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Section 24 Of The Law Of Liability Insurance Restatement Draft No. 4 (August 4, 2017), Reporter's Notes F And H, And The Decided Cases

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I. THE ROLE OF INITIATING SETTLEMENT NEGOTIATIONS, OR NOT, UNDER RESTATEMENT SECTION 24 AND THE DECIDED CASES

There are many views among the Courts on the nature of the liability carrier's duty to settle. What you are about to read was not written to set out all the possible ways of expressing a liability carrier's duty to settle claims. Nor was it written to align all the cases in the United States, or even within a given jurisdiction. There were and still are majority and minority views on the nature of a liability carrier's duty to settle claims. It is enough to recognize that there is a split of authorities, even as the existence of a split of authorities is recognized in the Comments and Notes to the Restatement of the Law of Liability Insurance, which concisely and accurately condenses the dispute into a single notion in Section 24 of the Restatement: "[T]he insurer has a duty to the insured to make reasonable settlement decisions."

There is clearly turmoil over whether Section 24

allows, or even imposes, *a specific duty to initiate settlement negotiations*. I understand that this turmoil bubbled to the surface at the 2017 Annual Meeting of the ALI when many insurance company advocates asked to relitigate Section 24, which had been around for about five years at that time. Parenthetically, I have searched through my own copies of past drafts of the Restatement and apparently substantially the same version of what is now numbered Section 24 was introduced in 2012.

Judging by comments left online at the American Law Institute, concerns about a mandate have continued after the Annual Meeting ended.

The language of Section 24 permits Courts to fashion a liability carrier's duty to initiate settlement negotiations, but its clear terms do not mandate any such duty. Full disclosure: I argued that the Restatement should impose a duty to initiate settlement negotiations, and I proposed additional language to that effect.

Nonetheless, the language of Section 24 remains unchanged.

Even though I personally would prefer a Restatement that expressly mandates a liability carrier's duty to initiate settlement negotiations where the insured's likely liability is clear and the likely damages are great (meaning in excess of policy limits), I do not find it appropriate to relitigate that matter.

Further, I also support and, more importantly, the case law supports the Restatement in refusing to include an (erroneous) declaration that a demand for settlement within policy limits is required before liability carriers are exposed to extracontractual liability for bad faith in settlement.

In the end, the case law supports Section 24 as it stands. And as it has stood for several years. The purpose of this article is to illustrate that the decided cases support Section 24 in its current form. With one request, which is that citations quoting a seemingly contrary source in Reporters' Notes f and h be deleted. This request is because although the quoted material is cited in the Notes on the first issue, it does not address the first issue, initiation of settlement negotiations in the absence of a demand. Further, it does not support the supposed condition precedent of a demand within policy limits before a liability carrier can be exposed to the risk of extracontractual liability for bad faith in settlement.

II. INITIATE SETTLEMENT: *Restatement Section 24 and the decided cases*

The author of this article examined every case found in which a Court addressed the issue of whether a liability insurance carrier had a duty to initiate settlement negotiations when the claimant did not make a settlement demand.

To say again, there is a dispute among the Courts and between the jurisdictions over the nature of a liability insurance company's duty to settle claims. Some States say that the nature of the duty is negligence, others that it is contractual, and still others that the duty to settle is a fiduciary duty. The Restatement aligns all of these legal interpretations under a single standard and recites that the liability insurer has a duty to its insureds to make reasonable settlement decisions based on "equal consideration" or "at least equal consideration" of the insured's interests.

The *facts* of decided cases reveal that regardless of how a Court lines up on the question of whether there is a *legal* duty to "initiate settlement negotiations" in any given case, the overall standard of "equal consideration" or "at least equal consideration" governs.

Just as there is a conflict in the case law among the Courts and between the States over the nature of the liability carrier's settlement duties, there are cases which say that they require a liability carrier to initiate settlement negotiations even when the claimant has not made a settlement demand, but the facts reveal that the carrier is exonerated from extracontractual liability because of some other factor, such as lack of a reasonable opportunity to initiate the negotiations. There are other Courts that say and do exactly the opposite, both in other States and within any given jurisdiction. None of this means that the conflicts cannot be sorted out by astute judges and skillful advocates, however.

