
10 Settlement Agreement and all benefits and obligations of both parties to this agreement.

11 **E. Dismissal of All Claims Against Lipscomb Family Members:** Upon the
12 conclusion of a reasonableness hearing, the entry of a stipulated judgment determined by
13 the Court to be reasonable, and the approval of this Settlement Agreement and terms of
14 the settlement with Plaintiff to be reasonable in a minor's settlement approval hearing,
15 Plaintiff, through her court appointed Guardian Ad Litem _____, shall release all
16 claims against _____, _____, _____, _____, and any family
17 trusts or corporations in which these family members and/or Defendant may have an
18 interest. This release is intended to be broadly construed. Plaintiff shall also execute
19 settlement and dismissal documents to dismiss all claims Plaintiff may have against any
20 and all _____ family members relating to the _____ fire and the injuries and
21 damages caused to Plaintiff by that fire, with prejudice.

1 **F. Dismissal Of Claims Against Defendants Iribarren:** Defendant agrees
2 not to oppose or obstruct any settlement which Plaintiff may enter into with regard to the
3 _____ defendants, and upon completion of the necessary Court approvals for such
4 settlement, to dismiss all claims against the _____ defendants, and to release them
5 from all further claims for damages, regardless of the nature of the claim.

6 **G. Covenant Not to Execute or Enforce Judgments:** In exchange for the
7 above consideration, Plaintiff does hereby covenant not to enforce or execute upon any
8 judgment against _____ outside of the assigned assets, and to provide, upon
9 request, letters, notice or other documents requested by creditors that satisfactory
10 arrangements on any judgment against him have been made from the assigned assets only
11 and all non-assigned assets and property are not at risk of execution, enforcement or
12 encumbrance. This includes release of any lien on real property that may be created by
13 law from entry of the judgment. Further, upon resolution of assigned claims by settlement
14 or litigation, including all appeals, of the assigned claims Plaintiff will provide a full
15 satisfaction of judgment against _____.

16 **V. INFORMATION TO BE PROVIDED AND COOPERATION IN THE**
17 **PRESENTATION OF ASSIGNED CLAIMS.**

18 Defendant shall provide a declaration under oath stating the details of his contacts
19 with Farmers insurance Company following the _____ fire, what _____
20 Insurance Company advised him, or failed to advise him, regarding his legal liability for
21

1 the damages caused by the fire, the size of Plaintiff's claims against Defendant, and all
2 other matters relating to the assigned claims.

3 Defendant shall meet with Plaintiff's attorneys as requested during the pendency
4 of the assigned claims to provide information about the assigned claims and to respond to
5 the defenses to the assigned claims raised by Defendant's insurers. Defendant shall
6 produce requested documents or other evidence relating to assigned claims.

7 Defendant shall attend any depositions requested in the assigned claims, whether
8 requested by Plaintiff's attorneys or the attorneys for Defendant's insurers.

9 Defendant shall testify truthfully about assigned claims throughout the
10 proceedings on the assigned claims, and appear at trial to testify about assigned claims.

11 If Plaintiff believes that Defendant is not complying with the terms of this
12 Settlement Agreement, Plaintiff shall give reasonable notice and an opportunity to cure to
13 Defendant. If Defendant thereafter does not cure, then Plaintiff may submit the issue to
14 _____, or if he is unable or unwilling to serve, then before _____ for binding
15 arbitration. If binding arbitration determines that Defendant has not reasonably complied
16 with the obligations of this section, then the Plaintiff's Guardian Ad Litem, or trustee
17 shall have the right to sell the property in the Set Aside Trust and pay the net proceeds
18 over to Plaintiff pursuant to an SPR 98.16W minor settlement approval. Defendant shall
19 execute the necessary documents to carry out this sale, and in the event Defendant fails to
20 do so after binding arbitration, the Defendant authorizes a Superior Court Judge to
21 execute the necessary documents.

1 **VI. DISCLOSURE OF AGREEMENT TO THIRD PERSONS.**

2 This Settlement Agreement shall be fully disclosed to the Court, to the
3 Defendant's insurers, and, if deemed appropriate by the Court, to any jury which shall
4 hear and decide the assigned claims. It is the intent of the parties that the terms of the
5 settlement be clearly set forth and subject to review.

6 **VII. MUTUAL RELEASE OF PARTIES FROM THE TERMS AND
7 CONDITIONS OF THIS AGREEMENT**

8 This Settlement Agreement shall be provided to Defendant's insurers for review
9 so that Defendant's insurers may consider whether to fully protect Defendant from the
10 injuries and damages Plaintiff sustained in the _____ fire. If, within 30 days from
11 the date that this Settlement Agreement is signed, Defendant's insurers provide written
12 proof to Defendant, and to Plaintiff's attorneys, that Defendant's insurers will pay all
13 injuries and damages sustained by Plaintiff in the _____ fire, then the parties
14 mutually release each other from all terms and conditions of this Settlement Agreement
15 and all benefits and obligations of both parties to this agreement, including refund by
16 Plaintiff to Defendant of any payments made by Defendant pursuant to this Settlement
17 Agreement.

