Litigation and Prevention of Insurer Bad Faith, Third Edition
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§ 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.

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.*[34.14] 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.[34.15]

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).[34.16]

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*,[34.17] *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.[34.18]

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.[34.19] 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.[34.20] Forensic research into the decided cases supports the Powell rule. The following discussion was previously published in 37 Insurance Litigation Reporter 597 (December 23, 2015), which is © by Thomson Reuters, and is reprinted here with the permission of Thomson Reuters.

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.

by

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I. THE AT LEAST EQUAL CONSIDERATION STANDARD.

The prevailing law setting the standard of extracontractual liability for liability insurers in settlement situations in decided cases is this:

> A liability insurer must give at least equal consideration to the insured's interests as to its own in determining whether and how to settle the underlying claim against its insureds.[34.21]

This "equal consideration" measure of a liability carrier's settlement decisions is followed by the majority of Courts. A simple, "one-step" standard, it would be changed in the American Law Institute's Restatement of the Law of Liability Insurance, to a four-part "reasonableness" view, as follows:

> (1) When an insurer has the authority to settle a claim brought against the insured, or when the authority to settle a claim rests with the insured but the insurer's prior consent is required for any settlement to be payable by the insurer, the insurer has a duty to the insured to make reasonable settlement decisions. The duty is owed only with respect to claims that expose the insured to liability in excess of the policy limits.
>
> (2) A reasonable settlement decision is one that would be made by a reasonable person who bears the sole financial responsibility for the full amount of the potential judgment.[34.22]
>
> (3) An insurer's duty to make reasonable settlement decisions includes a duty to accept reasonable settlement demands made by claimants, subject to the following limitation: the amount, if any, that an insurer is obligated by this duty to contribute to a settlement is never greater than its policy limits.
>
> (4) An insurer's duty to make reasonable settlement decisions includes the duty to contribute its policy limits to a reasonable settlement of a covered claim if that settlement exceeds those policy limits.[34.23]

The observation is offered in Reporters' Note e that "[t]here is a split of authority on the question of whether the duty to settle includes a requirement that the insurer affirmatively explore settlement negotiations should the claimant or claimants not come forward with a settlement offer."[34.24]

As will be seen below by the results of reviewing every decided case found in which the issue of "initiating settlement negotiations even without a settlement demand" has been raised, there certainly is a split of authority on that question. ***The results of that split overwhelmingly favor recognizing a legal duty to initiate settlement negotiations in such cases.***

However, the purpose of this Article is larger than setting the record straight, as it were, on how the Court cases actually line up on the question, as important as that is to know. The purpose of this Article is ultimately to offer a way to reconcile most if not all of the results in the cases and, ultimately, to offer revised language which should strengthen the authority of the Restatement in this area.

As a result of the prevailing one-step "equal considerations" measure of extracontractual liability for breach of a liability carrier's settlement duties, liability insurers are uniformly held to be under a duty to make reasonable settlement offers in response to the settlement demands of third parties.[34.25] In basic and simple terms, it is universally held in the Courts of the United States that when the injured or damaged claimant makes a settlement demand, the liability carrier must give at least equal consideration to the interests of its insured in settling the third party's claim as it gives to its own interests in not settling the third party's claim.

However, the "equal considerations" standard is applied whether or not there is a settlement demand. The "equal considerations" standard is applied ***because a conflict is present between the interests of the insured and the interests of the carrier***. Then and only then—when a conflict is present between the interests of the insured in settling claims against it and the interests of the carrier in not depleting its indemnity coverage under the liability policy in any given case—must the liability insurer faced with settlement decisions give at least equal consideration to the interests of the insured in settling, as it gives to its own interests in not paying indemnity under the liability policy, i.e., in not settling a given claim against the insured.

One of the most common claim situations containing a conflict of settlement interests between a carrier and its insured, occurs in the presence of the insured's probable liability and the claimant's "great" damages meaning that the

claimant's likely damages will be greater than the policy limits. When these things occur together—"liability is probable and damages are great"—some Courts impose a legal duty on the liability insurance carrier to initiate settlement negotiations with the claimant even if the claimant has not made a settlement demand. Some Courts require a settlement demand within policy limits before any liability carrier will be required to act in good faith concerning settlement.

The purpose of this Article is to explore the results of the decided cases in this situation. This Article will first report the results of researching every case in which a Court said whether or not it recognized a ***legal*** duty to initiate settlement negotiations when liability is probable and damages are great. The Article will proceed thereafter to look at how most if not all of the decided cases can be reconciled with the existing equal considerations standard of extracontractual or "insurer bad faith" liability in failure-to-settle cases.