In short, even the Courts which follow what this article candidly presents as the likely majority and certainly the preferable view, and which hold that there is a duty to initiate settlement negotiations, treat the way in which a liability insurer might fulfill that duty in a particular case as one factor in the determination of insurer bad faith in settlement.[1] In making this determination on the basis of all the facts and circumstances presented by particular cases, the Courts follow a flexible approach which allows for a

balance of the liability carrier's time to investigate and evaluate the claim against its insured, with the duty to initiate settlement negotiations once the evaluation is made that the insured's liability is clear and the claimant's likely damages are greater than the carrier's liability policy limit.[2]

Overall, the cases contradict two statements quoted in the ALI Reporters' Notes f and h, to the effect that (1) "[i]n most jurisdictions, the insurer cannot be liable for breaching the duty to settle unless a settlement offer within policy limits is made by the plaintiff," and (2) "[w]ithout a settlement offer, it is not possible for the insurer to have breached its duty." The results of the decided cases are actually the opposite of both of these further conclusions, as will be seen below.

A. *How the Courts line up on a liability carrier's exposure to extracontractual liability for not initiating settlement negotiations in the absence of a settlement demand*

In an earlier article, I argued: "Courts can be broken out into three camps of cases in which the Courts have faced the question of declaring whether or not there is a legal duty in their jurisdiction to initiate settlement negotiations even in the absence of a settlement demand from the claimant. For purposes of this Article, the three camps may be labelled 'pro,' 'not in the case at bar,' and 'con.'" Dennis J. Wall, "The American Law Institute and Good Faith Settlement Duties of Liability Carriers: The Scope of a Duty to Initiate Settlement Negotiations, What the ALI Restatement of the Law of Liability Insurance Has to Say About it, and the ALI Reporters' Notes," 37 Ins. Lit. Rptr. 597, 601 (Dec. 23, 2015).

I will continue to separate the cases into those three camps here.

1. *Pro*

Despite such ambiguity as may exist, and despite the disputed conflicts among the cases and States which surround the liability carrier's duty to settle claims, it is still possible to state certain conclusions. There are still ten jurisdictions from which cases have been reported and found in which the Courts have recognized that bad-faith-in-settlement cases ordinarily go to the jury when the facts include a liability insurance company's failure to initiate settlement negotiations, but there was no settlement demand from the claimant within policy limits.

The majority "pro" cases involve the law of the following States, listed alphabetically by State:

a. Arizona. *Fulton v. Woodford,* 26 Ariz. App. 17, 22, 545 P.2d 979, 984 (Ariz. Ct. App. Div. 1, Dep't B, 1976) (probably the seminal case in Arizona, holding that the "legal duty" is not absolute but is instead one factor among many to be considered on the question of whether the carrier conducted settlement negotiations in bad faith; held that under the evidence in this case, the carrier at bar did not breach its duties of good faith in settlement).

b. Florida. *Powell v. Prudential Prop. & Cas. Ins. Co.,* 584 So. 2d 12, 14 (Fla. 3d DCA 1991), *review denied*, 598 So. 2d 77 (Fla. 1992) (definitely the seminal case in Florida on the rule that where liability is clear and damages in excess of policy limits are likely, then the liability carrier has a duty to initiate settlement negotiations in some way; frequently mistaken for holding that the liability carrier has an absolute duty to settle). Recent citations to this decision are worth noting here. The *Powell* decision has been distinguished as inapposite in a Per Curiam Federal Circuit Court decision involving a requested jury instruction, on the ground that *Powell* "involved a directed verdict" standard instead. *Stalley v. Allstate Ins. Co.*, 682 F. App'x 846, 848 & n.4 (11th Cir. 2017).

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1. *E.g., Safeway Ins. Co. v. Botma,* No. CIV00-553-PHX RCB, 2003 WL 24100783, at *18 (D. Ariz. March 7, 2003), *aff'd mem. with opinion,* 129 F. App'x 355 (9th Cir. 2005); *Gutierrez v. Yochim,* 23 So. 3d 1221, 1226 (Fla. 2d DCA 2009):

> Finally, Dairyland argues that summary judgment was appropriate because there was never a formal offer to settle the case. Under the facts presented, a lack of a formal offer to settle is a factor to be considered in determining whether the insurance company acted in bad faith. *See Powell v. Prudential Prop. & Cas. Ins. Co.,* 584 So. 2d 12, 14 (Fla. 3d DCA 1991).

