Litigation and Prevention of Insurer Bad Faith, Third Edition

Dennis J. Wall

§ 3:16. Duty to initiate settlement negotiations

Since the generally accepted standard for measuring the settlement conduct of a liability insurer is whether the ordinary and prudent liability insurer without policy limits would settle for a given sum, liability insurers are under a duty to make reasonable offers in response to the settlement demands of third parties.[1] A reasonable offer is one based on an objective assessment of liability and damages. It does not include other facts, such as how much reinsurance the liability insurer has for its own protection,[2] whether or in what amount the insured purchased excess insurance[3] unless the demand is in excess of the limits of the primary liability insurer considering whether to offer its own limits,[4] or the naked desire to "'*try to negotiate some savings on our limits*.'"[5] Thus, the participants' more-or-less contemporaneous remarks on this comparison may well be admitted in evidence in a later bad faith case. The remarks of three different trial judges at three pretrial conferences on the same case, that the insurance company should settle that case within the company's policy limits, were at issue in Birth Center v. St. Paul Companies, Inc.[6] Another remark made by one of the trial judges was also at issue in the later bad faith case. The other remark at issue was that particular trial judge's observation during "a final pre-trial conference" in the underlying case *that the insurance company in question was breaching its fiduciary responsibility to its insureds and that there was a clear indication of bad faith.*[7]

It is a decision which must take into account the honest evaluation of counsel when such advice has been given.[8] Ultimately, the reasonableness of the size of the insurer's offer will also be determined by a comparison with the amount of the verdict rendered or judgment entered against the insured.[9]

There is a tension between properly investigating a claim against a Policyholder, on the one hand, and actively engaging in negotiations to settle that claim.

Without taking "a reasonable amount of time to properly investigate a claim before engaging in settlement negotiations," a liability carrier runs the risk of a judge or jury deciding that it acted in Bad Faith by not investigating before engaging in negotiations to settle a claim about which it may have very little information.[9.50]

"However, it is also true" that where damages are great and liability is probable in the case against the policyholder, in some jurisdictions at least the liability carrier has an affirmative duty to initiate settlement negotiations.[9.70]

When the carrier's or counsel's evaluation of the Bad Faith case is that it is likely that the Court will hold or the jury will find that damages in the underlying case were "great" and that the insured's liability in the underlying case was "probable" or "likely," it means that the Court and Jury are likely to see the underlying damages and liability exposure as so clear without further investigation that the Good Faith duty of settlement initiation will probably be held or found to have been triggered in the underlying case.

In that event, in jurisdictions recognizing the duty of settlement initiation, initiation quite simply trumps investigation—or a Court is likely to hold and a Jury to find that initiation trumps investigation in the particular case.

Here, as the analysis of decided cases discussed in this Section displays, is a resolution of the tensions between the Liability Carrier's Good Faith duties of investigation and initiation: When damages are reasonably known to be great, and liability is reasonably known to be probable, the liability carrier's prudent course is to initiate in that situation and not to insist that instead there is a further need to investigate in such a case.

"It is difficult to get a person to see the majority approach taken by the courts when his salary depends on his not seeing it" (with apologies to Upton Sinclair and his famous dictum that "It is difficult to get a man to understand something, when his salary depends on his not understanding it."). The story of a case here will illustrate the courts' approach to this issue.

This is the story of a case which did not contain a demand to settle for policy limits, and still the liability carrier was found to have acted in bad faith in settlement. This case is scheduled for much greater treatment later this year in a major insurance journal, but it can be said here that this was a case of a request by an injured claimant for disclosure of policy limits and the injured claimant clearly stated that he was interested in exploring settlement within the liability carrier's policy limits

before suit was filed against the liability carrier's insureds. But his was not a demand for settlement, it was a demand for disclosure of policy limits.

Our story here begins not at the beginning, but in the middle. After a Consent Judgment of $5 Million was entered without collusion in the underlying case, a liability insurance carrier, Metropolitan, filed an action for declaratory relief in the U.S. District Court for the Eastern District of California.

Met asked the Federal Court to declare whether it acted in good faith and dealt fairly with its insureds. Here are the essential facts behind the bad faith allegations.

Before he filed the underlying case against Met's insureds, an injured claimant sent a letter to Met. He did not make a settlement demand at that time. Instead, he asked Met to disclose its policy limits within 15 days of the letter because he wanted to know his options of settlement vs. a lawsuit.

In addition, in the letter he asked Met to respond to his sister at her separate address rather than to his home address, partly because he incurred brain injury among other injuries in the underlying accident and he wanted his sister to explain Met's response to him. Also, he must have been concerned about something Met also knew, which is that he had already spent a lot of time being treated in the hospital.

Met's applicable policy limit was $250,000 per injury, but Met did not tell him that. Faced with a brain-injured claimant who was representing himself, people at Met sent him a form letter that it used to communicate with injured claimants represented by an attorney.

After the 15-day deadline to state its policy limits, Met sent its letter—a month after the claimant's letter.

Met sent its letter to the injured claimant's home address and not to the sister's address, which the injured claimant gave to Met in his letter to Met in the first place.

In a bench trial, the Federal District Court declared that Met acted unreasonably in response to a reasonable letter that requested disclosure of policy limits with a reasonable time deadline. This finding led automatically to the legal conclusion that Met acted in bad faith in this case and so Met was required to indemnify its insured who was liable for the full amount of the stipulated $5 Million underlying judgment, without regard to its policy limits of $250,000.

It must be said again, that this was never a case with a demand to settle for policy limits. This was a case which featured only a request by an injured claimant for disclosure of policy limits where the injured claimant clearly stated that he was interested in exploring settlement within the liability carrier's policy limits before suit was filed against the liability carrier's insureds. *But his was not a demand for settlement, it was a demand for disclosure of policy limits.*

The Federal Judge followed case law decided in Federal Courts and in California State Courts holding that a jury could nonetheless find a liability carrier in bad faith under California law where the injured claimant gave the liability carrier a reasonable opportunity to settle the claim within policy limits. In such cases, when settlement opportunities are believed to exist, the liability carrier must act to make settlement happen if it can, on behalf of its insureds.

So, this is where the first part of the story ends here. Met was against paying the $5 Million Judgment, until it was for it. When the underlying judgment was satisfied, part of the deal was to make the Federal Judge's decision go away. The case is *Metropolitan Property & Casualty Insurance Co. v. Hedlund.*[9.80]

Unique situations are presented by cases involving attempts at some form of pool arrangements for settlement, among either multiple defendants or multiple claimants, and by cases involving workers' compensation liens. It appears that a liability insurer is under no duty to enter a settlement pool with other defendants in a joint effort to settle one or more claims, at least in the absence of proof that entrance into such a pool was in the interests of the insured.[10] It further appears that no court has yet been confronted with such proof, for no such case has been found. With respect to the settlement of multiple claims, the majority view is that insistence on settlement of all claims will not be allowed to run counter to the best interests of the insured, which usually lie in seeing at least some claims settled.[11] A good faith settlement offer also may not include insistence upon other insurance carriers waiving rights of subrogation.[12]

The question of workers' compensation liens in connection with settlement arises when a liability insurer is also the workers' compensation insurer of the injured plaintiff. The answer is not clear. Only one case has been found in which it has arisen. An excess liability insurer alleged that by imposing a lien on the workers' compensation benefits paid to the

third-party claimant a primary liability insurer could have reduced an excess judgment entered against the insured.[13] The court entered judgment for bad faith against the primary carrier on the basis of other conduct, thus rendering this issue moot in that case.[14] In practice, the question usually arises in a context where a liability insurer is also the claimant's workers' compensation carrier. The insurer must decide whether to waive its liens as a part of the settlement. In the author's view, a clear answer is provided by the application of general principles. The liability insurer is forbidden to prefer its own interests to those of its insured. If the prospects of liability and damages make it in the insured's interest to settle, then the liability insurer which fails to consider negotiating its albeit distinct workers' compensation lien because of its desire for a payoff has clearly preferred its own interests to those of its insured. The question in that case becomes whether a reasonable and prudent liability insurer, owed a debt by the injured party, would use that debt as an extra source of funding in settlement negotiations if it were liable without policy limits for any judgment that might be entered.[15]

Finally, as was previously noted,[16] it is established Florida law that "[w]here liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations."[17]

There is a question under Florida law which has not been completely settled, however, involving the apparent conflict between proper investigation of a claim against a policyholder, and actively negotiating settlement of that claim.

