Litigation and Prevention of Insurer Bad Faith, Third Edition
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§ 3:1. Requirements for fulfillment or enforcement of good faith in settlement: A working definition of third-party insurance and a standard for measuring insurer conduct*

Third-party insurance is liability insurance. It always involves a claim of loss and three distinct parties: an injured claimant, an insured, and the insured's insurance company.[1] In contrast to first-party insurance,[2] which applies to the insured's own claimed losses, third-party insurance is intended to protect the insured from the expense of defending and paying the claim of a third party within the policy's limits.[3]

Liability policies provide for absolute control by the insurer over the defense and settlement of all covered claims.[4] By virtue of the insurer's absolute control of defense and settlement, the insurer owes the insured a duty of good faith and fair dealing in the exercise of that control.[5]

The American Law Institute has proposed a new Restatement of the Law of Liability Insurance which refuses to address either "bad faith" or "good faith." Rather it would measure a liability insurer's settlement decisions by reasonableness under the circumstances.[5.50] As reflected in the footnote, the Restatement's reception in a couple of State legislatures and among some industry commentators has been rocky. When and as the courts start to cite to the Restatement we will take a very close look at it, but the time has not yet come when the judges have analyzed it.

The liability insurer's good faith settlement duties can arise even before the claim against the insured is in suit.[6] More accurately stated, perhaps, it is the liability insurance company's "control over the settlement negotiations" that obligates it, "obviously," to "exercise good faith" concerning settlement of the claim against the policyholder in California.[7]

Breach of that duty may result in liability of the insurer for extracontractual damages, which are sums beyond the costs, fees, and limits for which the insured contracted.[8]

The insurer's duty of good faith and fair dealing in settlement is activated by a conflict between the insurer and the insured concerning a particular claim. The courts appear to differ in their views over the nature of this activating conflict. It has been described as occurring "[w]hen there is a likelihood liability may exceed policy limits and there is an opportunity for settlement within policy limits …"[9] It has also been characterized as occurring by virtue of the fact that the claim is for damages in excess of policy limits as distinct from being dependent on a settlement demand from the injured party.[10]

As will be seen, the results of decided cases indicate that most courts are willing to accept twin propositions. First, that the insurer's duty of good faith and fair dealing in *settlement* is activated by a comparison of:

1. The insurer's policy limits
2. The insured's liability
3. The reasonably foreseeable amount of damages if the claim were tried[11]

Second, that the duty of good faith and fair dealing in *defense* of the claim is activated simply by virtue of the fact that a claim has been made which is covered by the policy.[12]

With regard to fulfillment of the duty of good faith and fair dealing in settlement when the respective interests of the insured and of the insurer are in conflict, a variety of standards have been judicially stated. These are all measures of insurer liability for extracontractual damages in such situations. What "Good Faith" or "Bad Faith" means is particularized in the case law; the terms are not meant in other words to convey that a claim or a cause of action can somehow be based on general allegations or theories that the insurance company defendant is "bad."[13]

One such standard is that liability insurance companies "should be held to that degree of care and diligence which a man of ordinary care and prudence should exercise in the management of his own business."[14] Another standard is that the insurer must give at least equal consideration to the insured's interests as to its own in determining whether and how to settle the claim that has called forth the insurer's duty of good faith and fair dealing in settlement.[15] Still another standard would have the insurer evaluate such a claim as though only the insurer would be responsible to satisfy it, i.e., as though the insurer had issued its policy without limits.[16]

Another standard holds that a decision not to settle such a claim "must be a realistic one when tested by the necessarily assumed expertise of the company."[17] The standard of liability will be more exacting after a verdict or judgment in excess of the policy limits has been returned against the insured and the insurer is considering an appeal instead of settlement for the policy limit.[18]

It is generally agreed that the insurer's liability for extracontractual damages on account of alleged bad faith and unfair dealing in settlement is tested in light of facts known or reasonably knowable at the time the decision not to settle was made.[19] Ordinarily, application of this standard to the insurer conduct in question in a particular case is left to the trier of fact.[20]

A new test for measuring a liability insurance company's settlement conduct has been suggested in some of the recent academic literature. No case law has been found to support it. The new view is put forward something like this:

> A liability insurance company with a duty to settle claims against its insureds is subject to a duty to make reasonable settlement decisions. A liability insurer makes a reasonable settlement decision under this standard if it is a decision that would be made by a reasonable insurer that has the exclusive financial responsibility to pay the entire potential judgment and the costs of defending the claim.

