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Plan of attack when the defense denies liability on a clear-liability case

HOW TO TURN THE TIDE AND MAKE THEM REGRET THEIR STRATEGY OF DENY AND DELAY

It is becoming more and more popular for insurance carriers and defense attorneys to flatly deny liability in automobile or premises-liability cases where there is no basis to dispute liability. Shockingly, we see this occur most often in rear-end automobile collisions, where the carrier already has the plaintiff's settlement offer, property-damage estimates, the traffic-collision report, photographs, party statements, and our client's medical records and bills.

If an insurance carrier or defense attorney wants to take this position, there are certain things you must do to combat their unreasonable stance.

The beginning

You have a client that was involved in a rear-end automobile collision. You obtain the property-damage estimate, the traffic-collision report that is favorable towards your client, photographs, your client's medical records, medical bills, and finally draft and serve a time-limited pre-litigation settlement letter to the at-fault party's insurance carrier.

The insurance carrier acknowledges your settlement letter, and subsequently asks for a two-week extension to respond. You, being the reasonable lawyer that you are, grant the extension. After two weeks go by you receive a faxed letter from the insurance adjuster stating that "[o]ur insured maintains their innocence in this matter, and as a result, we are denying the claim for this matter." Now, you must act!

Immediately file a lawsuit and propound discovery

Once you receive this type of letter, do not respond to the insurance adjuster. Simply draft your complaint, file the lawsuit, and get the defendant served as soon as you can. Once you receive and file your proof of service with the court, send a letter or an email to the insurance adjuster, attaching the summons, complaint, and the proof of service. The communication should simply state: "Please see attached summons, complaint, and proof of service for the above-referenced claim. Please assign this case to defense counsel and have them contact me immediately. Thank you for your attention to this matter."

It is very important that ten days after the defendant insured was served with the summons and complaint that you propound written discovery against them. If the ten-day mark arrives without you hearing from a defense attorney, serve the individual defendant with the written discovery. If you have heard from a defense attorney, serve them instead. Your written discovery should include:

Form interrogatories – Do not forget to check off 17.1!

Special interrogatories including questions like the following:

- Describe in detail how the incident occurred.
- List any actions taken by Plaintiff on the day of the incident that you believe support or tend to support any conclusion that Plaintiff contributed to causing the collision.
- List any actions taken by Plaintiff on the day of the incident that you believe support or tend to support any conclusion that Plaintiff contributed to his/her own injuries sustained in the incident.
- If you deny that you were negligent with respect to causing the incident in question, please state all facts on which you base such denial.
- If you deny that you were negligent with respect to causing the incident in question, identify (name, address, telephone number) every individual that supports your position.
- If you admit that you were negligent with respect to causing the incident in question, please describe the nature and extent of your negligence.

Requests for production and admissions

Your Requests for Production should ask for any documents related to the incident, any statements related to the incident, any photographs of the vehicles involved in the incident, any reports related to the incident, any photographs or video of Plaintiff, any documents identified in the interrogatory responses, and any documents identified in the requests for admissions responses.

Requests for admissions should include asking the defendant to:

- Admit that your actions were a cause of the incident.
- Admit that on or about [date of incident], you were negligent in the operation of a motor vehicle in connection with the incident.
- Admit that no person other than you was a cause of the incident.
- Admit that Plaintiff's actions were not a cause of the incident.
- Admit that Plaintiff was not negligent in connection with the incident.
- Admit that Plaintiff was injured as a result of the incident.
- Admit that in connection with the incident, your negligence caused injuries to plaintiff.
- Admit that in connection with the incident, your negligence was a substantial factor in causing injuries to plaintiff.
- Admit that you have no evidence to support your contention that you did not cause the incident.

If the Defendant does not reply with an affirmative denial, and instead responds with objections and or some version of "unable to admit or deny at this time," you must bring a motion to compel further responses. If you don't, and you win liability at trial, you will not be able to recover on a cost motion post-trial. (Code Civ. Proc., § 2033.420; *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 633; *American Federation of State, County & Municipal Employees v.*

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Metropolitan Water Dist. of Southern Calif. (2005) 126 Cal.App.4th 247, 268.)