18 **VIII. BINDING NATURE OF AGREEMENT.**

19 It is the intent of the parties to enter a binding agreement resolving the legal claims
20 arising out of the _____ fire. In the event that the parties have a dispute concerning
21 the implementation of this Settlement Agreement or an issue arises after the execution of
this agreement which the parties did not anticipate, then this agreement may be

1 supplemented by agreement of the parties. If the parties are not able to so agree then the
2 dispute or issue may be submitted to _____, or if he is unable or unwilling to serve,
3 then before _____ for binding arbitration, with the arbitration to determine the
4 dispute or issue in a manner consistent with and promoting the operation of this
5 Settlement Agreement.

6 **IX. FARMERS INSURANCE COMPANY'S FAILURE TO PRODUCE**
7 **ADJUSTING FILE WHEN REQUESTED BY PERSONAL COUNSEL.**

8 Plaintiff has asked to review the adjusting file, in order to further evaluate the
9 rights, privileges, claims, causes or chose of action that Defendant may have against his
10 insurers or affiliated companies, and their agents.

11 _____, personal counsel for _____ requested that _____
12 Insurance Company produce the adjusting and claim files by email dated _____,
13 _____, by letter dated _____, and again by email on _____.

14 On _____, _____'s counsel forwarded a box of documents and what
15 appears to be a log of adjusting activity on the file, for which the supporting log entries,
16 phone messages, etc., have not been produced. _____ Insurance Company's failure
17 to provide information reasonably requested by its insured has prejudiced personal
18 counsel _____'s ability to advise _____ what course of action to take, at a
19 time when the _____ lawsuit against him has reached critical mass.

20 The parties wish to attempt to reach a settlement of the claims against
21 _____, and given _____ Insurance Company's refusal to provide the

1 requested information in a timely manner, have decided to proceed as follows.
2 _____, through attorneys _____ and _____ shall request production of
3 the _____ Insurance Company adjusting file, with a complete copy of that adjusting
4 file to be produced within 10 days. The parties agree that communications in the
5 adjusting file between the adjuster(s) and any attorney who represents _____
6 Insurance Company or its affiliated companies for rights, privileges, claims, causes or
7 chose in action that _____ may have against his insurer, may be excluded.

8 In the event _____ Insurance Company does not provide the requested
9 information within 10 days, then Plaintiff, at her sole discretion, may withdraw from this
10 Settlement Agreement. If Plaintiff withdraws from this Settlement Agreement pursuant to
11 this paragraph, then the parties mutually release each other from all terms and conditions
12 of the Settlement Agreement and all benefits and obligations of both parties to this
13 agreement.

14
15 _____
16 [Signature]

_____ Date

17 _____
18 Robert K. Dawson

_____ Date

19 _____
20 Attorney for _____

21 _____
[Signature]

_____ Date

Guardian Ad Litem for _____

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6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 320.05 (5th ed.)

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Washington Pattern Jury Instructions--Civil
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Part XV. Insurance Bad Faith
Chapter 320. Insurance Bad Faith Actions

WPI 320.05 Insurer's Failure to Act in Good Faith—Failure to Investigate and Explore Settlement

The duty of good faith requires an insurer to:

[(1) Perform a reasonable investigation and evaluation of a claim against its insured;]

[(2) If its investigation discloses a reasonable likelihood that its insured may be liable, make a good faith effort to settle the claim. This includes an obligation at least to conduct good faith settlement negotiations sufficient to ascertain the most favorable terms available and make an informed evaluation of the settlement demand;]

[(3) Evaluate settlement offers as though it bore the entire risk, including the risk of any judgment in excess of the policy limits;]

[(4) Timely communicate its investigations and evaluations, and any settlement offers, to its insured;] *[and]*

[(5) If the settlement demand exceeds the insurer's policy limits, communicate the offer to its insured, ascertain whether the insured is willing to make the necessary contribution to the settlement amount, and exercise good faith in deciding whether to pay its own limits.]

An insurer who fails to fulfill *[this duty]* *[any of these duties]* fails to act in good faith.

Note on Use

Use this instruction when an insured claims the insurer failed to use good faith efforts to explore settlement or settle within policy limits in a case in which the insured was exposed to an excess verdict.

The instruction should usually be incorporated at the end of WPI 320.02 (Insurer's Duty of Good Faith—General Duty), which more generally describes the insurer's duty. If not incorporated into WPI 320.02, the instruction above should begin with the statement that insurers have a duty of good faith when dealing with their insureds.