II. INITIATE SETTLEMENT.

A. Restatement Section 24, the ALI Restatement Reporters' Note e, and the decided cases.

The Restatement's Reporters' Note e, already quoted above, bears quoting again as we prepare to address it in some detail:

> There is a split of authority on the question of whether the duty to settle includes a requirement that the insurer affirmatively explore settlement negotiations should the claimant or claimants not come forward with a settlement offer.[34.26]

Two authorities are cited for this reflection in Reporters' Note e, one identified by a parenthetical as "discussing the split of authority," and the other noted for its "suggestion" that the duty to initiate settlement negotiations duty is actually a minority rule and not the majority rule:

> In most jurisdictions, the insurer cannot be liable for breaching the duty unless a settlement offer within policy limits is made by the plaintiff. Without a settlement offer, it is not possible for the insurer to have breached its duty.[34.27]

The above quote in the ALI Reporters' Note was taken from the Fourth Edition in 2007 of a deservedly leading and widely used treatise on "Understanding Insurance Law" which, in turn, relied on a "see" citation to three cases. Thanks to the generous assistance of one of the co-authors of that treatise, the author of this Article is also in possession of a copy of the same part of the Fifth Edition of the same treatise, published in 2012. It too rests on three "see" cite cases, two new cases and one case which was previously cited in the Fourth Edition. Each of these cases will be identified and discussed below.

The author of this Article examined every case found in which a Court addressed the issue of whether a liability insurance carrier has a legal duty to initiate settlement negotiations when the claimant did not make a settlement demand.[34.28] My investigation [which ran roughly through the time of this Article's publication, in December, 2015] used the search functions made available by WestlawNext, and included an update of every case on point which is already listed in Section 3:16 and in other Sections of my Book, "Litigation and Prevention of Insurer Bad Faith" (Third Edition, in Two Volumes, published by Thomson Reuters West; 2016 Supplements in process).[34.29]

III. IT ALL COMES BACK TO THE AT LEAST EQUAL CONSIDERATION STANDARD.

It all comes back to the "at least equal consideration" standard. The overwhelming majority of Courts measure liability carriers' exposure to extracontractual liability or liability beyond their policy limits on account of their settlement conduct, by looking at whether the liability carriers gave equal consideration (or "at least equal consideration") to the interests of their insureds as they give to consideration of their own interests in the course of negotiating the settlement of claims against the insureds.[34.30]

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. This is shown by how the Courts treat questions of extracontractual, bad faith liability such as by rejecting the imposition of liability where the liability carrier reasonably awaited receipt of the claimant's medical records which it reasonably requested to evaluate the likely damages,[34.31] or by rejecting a liability carrier's assertion that calling a wrong number, writing numerous letters to different addresses, and leaving a few voicemails without ever mentioning the

carrier's desire to settle the injury claim, meant that settlement negotiations were "initiated" in a case.[34.32]

In short, even the Courts which follow the majority view and 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 only one factor in the determination of insurer bad faith in settlement.[34.33] 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 probable and the claimant's likely damages are greater than the carrier's liability policy limit.[34.34]

The results of the decided cases contrast, first, with the false assertion, discussed above, by both of the authorities relied on for Restatement Section 24 that there is a recognizable "split of authority" among the Courts on whether to recognize a duty to initiate settlement negotiations even if there has not been a settlement demand from the claimant. (In short, 16 Courts or cases in favor and at most 3 against is not much of a "split" presenting "majority" and "minority" views unless the "majority" in this instance is more accurately described as the overwhelming majority and the "minority" is openly cast as a cluster of outliers on the issue.)

The results of the decided cases also contradict two statements made in one of the above-quoted authorities in the ALI Reporters' Note, to the effect that (1) "[i]n most jurisdictions, the insurer cannot be liable" unless there is a settlement demand within policy limits, 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. **As a result, the decided cases support a different rule than that stated in Section 24 of the Restatement of the Law of Liability Insurance.**

A. ***How the Courts line up on a legal duty to initiate settlement negotiations in the absence of a settlement demand.***

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."

1. ***Pro.***

There are at a minimum ten jurisdictions from which cases have been reported and found in which the Courts have declared a legal duty for liability insurance companies to initiate settlement negotiations even in the absence of a settlement demand from the claimant. These decisions were reached with varying degrees of confidence by the Courts involved. Some of them in other words are not as solidly in favor of imposing such a legal duty as other Courts have been. Where the Courts have been 'iffy' in any way on the question in the cases cited here, I have tried to indicate that fact in a parenthetical or other explanation along with citation of the case.

The majority "pro" cases involve the law of the following States, listed alphabetically:
1. Arizona;[34.35]
2. Florida;[34.36]
3. Georgia;[34.37]
4. Kansas;[34.38]
5. Michigan;[34.39]
6. New Jersey;[34.40]
7. New Mexico;[34.41]
8. Oklahoma;[34.42]
9. Oregon;[34.43] and
10. The State of Washington.[34.44]

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

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, include the following six States, again listed alphabetically:

1. California, which is often listed in the "con" column on this issue because of the decision in *Reid v. Mercury Insurance Co.*[34.45] However, the Reid Court was careful to point out that a demand is not required in every case, just that in the case at bar the evidence did not require the liability carrier to make a settlement offer without a demand:

> ***And a conflict may also arise, without a formal 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***, or when an insurer has an arbitrary rule or engages in other conduct that prevents settlement opportunities from arising. [Citation omitted.] ***But nothing like that happened here.***[34.46]

2. Idaho;[34.47]
3. Illinois, often cited as a "con" jurisdiction on this issue, but recognizing an exception that would require liability insurers to initiate settlement negotiations even without a settlement demand where the insured's liability is probable and the claimant's likely damages are great, an exception which has long been recognized in Illinois law including in a case cited for the contrary position in the authority relied on by the ALI Reporters' Note e;[34.48]
4. Ohio;[34.49]
5. Pennsylvania;[34.50] and
6. Texas.[34.51] 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, which is relied on by one of the ALI's Reporters' Note e authorities, for the proposition that this is the rule "[i]n most jurisdictions," which as can be seen from the decided cases, it is not.

3. *Con.*

Two jurisdictions have been found which are firmly in the "con" camp on this issue, and one further jurisdiction has been found in which a "con" position seems likely, for a total of two or three jurisdictions in the "con" camp to one degree or another:

1. Perhaps 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;[34.52]
2. Perhaps Mississippi;[34.53] and
3. Texas.[34.54]

Submitting the lineup.

The lineup of the Courts in these decided cases is 16 Courts (or, perhaps more accurately, 16 cases decided under the laws of 16 States) either would allow the case to go to the jury (depending on the evidence, of course) and also impose a legal duty to initiate settlement negotiations even though the claimant has not made a settlement demand, or they would not impose a legal duty as such, but would also let the case go to the jury.

Only 3 Courts in the United States take even arguably a contrary position.

Clearly, the majority view is that a settlement demand is not required before a liability carrier should initiate settlement negotiations to protect its insureds, particularly where the insured's liability is probable and the claimant's likely damages are great. The effect of the evidence on the ALI Restatement and Reporters' Note is discussed below, but the evidence of the decided cases clearly mandates that, in order to be an accurate restatement of applicable law, Restatement Section 24 needs to be changed from what has been written there.

B. The role of Jury Instructions in reconciling the cases.

The Courts have noted that in most cases, claimants make settlement demands and so in most cases there is simply no issue surrounding the absence of a demand to settle.[34.55] The experience of the Courts in reported cases is the same as the experience of lawyers and litigants trying bad faith cases which may or may not ever be reported: Claimants make settlement demands in most cases.

Almost all jurisdictions agree on the "at least equal consideration" standard of extracontractual liability for a liability insurer's settlement conduct, which suffices in cases where a settlement demand has been made, as noted above. This standard is generally expressed, more or less, in an overall jury instruction on "bad faith" in settlement, such as in Florida:

> Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward [its policyholder] [its insured] [an excess carrier] and with due regard for [his] [her] [its] [their] interests. [34.56]

The fact that claimants make settlement demands in most cases is not to be confused, however,[34.57] with a manufactured legal requirement that a finding of insurer bad faith in settlement ***requires*** a settlement demand within policy limits. The overall standard once again governs the outcome: In basic and simple terms, did the liability carrier give at least equal consideration to the interests of its insured as it gave to its own interests when the carrier evaluated the case and attempted to settle it, or evaluated the case and did not attempt to settle it?

An additional way to manage the lineup of these Courts and decisions in cases in which no settlement demand has been made, may be to request a special jury instruction to be added to the standard instruction. In jurisdictions which recognize a legal duty to initiate settlement negotiations, the parties can request a special jury instruction on the issue in a bad faith case, a request more likely to come from the plaintiff than from the insurance carrier. Such a special instruction might be based on the language of what is perhaps the leading case to recognize a duty to initiate settlement negotiations, *Powell v. Prudential Property & Casualty Insurance Co.*[34.58]

REQUESTED PROPOSED SPECIAL JURY INSTRUCTION BASED ON THE FACTS OF THIS CASE[34.59]

> The lack of a formal offer to settle does not preclude a finding of bad faith. Bad faith may be inferred from a delay in settlement negotiations which is willful and without reasonable cause. Where 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.

In jurisdictions in which a duty to initiate can be recognized but it is an exception to the majority of cases, in which claimants make settlement demands, perhaps the standard instruction will suffice for the Courts and the litigants.

Finally, in those few jurisdictions in which a duty to initiate is infrequently or perhaps never recognized, something like the following language based on similar language used in a panel opinion by one of California's District Courts of Appeal might form the basis of a specially requested jury instruction if desired:

> Bad faith liability for failure to settle does not attach if an insurer fails to initiate settlement discussions, or offer its policy limits, as soon as an insured's liability in excess of policy limits has become clear.[34.60]

C. Another opportunity to reconcile the cases: The Verdict Form.[34.61]

The whole question of insurer bad faith settlement conduct in a given case can be thought of in terms of the verdict form given to the jury. To say again, in most cases, claimants make settlement demands. The verdict form can therefore simply contain a general question to the jury whether it finds that insurer bad faith exists, or not:

1. Do you find from a preponderance of the evidence that [the defendant liability insurance company] acted in bad faith regarding settlement of the [underlying case] [case against its insured(s)]:
   YES _____

   NO _____

If your answer to question 1 is "yes," go on to question 2. If your answer to question 1 is "no," you should not proceed further except to sign and date this verdict form and return it to the courtroom.

