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# Insurer Asks For A White Waiver As A Condition To Talking Settlement. Should You Do It?

December 29, 2016 | | Insurance,Policyholder Protection

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## What is a "*White* waiver?"

In 1986, the California Supreme Court held that an insurance company's low-ball offer of settlement to a policyholder made during litigation over an unpaid claim was admissible to prove the carrier's bad faith in the same litigation, notwithstanding the settlement privilege. Insurance companies dislike this ruling because it prevents them from shrouding unreasonable settlement positions in the cloak of the settlement and litigation privileges. Insurance companies also, and not infrequently, require what is known among insurance lawyers in California as "a White waiver" before discussing settlement with an insured during a bad faith action. Should the policyholder comply with this request? Does *White* really unwind the settlement and litigation privileges for bad faith settlement communications by an insurance company?

## Questions to consider in response to a request for a "*White* waiver"

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Whether to give a *White* waiver depends on where on the continuum of conduct and misconduct the carrier falls. Where there is an ongoing, reasonable dialog, it may make sense to provide a time-limited waiver to allow a candid conversation to proceed. But if an insurance company declines to talk with the policyholder unless a *White* waiver is provided, then waiving the right to introduce evidence of a low-ball settlement offer to prove bad faith may not be a good idea. In requesting a waiver, the carrier is asking the policyholder to take on faith that the offer it is about to make will be an objectively reasonable one – something the insured may not think is likely. If the litigation between the parties is acrimonious, the mistrust between insurer and policyholder may be at a level where this leap of faith is impossible. When no waiver is offered by the insurance company, policyholders should consider using the *White* decision to hold their carriers accountable when they make low-ball offers. Insureds also should expect insurers to fight hard against admission in bad faith litigation of evidence of settlement negotiations.

## What to expect from insurance carriers that try to avoid *White*

Here are some of the ways carriers try to argue their way around the *White* decision:

1. Insurance company argument #1: *White held that in insurance bad faith litigation, a ridiculously low settlement offer was not admissible as an independently-actionable tortious statement, like yelling "fire!" in a crowded theater.* The California Supreme Court did not decide whether an insurer statement made during settlement negotiations is independently actionable. Rather, it made a distinction between "a cause of action based squarely on a privileged communication" and "one based upon an underlying course of conduct evidenced by the communication," holding that the latter is admissible without deciding whether the former is admissible as well.

2. Insurance company argument #2: *Where a carrier makes a settlement proposal during coverage/bad faith litigation, this communication is protected by the absolute litigation privilege even if it is ridiculously low.* First, the litigation privilege is not absolute. Malicious prosecution claims are excepted from it. *Hagberg v. California Federal Bank FSB* (2004) 32 Cal.4th 350, 362. Second, there are remedies to protect the carrier against prejudice arising from having its litigation tactics put before a jury in the same action. The court in *Cal. Physicians' Serv. v. Superior Court* concluded that "*White* stands for the proposition that ridiculously low statutory offers of settlement may be introduced in a bifurcated trial, after liability has been established, as bearing on the issue of bad faith of the insurance company." Third, while several intermediate appellate courts in California have declined to extend *White*, the state's Supreme Court has not limited the decision in any way, and the trend nationally is to hold that the insurer's duty of good faith does not end with initiation of litigation with its insured.

3. Insurance company argument #3: *White involved a first-party claim under a property insurance policy.* The insurer made a settlement offer it knew was lower than as-yet-undisclosed evidence in its possession (an appraisal of real estate) suggested. The ruling doesn't apply to

litigation over claims under third-party liability policies because such litigation usually is about whether a settlement or judgment in an underlying action was covered by a policy. Allocation between the covered and non-covered parts of a settlement or judgment is much more subjective than valuation of real property by an appraiser. (An appraisal of real estate can be every bit as subjective as identification and valuation of the covered portion of a settlement or judgment. Carriers have a duty to make reasonable settlement proposals on claims under all kinds of insurance policies. California Administrative Code 10 CCR 2695.7(g) says "No insurer shall attempt to settle a claim by making a settlement offer that is unreasonably low."

4. Insurance company argument #4: *White is a holdover from an era in California insurance litigation in which its Supreme Court, led by ultra-liberal Chief Justice Rose Bird, rendered decisions unfairly weighted against insurance companies.* Justice Bird was voted off the Court in 1987, and California law has tacked to the right, in favor of insurers, ever since. This argument is misleading. Yes, the Rose Bird Supreme Court made decisions unfavorable to insurers. Yes, she and two other justices were voted out in 1987. Yes, the court has issued more conservative decisions on some insurance issues since then. But so what? The California Supreme Court has not reversed *White* in the 30 years it has been on the books, even as it reversed other key insurance decisions of the Bird Court such as *Moradi-Shalal v. Fireman's Fund Insurance Company* (1987) 46 Cal.3d 287 (which reversed *Royal Globe v. Superior Court* (1979) 23 Cal.3d 880 and eliminated third-party bad faith – the ability of a claimant against a policyholder to sue the carrier for bad faith handling of a liability claim – in California) and there is no reason for a lower court to stick its neck out by refusing to follow *White* contrary to the national trend.

## Conclusion

Bottom line? Give thought to granting a *White* waiver when the insurance company shows signs of making a significant move up on prior settlement offers. If there is any doubt that this is going to happen, consider whether to condition the waiver on the carrier making an offer at or above some minimum confidential number, and consider making the waiver apply only for a short period.