There are two things that this proposition does not account for.

First, the Courts in Bad Faith cases do not focus on whether each "settlement decision" is "reasonable" or not.

Second, no-one has given a reason to make this change. This is pretty well illuminated by the part of the proposal which would authorize liability insurance companies to defend their settlement conduct by suddenly making it Good Faith and Fair Dealing to include their costs of defense in their settlement calculations.

The prevailing view among the Courts of the United States is instead that a liability insurer is subject to the standard of liability of a fiduciary in the context of deciding whether to settle claims against its insured.

They have held that this majority view is so prevalent, that it requires no citation of authority to say so. The Supreme Court of Oregon may have been the first to announce that holding, in 1978. This rule of extracontractual liability has even been extended to first-party insurers in some jurisdictions. In the case of *Berg v. Nationwide Mutual Insurance Company*,[21] which involved a claim of Bad Faith based on an auto insurance company's denial that a vehicle was a total loss, despite an appraisal that the vehicle was a total loss, among other things. The Court held in that case:

> The duty of good faith originates from the insurer's status as a fiduciary for its insured under the insurance contract, which gives the insurer the right, inter alia, to handle and process claims.[22]

Parenthetically, the *Berg v. Nationwide* decision is an interesting new decision for many other reasons, including that the appellate court held that when the case is retried, the trial Court should admit the evidence that Nationwide paid its attorneys nearly $1 Million to defend Nationwide in the lawsuit filed against it by its policyholder, allegedly pursuant to a litigation strategy documented by its own claims manual, to deter the filing of small value claims.[23]

What the Court wrote in that new case is also relevant to this discussion:

> A claim must be evaluated on its merits alone, by examining the particular situation and the injury for which recovery is sought.[24]

Another recent case, one involving what Insurance commentators have already called a cornucopia of claims and involving liability insurance companies whose insureds were involved in a construction project, illustrates the ubiquity of the

prevailing rule that a Liability insurance company is never permitted to prefer its own interests to those of its insureds.

Harleysville Insurance Company is the general liability carrier for a general contractor. The general contractor is an "Additional Insured" on a subcontractor's general liability policy issued by Quincy Mutual Fire Insurance Company. In *Mega Construction Corporation v. Quincy Mutual Fire Insurance Co*.,[25] the Court held that Quincy owed the common Insured, the general contractor, duties to defend and to indemnify, both of which Quincy breached by refusing to defend the G.C. and refusing to contribute to the $1.1 Million settlement arranged by Harleysville which also defended the G.C.

After funding the settlement on behalf of Mega Construction, which is the general contractor and is also the insured which Harleysville and Quincy have in common, Harleysville claimed reimbursement from Quincy of the "$1.1 million [paid by Harleysville] in settlement of Mr. Tavares's claims against Mega."[26] Harleysville put on evidence sufficient to satisfy the law of both Pennsylvania and of New Jersey, that Harleysville's settlement on behalf of Mega with the injured claimant, Mr. Victor Tavares, was reasonable and in Good Faith. Without quoting all of the evidence referenced in the Court's opinion, Harleysville put on evidence of:

• The injuries suffered by the claimant, which in this case were "catastrophic."

• The claimant's settlement demands.

• The experience and expertise of the plaintiff's attorney in the underlying case.

• The venue where the underlying case was going to be tried to a jury.

• The legal rules governing liability in the underlying case.

Harleysville did not even attempt to put on any evidence at all of its defense costs, it appears, or to prove that its "settlement decisions" were reasonable, only that the amount of the settlement was reasonable and that Harleysville negotiated the settlement in Good Faith once Quincy denied all Coverage to Mega.