2. As the District Court succinctly put it in the case of *Merrett v. Liberty Mut. Ins. Co.,* No. 3:10-cv-1195-J-12MCR, 2013 WL 1245860, at *3 (M.D. Fla. March 27, 2013):

> So in a case involving a catastrophic claim with clear liability and insufficient policy limits, the existence of bad faith must be determined on a case by case basis in part by balancing the insurer's duty to act promptly to negotiate a settlement in order to protect its insured from exposure to liability for excess judgments with its duty to take the time needed to properly investigate the claim before attempting to settle it.

The Federal District Court in *Stalley* also distinguished *Powell* on this ground. As the Circuit Court noted in its opinion, the District Judge *also* went further (which the Circuit Court declined to do) and in the course of the District Court's own opinion *substantively* distinguished *Powell* as applying when the Florida appellate court in the *Powell* case said it applied, namely, only when liability is clear and damages in excess of policy limits are likely. *Stalley v. Allstate Ins. Co.*, No: 6:14-cv-1074-Orl-28DAB, 2016 WL 3282371, at *3 (M.D. Fla. June 10, 2016), *aff'd per curiam with opinion*, 682 F. App'x 846, 848-49 (11th Cir. 2017).

c. Kansas. *Roberts v. Printup,* 422 F.3d 1211, 1215 (10th Cir. 2005) (Kansas substantive law recognizes duty of liability insurer to initiate settlement negotiations under certain circumstances).

d. Michigan. *Commercial U. Ins. Co. v. Medical Protective Co.,* 426 Mich. 127, 138, 393 N.W.2d 161, 165 (1986) (recognizing duty but "when warranted under the circumstances" and only one factor among many to consider in deciding question of carrier's liability for bad faith breach of settlement duties).

e. New Jersey. *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.,* 65 N.J. 474, 493, 323 A.2d 495, 505 (1974), probably the seminal decision on the "initiate settlement negotiations" conundrum by other Courts throughout the United States, holding in part here pertinent: "At most, *the absence of a formal request to settle within the policy is merely one factor to be considered* in light of the surrounding circumstances, on the issue of good faith." *Rova Farms,* 65 N.J. at 493, 323 A.2d at 505 (emphasis added). As can be seen from the many cases decided on these issues, including those cited in the course of this article, that is more or less the approach that most Courts have taken over the past 40 years.

f. New Mexico. C*ity of Hobbs v. Hartford Fire Ins. Co*., 162 F.3d 576, 583-34 (10th Cir. 1998) (case of apparent first impression under New Mexico law).

g. Oklahoma. *See SRM, Inc. v. Great Am. Ins. Co*., 798 F.3d 1322, 1325-26 (10th Cir. 2015) (predicting that the Oklahoma Supreme Court would not extend the duty to initiate settlement negotiations under Oklahoma law to an excess carrier where the excess carrier's policy required that underlying, primary policy limits must first be exhausted before the excess insurance policy takes effect; case of apparent first impression).

h. Oregon. *Goddard v. Farmers Ins. Co*., 173 Or. App 633, 638, 22 P.3d 1224, 1227 (Or. Ct. App. 2001), *review denied*, 332 Or. 631, 34 P.3d 1178 (2001) ("Thus, an insurer has an affirmative duty of care to its insured, which in an appropriate case requires the insurer to initiate settlement efforts," holding that liability insurer in case at bar had such a duty, but that genuine issues of material fact on causation presented jury issues in this case),

and

i. The State of Washington. *Cox v. Continental Cas. Co.*, No. C13-2288 MJP, 2014 WL 2011238, at *3-*4 (W.D. Wash. May 16, 2014), *aff'd in part, rev'd in part on other grounds*, ___ F. App'x ___, Nos. 15-35517 & 15-35525, 2017 WL 2829122 (9th Cir. June 30, 2017) (predicting Washington State law).

j. Louisiana, Tennessee, West Virginia, and Wisconsin. It has been suggested to me that decisions under the laws of Louisiana, Tennessee, West Virginia, and Wisconsin should be added to a list of the "Pro" view. That would bring the "Pro" list to about thirteen cases. However, I said that I was basing my observations on all the cases that I had found, not on all the cases that had been decided.

I appreciate the additional research I had to make into these four suggested cases. But to say again, I was and still am basing my conclusions on the cases I found in which the Courts have recognized that bad-faith-in-settlement cases ordinarily go to the jury *when the facts included a liability insurance company's failure to initiate settlement negotiations*, *but* there was *no settlement demand from the claimant within policy limits*.