One way to reconcile the cases in which settlement demands have not been made, is to leave the verdict form as is, and allow the jury to be instructed on the law by way of standard jury instructions like that quoted earlier in this Article, or by added special instructions, as the case may be.

Another way to reconcile the cases is to include a special interrogatory verdict form to address whether or not the defendant initiated settlement negotiations under the evidence in the particular case:

1a. If you find from a preponderance of the evidence that the case against [the insured] was a case in which [the insured's] liability was probable and the likely recoverable damages of [the claimant] were greater than the liability policy limit of [the defendant insurance company's] policy, do you find from a preponderance of the evidence that [the defendant insurance company] initiated settlement negotiations of the case against [the insured]?

YES _____

NO _____

2. If your answer to question 1 is "yes," was the conduct of [the defendant liability insurance company] a legal cause of [loss] [injury] [or] [damage] to [claimant/plaintiff]?

YES _____

NO _____

This second question on our hypothetical interrogatory verdict form alerts us to the fact that there is a ***second*** issue involved in cases which do not feature a settlement demand within policy limits: Did the liability carrier have a reasonable opportunity to settle within policy limits or, alternatively, could the case against the insured have reasonably been settled within policy limits? This is a comparatively simple issue, in the sense that it is not as complicated as the separate issue of whether there is a legal duty to initiate settlement negotiations. Our discussion of it, in the following section of this Article, will therefore necessarily be relatively brief.

IV. WHETHER THE DEFENDANT INSURANCE COMPANY'S SETTLEMENT CONDUCT WAS A LEGAL OR PROXIMATE CAUSE OF THE PLAINTIFF'S INJURIES, i.e., DID THE LIABILITY CARRIER HAVE A REASONABLE OPPORTUNITY TO SETTLE THE UNDERLYING CASE WITHIN THE POLICY LIMITS?

In some cases, Courts have held that the focus of an insurance bad faith case involving settlement issues is on the liability insurance company's "observable" conduct.[34.62] The focus is objective in such cases. Any issue of whether the liability carrier had a reasonable opportunity to settle the case against its insured within its policy limits is an affirmative defense in such jurisdictions, where evidence on the issue is admissible at all.[34.63]

In other jurisdictions a reasonable opportunity to settle within policy limits is an element of the plaintiff's bad faith case when there is no settlement demand within policy limits.[34.64] In jurisdictions which require proof of a reasonable opportunity to settle within policy limits but there is no settlement demand, the absence of evidence that there was a reasonable opportunity to settle within policy limits is fatal to a claim of insurer bad faith in settlement.[34.65]

To sum it all up, the great majority of jurisdictions recognize that a liability carrier has a duty to initiate settlement negotiations even when the claimant does not make a settlement demand, where 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 depend on all the facts, like the question of bad faith itself. In many cases, the facts to be considered can include the analogous but separate issue of whether the liability carrier had a reasonable opportunity to settle within policy limits.[34.66]

In most cases claimants make settlement demands. This does not mean that a settlement demand is necessary before the liability carrier must act in good faith or bear the consequences. Bad faith, extracontractual liability may exist when there has been a demand within policy limits; it may also exist when there has been no such demand. In the end, the liability insurer's risk of exposure to bad faith, extracontractual liability depends on its settlement conduct under all the circumstances.

V. THE CLOSEST THING TO A CONCLUSION HERE: CHANGE SECTION 24 OF THE RESTATEMENT AND REMOVE REPORTERS' NOTE e.

The closest thing to a conclusion here are twin observations: Section 24 of the Restatement needs to be changed and Reporters' Note e needs to be removed. Section 24 of the Restatement is incomplete. Reporters' Note e is so inaccurate as to be incapable of a fix or even a workaround.

This Article's conclusion could not have a more positive result than this pair of changes.

However, since change must come to Section 24, here is one way in which it might be changed so as to restate the law it purports to address—and which has been announced by the Courts in the many cases surfaced in this Article. The structure of Section 24 will not readily accommodate the teachings of the decided cases by interlineation, or by editing the existing text in other ways. Therefore, the author proposes two (2) subsections to add at the end of the existing text which will or ought to clarify the text and conform Section 24 more nearly to the prevailing law:

> (5) Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances, it could[34.67] and should have done so, had it acted fairly and honestly toward [its policyholder] [its insured] [an excess carrier] and with at least equal consideration[34.68] for [his] [her] [its] [their] interests.
>
> (6) The lack of a formal settlement demand is only one factor to be considered in determining bad faith. Where 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. Whether and how a liability insurer initiates settlement negotiations, if at all, depends on the facts of each particular case.