Serve a 998 and communicate with the defense attorney

Once a defense attorney has made an appearance in the case, serve him or her with a Statutory Offer to Compromise under section 998 of the Code of Civil Procedure for the defendant's policy limit, or if the case is truly not worth the limits, a reasonable amount within the insured's policy limits. Send a courtesy copy of the offer in an email with a message that resembles the following:

"Dear Mr. or Ms. Defense Lawyer,

Please find attached courtesy copy of Plaintiff's C.C.P. § 998 Statutory Offer to Compromise for $X.

The insurance company already has the following information on this claim in order to analyze the probable liability of its insured and whether a judgment in this case is likely to exceed the settlement offer: Plaintiff's comprehensive settlement offer, property damage estimates, the traffic collision report that is in Plaintiff's favor, photographs, party statements, and Plaintiff's medical records and bills.

If your client's insurance company necessitates Plaintiff's deposition and/or a defense medical examination to further analyze the probable liability of its insured and whether a judgment in this case is likely to exceed this settlement offer, I am willing to waive statutory notice requirements for both Plaintiff's deposition and defense medical examination. However, please note, that no extension will be given on Plaintiff's pending C.C.P. § 998 Offer."

In the first paragraph, you are creating a further record of all the information that the insurance company has to evaluate the claim. In the second paragraph, you are holding their feet to the fire so that your client may not have to suffer from any more delayed justice. In my experience, once the defense attorney and adjuster get this communication, they move very quickly on the deposition and defense medical examination – funny how that happens!

Whether you do or do not hear from the defense in a couple of days, send them a follow-up email requesting status of the above or thanking them for their expedience. Also include something like the following in your email message:

"… Also, please offer two to three dates that you and your client are available for his or her deposition within the next three weeks. If I do not hear from you by the end of the week, I will have to unilaterally notice the deposition and move forward on that date and time. In the alternative, I am willing to forgo your client's deposition entirely if you stipulate to liability and agree to not call your client at trial."

Here, you are making a record that they have or have not responded to your previous email. You are also giving the insurance company an opportunity to protect its insured from the killer deposition you are about to take of them and from the potential humiliation of being called to the witness stand in front of the jury at trial (i.e., damages in an insurance bad-faith action).

It's a win-win for us plaintiff lawyers – if the case goes to trial and you get an excess verdict, you have further evidence of the carrier's unreasonableness or, in the alternative, you have forced them to admit liability. (*Editor's note*: If you fail to grant an extension when the insurer asks for one to evaluate a pending settlement offer, you run the risk that in a later bad-faith trial, the offer will not be found to be a "reasonable" one that triggers bad-faith liability.)

Defendant's deposition

Assuming the insurance company has not settled with you yet, and they did not want to stipulate to your proposal, move forward with defendant's deposition at the earliest opportunity. Here is a general outline of questions and topics that you should be sure to hit on, in addition to the ordinary stuff:

Rules of the road/Setup questions

• Familiar with the rules of the road?
• You had to learn the rules of the road when you studied for your California drivers license, correct?
• And you're familiar with the rule that [enter rule that was broken by the defendant]?
• You would agree that that rule of the road was created not only to protect you from harm, but also to protect against harm to other people on the road as well?
• And you would agree that if that rule is violated by a driver, that driver or other innocent people can get hurt?
• And you are a law-abiding citizen?
• And you know the law entitles the injured party to be compensated for their harms?
• That's better than the "eye for an eye" system, right?
• So you would agree that if a driver violates one of the rules of the road, and as a result an innocent person gets hurt, the driver should accept responsibility for causing that harm so the injured innocent person can be properly compensated, right?
• That means that the driver who broke the rule of the road should apologize to the person they hurt?
• The driver should offer to pay for their medical bills?
• Offer to pay for the time the injured person was forced to miss work?
• And most importantly, offer to pay for the pain, anxiety, inconvenience, and loss of enjoyment of life that resulted from the driver's actions, right?

[Now you have set up the Defendant to look very unreasonable when you get into the facts of your case if he or she starts to backtrack on the very rules they just agreed with you about. Also, you have some great clips for your opening statement!]

Flip the script - Defendant in Plaintiff's shoes

• If the driver who broke the rule of the road has insurance, and his insurance company was denying responsibility for the crash – that would be unreasonable?
• The insurance company, that you paid premiums to for these exact situations, is doing just that in this case, right?
• You don't want to be at this deposition?
• You want them to cover you and pay your policy, right?