In three of these four additional cases that have been brought to my attention for consideration in the "pro" category, it was instead a fact that the liability carriers involved in each of these three cases either *did* make a policy limits offer or that the injured claimants *did* make a settlement demand for an amount within policy limits, and further, at least two of these also included a distinct additional issue: whether extracontractual exposure existed despite an offer that did not meet a time limit but still offered policy limits. *Kelly v. State Farm Fire & Cas. Co.*, 169 So. 3d 328, 341 (La. 2015) (stating that a demand is not required for bad faith liability; *in this case, the insurance company did make a policy limits offer* and the issue was whether the fact that the offer did not meet a time limit prevented or triggered bad faith

liability, an issue answered against the carrier in this case); *Daniels v. Horace Mann Mut. Ins. Co.*, 422 F.2d 87, 89 (4th Cir. 1970) (ostensibly applying West Virginia substantive law, but the opinion does not cite a single West Virginia decision; *in this case, there was a pretrial demand within policy limits*); *Alt v. American Fam. Mut. Ins. Co.*, 71 Wis. 2d 340, 345, 351, 237 N.W.2d 706, 710, 713 (1976) (*case involved three settlement demands, two disputed factually and the third for policy limits before trial*; the issue once again was whether there could be bad faith liability for an offer that did not meet a time-limited demand).

The facts of the fourth case that was suggested to me for this "Pro" category, which is from Tennessee, come closest to the cases I found following the Pro view, although a demand *was* made in this case *and as I said, I limited my list of cases to those in which no demand was made and yet the courts involved let the claims of bad-faith-in-settlement go to the jury including facts reflecting liability carriers' failures to initiate settlement negotiations.*

In *State Auto. Ins. Co. of Columbus, Ohio v. Rowland*, 221 Tenn. 421, 427 S.W.2d 30 (1968), the reported facts show a pretrial demand above policy limits, and no settlement offer on the facts. Still, the Tennessee Supreme Court held:

> We do not hold that the insurance company has an affirmative duty to negotiate with the injured claimant in all cases. We would only say that a refusal to discuss a settlement may be considered along with other evidence in determining the issue of bad faith.

Rowland, 221 Tenn. at 434, 427 S.W.2d at 35.

Placing Tennessee in the Pro category on the strength of the *Rowland* decision would make a list of 10 cases in which no demand was made within policy limits and the Courts involved recognized that the claim of bad faith in settlement can go to the jury including in a case in which the liability carrier involved failed to initiate settlement negotiations.

2. *"Maybe, but not in this case"*

In my article, I said that I made this category expressly for what might also be called iffy cases: "Cases in which the Courts of a given jurisdiction have recognized that at least there might be a legal duty on the liability carrier to initiate settlement negotiations without a settlement demand, particularly where the insured's liability is probable and the claimant's likely damages are great," followed by my list of six States at the time. Wall, "The American Law Institute and Good Faith Settlement Duties of Liability Carriers," 37 Ins. Lit. Rptr. at 602-03.

Those six States and the cases in which the Courts recognized that holding a liability carrier liable for bad faith in settlement because it did not initiate settlement negotiations was at least a theoretical possibility, but that the possibility was not open in those particular cases, are:

a. California, *Reid v. Mercury Ins. Co.*, 220 Cal. App. 4th 262, 278, 162 Cal. Rptr. 3d 894, 907 (Cal. 2d DCA, Div. 8, 2013), *review denied* (unreported) (Cal. January 21, 2014) (while allowing for the theoretical possibility that "a conflict may also arise, without a settlement offer, when a claimant clearly conveys to the insurer an interest in discussing settlement but the insurer ignores the opportunity to explore settlement possibilities to the insured's detriment," the Court concluded: "But nothing like that happened here.");

b. Idaho, *Morrell Constr., Inc. v. Home Ins. Co.*, 920 F.2d 576, 581 (9th Cir. 1990) (recognizing that a duty to initiate settlement negotiations may arise under Idaho law in some situations, but not as here before suit is filed);