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THE ALI LIABILITY RESTATEMENT REPORTERS GET THE LAST WORD.

by

DENNIS J. WALL*

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.*

The important point in my article republished in pertinent part above in this Section 3:16 of Litigation and Prevention of Insurer Bad Faith, titled *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*,[34.69] is that many Courts have recognized that bad-faith-in-settlement cases usually go to the jury when the facts include a liability insurance carrier's failure to initiate settlement negotiations, but there was no settlement demand from the claimant within policy limits.

I listed each of the cases in my article, republished in this Section 3:16, above. A crucial point may have been overlooked by a few of the commentators on the *Powell* rule.

Even the Courts following this rule do not hold that liability carriers are required to settle every case, but only to take steps to initiate settlement negotiations in cases where the insured's liability is probable and the likely damages faced by the insured are great.

B. THE ALI LIABILITY INSURANCE RESTATEMENT REPORTERS GET THE LAST WORD.

In conclusion, it is more than sufficient to quote, with permission, from one of the last drafts of the American Law Institute Law of Liability Insurance Restatement. To say again, it is more than sufficient, it is the final word on the subject. I have been told by the American Law Institute that although the ALI does not readily permit reproduction of parts of Council Drafts, they granted copyright permission in this instance to reproduce the following material here, in part because of my work on this project:

> *f. The insurer's failure to make settlement offers and counteroffers*. There is a split of authority on the question whether the duty to make reasonable settlement decisions can obligate the insurer to explore settlement negotiations should the claimant or claimants not come forward with a settlement offer. * * * At least one

leading treatise has suggested that the view stated in this Section is a minority rule. *See* ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 840 (5th ed. 2012) ("In most jurisdictions, the insurer cannot be liable for breaching the duty to settle unless the plaintiff makes a settlement offer within policy limits. Without a settlement offer, it is not possible for the insurer to have breached its duty."). But a more recent review of the authority concludes that many of the courts cited as requiring an offer by the plaintiff hold simply that the insurer did not breach the duty in the particular case, not that there must always be an offer by the plaintiff. *See* 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).[34.70]

[Author's Note: The quoted language was approved by the Council of the American Law Institute at its meeting on January 18-19, 2018. In May 2018, the ALI adopted the Restatement including Section 24 at its Annual Meeting.]

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

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

34.15 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).

34.16 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).

34.17 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).

34.18 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).

34.19 *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).

34.20 *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.

34.21 1 Dennis J. Wall "Litigation and Prevention of Insurer Bad Faith" § 3:1, 2019 Supp. (3d ed. Thomson Reuters West).

34.22 This clearly appears to be a recognition of the standard generally held to govern a liability insurer's settlement conduct to the effect that the carrier must behave toward settlement as though it had no policy limits. As noted below, the Courts have equated the "without policy limits" standard of extracontractual liability with the "at least equal consideration" standard, under which the liability carrier is required to give "at least equal consideration" to the interests of its insured as it gives to its own interests.

34.23 Restatement of Law of Liability Insurance § 24 (2015). Citations to the Restatement of Law of Liability Insurance and to its Reporters' Notes in this Article are to the Council Draft No. 1 ("CD No. 1") approved in 2015.

34.24 Reporters' Note e to Restatement of Law of Liability Insurance § 24 (2015).

34.25 *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).

34.26 Reporters' Note e to Restatement of Law of Liability Insurance § 24 (2015).

34.27 Reporters' Note e to Restatement of Law of Liability Insurance § 24 (2015), at p. 210, quoting the Fourth Edition (2007) of Understanding Insurance Law.

34.28 The author gratefully acknowledges the assistance of John K. DiMugno, Esquire in bringing a decision of the Federal Fifth Circuit Court of Appeals to the author's attention during the writing of this Article. 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), predicting Mississippi law as discussed below.

34.29 Section 3:16 is titled, "Duty to initiate settlement negotiations."

34.30 *E.g.*, Cox v. Continental Cas. Co., No. C13-2288 MJP, 2014 WL 2011238 at *3 (W.D. Wash. May 16, 2014); Safeway Ins. Co. v. Botma, No. CIV00-553-PHX RCB, 2003 WL 24100783 at *9 (D. Ariz. March 7, 2003), aff'd, 129 F. Appx. 355 (9th Cir. 2005). The "equal consideration" standard has been equated with the standard which measures

extracontractual liability in such cases in terms of whether the liability carrier has acted as though it had no policy limits when attempting to settle claims. *E.g.*, Cox v. Continental Cas. Co., No. C13-2288 MJP, 2014 WL 2011238 at *3 (W.D. Wash. May 16, 2014) ("In other words, the insurer must regard the portion of the potential judgment that lies beyond the policy limits with as much gravity as it regards the threat to its own policy funds."); Crabb v. National Indem. Co., 87 S.D. 222, 227, 205 N.W.2d 633, 635 (1973). Further, the "duty to initiate settlement negotiations," where it has been recognized, has been said to originate from a conflict of interests between a liability carrier and its insureds. Safeway Ins. Co. v. Botma, No. CIV00-553-PHX RCB, 2003 WL 24100783 at *15 (D. Ariz. March 7, 2003), aff'd, 129 F. Appx. 355 (9th Cir. 2005). Although there is certainly a conflict of interests whenever the insured's liability is probable and the claimant's damages are great, i.e., likely in excess of policy limits, there can be other conflicts of interest which are not addressed in this Article.