Under the evidence of record in this case, Harleysville met its burden of proving that its settlement on behalf of Mega in the underlying case was both reasonable in amount, and negotiated in Good Faith. This has the legal effect of rendering the Defendant Liability insurance company, here Quincy, liable up to its policy limits for the amount of the settlement in a case like this one.[27]

Under both New Jersey and Pennsylvania law, Mega Construction's Bad Faith claim against Quincy—for amounts beyond the Policy limits—presented questions of fact which would be resolved by a Jury, the Court ruled.[28]

Similarly, the prevailing law setting the standard of extracontractual liability for liability insurers in settlement situations is that 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. This is the rule followed in cases decided in states whose courts are as diverse as:

1. Florida.

2. New York.

3. California.

4. New Mexico.

5. Oklahoma, and

6. Wisconsin, for 6 of many examples that have earned attention.[29]

Changing the standards, therefore, has the inherent capacity of deciding the outcomes of the cases. Whether to apply an academically approved new standard, instead of a standard born out of experience in Insurance Bad Faith litigation and prevention, is clearly a matter of interest to Policyholders and Insurance Companies and their Counsel alike.

While in reality Liability Insurance Companies will certainly consider the costs of defending the claim, the law does not now and should not in the future authorize Liability Insurance Companies to prefer their own interests in not spending

money for the costs of defending the claim, against the interests of their Insureds in settling those claims simply because a decision not to pay lawyers and others may be defensible as "reasonable" in some or all of the cases filed against the Insureds.

Take for example the recent case of *Cincinnati Insurance Co. v. Amerisure Insurance Co.*[30] Cincinnati Insurance "paid the sum of $168,842.06 in [defense] attorney's fees and expenses, as well as a $25,000 settlement payment" on behalf of a common Insured of Amerisure. The common Insured is a corporate General contractor.

Cincinnati sued Amerisure to get all that money back, alleging legal theories of breach of contract and negligence, and seeking damages as equitable remedies under claims for contribution among insurers, unjust enrichment, and equitable subrogation.[31] For reasons which need not be addressed here, Cincinnati lost on all counts.

The facts of this case illustrate that Liability Insurers will and do spend large amounts of defense costs in cases that may ultimately result in low settlement or indemnity payments.

Suppose, hypothetically, that the case had involved the Insured General contractor's Bad Faith claims against Cincinnati, the CGL carrier which expended $169,000.00 in defense of the underlying case against the Insured. Under the proposed new "reasonableness" standard, Cincinnati would have been authorized to include the costs of defense in its settlement calculations.

If Cincinnati had never settled the underlying case, and had the underlying case gone to an excess verdict and judgment above the Insured's policy limits, then it seems that the reasonableness standard would likely have insulated Cincinnati from a Bad Faith claim by the Insured General contractor, considering the huge amount of costs to defend the claim which are presented in that case.

In short, even though the Liability insurance company might have preferred its own interests to the settlement interests of its Insured in that scenario, it would have been immunized from extracontractual liability under this proposed new standard for failure to settle the claim against its Insured because its settlement decision taking account of the defense costs was "reasonable"; after all, the argument has at least some facial plausibility that no rational person—or corporation—would pay $169,000.00 in costs to defend rather than settle a potentially low value claim. The real questions are whether the liability insurance company has a duty to accept a reasonable settlement demand or to make a reasonable settlement offer or take other action on the claim, and how are we going to define the kind of reasonable settlement conduct we want to encourage as a matter of public policy. It creates unnecessary confusion to misdirect the Courts' attention to the insurance company's settlement decisions and away from the entirety of the circumstances surrounding settlement opportunities in the given case.

In succeeding sections, the kinds of insurer conduct which have been or might soon be litigated in bad faith cases are examined.

