**You’ve Been Sued in a Personal Injury Lawsuit: Frequently Asked Questions**

 **By Andrew M. Fallek, Esq.\***

*I was just named as a defendant in an accident suit. I gave the papers to my broker and I just received a letter from my insurance carrier informing me that the claim is in excess of my insurance coverage, that I may be personally liable for any judgment over the coverage amount, and that I may wish to obtain my your own attorney, at my expense, to protect my interests. What do I do?*

First, don’t panic. Insurance carriers send these letters whenever the amount of money damages sought in a lawsuit exceeds your insurance coverage. In the personal injury context in New York, the document that starts a lawsuit cannot demand a specific amount of money damages. The defendant’s counsel, however, can request the amount demanded by the plaintiff. In most cases the “demand” will greatly exceed the amount that the attorney really expects to collect. Why? Because no attorney wants a jury to return a verdict for more than was demanded. If a jury awards more money than is asked for by the plaintiff’s attorney, a judge might limit the award to the amount demanded and the failure to ask for more money at the outset could be legal malpractice. Better to ask for more than any reasonable jury would award. That’s why you read about a person demanding a million dollars for some minor injury or for one hundred million dollars for a significant injury. Also, a complaint can contain separate claims based on different theories of recovery against the same defendant with each seeking the full amount of damages. Let’s say you are shoved by a security guard at a concert and break your ankle. You might sue the security guard for negligence and alternatively for an intentional act. The injured party cannot recover the damages more than once, but if you add up all the claims, the amount demanded could be eye popping.

There’s another reason too. An outrageous demand might encourage the person being sued to push his insurance carrier to offer to settle for the amount of the insurance coverage.

Remember, most cases are settled for no more than the amount of your insurance coverage.

*Can I trust the attorney the insurance company hires to represent me?*

When you buy insurance for your car or home, part of your “benefit” is getting an attorney paid by the insurance company to defend accident related claims against you. This is a huge benefit to you because even if you are not at fault, paying a lawyer to defend a case can cost tens of thousands of dollars. Most insurance carriers have a list of private outside lawyers to whom they “assign” cases. Others prefer to use “in-house” attorneys employed by the insurance carrier itself. Some may use “in-house” attorneys initially but assign the case to an outside counsel if the case appears to be headed to trial. Generally speaking, an attorney assigned by the insurance company to defend you will properly represent your interests even if those interests conflict with the interests of the insurance company that pays them.

Most trial attorneys hired by insurance carriers have a pretty good idea of the settlement value of a case and they make recommendations about settlement to your insurance carrier. If the claim is actually worth more than your insurance coverage, the attorney will generally recommend that the insurance carrier be prepared to pay the full amount of the policy coverage, if necessary. The insurance company can try to settle the case for less, but it should pay the full amount of your policy if it knows that a jury’s damage award will exceed the coverage and the plaintiff is willing to accept the “policy” amount. As previously mentioned, in most cases the plaintiff (on advice from his or her counsel) will accept this amount and the case will settle, so there is no need for you to hire a private attorney.

*Why would the injured person settle for less than a jury would award?*

When an insurance company agrees to settle a case, it promptly sends over a check and has funds on hand to pay the settlement amount. A verdict or a judgment against an individual or a company, on the other hand, is only worth what you can actually collect from them. The process of trying to collect a judgment can be expensive and time consuming and is often futile. Many defendants simply have nothing of value that can legally be taken to pay the judgment, and by the time a judgment is entered, others, such as small businesses, have already taken steps like shutting down and operating under a new company, to render the judgment against the former company worthless. Additionally, most lawyers who handle these kinds of personal injury cases have no real expertise in representing creditors in “collection” cases and are not eager to devote substantial efforts in areas in which they do not regularly practice without real expectations of collecting additional monies.

Most significantly, a plaintiff’s attorney should seek to maximize his or her client’s ultimate recovery. It can cost tens of thousands of dollar to conduct the trial of a serious case and if the plaintiff is unlikely to actually collect any more than the amount of the insurance policy, which has been offered before trial, the additional expense of the trial may actually reduce the amount received by the plaintiff. Even if a jury is likely to award $500,000 for the injuries sustained, incurring $30,000 in trial expenses to “try” a case where the only source of recovery is a $100,000 policy would reduce the client’s final recovery and not be in the client’s (or the attorney’s) best interest.

*Are there situations where I should hire my own attorney*?

The short answer is “yes.” You purchased a certain amount of insurance coverage because you believed that your insurance carrier would pay that amount if it was necessary to protect you from individual liability. When you purchased that policy you probably weren’t expecting your insurance carrier to endanger your net worth by gambling that a jury might award less than your policy or that the plaintiff might “blink” and accept a low ball settlement offer rather than risk trial. As many people say, “that’s what insurance is there for.”