34.31 *E.g.*, Safeway Ins. Co. v. Botma, 129 Fed. Appx. 355, 356 (9th Cir. 2005) (affirming summary judgment in favor of liability carrier on issue of bad faith in settlement whether among other things liability carrier reasonably requested medical documentation and reasonably awaited plaintiff's obtaining "a waiver of a government medical lien before settling;" case decided under Arizona substantive law which does not necessarily impose a legal duty that a liability carrier initiate settlement negotiations but instead applies "the eight-part 'equal consideration' test" set forth in Arizona case law); MacHalette v. Southern-Owners Ins. Co., No. 8:10–cv–600–T–30TGW, 2011 WL 3703368 at *5 (M.D. Fla. August 23, 2011) (recognizing legal duty to initiate settlement negotiations even without a settlement demand in the case at bar, but granting the liability carrier's motion for summary judgment "because it did not have reliable information about Mr. Olivio's injuries and went to great lengths to obtain verification of his damages."); Aboy v. State Farm Mut. Auto. Ins. Co., No. 09–CV–21400–CIV, 2010 WL 727967 at *4 (S.D. Fla. January 5, 2010) (recognizing legal duty to "initiate settlement negotiations" under Florida law, but holding that insurance companies reasonably sought additional information to document the injured claimant's condition before initiating settlement discussions), *aff'd with opinion*, 394 F. Appx. 655 (11th Cir. August 30, 2010).

34.32 Jaimes v. GEICO General Ins. Co., 534 Fed. Appx. 860, 862, 865-66 (11th Cir. 2013) (case involved Florida substantive law, which imposes a legal duty in certain cases to initiate settlement negotiations).

34.33 *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. Appx. 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).

34.34 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.

34.35 Although the legal duty has been recognized in Arizona, it is not absolute but instead compliance with this 'duty' is one factor among many to be considered on the question of whether the carrier conducted settlement negotiations in bad faith. Safeway Ins. Co. v. Botma, No. CIV00-553-PHX RCB, 2003 WL 24100783 at *11-*12, *18 (D. Ariz. March 7, 2003), aff'd, 129 F. Appx. 355 (9th Cir. 2005); Fulton v. Woodford, 26 Ariz. App. 17, 22, 545 P.2d 979, 984 (Ariz. Ct. App. Div. 1, Dep't B, 1976).

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

1992).

34.37 Delancy v. St. Paul Fire & Marine Ins. Co., 947 F.2d 1536, 1550-51 (11th Cir. 1991) (noting that "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"; 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).

34.38 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).

34.39 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).

34.40 Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 323 A.2d 495, 505 (1974). This decision is treated as the seminal decision on the "initiate settlement negotiations" conundrum by other Courts faced with the same situation. In many cases the carrier's lack of initiating settlement negotiations is but one factor among many to be considered in a given case. Many such cases have been noted in parentheticals following their citation in this Article. For what appears to be the first time in the reported cases, followed since by more than 40 years of subsequent cases, in Rova Farms the New Jersey Supreme Court turned the question on its head, so to speak, by rearranging the consideration of ***what*** amounts to a factor to be considered on the issue of bad faith: "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). [Emphasis added.] As can be seen from the many cases cited in the course of this Article, that approach more or less describes what most Courts have been doing for the last 40 years and more.

34.41 City 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).

34.42 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).

34.43 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).

34.44 Cox v. Continental Cas. Co., No. C13-2288 MJP, 2014 WL 2011238 at *3-*4 (W.D. Wash. May 16, 2014) (predicting Washington State law).

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

34.46 Reid v. Mercury Ins. Co., 220 Cal. App. 4th 262, 279, 162 Cal. Rptr. 3d 894, 907 (Cal. 2d DCA, Div. 8, 2013), review denied (unreported) (Cal. January 21, 2014). [Emphasis added.]

34.47 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).

34.48 Adduci v. Vigilant Ins. Co., 98 Ill. App. 3d 472, 478, 424 N.E.2d 645, 649-50 (Ill. 1st DCA, 2d Div., 1981):

> It is settled in Illinois that insurance companies are not required to initiate negotiations to settle a case…. While an exception is recognized where the probability of an adverse finding on liability is considerable and the amount of probable damages would greatly exceed the insured's coverage [citation omitted], we believe that this exception should be sparingly used, and then only in the most glaring cases of an insured's liability….

After providing this summary of Illinois law on the subject, the *Adduci* Court applied the Illinois default rule rather than the exception to the facts of this case. The Illinois Supreme Court case cited for the contrary proposition by the "Understanding Insurance Law" authority on which the ALI Reporters' Note e is predicated, is similarly in accord with this statement of Illinois law and with the *Adduci* decision applied to the facts of that case as well: Haddick ex rel. Griffith v. Valor Ins., 198 Ill. 2d 409, 416-17, 763 N.E.2d 299, 334-35 (2001).