Footnotes

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1 *E.g.*, Zephyr Park, Ltd. v Superior Ct., 213 Cal. App. 3d 833, 262 Cal. Rptr. 106, 107 n.2 (Cal. 4th DCA, Div. 1,1989), *review denied* (unreported) (Cal. November 2, 1989); *see, e.g.*, Lamar Truck Plaza, Inc. v Sentry Ins., 757 P.2d 1143, 1143–44 (Colo. Ct. App. 1988); Mason v Home Ins. Co., 177 Ill. App. 3d 454, 532 N.E.2d 526, 527–29 (Ill. 3d DCA 1988), cert. denied,125 Ill. 2d 567, 537 N.E.2d 811 (1989); Falkenstein's Meat Co v Maryland Cas. Co., 91 Or. App. 276, 278–79, 754 P.2d 621, 622–23 (Or. Ct. App. 1988); Campbell v State Farm Mut. Auto. Ins. Co., 840 P.2d 130, 137 n.12 (Utah Ct. App.), cert. denied, 853 P.2d 897 (Utah 1992); Transcontinental Ins. Co. v Washington Pub. Utils. Dists. Util. Sys., 111 Wash. 2d 452, 454–59, 760 P.2d 337, 339–41 (1988); State ex rel. Brison v. Kaufman, 213 W. Va. 624, 630, 584 S.E.2d 480, 486 (2003). *See* James B. Dolan, Jr., "The Growing Significance of Employment Practices Liability Insurance," 34 The Briefs 30, 31–32 (Winter 2005). *Cf.* Liberty Mut. Fire Ins. Co. v. Richard McNay, Inc., 2010 WL 2925947 *5-*6 (C.D. Ill. July 23, 2010) (holding that "bad faith" under Section 155 of the Illinois Insurance Code did not reach payment of a worker's compensation claim, which was treated as if it was liability insurance for purposes of Section 155). *See also* Shannon Briglia & Edward Etcheverry, "The Construction Defect Hot Potato: The Interplay Between the Performance Bond and CGL Policy—A Surety's Perspective" 77 Def. Couns. J. 30 (January 2010); Dennis J. Wall, Avoiding "Bad Faith" in Settlement: What are the Developments?, 63

Defense Couns. J. 249 (April 1996). As was held regarding the California implied covenant of good faith and fair dealing, a contract is required. "Pre-contract conduct, however, cannot support a claim for breach of the implied covenant of good faith and fair dealing." Newsom v. Countrywide Home Loans, Inc., 714 F. Supp. 2d 1000, 1007–08 (N.D. Cal. 2010).

[2] *See* § 9:1. *E.g.*, Thomas V. Flaherty, Rebecca L. Ross, Michael D. Sullivan, & Charles T. Blair, Developments in West Virginia's Insurance Bad Faith Law—Where do we go From Here?, 98 W. Va. L. Rev. 267, 269 & n.3 (1995), CITING THIS BOOK.

[3] *E.g.*, A&E Supply Co v Nationwide Mut. Fire Ins. Co., 798 F.2d 669, 676 n.8 (4th Cir. 1986), cert. denied, 479 U.S. 1091 (1987) (Virginia law); Best Place, Inc. v. Penn Am. Ins. Co., 82 Haw. 120, 920 P.2d 334, 338 n.4 (1996); Rova Farms Resort, Inc. v Investors Ins. Co. of Am., 65 N.J. 474, 323 A.2d 495, 505 (1974); Radio Taxi Serv., Inc. v Lincoln Mut. Ins. Co., 31 N.J. 299, 157 A.2d 319, 322 (1960); Beck v Farmers Ins. Exch., 701 P.2d 795, 798 n.2 (Utah 1985); Dennis J. Wall, Bad Faith, Excess Liability Actions by or Against Excess Insurers, 48 Ins. Couns. J. 311, 312–15 (1981).
Cf. Boeing Co v Aetna Cas. & Sur. Co, 113 Wash. 2d 869, 784 P.2d 507, 510 (1990) (en banc):

> The question before us is whether these response costs to remedy an actual release of hazardous substances constitute damages within the meaning of the insureds' comprehensive general liability policies issued by insurers. In order for the policyholders to be indemnified, the plain meaning of the contract must provide coverage for the subject "response costs." Alternatively, before the insurers can avoid indemnifying the policyholders, this court must be satisfied that the plain meaning of "damages," as it would be understood by the average lay person, unmistakably precludes coverage for response costs, and any ambiguity is to be construed against the insurer.

See generally Anderson, Tydings & Lewis, Liability Insurance: A Primer for Corporate Counsel, 49 Bus. Law. 259 (1993).