It has been held that unless a liability carrier takes "a reasonable amount of time to properly investigate a claim before engaging in settlement negotiations," it may thereby be exposing itself to bad faith, extracontractual liability.[17.30]

However, not surprisingly in the same case it was also held that where damages are great and the policyholder's liability is probable, nonetheless the liability carrier has an affirmative duty to initiate settlement negotiations.[17.50]

Here is one proposed resolution of the apparent conflict between investigation and settlement of a claim in which the insured's liability appears probable and the damages of the injured claimant appear to be great, i.e., greater than the liability insurance policy limits. The resolution proposed here is one of many possible resolutions of this perceived conflict in such cases. It begins with the realization that to say that when in a given case the insured's liability appears to be "probable," and that the injured claimant's damages appear to be "great," what is really said in such a case is that the Court and Jury are likely to look at the evidence of the underlying damages and of liability exposure as being so clear without further investigation that good faith settlement duties—meaning a duty to initiate settlement negotiations even without a settlement demand—will probably be held by a Court or found by a Jury to have been triggered in that case.

In that specific and particular case, in jurisdictions recognizing the duty of settlement initiation a Court is likely to hold and a Jury is likely to find that initiation trumps investigation. There is another way to state the resolution among many possible resolutions of the conflict between investigation and settlement in such cases which is proposed here: When Damages are reasonably known to be great, and Liability is reasonably known to be probable, the Liability Carrier's prudent course is to initiate settlement negotiations and not to insist that instead there is a need to investigate in that situation.

It appears that an "offer" does not necessarily require a "tender" or a parting with control over the money which has been placed into the hands of the injured claimant or the injured claimant's attorney, at least where the record facts clearly show the futility of making the tender as opposed to the offer.[18]

Where liability is probable and damages are great, the focus of the Courts following the view that a liability carrier should initiate settlement negotiations is not on whether the injured claimant ***could*** have accepted a settlement offer but instead they focus on proof by a preponderance of the evidence on the question of whether the injured claimant ***would*** have settled the underlying case:

> ***Clearly the trial court erred in granting summary judgment based on its assumption there could be no bad faith because Swaby was in a coma and therefore there was no one to whom to make an offer.*** *See Berges,* 896 So. 2d at 675 [*Berges v. Infinity Ins. Co.,* 896 So. 2d 665, 674 (Fla. 2004)] (a guardian or personal representative who has not yet been appointed can negotiate a settlement on behalf of a claimant). Furthermore we can find no case law support for AVIC's argument that it could not have at least made a written offer and/or tender to Swaby through her mother. It is unclear at what point an attorney had been retained. If in fact Goheagan had retained an attorney, the assistance of the attorney may have been necessary to finalize a settlement but would not have precluded an offer. ***With the catastrophic injuries, clear liability, and the limited available liability limits of $10,000, a jury could decide that there was not much to negotiate; and the representation by an attorney would not have been an impediment to at least make an offer to settle.***[18.50]

The burden of proof belongs to the liability insurance company in such a case to show that realistically the injured claimant would not have accepted the settlement offer:

> Any doubt as to the existence of an opportunity to settle within the face amount of the coverage or as to the ability and willingness of the insured to pay any excess required for settlement must be resolved in favor of the insured unless the insurer, by some affirmative evidence, demonstrates that there was not only no realistic possibility of settlement within policy limits, but also that the insured would not have contributed to whatever settlement figure above that sum might have been available. [19]

"Florida law, however, … treats the unwillingness of a victim to settle as a defense which the insurer must prove."[20] The Federal Court in this last-quoted case added this explanation of the reason behind this rule of Florida law:

> The recognition of the speculative nature of this kind of testimony is the reason why Florida courts have focused not on the mindset of the injured party but on the conduct of the insurer under the circumstances. That is, rather than trying to conjure the secret intent of the injured party, courts simply ask whether under all the circumstances known to the insurer[,] would reasonable diligence and ordinary care dictate an offer to settle within policy limits. The victim's unwillingness to settle, however, is not completely ignored under Florida law. The unwillingness to settle will become a factor only in the unlikely case where the insurer is able to conclusively prove the unwillingness to settle for the policy limits. [21]

However, the Florida State Courts and other Federal Courts applying Florida law, follow a far less restrictive approach.[22]

In the recent case of Barry v. GEICO General Insurance Co.,[23] this burden was met with evidence that included this testimony of a lawyer as an Expert Witness:

> GEICO presented the testimony of … a lawyer-expert in insurance bad faith, who opined that GEICO did not act in bad faith. He testified that although GEICO immediately attempted settlement and Stone[, 'the assigned claims adjuster,'] had tried to work with [the widow of the deceased victim,] Capelli, her refusal to communicate with Stone made it clear that she was not intending to settle … [The lawyer-expert] further stated that the actions of Capelli and her attorney were inconsistent with a willingness to settle. These included Capelli's failure to speak to the insurance company and her attorney's failure to notify the insurance company that he represented Capelli, which indicated to him that this was not a claim which could have been settled. [24]

The result was a jury verdict for the insurance company on the claim of Bad Faith failure to settle.[25] The Florida appellate court explained its affirmance of the Judgment entered by the Trial Court upon the jury verdict:

> Although [the policyholder] Barry is correct that the focus of an insurance bad faith case is not on the motive of the claimant but of the insurer in fulfilling its duty to its insured, *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 667 (Fla. 2004), that does not mean that all inquiries into prior conduct and motives are irrelevant and prejudicial. In a bad faith case, the insurer has the burden to show that there was no realistic possibility of settlement within the policy limits. *See Powell [v. Prudential Property & Cas. Insurance Co.*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991), *review denied*, 598 So. 2d 77 (Fla. 1992)]. This question is decided based upon the totality of the circumstances. *See Berges*. The conduct of Capelli and her attorney would be relevant to the question of whether there was any realistic possibility of settlement. Despite Capelli's testimony at trial that she would have settled the case if GEICO had not made the mistake, her actions and those of her attorney suggested otherwise. The jury could have concluded that the failure of her attorney to notify GEICO of his representation coupled with her refusal to meet with Stone on the settlement, among other incidents, showed that she did not want to settle with GEICO for the policy limits. Thus, GEICO did not inject irrelevant information into the case, and therefore we reject Barry's argument as to the cumulative nature of the errors. [26]

In any case, whether the liability insurance carrier had a realistic opportunity to settle is an affirmative defense to liability for bad faith in settlement, at least in Florida. "[W]hether an insurer had a realistic opportunity to settle is relevant to the determination of bad faith, and … the insurer bears the burden of proof on this issue."[26.10]

In the decision from which this quotation is taken, the Court cited settled law in the *Powell* case,[26.20] in support of its holding along with two other U.S. District Court decisions on point from the Northern District of Florida.

In the course of reaching this ruling, the Court in this case ***agreed with the insurance carrier's argument that the***

insurance carrier bears the burden of proof on this affirmative defense.

After giving this assertion on behalf of a defendant liability carrier a moment's thought, this is not really surprising. Defendants like the insurance carrier in this alleged bad-faith-in-settlement case bear the burden of proving their affirmative defenses. If the Court was going to allow this crucial affirmative defense to stand as pleaded, then the carrier-defendant had to acknowledge that it bears the burden of proving it.

Here is the affirmative defense which the Court accordingly ruled withstood the plaintiffs'-policyholders' motion for partial summary judgment on the insurance-bad-faith-failure-to-settle claim alleged in the quoted case:

> There was no realistic possibility of settlement within the policy limits pursuant to *DeLaune v. Liberty Mutual Ins. Co.*, 314 So. 2d 601 (Fla. 4th DCA 1975)[, *cert. denied*, 330 So. 2d 16 (Fla. 1976)], because of Plaintiffs' attorney['s] … deliberate scheme to try and manufacture a reason to reject Allstate's good faith offer to settle Plaintiffs' claims as evidenced by his intentionally withholding pertinent information that was requested by Allstate, by feigning outrage over reasonable questions asked by defense counsel[,] … by feigning outrage over the "Colossus" letter which he knew was a letter that was automatically computer generated sent out on every file, by misrepresenting that the Colossus letter was an attempt to settle the claim, and by otherwise acting in a manner so as to obstruct and/or delay settlement of the claim.[26.30]

Florida Courts consistently hold that Florida is a fact-based Bad-Faith jurisdiction.[26.50] On this basis, Florida's Second District Court of Appeal reversed a summary judgment entered by a trial court in favor of a liability insurance company in a Bad Faith failure to settle case, Gutierrez v. Yochim.[27]

In addition, the Second District Panel in that case may have actually *expanded* the legal rules applied to claims in which there may be a "duty to make a settlement offer" under the preexisting Florida case law. In the Gutierrez appeal, according to the Second District, the liability insurance company argued that the injured claimant-Plaintiff in the underlying case "never" made "a formal offer to settle the case."[28] That simply did not deter the Second District Panel in this particular case from reversing the summary judgment that the trial court had entered in favor of the liability insurance company:

> 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). [29]

Calling a wrong number does not initiate settlement.

