RATHBONE GROUP

1100 Superior Avenue, Suite 1850
Cleveland, Ohio 44114

800-870-5521

www.RathboneGroup.com

Tricks, Tips, and Pitfalls to Recovering Underinsured Claims – Mark Demian, Rathbone Group, LLC

How many times have we opened that email with the new claim, and crossed our fingers that it was not an underinsured claim? Crossing our fingers did not work so we begin cursing minimum limits in the state of loss and find another recoverable claim to address. Some of the most frustrating cases for subrogation professionals are underinsured cases – whether it be a bodily injury claim, property damage claim, or both. We have a strong liability case, and reasonable and related damages, but factors outside our control make recovery difficult to achieve. There are, however, steps to take and pitfalls to avoid to be sure that we are maximizing opportunities to recover.

Minimum insurance limits vary by states so the first step is know what the limits are and who else wants them. In some states, an adverse carrier can pay interested parties and exhaust limits on a "first come, first serve" basis; therefore, early identification of a limits/excess issue is important. Since an adverse carrier is eager to settle for limits or pro-rata distribution in exchange for a full release, we typically can learn the limits and those seeking them directly from the carrier. Assuming others are seeking recovery too, once an adverse carrier provides you with pro rata distribution, consider asking the carrier for damage supports of others seeking recovery. Perhaps a review of others' claims will give you a basis to argue inflated property damage estimates, unreasonable replacement vehicle expenses, excessive or unrelated medical treatment, and/or illegitimate out-of-pocket expenses incurred by another carrier's insured. We can use that information to argue our entitlement to a greater percentage. The downside to contesting damage assessments is delaying the settlement process or a carrier might get nervous and refer to counsel. That can make the process more contested. In the right circumstance, however, testing the sufficiency of evidence could realize a greater recovery.

Once limits are determined, and besides considering testing others' damages, see if the adverse carrier will volunteer asset and financial information about its insured. Consider doing your own independent investigation. We can research responsible party's assets, or lack thereof, by searching available public records; however, those records usually provide basic information like whether the individual owns property, or has any prior judgments, convictions, or bankruptcies. While subrogation claims generally are not considered "consumer transactions", we need to be careful not to conflict with certain mandates of Federal law.

The Gramm-Leach-Bliley Act (15 U.S.C. 6801 et seq.) requires that those seeking private information about a consumer have a permissible purpose in seeking such information. The vast scope of the Act is beyond consideration here, but a few permissible purposes include use by a person holding a legal or beneficial interest relating to a consumer (in this case the responsible party). Arguably, a subrogated carrier has a legal interest (i.e., a claim for relief) against the responsible party. Another permissible purpose is using information about a responsible party to comply with federal, state, or local laws and other applicable legal requirements. We could argue that finding particulars about a person is necessary to perfect service of process after filing suit, and therefore a permissible purpose. Another purpose is protecting against possible fraud or other liability. We could argue that we need information on a responsible party to confirm facts and circumstances of losses presented by our insured or gained from other sources.

The ideal person to recover excess from is not whom we might think. That person is someone under the age of 40 who has an identifiable social security number. If we have a SSN, then the chances are the party has been seeking credit or otherwise participating in the economy. Those people are more apt to access funds to pay and are more concerned with the negative financial effect of judgment on the excess portion. We might think established older persons have more time to accumulate assets, but those over 40 tend to have assets that are not attachable (i.e., disability or social security income that a court cannot mandate be turned over to us), or have made a conscious life decision to keep minimal insurance based on personal finances.

So we have done our due diligence, and either are dissatisfied with adverse carrier offers, have disputed the damages presented, or have an inkling the responsible party has the wherewithal to contribute on the excess. The next step is litigation. Things are starting to look up for recovery. And while public records can be informative, we learn the most beneficial information from sworn facts and testimony from the responsible party themselves. The best opportunity to gain that information comes by filing a lawsuit and conducting discovery. Before we commit to litigation, we must be prepared to incur court costs and be patient with the time it may take for counsel to perfect service and advance the case towards trial.

Be on the offensive and issue discovery to the responsible party. If the carrier or responsible party has been unresponsive or evasive thus far in the process, then filing suit puts us more on the offensive. We cannot typically inquire as to assets and liabilities of a party pre-judgment; however, most defense counsel will permit discovery on assets/liabilities in these cases. Counsel knows the easiest way to resolve the underinsured case is to volunteer details showing the lack of assets of the responsible party. Consider sending counsel detailed financial affidavits that ask the responsible party to identify assets and liabilities. We can inquire as to real estate and other physical assets like vehicles, boats, trucks, motorcycles, and motor homes. We can ask about other tangible assets like stocks, life insurance, and retirement accounts. Naturally, we will want to ask about income, employment, unemployment benefits, workers compensation benefits, social security and disability benefits, and spousal support. We can also inquire as to liabilities and expenses like student loans, credit card obligations, and monthly expenses (mortgage, rent, electric, gas, telephone, cable, insurance coverage); and other living expenses (groceries, gas, parking, clothing or other personal care). Finally, consider asking about dependents and expenses for childcare, school supplies, extracurricular activities, etc. If counsel resists providing financial details pre-judgment, then consider it a lucky payday. We might be onto something!