[4] *E.g.*, Comment, Expanding the Insurer's Duty to Attempt Settlement, 49 U. Colo. L. Rev. 251, 251 & n.2 (1978); *see, e.g.*, Maine Bonding & Cas. Co. v Centennial Ins. Co., 298 Or. 514, 693 P.2d 1296, 1298 (1985) (en banc); Appleman, Duty of Liability Insurer to Compromise Litigation, 26 Ky. L.J. 100, 100 & n.2 (1938). Aside from vesting control over limiting liability in the hands of the insurer's agents, a further purpose behind this provision is to vest control in those same hands over the costs of investigation and defense. *See* Keeton, Liability Insurance and Responsibility for Settlement, 67 Harv. L. Rev. 1136, 1166 (1954).
Where the insured controls the settlement decision because the policy requires the insured's consent, the contract "is more than a simple liability policy." Brion v Vigilant Ins. Co., 651 S.W.2d 183, 185 (Mo Ct. App. 1983). Such a so-called pride provision is found in some professional malpractice liability policies and gives the insured "control over litigation which could jeopardize his professional reputation." Brion v Vigilant Ins. Co., 651 S.W.2d at 184. The liability insurer's basis of liability should it ignore this contractual provision and settle without obtaining the insured's consent is in contract. It is liable for the same damages to reputation and for mental anguish which the pride provision purchased by the insured was to prevent. *See* Brion v Vigilant Ins. Co., 651 S.W.2d at 184-85.
A contrary result was reached in a case where the insurer had reserved the exclusive right to settle and settled against the insured's wishes. Shuster v South Broward Hosp. Dist. Physicians' Prof. Liab. Ins. Trust, 570 So. 2d 1362, 1368 (Fla. 4th DCA 1990), aff'd, 591 So. 2d 174 (Fla. 1992). To the same effect, analyzing Shuster and similar cases and considering the facts at bar, is Doe v. South Carolina Med. Mal. Liab. Joint Underwriting Ass'n, 347 S.C. 642, 653, 557 S.E.2d 670, 676 (2001):

> Under these circumstances, JUA's decisions to settle the case on behalf of Doe and to charge a portion of the settlement against his policy were eminently reasonable.

In Florida, by the provisions of a statute entitled, "Medical malpractice insurance contracts," the so-called pride provisions in such contracts of insurance have been severely limited or legislatively abrogated:

> It is against public policy for any insurance or self-insurance policy to contain a clause giving the insured the exclusive right to veto any offer for admission of liability and for arbitration pursuant to s. 766.106, settlement offer, or offer of judgment, *when* such offer is within the policy limits. However, *any* offer of admission of liability, settlement offer, or offer of judgment made by an insurer or self-insurer shall be made in good

> faith and in the best interests of the insured.

Fla. Stat. § 627.4147(1)(b) 1 (2009). [Emphasis added.] The Florida Legislature has since amended the above-quoted provision. The amendment appears to have substantially reinstated the physicians' "pride provisions" in policies issued or issued for delivery in Florida. The statute now provides as follows in pertinent part:

> (1) In addition to any other requirements imposed by law, each self-insurance policy as authorized under s. 627.357 or s. 624.462 or insurance policy providing coverage for claims arising out of the rendering of, or the failure to render, medical care or services, including those of the Florida Medical Malpractice Joint Underwriting Association, shall include:
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> *** * ***
>
> (b)1. A clause clearly stating whether or not the insured has the exclusive right to veto any offer of admission of liability and for arbitration pursuant to s. 766.106, settlement offer, or offer of judgment if the offer is ***within*** policy limits. An insurer or self-insurer shall not make or conclude, without the permission of the insured, any offer of admission of liability and for arbitration pursuant to s. 766.106, settlement offer, or offer of judgment, ***if*** such offer is ***outside*** the policy limits. However, any offer for admission of liability and for arbitration made under s. 766.106, settlement offer, or offer of judgment made by an insurer or self-insurer shall be made in good faith and in the best interest of the insured.

[Emphasis added.]

Where the liability policy provides for a deductible and the insurer has the unfettered right to settle all claims, with or without the insured's consent, it has been held that there is no duty of good faith or fair dealing which would prevent the insurer from settling a claim within the deductible amount even if the insured does not consent. Casualty Ins. Co. v Town & Country Pre-School Nursery, Inc., 147 Ill. App. 3d 567, 498 N.E.2d 1177, 1178–79 (Ill. 1st DCA, Div. 3, 1986).