Attach the 998 to the record

• Have you seen this before?
• Do you know what it is?
• Without telling me the substance of the conversation, or who it was with, have

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you ever been informed of the consequences of either accepting or rejecting this Offer to Compromise?
• Do you know the consequences you now face because this offer was not accepted?
• Do you know that you are financially responsible for any jury verdict that comes in over your insurance policy limit?
• Do you want to go to a jury trial on this case?
• Your insurance company can simply settle the case within your insurance policy – which do you prefer?

Do not cave – wait for that trial date to get closer and closer

After the above is completed, just wait. You will see that nine times out of ten, the insurance company will come to the table with money.

This approach also works well for slip or trip-and-fall cases. In those cases, it is even more important to take defense liability depositions sooner rather than later. Below is a slightly edited email I sent to a city attorney on a case where my client tripped into a city tree well that was not at-grade. In the email, I confirm that he is taking my client's deposition and DME in the upcoming weeks, I establish liability with his own witness's deposition testimony with the transcripts cites, and I confirm no extensions will be given on Plaintiff's pending C.C.P. 998 offer.

Dear Mr. Defense Attorney:

Thank you for your willingness to take our client's deposition and defense medical examination in the next two weeks.

I am attaching Plaintiff's CCP § 998 for $1 million. This is our demand for settlement and we believe it is reasonable for the following reasons:

Liability

As of November of 2016, the City was responsible for maintaining the subject tree well (Deposition of PMQ 2, 82:20-23, Deposition of PMQ 1, 14:2-13);

It is the City's responsibility to make sure that its public right of ways are free of any potentially dangerous conditions (Deposition of PMQ 1, 80:24-81:6; 116:10-18);

The number one reason why the tree wells are backfilled by the city is for public safety (Deposition of PMQ 1, 90:11-91:14);

The City knows that when a tree well is not at grade to the adjacent surface, it is a trip hazard, and people can hurt themselves, which is why they back fill these areas (Deposition of PMQ 2, 20:8-16, 22:6-23:1, 57:18-58-6);

The City Urban Forestry Division is authorized to unilaterally back fill tree wells without consulting with another City division (Deposition of PMQ 2, 14:1-13);

The cost to back fill a tree well is negligible and it takes approximately 30 minutes to complete, and even if it is a challenging back fill project, the challenge is outweighed by the completion of the project and eliminating the trip hazard (Deposition of PMQ 2, 36:10-38:10; 67:1-4);

The City believes that one injury to a pedestrian due to a city tree well that is not at grade with the sidewalk is unacceptable to the city if that incident could have been reasonably prevented (Deposition of PMQ 1, 81:20-82:2); and

If the City fails to take reasonable precautions to insure that no pedestrians walking on its sidewalks fall due to a non at grade tree well, that is a violation of the city's policies and procedures (Deposition of PMQ 1, 82:4-12);

The City acknowledges that the subject tree well is a trip hazard and someone can get hurt (Deposition of PMQ 1, 102:3-20);

The City acknowledges that had the subject tree well been backfilled, it would have removed the trip hazard (Deposition of PMQ 1, 110:19-111:15);

Despite this, the Urban Forestry Division does not actively inspect tree wells to check for deviations and back fill them (Deposition of PMQ 2, 17:8-11);

The City Streets division only inspected the subject block's tree wells one time in the five years between November 2011 and November (Deposition of PMQ 1, 27:10-16);

The City did not proactively inspect tree wells (Deposition of PMQ 1, 34:10-14);

The City's street division employees are not trained to notice and identify vertical displacements in city tree wells and adjacent sidewalks (Deposition of PMQ 1, 96:18-21);

City employees are not required to report these potentially dangerous conditions when they notice them (Deposition of PMQ 1, 94:13-95:17);

The City does not train its Streets Services supervisors about potential trip hazards on city sidewalks and tree wells (Deposition of PMQ 1, 15:23-16:12; 18:20-19:3);

Yet, despite all of the above, the City thinks it does everything in reason to remedy these subject trip hazard (Deposition of PMQ 2, 110:5-17; Deposition of PMQ 1, 81:8-14).

Damages

In addition to Plaintiff's discovery responses and medical records and bills that you already have in your possession, I look forward to you meeting my client and listening to how the subject incident has significantly affected her life.

Please be advised that there will be no extensions on Plaintiff's pending CCP §998 Offer for $1 million.

Thank you very much for your continued professionalism and care with this case."

Conclusion

With this plan of attack, I hope you will feel less frustrated when you get that denial letter in the mail. You know what to do to make them regret their decision!

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