Comment

This instruction is based on the principles set forth in *Truck Ins. Exch. v. Century Indem. Co.*, 76 Wn.App. 527, 887 P.2d 455 (1995), which summarized Washington law regarding bad faith failure to settle. See also *Smith v. Safeco Ins. Co.*, 112 Wn.App. 645, 650–51, 50 P.3d 277 (2002) (slightly restating the Truck Ins. Exchange principles and adding factors to use with regard to breaches of duty). The committee has restated these principles in order to more concisely and clearly state the applicable law for jurors. Also, the instruction has been rephrased in terms of "reasonableness," rather than "diligence," for consistency with other instructions in tort cases. See WPI Chapter 10, Negligence; see also WAC 284-30-330(4) (referring to "reasonable" investigations).

EXHIBIT 4

The duty to investigate and explore settlement arises out of the duty to defend, not the duty to pay indemnity. In *Truck Ins. Exchange*, Division I of the Court of Appeals held that a primary insurer could be held liable for a bad faith failure to settle a case on appeal. While an excess carrier has no direct cause of action for bad faith against the primary carrier, it is equitably subrogated to the rights of the insured.

Several cases have addressed this duty. *Hamilton v. State Farm Ins. Co.*, 83 Wn.2d 787, 523 P.2d 193 (1974) (bad faith failure to settle within \$10,000 limits when verdict was \$45,000; the "no limit" jury instruction was approved, and the court held that the flat refusal to negotiate under circumstances where there is substantial exposure to liability and limited insurance can constitute bad faith); *Burnham v. Commercial Cas. Ins. Co.*, 10 Wn.2d 624, 117 P.2d 644 (1941) (not bad faith to fail to settle within \$5,000 policy limit where verdict was for \$21,400; the court stated that insurer was not liable "in the absence of negligence or bad faith"); *Tyler v. Grange Ins. Ass'n*, 3 Wn.App. 167, 473 P.2d 193 (1970) (bad faith failure to settle auto claim within \$10,000 policy limit where verdict was \$29,087.40; the court held that the "no limit" standard should be adopted, and recognized the hybrid—negligence and bad faith—nature of an insurance bad faith cause of action).

The remedy for a bad faith failure to investigate and explore settlement is that the insurer will be held liable for any excess verdict plus interest. *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 393, 823 P.2d 499 (1992); *Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 736–37, 49 P.3d 887 (2002); *Greer v. Northwestern Nat'l Ins. Co.*, 109 Wn.2d 191, 203 n. 6, 743 P.2d 1244 (1987) (citing 40 A.L.R.2d 168 (1955)).

[Current as of April 2004.]

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6A WAPRAC WPI 320.05

END OF DOCUMENT

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DAWSON BROWN^{PS}

LAWYERS FOR EXCEPTIONAL CASES®

Ltr to Third-Party Adjuster requesting insurance policy limits

[DATE]

Addressee
Address

Re: *Our Client:*
Your Named Insured:
Your Claim Number:
Date of Loss:

Dear _____:

Thank you for taking my call on _____. I represent _____.

We have obtained some information to assist _____ Insurance Company in evaluating this claim. I am enclosing a copy of the Police Traffic Collision Report prepared by the _____.

After the automobile collision, _____ was taken to the _____ Hospital. I am enclosing a copy of the _____ Hospital records. I am also enclosing a copy of the _____ Hospital bill in the amount of \$_____.

_____ is employed as _____. (S)he has been off work since the _____ motor vehicle collision. There will be a lengthy rehabilitation. It is not known whether or when _____ will be able to return to work.

If you have any questions or concerns, or need additional information, please feel free to call.

During our phone call I asked you to tell me the amount of the _____ Insurance Company policy limits applicable to the collision. There was a reason for this request. _____ has serious orthopedic injuries requiring surgery and a long rehabilitation. _____ is seriously injured and will be out of work for an extended period of time. The injury your insured caused has come at a very difficult time for the _____ family.

The _____ have some significant financial concerns. They are concerned that their savings are going to be depleted. They have to make plans for their future.

Addressee
[DATE]
Page 2

Our investigation indicates that your insured is liable for the harm caused when he _____ . There are a number of witnesses. The police report indicates that your insured is liable for the harm caused in the collision.

_____ would prefer not to file suit against your insured. _____ would prefer that we negotiate a settlement. But in order to negotiate, and settle the case against your insured, we need to be informed what the _____ insurance policy limits are. We need the policy limits information so that _____ can make an intelligent assessment of the realistic range of potential financial recovery, and make plans for their future.

_____ would be within his rights to file suit against your insured and to seek a full recovery for his significant damages through a court judgment. There is no legal requirement for _____ to negotiate with _____, but he is willing for us to do so, and prefers to do so if that would result in a fair outcome for him and your insured. If _____ were to file suit against your insured, and seek the full damages for what happened, the outcome would almost certainly expose your insured to substantial personal liability.

Please let me know if _____ is willing to reconsider its position and disclose the insurance policy limits applicable to the collision that occurred on _____, so that we can have informed and meaningful settlement discussions.

Sincerely yours,

DAWSONBROWN^{PS}

Robert K. Dawson

RKD:emw
Encls.

cc: [client] (w/o encls.)

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