Getting all this relevant information can be challenging when counsel or the adverse insurance company cannot find their insureds - which often happens. That can create another obstacle for recovery of excess portion, let alone the limits. If we are at that point, suggest counsel employ a private investigator to find the person. Many insurance companies will use special investigation units (SIU) to research issues and find insureds. Ask them to use SIU. Some insurance companies use the "I can't find my insured" defense to force our hand at settlement - the omnipresent "cooperation clause" in policies. Many states do permit a carrier to disclaim or withdraw coverage for non-cooperation - even after judgment. Know your adverse carrier's position and your state's law before pressing hard for discovery and asset/liability responses.

There is nothing more frustrating than proceeding along in a case and then hearing from counsel that the responsible party needs separate counsel on the excess claim since coverage is afforded only up to the policy limits. This happens most often when captive or in-house counsel represents the responsible party initially thinking the case can be resolved for limits, only to realize the exposure or inability to find the policyholder creates real conflicts for them. To avoid that pitfall, at the outset of counsel becoming involved, ask if he or she is aware of the excess claim and if there is any issue with counsel representing on all claims. Avoid the possible headache by making sure counsel is well aware of the excess claim so you can avoid the delay that comes from additional or new counsel becoming involved well into litigation.

Another procedural maneuver available to adverse carriers is something called Interpleader. Think of it as the adverse carrier beating us to the courthouse and asking the court to tell it whom it should pay and what it should pay to each interested party. Some carriers use this method when they cannot amicably resolve a pro-rata case and simply want to throw themselves at

the mercy of a court in order to reach some conclusion. This action requires the carrier to deposit the limits into court, file suit against all parties entitled to the funds, perfect service on them, and force them to come forward to make their claim. If the interested party is served properly with the complaint, but does not present a claim, then the party may be barred from recovering. The downside for the adverse carrier is incurring attorney fees and costs for filing suit and getting service, but it also can be advantageous for them when they cannot settle a case voluntarily and know they will have to incur attorney fees and costs anyway. This way the carrier can contain, or at least know, its costs and expenses. The carrier can also file the interpleader when it cannot find its insureds to assist in overall early resolution. The carrier typically does not need the assistance of its insured in this case because it is admitting liability and letting a Judge decide who should be paid what. When an interpleader is served, we are named as Defendants and must answer and assert Cross Claims against Co-Defendants (usually the responsible party) or others who might be entitled to a portion of the limits. This is where early review and knowing others' damages as mentioned above can become quite meaningful. If we can dispute damages in some way, here is the time to do it by asserting the basis and convincing the Judge of our position.

Just when we might be making process towards recovery, the dreaded Made Whole Doctrine can be another pitfall to recovery. In many states, the insureds must be reimbursed for their deductible and out-of-pocket expenses before a subrogated carrier can recover. Oftentimes, we will not know the out-of-pocket costs, and neither will the adverse carrier. When Made Whole applies to underinsured claims, be sure to communicate with the adverse carrier on those expenses so they are included in any computation. Of course, communicating with the carrier on those expenses necessarily requires the insured to be in communication with you. When that does not happen, it really creates obstacles to settling. When faced with this obstacle, the best practice is to be sure we are treating the insureds fairly and reasonably throughout the process. As long as that is happening, we are meeting our contractual obligations to the insured.

After painstaking effort, we get the case settled for the limits and excess. All carriers will want a release, but be sure to avoid overbroad indemnity or hold harmless language. The carrier may try to bind us to indemnifying the carrier and responsible party or holding them harmless for all claims brought by others. That is unreasonable, especially if we know other parties are trying to recover. Furthermore, if the settlement on the excess is to come in payments, be sure that any release proposed by counsel on the limits does not jeopardize recovery on the excess. Adverse carriers and counsel cannot expect a full release when the responsible party must still make payments individually. Perhaps the easiest way to accomplish an acceptable release is adding a clause in the release that exempts the terms of a separate obligation that responsible party has on the excess. You could reference the separate agreement in the release itself. The agreement should come in the form of an Agreed Judgment Entry that is filed with the court. Avoid an agreement that is not filed with the court. By filing an entry with the court, we maintain the ability to enforce the obligation on the excess without having to file a separate lawsuit later. When there is a default on the excess, we can begin executing on the judgment through wage garnishment, bank attachment, property levy etc. Remember though we cannot suspend a driver's license or privileges since they had adequate minimum insurance in the state.

Underinsured claims can be challenging and frustrating, but following a few steps can make the experience one where there is less dread and more bread!