See Cohen v. Freeman, 914 So. 2d 449, 449 (Fla. 4th DCA 2005), review denied, 980 So. 2d 1070 (Fla. 2008), in which the appellate court remanded on appeal from a trial court's "initial decision declining to enter a judgment of enforcement" due to "procedural irregularities" in a motion to enforce a settlement in a medical malpractice action. The opinion for the appellate court went on, nonetheless, to emphasize that the objection of the defendant doctor "would not bar that settlement":

> The pending bad faith claims by the doctor may not be used to delay or impair the entitlement of the settling parties to immediate enforcement of their settlement.

Cohen, 914 So.2d at 450.

5 *E.g.*, Northwestern Mut. Ins. Co. v Farmers Ins. Grp., 76 Cal. App. 3d 1031, 1043, 143 Cal. Rptr. 415, 422 (Cal. 4th DCA, Div. 2, 1978); Farmers Grp., Inc. v Trimble, 691 P.2d 1138, 1141 (Colo. 1984) (en banc); General Accident Fire & Life Assurance Corp., 390 So. 2d 761, 764 (Fla. 3d DCA 1980), review denied, 399 So. 2d 1142 (Fla. 1981); Fireman's Fund Ins. Co. v Continental Ins. Co., 308 Md. 315, 519 A.2d 202, 204 (1987); Johnson v Federal Kemper Ins. Co., 74 Md. App. 243, 536 A.2d 1211, 1213, cert. denied, 313 Md. 8, 542 A.2d 844 (1988); Bowers v Camden Fire Ins Ass'n, 51 N.J. 62, 237 A.2d 857, 861 (1968); Ambassador Ins. Co. v St. Paul Fire & Marine Ins. Co., 102 N.M. 28, 690 P.2d 1022, 1024–25 (1984); Maine Bonding & Cas. Co. v Centennial Ins. Co., 298 Or 514, 693 P.2d 1296, 1298 (1985) (en banc); Ranger County Mut. Ins. Co. v Guin, 704 S.W.2d 813, 820 (Tex. Ct. App. 1985), aff'd, 723 S.W.2d 656 (Tex. 1987); Myers v Ambassador Ins. Co., 146 Vt. 552, 508 A.2d 689, 690 (1986); Mowry v Badger State Mut. Cas. Co., 129 Wis. 2d 496, 385 N.W.2d 171, 178 (1986). *See* McNally v Nationwide Ins. Co., 815 F.2d 254, 263 (3d Cir. 1987) (CITING THIS BOOK); Continental Cas. Co. v Great Am. Ins. Co., 711 F. Supp. 1475, 1479 (N.D. Ill 1989) (holding that the rule obviously does not apply in the face of evidence that the insurer exercised no such control in the case at bar).

In a federal case, it was even held under a standard director's and officer's liability policy, which does not contain a duty to defend but provides instead for reimbursement of the insureds' defense fees and costs, that "[a]n insurance company has a duty implied in law to conduct good faith settlement negotiations whether or not the policy explicitly requires it to defend." Okada v MGIC Indem. Corp., 608 F. Supp. 383, 390 (D. Haw. 1985), aff'd in part, rev'd in part, 823 F.2d 276 (9th Cir. 1987). *Cf.* Manley Bennett, McDonald & Co v. St. Paul Fire & Marine Ins. Co., 792 F. Supp. 1070, 1073 (E.D. Mich. 1992), aff'd mem., 933 F.2d 55 (6th Cir. 1994), in which the District Judge held that "I reject this view [that indemnity for defense costs is governed by different tests and rules than the duty to defend under a liability policy] and hold that the duty to defend is the same as the duty to indemnify for defense costs." Obversely,

where an indemnity policy provides that the insured has control over defense and settlement, it has been held:

> The duty of good faith is also present in an indemnity type policy, although the relationship between the insured and the insurer changes. Often, excess insurance policies take the form of indemnity policies because they leave the duty to defend and settle a claim against the insured to the primary insurer, or in this case, the insured … Similarly, the duty of good faith engrafted into the contractual obligations of these policies requires that the insured exercise diligence and good faith in conducting the defense for the benefit of both the insured and the insurer who each have a financial stake in the proceedings.

North Am. Van Lines v. Lexington Ins. Co., 678 So. 2d 1325, 1331 (4th DCA 1996), review denied, 692 So.2d 185 (Fla. 1997).