Unfortunately, some insurance companies will not follow the recommendations of the attorney they have assigned to handle the case. For various reasons, they prefer to force the case to trial, or “test” whether a plaintiff will back down from its demand at the last minute before trial and take less. All of this may be going on without any notice to you, the policyholder. This strategy puts you at real risk of a verdict in excess of your policy benefits. If this is still going on as a date for trial nears, you should engage the services of a private attorney.

*How do I know if this is happening?*

Ask the attorney assigned to handle your case. It is very likely that you will be required to appear for a question and answer deposition where you will be represented by an attorney. This will occur long before any date is set for trial. Get your attorney’s name, phone number and email address and keep in touch with him or her. Find out if there have been settlement discussions and get specific numbers. How much did the plaintiff’s attorney last demand to settle the case? How much, if anything, did your insurance company offer? If no offer was made by the carrier, does it plan to make an offer at some point? When? Were any prior settlement demands or offers withdrawn? When was the last time your lawyer or the insurance company made an offer to settle? Remember, you, not the insurance company, are the client. You may also receive correspondence telling you that the case is expected to go to trial. Call up the attorney and find out why it has not settled. It is also important to tell your lawyer if you have substantial personal assets that could be used to satisfy a judgment in excess of your policy. Make it clear that his failure to settle may have devastating consequences for you.

*Why would a private attorney succeed in convincing my insurance company to offer my entire policy if the insurance carrier won’t listen to the attorney that it hired to defend me?*

Law firms that are assigned by insurance companies depend on those companies for present and future business (or in the case of in-house attorneys, for employment). They can complain about a carrier’s decision, but there’s an obvious practical limit to how far they will go. When the insurance company operates without oversight from its policyholder it may feel free to put its own interests ahead of the person being sued. The insurance carrier may have a strategy that it applies to all cases – even where another strategy might be better in your case. For example, an insurance company may want to develop or maintain a reputation as a carrier that doesn’t settle or that is tightfisted with its money. This can discourage lawsuits, especially smaller ones, and nuisance claims, or force plaintiff’s attorneys to settle for less if the cost of a trial may eat up most of the recovery. Lower settlement costs may help the carrier’s bottom line and potentially reduce premiums. That’s good for the carrier and the policyholder. The problem is that such a strategy endangers you if the plaintiff’s attorney and his client are not the settling type and the injuries are serious.

A private attorney can apply pressure by “reminding” the company -- and the attorney defending the case -- of their contractual and legal duties to the policyholder. The private attorney may provide lists of verdicts in excess of the coverage limits of your policy for similar injuries and will typically cite legal decisions requiring insurance companies to pay judgments in excess of the policy amounts if they act in “bad faith”; meaning they don’t settle and pay the policy amount when they know that the verdict is likely to exceed the amount of available coverage. If that happens, an insurance carrier will, in effect, end up paying for insurance benefits for which it never received a premium.

The private attorney may also remind them of business and regulatory issues. When an insurance carrier makes this strategy a habit, it can provoke complaints to the State Insurance Department. Insurance carriers don’t like those kinds of problems. Much insurance is sold through independent brokers and brokers who offer policies from more than one company may be less inclined to sell that carrier’s polices if the company has a reputation of not acting in its policyholder’s interests.

After your private attorney reviews the file of the “defense” attorney your insurance carrier assigned to represent you, he will not only be reminding the carrier of these issues, he will be privately telling the defense attorney how strong the plaintiff’s case is, how good the plaintiff’s attorney is, the weaknesses in your case, and all the things he should have done but did not do in defending you. If the defense attorney did do something wrong, either in preparing the case or in trying the case, and a big verdict comes in, the policyholder may eventually sue him or her for malpractice. All of these thoughts provoke concern and no one likes another lawyer looking over their shoulder and offering criticism. This generally encourages your defense counsel to push much harder for the carrier to settle. Not surprisingly, once a private lawyer is involved, things have a way of working out for the policyholder.

*Won’t this help the person suing me and possibly pay them money that he or she doesn’t deserve?*

Judges, lawyers and insurance companies can generally give a fairly accurate range of the value of a case and no matter what you do or say your carrier is unlikely to settle for more than the uppermost number in that range. A realistic, well informed carrier knows when the case is worth more than the policy coverage and also knows that its failure to make a reasonable offer for its own strategic purposes endangers its insured. Most plaintiff’s attorneys will tell you that their highest verdicts came in cases where they had no choice but to take a jury verdict because the defendant either never made any offer or made an offer that was so ridiculously low that it was not a real offer. Ultimately it is the injured party who makes the decision to accept or reject a settlement offer and the vast majority of actual plaintiffs will settle their cases if the defendant makes an offer which is reasonable – even if that number is less than what they believe they actually deserve. Pushing your carrier to make a settlement offer may speed up the settlement process, which may be good for the plaintiff; it may even cause the insurance company to pay a little more than it would like to pay in a perfect world, but is unlikely to cause it to pay the plaintiff more than the reasonable value of the case.

\*Andrew M. Fallek, Esq. is an attorney licensed in the State of New York. Persons seeking information concerning the law of other states should consult with lawyers licensed in that state.