c. Illinois, *Haddick* ex rel. *Griffith v. Valor Ins.*, 198 Ill. 2d 409, 417 & n.1, 763 N.E.2d 299, 304-05 & 304 n.1 (2001) (recognizing what the Illinois Courts term an "exception" to a general rule in Illinois that liability carriers do not have to initiate settlement negotiations, but an "exception" would apply when liability insurers failed to initiate settlement negotiations even without a settlement demand where in general and basic terms the insured's liability is clear and the claimant's likely damages are great, holding that the exception did not apply in the case at bar), following with approval *Adduci v. Vigilant Ins. Co.*, 98 Ill. App. 3d 472, 478, 424 N.E.2d 645, 649-50 (Ill. 1st DCA, 2d Div., 1981);

d. Ohio, *Miller v. Kronk*, 35 Ohio App. 3d 103, 106, 519 N.E.2d 856, 860 (Ohio 10th DCA, Franklin County, 1987) ("Settlement negotiations were never initiated by plaintiff Miller and, *considering the facts of this case*, Buckeye Union had no duty to initiate negotiations." [emphasis added]);

e. Pennsylvania, *Puritan Ins. Co. v. Canadian*

Univ'l Ins. Co., 775 F.2d 76, 77-78, 82 (3d Cir. 1985) (Pennsylvania law; in bad-faith-failure-to-settle case brought by excess carrier against primary carrier, the Federal Circuit Court refused to allow the excess carrier's claim in the absence of a demand from the claimant, including refusing to recognize any claim that the primary carrier should have initiated settlement negotiations: "Nor do we agree that on this record Canadian [the primary liability carrier] had an affirmative duty to initiate settlement negotiations with Donahue [the injured claimant]. The same factors that militate against a finding of bad faith in refusing to settle are relevant in this instance as well. An insurance carrier may be required to broach settlement negotiations under some circumstances but this case does not present them.").

f. and Texas. As I previously stated, "Texas is a State in which the Supreme Court seems to have spent a great deal of time wrestling with this question. Texas is also listed in this Article as one of three 'con' jurisdictions due to a holding in another case, discussed below[.]" Wall, "The American Law Institute and Good Faith Settlement Duties of Liability Carriers," 37 Ins. Lit. Rptr. at 603.

It may be said that the Courts in these cases "talk the talk, but do not walk the walk." To this list of "Maybe, but not in this case," I would now add a seventh case and State, Georgia, moving it from the list of "Pro" cases because although Georgia law apparently recognizes the possibility of a jury considering a bad-faith-in-settlement claim when the liability carrier has not initiated settlement negotiations and there was no settlement demand, still the possibility appears to be recognized only as dicta in Georgia. *Delancy v. St. Paul Fire & Marine Ins. Co.,* 947 F.2d 1536, 1550-51 (11th Cir. 1991) ("Georgia law does not clearly require the insured to show that the insurer refused an offer within the policy limits to establish liability for tortious failure to settle, but it does not foreclose the argument that such an offer is required before the insured may recover"; assuming without necessarily deciding that the insured could state such a claim "if the insured alleges facts showing that the insurer knew, or reasonably should have known, that the case could have been settled within the policy limits," but affirming summary judgment in favor of the liability carrier on the record of this case, which does not appear to have ever been cited by a Georgia State Court).

Other observers have since agreed with my original assessment of these cases, firmly assigning them to the category I originally said they belong in, "Maybe, but not in this case."

As I have repeatedly observed, these decisions are iffy at best on the proposition at hand, which to expressly state it again is whether Courts would allow a claim of bad faith in settlement to go to the jury on the strength of facts which include the liability carrier's failure to initiate settlement negotiations and there has not been a settlement demand within policy limits. Once again, it may be said that they "talk the talk" without "walking the walk." They could justifiably be placed either in the "Pro" column or in the "Con" column. I choose to place them in neither but instead continue to recognize that they could go either way.

If each and every one of these cases is placed in the "Pro" column, then the decided cases are in favor of letting a liability carrier's failure to initiate settlement negotiations go to the jury in a bad faith case, regardless of whether there was a settlement demand or not.

If all of these cases are placed instead in the "Con" column, then the cases are probably fairly evenly distributed between "Pro" and "Con."

That being the situation, for purposes of the present comments I will eliminate these cases from my analysis of the decided case law on the proposition at hand, namely, whether a Court would allow a jury to decide the question of whether a liability insurer's failure to initiate settlement negotiations in a given underlying case against an insured amounts to bad faith in settlement, in a case in which the claimant did not make a settlement demand within policy limits. In the final analysis, since the cases in this category can be taken to go either way, they are probably not much help in figuring out nationwide "majority" and "minority" lineups on that question.