In a case involving an automobile liability insurance policy with $10/$20 limits, a minor passenger in the policyholder's vehicle was seriously injured in an automobile accident involving the policyholder and the subject vehicle. One of her fingers was amputated as a result of the accident.[29.10]

The carrier in that case was shown to be aware that the young girl's injuries "well exceeded the Policy's limits." From the date that the accident happened, the carrier appreciated that "the injury warranted a tender of the Policy's limits."[29.20]

But the carrier did not tender its policy limits. The Jury returned a verdict and the Court entered judgment against the insured driver in the amount of $227,493.85, an amount which was more than 22 times the individual policy limit and over 11 times the aggregate policy limit.[29.30]

The carrier defended on many grounds. One of its grounds for defense was that while its handling of that case may have been negligent, nonetheless it should not be held to have acted in bad faith in failing to settle in this case. The carrier's adjuster tried to initiate settlement with the injured claimants but he called a wrong number. After that, he wrote "numerous letters (to multiple addresses) and left a few voicemails (at various numbers)" asking the claimants to contact him. ***However, the Appellate Court in that case pointed out that none of the letters or voicemails communicated his company's desire to settle the child's injury claim***.[29.40]

The Federal Eleventh Circuit Court of Appeals reviewed the evidence and held that the evidence of the alleged bad-faith-failure-to-settle was sufficient in that case.[29.50] In the course of its opinion, the Federal appellate court observed that "negligence in handling the underlying claim is not a defense, but rather, is material in determining bad faith."[29.60]

The Federal appellate court similarly disposed of another of the carrier's contentions. The carrier in that case

contended on appeal that there could be no bad faith because the injured claimant did not make a settlement demand for policy limits "within the time period in which she would have accepted the Policy's limits to settle her claim." The Eleventh Circuit panel followed Florida law and held in response to this contention that the absence of a formal demand in such a case as this, does not preclude a finding of bad faith, citing a Florida case decided 23 years before.[29.70]

Many courts, taking what is clearly the modern view, have similarly held that a liability insurer has an affirmative duty to undertake settlement negotiations when:

1. The probability of liability is high

2. Likely damages are great

3. The insured has an excess liability policy

Also, if there are other financial holdings which could be exposed before or after the entry of an excess judgment, regardless of whether there has been any demand by the injured third party, the insurer must undertake settlement negotiations.[30]

Kansas law imposes such a duty, it has been held by the Federal Tenth Circuit Court of Appeals in the landmark case of Roberts v. Printup:[31]

> Kansas imposes, under certain circumstances, a duty upon an insurer to initiate settlement negotiations even without an offer to settle being made by the claimant. *Coleman v. Holecek*, 542 F.2d 532, 537 (10th Cir. 1976). Rather than this duty hinging on the existence of a claimant's settlement offer, a Kansas insurer's "duty to settle arises if the carrier would initiate settlement negotiations on its own behalf were its potential liability equal to that of its insured." *Id.* [32]

This duty arises where the liability insurance company would "initiate settlement negotiations" for itself it its own exposure to potential liability was the same as that of its insureds. It is the existence of a *claim* for damages in excess of policy limits that activates this duty, which is a fiduciary duty, the Roberts court held under Kansas law, and not the existence of an injured claimant's *offer* or *demand* in excess of policy limits.[33] Moreover, Kansas law requires a *claim*, not a *lawsuit*, for damages in excess of policy limits.[34]

Rhode Island provides another example of a similar rule. In a 2019 decision, the Rhode Island Supreme Court summarized its existing decisional law on this issue in this way:

> We began our discussion by noting the differences between claims for insurer bad faith in the first-party and third-party contexts, stating:
>
> > "In recent years, this Court has had occasion to address the refusal or negligent failure of an insurance company to make a timely offer of settlement in the context of both third-party claims, *in which the insurer is obligated to defend its insured against liability to third-parties*, *Asermely* [Asermely v. Allstate Ins. Co., 728 A.2d 461 (R.I. 1999)] * * * and in first-party claims, *where the insured has made a claim against its own carrier* for compensation arising out of injuries received from a UM-UIM driver." *Id.* [Skaling v. Aetna Ins. Co., 799 A. 2d 997 (R.I. 2002)] at 1005 (emphasis added).
>
> > We highlighted the fact "that the duty of good faith and fair dealing includes an affirmative duty to engage in timely and meaningful settlement negotiations and to make and consider offers of settlement consistent with an insurer's fiduciary duty to protect *its insured* from excess liability" in both kinds of cases. *Id.* at 1005, 1006 (emphasis added).[34.01]

This appears to be dicta. Strong dicta, but dicta.

The *Summit* decision came in an interesting case. In this Section titled *Duty to initiate settlement negotiations*, it is worth our while to take a little more time and take another look at the *Summit* case.

At the outset, it is important to note that the *Summit* case did not involve the insurance company's insured, Mr. Eric Stricklett. The *Summit* appeal was from a declaratory judgment which the trial court entered in favor of Summit and against

the injured claimants but not against him. "Mr. Stricklett was not part of the final judgment and has made no appeal to this Court," the Rhode Island Supreme Court carefully pointed out in *Summit*.[34.02]

It bears repeating as the Rhode Island Supreme Court did, that "Mr. Stricklett was not made part of the final judgment in this case,"[34.03] which was a declaratory judgment in favor of Summit. It is important to understand that the *Summit* appeal involved only Summit and the injured claimants who were suing the insurance company's insured.

The issue in *Summit* was thus, broadly stated, whether an injured claimant has a cause of action for third-party bad faith, i.e., whether injured claimants can sue the policyholder's liability insurance carrier for alleged bad faith in their own right and without an assignment from the insured, under Rhode Island law. The Supreme Court answered that question in the negative. Concisely put,

> this Court has never recognized such a duty and has never held that an insurer has extracontractual liability to a third-party claimant in addition to a contractual, fiduciary duty to its insured for failing to settle a claim in a timely manner where § 27-7-2.2 was not applicable.[34.04]

The Alveses did not have an assignment of Mr. Strickland's bad-faith rights, if any. Therefore, they contended, as they had to contend if they were to prevail on their arguments against Summit, that Rhode Island law recognized what they called a "strict duty on the insurer to proactively engage in settlement discussions."[34.05] The Rhode Island Supreme Court's review of its bad-faith case law in the *Summit* case ended where it began, by rejecting the Alveses' contentions that Summit owed them a direct duty of good faith, exactly equal to the duty of good faith that Summit owed to Strickland, its insured, even though the Alveses never obtained an assignment from Strickland, Summit's insured.[34.06]

The Supreme Court acknowledged in *Summit* that it had previously held in cases of multiple claimants with claims that together exceed the policy limits, that under Rhode Island law insurers have a duty to engage in settlement negotiations to attempt to settle as many claims as possible. It is important for us to acknowledge this as well. The Alveses did not simply make this up, there was precedent in Rhode Island law that in cases of multiple claimants where the multiple claims taken together exceeded the available policy limits, a liability carrier should engage in settlement negotiations so as to settle as many of those claims as possible.

The Court's answer to the Alveses in *Summit* was determinative of their argument that Summit owed them too a duty of good faith, however. The Court emphasized that this affirmative duty was imposed on cases of multiple claimants in order for insurers in such cases to make an effort to relieve their insureds from the burdens and expenses of litigation.[34.07] In the eyes of the Supreme Court, the effort to "relieve the insured" from the burden of litigation and its expense in cases involving multiple claimants clearly did not fashion a duty toward the injured claimant, and certainly not without an assignment from the insured.

In the end, the injured claimants in *Summit*, the Alveses, could not overcome the admitted fact that they did not make a settlement demand within policy limits at any relevant time. Moreover, the Supreme Court was not going to determine whether there was a breach of good-faith duty toward the policyholder here unless and until an excess judgment was entered against him in the underlying case:

> Additionally, because Mr. Stricklett was not made part of the final judgment in this case, Summit's liability to Mr. Stricklett, under *Asermely* [Asermely v. Allstate Insurance Co., 728 A.2d 461 (R.I. 1999)] or otherwise, may be determined if Mr. Stricklett is found liable to the Alveses in an amount exceeding the policy limit in the underlying tort action.[34.08]

In short, the Rhode Island Supreme Court's *Summit* decision did not involve the insurance company's insured. It involved only the injured claimants who were suing the insurance company's insured. The holding in *Summit* extended only to them, the injured claimants. This has been a long way of saying two things. First, that the quote we started out with is dicta. Strong dicta, but dicta nonetheless. And second, that with respect to good-faith duties owed to insureds under Rhode Island law, *Summit* and the cases reviewed in it certainly do not provide any logical basis for a requirement that the injured claimants make a settlement demand within the policy limits before the insured has a cause of action for bad faith.