34.49 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]).

34.50 Puritan Ins. Co. v. Canadian Univ’l Ins. Co., 775 F.2d 76, 77-78, 82 (3d Cir. 1985) (Pennsylvania law).

34.51 American Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 849 (Tex. 1994). After wrestling with several alternative descriptions of this decision, I have settled on a simple description, not a technical term: This 5-4 decision is weird. It was rendered only after a previous decision in the same case with a contrary result was withdrawn, and this opinion was substituted for it on rehearing. Texas later addressed this issue in a 5-2-2 decision which appears to place Texas among the “con” jurisdictions on this subject: Rocor Int’l, Inc. v. National U. Fire Ins. Co., 77 S.W.3d 253, 261-62 (Tex. 2002), one of five “see” cites relied on for this proposition in ALI’s Reporters’ Note e authority, and the only case found which may actually be in that category. In a later edition of the same authority, another 5-4 Texas Supreme Court decision is cited as “see” cite authority, but in that case, which has only been cited by Texas courts, the case instead involved a statutory cap on medical malpractice awards and a majority of the Supreme Court “reserved for another case” the issue being considered here, whether a liability insurer ever has a duty to initiate settlement negotiations in the absence of a settlement demand from the claimant. The later Texas Supreme Court case which centered on statutory prescriptions for medical malpractice cases is Phillips v. Bramlett, 288 S.W.3d 876, 882 (Tex. 2009).

34.52 Jackson v. American Equity Ins. Co., 90 P.3d 136, 142 (Alaska 2004). [Emphasis added.] The Jackson case is listed as a “see” cite in both the Fourth Edition of the “Understanding Insurance Law” authority relied on by the ALI in the Restatement, and in the later Fifth edition of the same authority. Perhaps reflecting its outlier status noted in the text, this decision has only been cited by other Alaska courts.

34.53 In 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), 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. The case is distinguishable on various grounds. For one thing, 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. For a second thing, the Fifth Circuit’s ability to forecast how the Mississippi Supreme Court will rule on any given issue is demonstrably open to question if not downright faulty. *See* John K. DiMugno, Steven Plitt & Dennis J. Wall, CATASTROPHE CLAIMS / Insurance Coverage for Natural and Man-Made Disasters § 7:5, “ACCC or ‘lead-in language’” (Thomson Reuters West November 2019), where the Fifth Circuit’s prediction of how the Mississippi Supreme Court would bar all insurance coverage under Mississippi law based on the anti-concurrent cause clause exclusion, and the Supreme Court’s rejection of that prediction by name, are well-documented.

34.54 As was noted earlier, 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).

34.55 *See, e.g.*, Delancy v. St. Paul Fire & Marine Ins. Co., 947 F.2d 1536, 1550-51 (11th Cir. 1991) (case involved Georgia substantive law); State Auto. Ins. Co. v. Rowland, 221 Tenn. 421, 433, 427 S.W.2d 30, 35 (1968). As the Eleventh Circuit Court of Appeals observed in the *Delancy* case:

> The best evidence that the case could have been settled, of course, is the existence of an offer within the policy limits; liability in the absence of such an offer will be rare.

Delancy v. St. Paul Fire & Marine Ins. Co., 947 F.2d 1536, 1550-51 (11th Cir. 1991).

34.56 Florida Standard Jury Instruction 404.4 (Fla. Bar 2d ed. published December, 2013; last accessed online on [Tuesday, March 22, 2016].

34.57 ”This authority, however, clearly supports only the proposition that liability may exist when there has been an offer within limits; it does not make such an offer a requirement for recovery.” Delancy v. St. Paul Fire & Marine Ins. Co., 947 F.2d 1536, 1549 (11th Cir. 1991).

34.58 Powell v. Prudential Prop. & Cas. Ins. Co., 584 So. 2d 12, 14 (Fla. 3d DCA 1991), review denied, 598 So. 2d 77 (Fla. 1992). The quotation in the text employs much of the actual language of the Powell opinion, but it is offered here in this form as a hypothetical special jury instruction in order to illustrate the preceding text, rather than as an exact quotation from the Court’s opinion.

34.59 So-called “special jury instructions” are written in this Article to illustrate and highlight points made in the text of this Article. They are not offered nor should they be taken as something to offer to a Court for the Court’s consideration in

any particular case.

34.60 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).

34.61 Like the special jury instruction language discussed above in this Article, these hypothetical verdict forms were not written here for submission to a Court in a particular case. They were written for an audience which would instead read this Article, and so to support the text. In short, they were written for you the reader.