3. *Con*

In my article, I noted cases from a total of three jurisdictions which I placed in the "Con" camp. Two jurisdictions should be firmly placed in that category, and the third is likely, I said:

a. Alaska, in a case in which the Alaska Supreme Court said that the presence of "a policy limits demand" in a case where "there is a substantial likelihood of an excess verdict" against the

policyholder "places a duty on an insurer to *tender* maximum policy limits" and also that it requires the insurer to *settle* the claim, statements which together probably go beyond anything any other Court has ever said about the consequences of a settlement demand in such a case, *Jackson v. American Equity Ins. Co.,* 90 P.3d 136, 142 (Alaska 2004) (emphasis added). Parenthetically, perhaps reflecting the lack of precedential value inherent in the broad statements which have just been quoted from the opinion in this case, this decision has only been cited by other Alaska courts;

b. Perhaps Mississippi, in a Federal Circuit Court case, *Hemphill v. State Farm Mut. Auto. Ins. Co*., 805 F.3d 535, 542 (5th Cir. 2015), cert. denied, __ U.S. __, 136 S. Ct. 1715 (2016) (in this case, the Federal Fifth Circuit Court of Appeals ventured a guess that the Mississippi Supreme Court would not hold that the defendant liability insurer in the case at bar should have made a settlement offer earlier than it actually did; while the liability carrier in the *Hemphill* case actually made a settlement offer, the dispute was about whether it should have made the offer sooner than it did),

c.. Texas. As I noted earlier several times, "Texas addressed this issue seemingly head-on in its 5-2-2 decision *in Rocor Int'l, Inc. v. National U. Fire Ins. Co.*, 77 S.W.3d 253, 261-62 (Tex. 2002)." Wall, "The American Law Institute and Good Faith Settlement Duties of Liability Carriers," 37 Ins. Lit. Rptr. at 603 n.34.

and

d. Kentucky. To these three cases from three different States, I would now add a probable fourth case and State, Kentucky, because the Supreme Court of Kentucky wrote that "[a]n insurer is liable for a judgment against its insured in excess of the policy limits only if it refused in 'bad faith' to pay a settlement demand within its policy limits." *American Physicians Assur. Corp. v. Schmidt*, 187 S.W.3d 313, 318 (Ky. 2006). However, that decision actually stands for the separate proposition that unless the liability carrier has a reasonable opportunity to settle within policy limits, it cannot be held liable for bad faith in settlement. In *American Physicians*, the policyholder controlled the settlement decisions under the policy and *although the claimant "was willing to settle for the policy limits,"* the policyholder refused to consent to settlement and so the liability carrier could not be held liable for bad faith in settlement. *American Physicians Assurance Corp.,* 187 S.W.3d at 317 (emphasis added).

I have been invited to include two cases decided in the 1990's in the "Con" column. That is, to include two cases for the ostensible reason that the Courts involved in those cases also take a contrary position on the proposition that there can be extracontractual exposure for a liability insurance company's failure to initiate settlement negotiations in the absence of a settlement demand. Again, I appreciate the opportunity. This time, however, I must completely decline the opportunity. The reason is that in these cases the facts do not support that citation: Iowa, in *Wierck v. Grinnell Mut. Reins. Co.*, 456 N.W.2d 191, 194 (Iowa 1990) (*liability insurance company in that case did offer policy limits, even without a demand for a sum certain*), and New York, in *Pavia v. State Farm Mut. Auto. Ins. Co.*, 82 N.Y.2d 445, 454-55, 626 N.E.2d 24, 28, 605 N.Y.S.2d 208, 212 (1993) (*policy limits demand was made in that case during insurance company's investigation of insureds' liability*; no bad-faith-in-settlement claim could be established, the Court held, because *it was not bad faith not to accept the demand while the carrier was still in the course of investigating whether its insured would likely be held liable at trial*).

4. Submitting the lineup

The lineup of the Courts in these decided cases is 9 or perhaps 10 cases decided in as many Courts under the laws of just as many States, in which the Courts recognized that claims of bad faith in settlement alleged against liability carriers would ordinarily be allowed to go to the jury when the carriers involved did not initiate settlement negotiations and there was no settlement demand from the claimant within policy limits.