Being required in a given case to initiate settlement negotiations does not mean that any liability carrier must "effectuate" settlement by that act. That this is so was never illustrated more clearly than in two appellate decisions in 2012 in the same Federal case involving California substantive law.

On June 11, 2012, a panel of the Ninth Circuit Court of Appeals issued a controversial opinion under questionable

circumstances. There were two issues before the panel: One involving whether liability was clear and damages were great, and the other issue involving whether there was sufficient evidence that a statutory provision was violated, which makes it an Unfair Claims Practice in California if an insurance company does not "effectuate" a settlement when liability of its insured is reasonably clear.[34.09] On both issues, the panel's holding in June that the liability carrier involved, Deerbrook, had a duty to "effectuate" settlement where liability was reasonably clear, was dicta. Frankly and simply put, the holding in June was not supported by the evidence in the record.

This June 11, 2012 decision was "amended" and superseded on October 5, 2012 on petition for rehearing.[34.10]

In both opinions, the Ninth Circuit actually rejected the appellant's-plaintiff's claim of reversible error, ***because the appellate panel agreed with the District Judge that there was no evidentiary basis for a proposed jury instruction requested by the plaintiff in this particular case.***

Ms. Du's proposed jury instruction did not use either the word, "initiate," or the Ninth Circuit's and California Legislature's word of choice, "effectuate." (Ms. Du sued as the assignee of one Mr. Kim's Claims against Mr. Kim's liability insurance company, Deerbrook, including assignment of the potential claim for bad faith in settlement which Ms. Du alleged here.).

Here is the jury instruction Ms. Yan Fang Du proposed, which the Ninth Circuit panel in this case wrote in June should have been given by the District Judge but the refusal to give which instruction was upheld on appeal, ***because there was no evidentiary basis to give it in this particular case***:

> In determining whether Deerbrook Insurance Company breached the obligation of good faith and fair dealing owed to Mr. Kim, ***you may consider whether the defendant did not attempt in good faith to reach*** a prompt, fair, and equitable ***settlement*** of Yan Fang Du's claim ***after liability [of its insured Kim] had become reasonably clear***.
>
> The presence or absence of this factor alone is not enough to determine whether Deerbrook Insurance Company's conduct breached the obligation of good faith and fair dealing. You must consider Deerbrook Insurance Company's conduct as a whole in making this determination.[34.11]

To say again, for it bears repeating, the plaintiff requested that this jury instruction be given in that case, the plaintiff's request was denied by the District Judge, and the refusal to give this instruction was upheld on appeal because there was insufficient evidence in the record to support giving such an instruction. Further, the Ninth Circuit panel observed that even if Deerbrook was under a duty to initiate settlement negotiations, "it did so in a timely fashion in view of the circumstances. The record supports Deerbrook's contention."[34.12]

Casual observers of the Appellate opinions in this case in the Summer and Fall of 2012, are to be forgiven if they received a contrary impression from many of the descriptions of these opinions at the time.

Since the above-discussed Federal case was decided, a California State Court has refused to adopt a *Powell v. Prudential Casualty* rule in the absence of California authorities. There is no duty to initiate settlement negotiations at the present time in California, even when the insured's liability is probable and the injured claimant's damages are "great."[34.13]

The American Law Institute is continuing its work on a Restatement of the Law of Liability Insurance, which began some years ago as a Principles Project. At the time these words are written in the Spring of 2015, the ALI's drafts do not appear to include any reference to the *Powell* rule discussed above. An explicit statement of the *Powell* rule in the Restatement would go a long way to protect both liability insurers from frivolous setups, and to protect policyholders from unreasonable insurer settlement conduct.

To summarize once again, the *Powell* rule has been applied by Courts to cases in which an injured or damaged claimant does *not* make a settlement demand:

> A liability insurance company has a duty to initiate settlement negotiations when:

1. Liability of the policyholder is clear, and

2. The injuries of the claimant are so serious that a judgment in excess of the policy limits is likely.

To put it another way: "Where the liability is clear and injuries are so serious that an excess judgement is likely, an insurer must do more than merely wait for a settlement offer; the insurer has an affirmative duty to initiate settlement negotiations."[34.14]

This rule of law mandates that a liability insurer initiate settlement negotiations in such a situation if the insurer is going to be held to make a reasonable settlement decision. This rule is most commonly called the "*Powell* rule," named after the case which is best known for stating it: *Powell v. Prudential Property & Casualty Insurance Co.*[34.15] The so-called *Powell* rule was established even before the *Powell* case itself was decided, and a number of Courts in other jurisdictions have followed *Powell* since it was decided. Nonetheless, the *Powell* rule is a minority rule.

The *Powell* rule provides a fair and clear statement of the limits of the liability insurer's extracontractual exposure or risk when faced with the prospect of settling cases against its policyholder. There is an argument often made in such cases that liability insurers have a duty to actually settle the case whenever the policyholder's liability is probable and the claimant's damages are great. **Under the *Powell* rule, the liability insurer does not have to settle in such a case, it only has to initiate settlement negotiations.**

Senior U.S. District Judge Roger Vinson recently wrote a decision which illuminates two parts of Florida's bad faith law. First, he wrote that the duty to investigate is a part of the insurance company's good faith duty and not an independent duty standing by itself apart from the duty of good faith:

> An insurer's "duty to investigate" does not exist in a vacuum; rather; it is part and parcel of the overall duty to settle a claim within policy limits wherever possible, thereby protecting the insured from a potential excess judgment.[34.16]

Second, he ruled that when a liability carrier has a duty to initiate settlement negotiations even without a settlement demand from the injured claimant, it is when the insured's liability is reasonably clear:

> It is true, of course, that *Powell* [Powell v. Prudential Prop. & Cas. Ins. Co., 544 So. 2d 12 (Fla. 3d DCA 1991), *review denied*, 598 So. 2d 77 (Fla. 1992)] holds that an insurer does not have to sit back and wait for a formal demand ("the lack of a formal offer to settle does not preclude a finding of bad faith"), and, consequently, bad faith can exist if the insurer does not attempt settlement on its own ("an insurer has an affirmative duty to initiate settlement negotiations"). However, *Powell* itself cautions that the insurer's affirmative duty to initiate settlement negotiations will exist only "*where liability is clear.*" 584 So.2d at 14 (emphasis added).
>
> *** * ***
>
> On its face, *Powell* does not obligate insurers to initiate settlement negotiations whenever an insured is involved in a crash and has *some* potential liability. Indeed, if that were the law, insurers would have that obligation in virtually every accident case as it is almost always possible that an insured may be found at least *partially* liable for an injury. But that is not what the *Powell* Court said. Rather, at the risk of repetition, *Powell* speaks specifically about an insurer's responsibility when its insured's liability is clear, which generally means: "Free from doubt; sure. Unambiguous." *See* Black's Law Dictionary (10th ed. 2014); (further citation omitted).[34.17]

Legal enthusiasts may remember Judge Vinson's lengthy opinion stimulated by the issue of constitutionality of the Affordable Care Act. (The U.S. Supreme Court ultimately disagreed with his holding that the ACA was unconstitutional.) However, Judge Vinson's decision in *Welford v. Liberty Insurance* stands on firmer ground and it is supported by other authorities, which are cited in the opinion.