34.62 Cox v. Continental Cas. Co., No. C13-2288 MJP, 2014 WL 2011238 at *7, *9 (W.D. Wash. May 16, 2014).

34.63 *E.g.*, Snowden v. Lumbermens Mut. Cas. Co., 358 F. Supp. 2d 1125, 1128 (N.D. Fla. 2003) ("Florida law … treats the unwillingness of a victim to settle as a defense which the insurer must prove."); State Auto. Ins. Co. v. Rowland, 221 Tenn. 421, 435, 427 S.W.2d 30, 36 (1968) ("The defendant was not under an absolute duty to bring about a settlement, but only to exercise good faith in its defense of the claim against the Rowlands, and in conducting negotiations in an attempt to settle the matter.").

34.64 *E.g.*, Whiting-Turner Contracting Co. v. Liberty Mut. Ins. Co., 912 F. Supp. 2d 321, 342-43 (D. Md. 2012); *see* Scottsdale Ins. Co. v. Addison Ins. Co., 448 S.W.3d 818, 829 (Mo. 2014) (unclear as to exactly which party has the burden of proof on this issue but reversing a summary judgment entered in favor of the liability insurance company where "the uncontroverted facts in United Fire's summary judgment motion do not show that Wells Trucking would be unable to prove the essential elements of a bad faith refusal to settle the action"); *cf.* Cox v. Continental Cas. Co., No. C13-2288 MJP, 2014 WL 2011238 at *4 (W.D. Wash. May 16, 2014) (treating lack of a reasonable opportunity to settle within policy limits more or less as an affirmative defense to be proven by the liability carrier, but noting that "[t]he facts needed to prove a 'demonstrated receptive climate to settlement,' [citation omitted], are undefined. Claimants at minimum need to broach the topic of settlement, but Plaintiffs adequately allege that fact.").

34.65 *E.g.*, American Physicians Assur. Corp. v. Schmidt, 187 S.W.3d 313, 317 (Ky. 2006); *see, e.g.*, Delancy v. St. Paul Fire & Marine Ins. Co., 947 F.2d 1536, 1544-45 (11th Cir. 1991) (case involved Georgia substantive law).
The *American Physicians* decision of the Kentucky Supreme Court is relied on in the "Understanding Insurance Law" treatise relied on in the ALI Restatement's Reporters' Note e. There, the treatise is quoted as standing instead for the legal proposition that the liability insurer cannot be liable for breach of settlement duties without a settlement demand from the claimant.
In *Delancy*, the Eleventh Circuit "assumed" that Georgia law would allow a claim for a liability insurer's bad faith in settlement even where there was no settlement demand, but held that the absence of proof of a reasonable opportunity to settle was fatal to the claim of the plaintiffs at bar:

> The plaintiffs, however, have introduced no competent evidence that shows that St. Paul knew or reasonably should have known that it could have settled the suit for Dr. Delancy's [its insured's] policy limits (or for the policy limits plus an amount Dr. Delancy had notified St. Paul that he was willing to pay) at any time before settlement actually occurred. Because the plaintiffs have failed to adduce evidence of a genuine issue of material fact on an essential element of their suit on which they have the burden of proof, St. Paul is entitled to summary judgment as a matter of law.

Delancy v. St. Paul Fire & Marine Ins. Co., 947 F.2d 1536, 1544-45 (11th Cir. 1991).

34.66 For example, the distinction was made in a recent case which arose under Maryland substantive law. In that case, the District Court examined one of the authorities, Appleman, relied on in Reporters' Note e. The Court noted in particular the statement in Appleman that there is a split of authority on whether a settlement demand within policy limits is required for bad faith liability, or whether there is a duty to initiate settlement negotiations in the absence of a within-limits settlement demand. "I am unaware of a decision of a Maryland state appellate court that has chosen between the two possible rules," the District Judge wrote. "However, the case law appears uniformly to require the insured to demonstrate, at a minimum, that there was some opportunity for the claim to be settled within policy limits." Whiting-Turner Contracting Co. v. Liberty Mut. Ins. Co., 912 F. Supp. 2d 321, 341 n.20 (D. Md. 2012).

34.67 Instructing the jury in more or less neutral language like that employed on this issue by Florida's Standard Jury Instruction 404.4, to the effect that it is necessary to find first that the liability carrier "could" have settled the case against the insured before there can be a finding of "bad faith" in settlement, addresses the issue of the liability carrier confronting a "reasonable opportunity to settle within policy limits" without taking sides from among the competing cases as to which party has the burden of proof on this issue.

34.68 Expressly injecting the "at least equal consideration" wording into the "without policy limits" notion already expressed in Restatement Section 24 strengthens the section's position as a Restatement of the law, and not as an

advocate for what the law has never been, but what it might be in the future.

34.69 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. Litig. Rptr.* 597 (December 23, 2015).

34.70 Reporter's note f to Section 24 of the Restatement of the Law, Liability Insurance, Council Draft No. 4 (December 4, 2017) copyright © 2017 by The American Law Institute. This Draft was submitted to the meeting of the Council of The American Law Institute on January 18-19, 2018. All rights reserved. Reproduced with permission. This draft was brought forward without change. It is now the Restatement of the Law of Liability Insurance. It was approved by the American Law Institute at its Annual Meeting on May 22, 2018.

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).