Four Courts in the United States take even arguably a contrary position.

That ratio is decidedly and clearly in favor of recognizing that claims of bad faith in settlement alleged against liability carriers are ordinarily allowed to go to the jury when the carriers involved did not initiate settlement negotiations and there was no settlement demand from the claimant within policy limits.

5. The Conclusion Regarding Initiating

Clearly, the "majority view" in this slice of case law is that a settlement demand is not required and that a jury question was nonetheless presented in a case of alleged bad faith in settlement including whether a liability carrier should have initiated settlement negotiations to protect its insureds, particularly where the insured's liability is probable and the claimant's likely damages are great.

Still, I choose not to relitigate the issue of whether the Restatement should explicitly state this clear majority view. It is enough that the Restatement, as written, is supported by the clearly emerging majority view from all of the available case law on this issue.

III. THE REQUIREMENT OF A SETTLEMENT DEMAND, OR NOT, UNDER RESTATEMENT SECTION 24 AND THE DECIDED CASES

The same cases previously examined here, which support extracontractual liability when the liability carrier fails or refuses to initiate settlement negotiations in the absence of a demand for settlement within policy limits, necessarily also simultaneously support the view that a settlement demand is not required in order for extracontractual liability to attach. Since none of those cases, which I have listed in the "Pro" column, required a demand within policy limits and still recognized that the issue of extracontractual liability was a jury question in a bad-faith-in-settlement case which included the carrier's failure to initiate settlement negotiations, *the determinative fact in the liability carriers' extracontractual exposure was not the claimants' demand but the carriers' own settlement conduct.* The proposed Restatement characterizes this conduct as a duty to make reasonable settlement decisions.

Not only would the Courts that decided all the cases which I have broken out into the "Pro" column let extracontractual claims go to the jury in the absence of any settlement demand, but so do many of the other Courts regardless of whether they are "Pro" or "Con," and even including for this purpose those Courts which are just "Maybe."

"To be clear, there should not be an absolute rule that an insurer can never be liable for failure to settle if the claimant never made a within-limits offer. Such arguments have sometimes been made by insurers, but have properly been rejected. Insurers have other duties regarding defense or settlement which, if breached, can subject them to liability for failure to settle." William Barker, "Insurers Ought Not to be Required to Initiate Settlement Negotiations," 38 Ins. Lit. Rptr. 77, 78 (March 3, 2016).

IV. CONCLUSION

To be clear, it is proper to recognize that a liability carrier sometimes will have a duty to initiate settlement negotiations even when the claimant does not make a settlement demand, particularly but not only when the insured's liability is probable and the claimant's likely recoverable damages are greater than the liability policy limits. Whether and how the liability insurer fulfills that duty in any given case will ordinarily depend on all the facts including whether the carrier had a reasonable opportunity to settle within policy limits.

As the Courts in several of these cases have pointed out, the fact that in most cases claimants make settlement demands does not mean that a settlement demand is necessary before the liability carrier must act in good faith or bear the consequences. The risk of bad faith, extracontractual liability may exist in cases where there has been a demand within policy limits, but that risk can also be present in cases when there has been no such demand. In the end, the liability insurer's risk of exposure to bad faith, extracontractual liability depends on whether its settlement conduct was reasonable under all the circumstances.

V. ONE MORE THING: REPORTERS' NOTES f AND h AND THE DECIDED CASES

The Restatement's Reporters' Notes f and h bear quoting in respect of a particular assertion that on its face seems contrary to Section 24. Although the Reporters did not endorse the assertion by any means, they did clearly offer it as contrary authority in two of many citations to the same source.

The results of the decided cases contradict both of the two statements quoted in the ALI Reporters' Notes f and h, to the effect that (1) "[i]n most jurisdictions, the insurer cannot be liable for breaching the duty to settle unless a settlement offer within policy limits is made by the plaintiff," and (2) "[w]ithout a settlement offer, it is not possible for the insurer to have breached its duty." *As has been shown, the results of the decided cases are actually the opposite of both of these further conclusions.*

This is likely to be the final opportunity to address this situation before the Restatement is published. Although to say again, the Reporters have not endorsed the assertions quoted from the hornbook in Notes f and h, the citations including their parenthetical quotations in question should be deleted from Reporter's Notes f and h to Restatement section 24, for the above reasons whether taken separately or together.