Despite earlier indications to the contrary in the course of earlier rulings, in what appears to be the final iteration of another case, *Stalley v. Allstate Insurance Company*,[34.18] *Stalley* was apparently not a *Powell* case after all, and a crucial plaintiff's requested jury instruction was apparently supported neither by the law nor the evidence in the record at the conclusion of the case:

> **IV. Conclusion**
>
> The authorities cited by Plaintiff do not establish the existence of a "presumption" under Florida law in a jury trial setting regarding the possible outcome of settlement efforts. This Court does not read Powell as creating any such presumption; instead, as noted earlier, this Court construes the statement in Powell that "[a]ny

> question about the possible outcome of a settlement effort should be resolved in favor of the insured" as an accurate, well-established statement of the movant's burden on a motion for directed verdict—the context in which that statement was made. Plaintiff has identified no Florida state court decision discussing or approving a jury instruction informing the jury that it should resolve "any question about the possible outcome of a settlement effort" in favor of the insured. No binding Eleventh Circuit precedent to this effect has been brought to the Court's attention either. Furthermore, Plaintiff's proposal of language requiring "conclusive proof" by an insurance company to overcome the supposed "Powell presumption" is wholly lacking in support. Thus, this Court concludes that the portion of Plaintiff's proposed Special Instruction 3 quoted earlier in this order is not an accurate statement of Florida law in the context of jury instructions, and accordingly this Court concluded that it was not appropriate to include that proposed language in the jury instructions in this case.[34.19]

In an earlier appearance of *Stalley*, on an earlier record, the same District Judge ruled that the record at that time potentially supported *Powell* and accordingly denied Allstate's motion for summary judgment at that time. The Court's stated rationale included the *Powell* rule.[34.20] The *Powell* rule of initiating settlement negotiations when the likely damages in the underlying case are greater than available policy limits ("when damages are great") and when the insured's underlying liability is probable ("when liability is probable"), is not a hard-and-fast legally constructed duty despite being called a "rule." Instead, it varies with the facts, as the rulings in *Stalley* so clearly display.

Claimants are absolutely under no legal or other obligation to make a settlement demand. However, sometimes claimants not only refuse to make a settlement demand, but they refuse to ***settle***. All settlements of claims against policyholders require both the claimants' and the liability insurers' willingness to settle.

The *Powell* rule makes it clear that the liability insurer is not going to be held strictly or absolutely liable if a given case is not settled, but that it is exposed to extra contractual liability if it does not initiate settlement negotiations in a case in which liability is probable and damages are great even ***without a settlement demand from the injured claimant***. This provision reinforces the concept prevailing in the Restatement officially approved draft extant in the Spring of 2019 that the standard of liability to be applied to the liability insurer's settlement conduct is reasonableness.

After it was repeatedly pointed out in earlier editions of this Book that the *Powell* rule discussed above was not even mentioned in the Restatement's earlier drafts, *Powell* is now cited in the American Law Institute's Restatement of the Law of Liability Insurance.[34.21] Forensic research into the decided cases supports the *Powell* rule.[34.22]

To summarize what was written here as a result of a canvass of the case law then existing on these issues more than two decades ago, the modern view then was that the absence of a third party's settlement demand will not insulate a liability insurer from exposure to liability to pay sums beyond its policy limits as a result of its bad faith and unfair dealing in settlement.[35] That is still the modern view. More than that, it is hard to find any contrary proponent in any judicial decision available today. If not the unanimous view for a very long time, such is the decided majority view and has been the majority view in United States jurisdictions for decades.[36] To put it another way, as one Federal District Court has done, "the duty to accept reasonable settlement offers within policy limits when faced with the significant likelihood of an excess judgment (and potential punitive damage liability for the insured)" is an extension of the duty to defend.[37]

Footnotes

* This Chapter contains material reprinted with permission of the author and copyright holder, Dennis J. Wall, including from his blogs Claims and Issues, at https://claimsissues.typepad.com/, and Insurance Bad Faith Law, at https://insuranceclaimsbadfaith.typepad.com.

1 *See, e.g.*, Continental Cas. Co v United States Fid. & Guar. Co, 516 F. Supp. 384, 390 & n.7 (N.D. Cal 1981) (applying California law); Vencill v Continental Cas. Co, 433 F. Supp. 1371, 1374 & n.5, 1375 & nn.6 & 7 (S.D. W. Va. 1977) (applying West Virginia law); Zumwalt v Utilities Ins. Co., 360 Mo. 362, 228 S.W.2d 750, 752, 754 (1950). "An insurer may ignore a frivolous offer." Mowry v Badger State Mut. Cas. Co, 129 Wis. 2d 496, 385 N.W.2d 171, 185 (1986).

The insurer can have a duty to make a good-faith settlement offer, even if the injured claimant has not made a demand.

Smith v Blackwell, 14 Kan. App. 2d 158, 791 P.2d 1343, 1346 (Kan. Ct. App. 1989). *See* § 3:14.

However, in what appears to be a clear minority view, it has been held that there is no duty to investigate and no duty to initiate settlement offers before suit is filed. Morrell Constr., Inc. v Home Ins. Co., 920 F.2d 576, 581 (9th Cir. 1990) (Idaho law).

[2] *E.g.*, American Fid. & Cas. Co v Greyhound Corp., 258 F.2d 709, 712 (5th Cir. 1958) (applying Florida law); Zumwalt v Utilities Ins. Co., 360 Mo. 362, 228 S.W.2d 750, 754–55 (1950).

[3] Vencill v Continental Cas. Co, 433 F. Supp. 1371, 1377–78 (S.D. W. Va. 1977) (applying West Virginia law). *Cf.* Allstate Indem. Co. v. Oser, 893 So. 2d 675, 677 (Fla. 1st DCA 2005) (denying petition for writ of certiorari): Where a liability insurer contended that its policy provided only Property Damage Coverage, and the liability insurer refused a demand to settle all claims including both Bodily Injury and Property Damage claims for the Property Damage limits, the question of that insurer's liability for bad faith "depends upon a mixed question of law and fact whether, even without BIL coverage, Allstate owed Patterson a duty to settle Oser's claims against her for both BIL and property damage because it either expressly undertook such a duty or because the circumstances created a duty."

[4] Continental Cas. Co v United States Fid. & Guar. Co, 516 F. Supp. 384, 388–89, 391 n.8 (N.D. Cal 1981) (applying California law).

[5] Vencill v Continental Cas. Co, 433 F. Supp. 1371, 1374 (S.D. W. Va. 1977) (emphasis by the court). The quoted statement was made in intra-office correspondence by a primary liability insurer's claims representative. In a footnote, the court excoriated this statement as being "simply beyond the pale." Vencill v Continental Cas. Co, 433 F. Supp. at 1374 n.5. Most claims personnel and insurance counsel would probably agree. *See* Bachmann, Settle-or Else!, 19 Ins. Couns. J 142, 144 (1952).

[6] Birth Ctr. v. St. Paul Cos., 727 A.2d 1144, 1150 (Pa. Super. Ct. 1999), app. granted & limited, 560 Pa. 633, 747 A.2d 858 (2000), & aff'd in pertinent part, 567 Pa. 386, 787 A.2d 376 (2001).

[7] Birth Ctr. v. St. Paul Cos., 727 A.2d at 1150–51. The Pennsylvania Superior Court held in the bad faith case that all of the above remarks were "'quite relevant' to the determination of whether St. Paul's decision not to settle was objective and intelligent." Birth Ctr. v. St. Paul Cos., 727 A.2d at 1166. In addition, any unduly prejudicial effect of admitting that evidence was "limited", the court held, "by not allowing the judges to testify in person before the jury. Instead, the trial court only permitted the notes of testimony" from the underlying case to be read into evidence in the bad faith case, with a cautionary instruction. Birth Ctr. v. St. Paul Cos., 727 A.2d at 1166–67. Finally, the Pennsylvania Superior Court held in the bad faith case that "[t]his evidence was not offered as expert testimony, but [was] only offered as information available to St. Paul when it made its decision not to settle" the underlying case. Birth Ctr. v. St. Paul Cos., 727 A.2d at 1167.

[8] *E.g.*, Liberty Mut. Ins. Co. v Davis, 412 F.2d 475, 478, 482 (5th Cir. 1969) (applying Florida law); U.B. Vehicle Leasing Inc. v. Atlantic Mut. Ins. Co., 2004 WL 503729 *7 (S.D.N.Y. March 12, 2004) ("In addition, Atlantic's outside counsel who took over the case just before trial provided Atlantic with a written evaluation of the case and opined that the case was worth between $775,000 to $925,000, for both claims. There is nothing in the record to suggest that this opinion was given in bad faith or that Atlantic could not have reasonably relied on it. In fact, Atlantic offered $700,000, and it undoubtedly could have been persuaded to offer more if Green and Eakley [the tort claimants in the underlying case] had been willing to negotiate."); Vencill v Continental Cas. Co, 433 F. Supp. 1371, 1375 & n.7 (S.D. W. Va. 1977) (applying West Virginia law); *see, e.g.*, Puritan Ins. Co. v Canadian Universal Ins. Co., 775 F.2d 76, 77–78, 81 (3d Cir. 1985) (Pennsylvania law); State Farm Mut. Auto. Ins. Co. v Brewer, 406 F.2d 610, 613 (9th Cir. 1968) (applying Oregon law); Crabb v National Indem. Co, 87 S.D. 222, 205 N.W.2d 633, 636–37 (1973).

[9] Continental Cas. Co v United States Fid. & Guar. Co, 516 F. Supp. 384, 391 (N.D. Cal 1981) (applying California law). The following rulings in the case of U.B. Vehicle Leasing Inc. v. Atlantic Mut. Ins. Co., 2004 WL 503729 *6–*7 (S.D.N.Y. March 12, 2004), will illustrate this rule:

> On the course of the negotiations alone, a reasonable jury could only find that Atlantic acted in good faith. Atlantic moved from $325,000 to $500,000 to $750,000 without any movement from Eakley and Green [the claimants in the underlying liability case], who simply would not negotiate. Surely it was not unreasonable, in light of these undisputed facts, for Atlantic to decline to continue to bid against itself.
>
> Other undisputed facts in the record also show that Atlantic acted reasonably and in good faith. Eakley and Green's demand of $1.6 million was essentially what the jury awarded and was less than the amount of the final judgment; hence, as it turned out, their demand was not much of a compromise. If the final judgment is an accurate measure of what the case was worth, then Eakley and Green should have been willing to compromise for something less to avoid the risk of a low verdict.

[9.50] *See* Merrett v. Liberty Mut. Ins. Co., 2013 WL 1245860 *3 (M.D. Fla. March 27, 2013).

[9.70] In addition to the decisions analyzed *infra*, *see* Merrett v. Liberty Mut. Ins. Co., 2013 WL 1245860 *3 (M.D. Fla. March 27, 2013).

[9.80] Metropolitan Property & Casualty Insurance Co. v. Hedlund, 218 F. Supp. 3d 1075 (E.D. Cal. 2016), *appeal voluntarily dismissed by order approving stipulation for dismissal, No. 16-17102 (9th Cir. April 6, 2017), order granting "Unopposed" motion to vacate the court's judgment and findings of fact and conclusions of law*, 2017 WL 2609602 at *1 (E.D. Cal. "Dated: April 28, 2017 Filed 05/01/2017 DATE: May 18, 2017"). The emphasis is in Met's original Motion to Vacate, but the meaning of the three dates in this citation is unknown at this time.

[10] Avila v Travelers Ins. Cos., 481 F. Supp. 431, 437–38 (C.D. Cal 1979), aff'd on this point, 651 F.2d 658, 660 (9th Cir. 1981). *See* §§ 3:46 to 3:49.

[11] Liberty Mut. Ins. Co. v Davis, 412 F.2d 475, 480–81 (5th Cir. 1969); *see* Ranger County Mut. Ins. Co. v Guin, 704 S.W.2d 813, 820–21 (Tex. Ct. App. 1985), aff'd, 723 S.W.2d 656 (Tex. 1987). This subject is more fully discussed in § 3:45.

[12] *See* Kelly v Farmers Ins. Exch., 194 Cal. App. 3d 1, 239 Cal. Rptr. 259, 263 (Cal. 1st DCA, Div. 3, 1987).

[13] Peter v Travelers Ins. Co., 375 F. Supp. 1347, 1348 (C.D. Cal 1974).

[14] Peter v. Travelers Ins. Co., 375 F. Supp. at 1351.

[15] *E.g.*, National Union. Fire Ins. Co. v Liberty Mut. U. Ins. Co., 696 F. Supp. 1099, 1102–03 (E.D. La. 1988) (presents a question of fact for jury).

16 *See* § 3:14.

17 Powell v Prudential Prop. & Cas. Ins. Co., 584 So. 2d 12, 14 (Fla. 3d DCA 1991), review denied, 598 So. 2d 77 (Fla. 1992). *Accord* Adega v. State Farm Fire & Cas. Ins. Co., 2009 WL 3387689 *4–*5 (S.D. Fla. October 16, 2009) (stating and applying this rule of Florida law to situation involving beginning settlement negotiations with more than one claimant; holding that "[i]n this case, the Court is satisfied there are material fact issues as to whether a detailed rejection or counter-proposal from [the personal representative-Plaintiff's] lawyer was necessary."). This rule of Florida law may have first been pronounced by a Federal Court, twenty years before Powell was decided:

> A demand had been made on Allstate by Miss Self's personal counsel to settle her liability within the [$10,000.00] policy limits. Counsel for defendant seems to take the position in this case that under the factual situation there was no further duty on the part of Allstate to negotiate. It is contended that the only offer was the $9500.00 offer of settlement made by Mr. Hardee in his letter during the course of the trial. But this Court finds that the bad faith on the part of Allstate commenced at a much earlier time. This Court holds that Allstate had an affirmative duty to explore settlement possibilities and did not do so. It is, therefore, liable to the plaintiff in this case for the full amount of the liability imposed upon her, as a result of the Kilian trial.

Self v. Allstate Ins. Co., 345 F. Supp. 191, 197 (M.D. Fla. 1972). Under the facts of this case, the Federal Court also held that Allstate acted in Bad Faith because it did not even make a settlement offer in any amount: "This Court has concluded that Allstate is guilty of bad faith in failing to explore the possibility of settling *and in failing to make at least a minimum offer of settlement*." Self v. Allstate Ins. Co., 345 F. Supp. at 197. [Emphasis added.] *Accord with Powell:* King v. Government Emp's Ins. Co., 2012 WL 4052271 *3 (M.D. Fla. September 13, 2012); Harvey v. GEICO General Ins. Co., 259 So. 3d 1, 7 (Fla. 2018) (4-to-3 decision; due to age limits, several of the Justices who joined the majority have been replaced and their replacements are persons who generally share the views of the dissenters in this case); Goheagan v. American Vehicle Ins. Co., 107 So. 3d 433, 438–39 (Fla. 4th DCA 2012).

17.30 *See* Merrett v. Liberty Mutual Insurance Co., 2013 WL 1245860 *3 (M.D. Fla. March 27, 2013).

17.50 Merrett v. Liberty Mutual Insurance Co., 2013 WL 1245860 *3 (M.D. Fla. March 27, 2013).

18 An offer is sometimes if not always enough, and a tender is not always required in all cases, as a matter of law under the holding granting defendant's motion for summary judgment of no third-party bad faith in settlement, and denying the plaintiff's motion for summary judgment accordingly, in Boateng v. GEICO General Ins. Co., 2010 WL 4822601 *5 (S.D. Fla. Nov. 22, 2010). The Boateng case involved numerous other fact issues, which the Federal Court concisely summarized as follows and are worth looking at here:

> There is ample evidence, however, that GEICO promptly contacted both its insured and the tort victim, undertook an investigation to determine liability, provided Plaintiff with the insured's policy limits, informed Plaintiff that GEICO was going to tender the policy limits, visited Plaintiff at his home to provide a $10,000 check for his son Kaleb's injuries, and retained an attorney on Plaintiff's behalf to open an estate for Lissette Boateng so that GEICO could tender the policy limits for her death. Thus, based on the factual record before the Court, the undersigned finds that no reasonable fact finder could determine that GEICO acted in bad faith.
>
> The Court is not unsympathetic to the incomprehensible grief that Plaintiff must have experienced, and continues to experience, in the aftermath of the tragic accident that

> took his wife's life and injured his son. Nonetheless, GEICO initiated settlement negotiations with Plaintiff and Plaintiff did not respond. Instead, Plaintiff retained an attorney whose first move was to file a bad faith claim against GEICO.

Boateng v. GEICO General Ins. Co., 2010 WL 4822601 *5 (S.D. Fla. Nov. 22, 2010).

To like effect as the Powell decision quoted above, where the plaintiff does not make a settlement demand within policy limits:

> The better view is that the insurer has an affirmative duty to explore settlement possibilities … 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 Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 323 A.2d 495, 505 (1974).

18.50 Goheagan v. American Vehicle Ins. Co., 107 So. 3d 433, 439 (Fla. 4th DCA 2012), review denied, 130 So. 3d 1275 (Fla. 2013). [Emphasis added.]

19 Rova Farms, 323 A.2d at 507. *Accord*, Powell v. Prudential Prop. & Cas. Ins. Co., 584 So. 2d 12, 14 (Fla. 3d DCA 1991), review denied, 598 So. 2d 77 (Fla. 1992).

20 Snowden v. Lumbermens Mut. Cas. Co., 358 F. Supp. 2d 1125, 1128 (N.D. Fla. 2003).

21 Snowden v. Lumbermens Mut. Cas. Co., 358 F. Supp. 2d at 1129.

22 *See* Mendez v. Unitrin Direct Prop. & Cas. Ins. Co., 2007 WL 2696795 *4 (M.D. Fla. Sept. 12, 2007) (motion in limine was denied where the Court refused "to exclude evidence" regarding injured claimant and attorney's "actions and motives, because such evidence is relevant to the issue of whether the claim could have been settled.").

Whether discovery into this subject is itself eventually admissible at trial, or not, discovery of "the motives and conduct of an *insured and his attorney*" has been held to be admissible *or* reasonably calculated to lead to the discovery of admissible evidence:

> Although it is true that the focus of an insurance bad faith case is on the conduct of the insurer, not the insured, under the totality of circumstances test the conduct of the insured may be relevant in specific instances. [Citation omitted.] For example, the motives and conduct of an insured and his attorney may be relevant to the issues of whether the insured precluded the insurer from fully investigating the claim and whether the insured precluded the insurer from ever having a reasonable opportunity to settle a claim. [Citation omitted.]

> Here, [non-party, underlying claimant's counsel] Odom's motives and conduct during the settlement discussions are relevant and discoverable in addressing whether the insurer had a reasonable opportunity to settle the underlying claim. "In Florida, the question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the 'totality of the circumstances' standard." Berges v. Infinity Ins. Co., 896 So. 2d 665, 680 (Fla. 2004). Because these circumstances include the existence of a realistic possibility of settlement, evidence of conduct by an underlying

claimant's counsel during settlement negotiations may be relevant and admissible.

Kemm v. Allstate Prop. & Cas. Ins. Co., 2009 WL 1954146 *3 (M.D. Fla. July 7, 2009) (Jenkins, M.J.). [Emphasis added.]

23 Barry v. GEICO Gen. Ins. Co., 938 So. 2d 613 (Fla. 4th DCA 2006).

24 Barry v. GEICO Gen. Ins. Co., 938 So. 2d at 615–16.

25 Barry v. GEICO Gen. Ins. Co., 938 So. 2d at 616.

26 Barry v. GEICO Gen. Ins. Co., 938 So. 2d at 618. *Accord*, Mendez v. Unitrin Prop. & Cas. Ins. Co., 2007 WL 2696795 *3 - *4 (M.D. Fla. Sept. 12, 2007). *See generally* Dennis J. Wall, "The Era of Initiating Settlement Negotiations: What Is a Liability Insurance Company to Do?" 32 Ins. Lit. Rptr. 1 (2010).

26.10 Lopez v. Allstate Fire & Cas. Ins. Co., Case No. 14-20654-Civ-COOKE/TORRES, 2015 WL 5320916 *3 (S.D. Fla. September 14, 2015).

26.20 Powell v. Prudential Prop. & Cas. Ins. Co., 584 So. 2d 12 14 (Fla. 3d DCA 1991), review denied, 598 So. 2d 77 (Fla. 1992).

26.30 Lopez v. Allstate Fire & Cas. Ins. Co., Case No. 14-20654-Civ-COOKE/TORRES, 2015 WL 5320916 *3 (S.D. Fla. September 14, 2015).

26.50 *See* MacHalette v. Southern-Owners Ins. Co., 2011 WL 3703368 *5 (M.D. Fla. August 23, 2011):

> The crux of this case is whether Southern-Owners unreasonably or willfully delayed offering Mr. Olivio the $100,000 policy limit. In a case such as this one, where the claimant (Mr. Olivio) does not make a settlement demand, the insurer has an affirmative duty to initiate settlement negotiations "[w]here liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely." *Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991). Southern-Owners concedes that within days of the accident, it knew its insured was entirely at fault for causing the accident. Thus, this case turns on the issue of whether Southern-Owners had knowledge that Mr. Olivio's injuries were so serious that a judgment in excess of the policy limits was likely.

The Court in the *MacHalette* case went on to grant Southern-Owners' motion for summary judgment because in that case "the record is undisputed that Southern-Owners acted reasonably under the circumstances because it did not have reliable information about Mr. Olivio's injuries and went to great lengths to obtain verification of his damages." MacHalette v. Southern-Owners Ins. Co., 2011 WL 3703368 *5 (M.D. Fla. August 23, 2011).

27 Gutierrez v. Yochim, 23 So. 3d 1221 (Fla. 2d DCA 2009).

28 Gutierrez v. Yochim, 23 So. 3d 1221, 1226 (Fla. 2d DCA 2009).

29 Gutierrez v. Yochim, 23 So. 3d 1221, 1226 (Fla. 2d DCA 2009). The outcome under Florida law will be otherwise where a Court can hold that the record evidence reflects instead that the liability insurance company made a legitimate request for the injured claimant's medical records as part of an *investigation* to determine the claimant's *injuries* and *damages before* initiating settlement negotiations. Aboy v. State Farm Mut. Auto. Ins. Co., 2010 WL 727967 *4 (S.D. Fla. January 5, 2010), aff'd with opinion, 394 Fed. Appx. 655, 2010 WL 3394405 *1-*2 (11th Cir. Aug. 30, 2010). The *Aboy* case was described, however, as a case where the Court said that "the degree of seriousness of the injuries sustained in relation to the policy limits involved made it reasonable for the insurance companies to undertake investigation and seek additional information before initiating settlement discussions." Markel Am. Ins. Co. v. Flugga, 2013 WL 1289522 *3 (M.D. Fla. March 13, 2013) (Hodges, J.).

Note that an overreaching release can be bad faith and failure to properly initiate settlement negotiations. Maharaj v. GEICO Casualty Co., 996 F. Supp. 2d 1303, 1314–15 (S.D. Fla. 2014).

29.10 Jaimes v. GEICO General Ins. Co., 534 Fed. Appx. 860 (11th Cir. 2013).

29.20 Jaimes v. GEICO General Ins. Co., 534 Fed. Appx. 860, 866 (11th Cir. 2013).

29.30 Jaimes v. GEICO General Ins. Co., 534 Fed. Appx. 860, 861-62 (11th Cir. 2013).

29.40 Jaimes v. GEICO General Ins. Co., 534 Fed. Appx. 860, 862 (11th Cir. 2013).

29.50 Jaimes v. GEICO General Insurance Co., 534 Fed. Appx. 860, 865-66 (11th Cir. 2013).

29.60 Jaimes v. GEICO General Ins. Co., 534 Fed. Appx. 860, 866 (11th Cir. 2013).

29.70 Jaimes v. GEICO General Insurance Co., 534 Fed. Appx. 860, 865-66 (11th Cir. 2013). On the same point, *see* Hayas v. GEICO General Insurance Co., 2013 WL 4495196 *2-*3 (M.D. Fla. August 21, 2013) ("The Court rejects GEICO's assertion that dismissal is warranted because Hayas has not identified a specific offer to settle that GEICO neglected to accept.").

30 *E.g.*, Vencill v Continental Cas. Co, 433 F. Supp. 1371, 1377 (S.D. W. Va. 1977); Rova Farms Resort, Inc. v Investors Ins. Co. of Am., 65 N.J. 474, 323 A.2d 495, 505 (1974); 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); *see, e.g.*, City of Hobbs v. Hartford Fire Ins. Co., 162 F.3d 576, 583–84 (10th Cir. 1998) (case of first impression, apparently, under New Mexico law); Sequoia Ins. Co. v Royal Ins. Co. of Am., 971 F.2d 1385, 1391 (9th Cir. 1992) (California law); Delancy v St. Paul Fire & Marine Ins. Co., 947 F.2d 1536, 1551 (11th Cir. 1991) (Georgia law); Coleman v Holecek, 542 F.2d 532, 536–37 (10th Cir. 1976) (applying Kansas law); Liberty Mut. Ins. Co. v Davis, 412 F.2d 475, 477–79, 482 (5th Cir. 1969) (applying Florida law); Hartford Ins. Co. v Methodist Hosp., 785 F. Supp. 38, 40 (E.D.N.Y. 1992); Eastham v. Oregon Auto. Ins. Co., 273 Or. 600, 608–09, 540 P.2d 364, 368 (1975) (dicta; recognizing explicitly "that an insurer may be found to have acted in bad faith in failing to make or in unduly delaying an offer or counteroffer to settle. Also, when there is clear liability it may be bad faith for the insurer to refuse to settle", but nonetheless holding in case at bar that "[w]e do not believe that, in this posture, the jury could reasonably draw any inference of bad faith from the company's failure to make a counteroffer."); *cf.* Continental Cas. Co v United States Fid. & Guar. Co, 516 F. Supp. 384, 390 (N.D. Cal 1981) (applying California law to effect that conflict of interests gives rise to liability insurer's duty to negotiate, and finding it unnecessary to decide on facts at bar whether defendant liability insurer should have negotiated before demand since it later failed to negotiate reasonably after two demands). To like effect, *see* State Farm Mut. Auto. Ins. Co. v. Mendoza, 2006 WL 44376 *16–*17 (D. Ariz. Jan. 5, 2006), certification of question to

Arizona Supreme Court granted, 432 F. Supp. 2d 1017 (D. Ariz. 2006):

> The duty of equal consideration is not as narrow as State Farm suggests. There is no "absolute requirement that an offer to settle be a prerequisite to insurance company 'bad faith.'" Fulton v. Woodford, 26 Ariz. App. 17, 22, 545 P.2d 979, 984 (Ariz. Ct. App. 1976). Rather, even without a settlement demand, an insurer must "give equal consideration to the interests where there is a high potential of claimant recovery and a high probability that such a recovery will exceed policy limits." Id.
>
> *** * ***
>
> > As part of this duty, [State Farm] was required to engage in settlement negotiations (on its own or through an agent) and treat the interests of its insured as its own.

In Fulton v. Woodford, 26 Ariz. App. 17, 22, 545 P.2d 979, 984 (Ariz. Ct. App. Div. 1, Dep't B, 1976), the Arizona Court of Appeals wrote a comprehensive treatise on Arizona law on this issue, concluding in pertinent part:

> We therefore hold, in the absence of a demand or request to settle within policy limits or within the limits of the insured's financial ability, plus policy limits, that a conflict of interest would give rise to a duty on behalf of the insurer to give equal consideration to the interest of its insured where there is a high potential of claimant recovery and a high probability that such a recovery will exceed policy limits. It is important to remember that this holding only goes to the issues of when the duty to give equal consideration arises, *not what factors, including failure to initiate settlement, would give rise to a breach of that duty*.

[Emphasis added.] *See generally* Dennis J. Wall, "The Era of Initiating Settlement Negotiations: What Is a Liability Insurance Company to Do?" 32 Ins. Lit. Rptr. 1 (2010).

31 Roberts v. Printup, 422 F.3d 1211 (10th Cir. 2005).

32 Roberts v. Printup, 422 F.3d 1211, 1215 (10th Cir. 2005).

33 Roberts v. Printup, 422 F.3d at 1215–16.

34 Roberts v. Printup, 422 F.3d at 1216. In the Roberts case, the Tenth Circuit reversed a summary judgment for the insurance company, and remanded for further consideration of, among other things, an alleged claim that the liability insurer acted "negligently and/or in bad faith" by allegedly "failing to initiate negotiations for settlement when it was [allegedly] apparent that liability was reasonably clear and damages were in excess of policy limits." Roberts v. Printup, 422 F.3d at 1220.

34.01 Summit Ins. Co. v. Stricklett, 199 A.3d 523, 530 (R.I. 2019).

34.02 *Summit*, 199 A.3d at 524 & n.1.

34.03 *Summit*, 199 A.3d at 533.

34.04 *Summit*, 199 A.3d at 528. The unique Rhode Island statute cited and as quoted by the Court, General Laws 1956 § 27-7-2.2, provides that an insurer of a defendant faces liability to pay interest on a judgment against the defendant-insured when an injured claimant has made a written settlement demand within policy limits even though the resulting amount of the judgment plus interest may be in excess of policy limits. The statute is quoted in *Summit*, 199 A.3d at 527 n.12.

34.05 *Summit*, 199 A.3d at 526.

34.06 *See Summit*, 199 A.3d at 528-32.

34.07 *Summit*, 199 A.3d at 532.

34.08 *Summit*, 199 A.3d at 533.

34.09 Cal. Ins. Code § 790.03(h)(5). As the Ninth Circuit panel later explained in October, there is a conflict in the California case law as to whether a violation of Section 790.03(h)(5) is evidence of Bad Faith in settlement, even in the absence of a settlement demand, or whether a settlement demand is always required in California before a liability insurer can be held liable for Bad Faith in settlement. Yan Fang Du v. Allstate Ins. Co., 697 F.3d 753, 757–58 (9th Cir. 2012).

34.10 Yan Fang Du v. Allstate Ins. Co., 697 F.3d 753 (9th Cir. Amended October 5, 2012).

34.11 Yan Fang Du v. Allstate Ins. Co., 697 F.3d 753, 756 (9th Cir. 2012). [Emphasis added.]

34.12 Yan Fang Du v. Allstate Ins. Co., 697 F.3d 753, 758–59 (9th Cir. 2012).

34.13 Reid v. Mercury Ins. Co., 220 Cal. App. 4th 262, 277, 162 Cal. Rptr. 3d 894, 906 (Cal. 2d DCA, Div. 8, 2013), review denied (unreported) (Cal. January 21, 2014).

34.14 Ellis v. GEICO Gen. Ins. Co., 541 F. Supp. 3d 1371, 1380 (S.D. Fla. 2021), aff'd with opinion, No. 21-12159, 2022 WL 454176 (11th Cir. Feb. 15, 2022). The trial court granted the carrier's motion for summary judgment of no bad faith in *Ellis*.

34.15 Powell v. Prudential Prop. & Cas. Ins. Co., 584 So. 2d 12, 14 (Fla. 3d DCA 1991), review denied, 598 So. 2d 77 (Fla. 1992).

34.16 Welford v. Liberty Ins. Corp., 190 F. Supp. 3d 1085, 1095 (N.D. Fla. 2016), aff'd with opinion, 713 F. App'x 969 (11th Cir. 2017).

34.17 Welford v. Liberty Ins. Corp., 190 F. Supp. 3d 1085, 1095–96 (N.D. Fla. 2016), aff'd with opinion, 713 F. App'x 969 (11th Cir. 2017).

34.18 Stalley v. Allstate Ins. Co., No: 6:14-cv-1074-Orl-28DAB, 2016 WL 3282371 (M.D. Fla. June 10, 2016), aff'd with opinion, 682 F. App'x 846, No. 16-14816, 2017 WL 1033670 (11th Cir. March 17, 2017).

34.19 Stalley v. Allstate Ins. Co., No: 6:14-cv-1074-Orl-28DAB, 2016 WL 3282371 at *6 (M.D. Fla. June 10, 2016), aff'd with opinion, 682 F. App'x 846, No. 16-14816, 2017 WL 1033670 (11th Cir. March 17, 2017).

34.20 *See* Stalley v. Allstate Ins. Co., 183 F. Supp. 3d 1209, 1218 (M.D. Fla. 2016), *quoting* Powell v. Prudential Property & Casualty Insurance Co., 584 So. 2d 12, 14 (Fla. 3d DCA 1991), *review denied*, 598 So. 2d 77 (Fla. 1992).

34.21 *See* Reporters' Note f to Section 24, *The insurer's failure to make settlement offers and counteroffers*, Restatement, Law of Liability Insurance, Proposed Final Draft No. 2 Revised (2018) (West March 2019 Update), approved at the American Law Institute's Annual Meeting on May 22, 2018.

34.22 See in addition Appendixes 12 and 13, *infra.* Appendix 12 is an updated article previously published by the author regarding *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*, in 37 Ins. Litig. Rptr. 597 (2015).

Appendix 13 is a compilations of blogs and articles previously published by the author regarding *The ALI Liability Restatement Reporters Get the Last Word* ©Dennis J. Wall. Reprinted here with permission of the author.

35 *See* § 3:14, *supra.*

36 *E.g.*, Badillo v. Mid Century Ins. Co., ¶¶ 33–34, 2005 OK 48, 121 P.3d 1080, 1095 (2005) ("[A] legally binding, unconditional offer of settlement from the claimant is not a prerequisite to maintaining an action of this type where the insured has been exposed to an excess verdict … In the circumstances here, insurers could be found to have had an affirmative duty to seize a reasonable opportunity to protect insured from the potential for excess liability and their duty consisted of more than merely playing a passive role in the settlement process."); State Auto. Ins. Co. v. Rowland, 221 Tenn. 421, 432, 427 S.W.2d 30, 34 (1968) ("We are asked to hold as a matter of law that an insurance company cannot be held liable for bad faith for failing to settle a case when there is no demand for settlement for an amount of money which is within the limits of coverage afforded by the policy of insurance. We are of the opinion that such is not the law nor should it be."); Alt v. American Fam. Mut. Ins. Co., 71 Wis. 2d 340, 342, 237 N.W.2d 706, 709 (1976) ("We conclude that the trial court erred in holding that a legally binding offer by the claimant is a prerequisite to maintaining an action for bad faith where an insured has been exposed to excess liability."). *See generally* Dennis J. Wall, "The Era of Initiating Settlement Negotiations: What Is a Liability Insurance Company to Do?" 32 Ins. Lit. Rptr. 1 (2010).

37 Rupp v. Transcontinental Ins. Co., 627 F. Supp. 2d 1304, 1323–24 (D. Utah 2008) (case involved Utah substantive law).