The Supreme Court of Wisconsin reached a unanimous decision with major potential precedential value in a decision of potentially major precedential value in Roehl Transport, Inc. v. Liberty Mut. Ins. Co., 325 Wis. 2d 56, 784 N.W.2d 542 (2010). In its holding in that case, the Supreme Court of Wisconsin approved the expansion and application of the bad faith tort of failure to settle when the insured is exposed by the liability insurance company's alleged bad faith conduct, to liability ***within the Insured's Deductible***:

> Roehl Transport, an insured with a deductible for its liability coverage, has a cognizable bad faith claim against its insurance company ***when the company has control over settlement of a third-party claim*** and engages in bad faith conduct toward the insured, even though the judgment does not exceed the policy limits.

Roehl Transport, Inc. v. Liberty Mut. Ins. Co., ¶ 7, 325 Wis.2d 56, 784 N.W.2d 542, 547 (2010). [Emphasis added.]

The reasoning behind this holding is the same as Wisconsin Courts have always put to use in bad faith cases, in the eyes of the Supreme Court:

> For the very reason our cases have concluded that an insurance company becomes liable for the tort of bad faith when it fails to act in good faith and exposes its insured to liability ***over policy limits***, we likewise conclude that an insurance company may be liable for the tort of bad faith when the insurance company fails to act in good faith and exposes the insured to liability for sums ***within the deductible amount.***

Roehl Transport, Inc. v. Liberty Mut. Ins. Co., ¶ 57, 325 Wis. 2d 56, 784 N.W. 2d 542, 555 (2010). [Emphasis added.]

The Supreme Court of Wisconsin summarized its answer to this question:

> When a conflict exists between the interests of an insurance company and the interests of an insured, **and the insurance company has control over the claim**, the insurance company has a duty to act in good faith to protect the interests of the insured. When an insurance company breaches that duty, a cause of action for bad faith is cognizable in Wisconsin.

Roehl Transport, Inc. v. Liberty Mut. Ins. Co., ¶ 112, 325 Wis. 2d 56, 784 N.W.2d 542, 563 (2010). [Emphasis added.]

In the case of American Protection Ins. Co. v. Airborne, Inc., 476 F. Supp. 2d 985 (N.D. Ill. March 9, 2007), the Federal Court refused to impose a higher duty of good faith and fair dealing than what was imposed on the liability insurance company by the parties in their contract and by the situation. The parties' course of dealing, in which the policyholder allegedly settled most or all claims, did not change their written contract of insurance which expressly provided that the liability insurer had the power to settle a third-party claim without the policyholder's consent. Id. at page and paragraph number unavailable of paragraph concluding section of opinion entitled, "Power To Settle over Airborne's Objection." The situation involved in this case included the desire of the liability insurer to settle within policy limits including the payment of the policyholder's $1,000,000 deductible which the insurer later sued to recover back from the policyholder. The duty of Good Faith imposed by the Federal Court was thus not "the duty imposed when an insurer settles an underlying claim for an amount beyond policy limits so as to expose the insured to personal liability," a situation manifestly not presented here. American Protection Ins. Co. v. Airborne, Inc., 476 F. Supp. 2d 985 at first full paragraph, unnumbered, of section of opinion entitled, "Good Faith Performance." Rather, the duty of Good Faith to which the Federal Court held the liability insurer in this case under Illinois law was instead "only … the duty of good faith that is the normal expectation under any contract—not some higher standard." American Protection Ins. Co. v. Airborne, Inc., 476 F. Supp. 2d 985 at unnumbered paragraph following, in section entitled by the Court, "Good Faith Performance." This duty of Good Faith was met by the liability insurer, under circumstances which at their worst "would only have made its decision to settle a bad call, not bad faith." American Protection Ins. Co. v.

Airborne, Inc., 476 F. Supp. 2d 985 at unnumbered paragraph following, in section entitled by the Court, "Good Faith Performance." Accordingly, the plaintiff liability insurance company was allowed to recover its payment of the $1,000,000 deductible from the defendant policyholder "plus prejudgment interest" from the date of the insurance company's payment. American Protection Ins. Co. v. Airborne, Inc., 476 F. Supp. 2d 985 at "Damages" and "Conclusion" sections of the Federal Court's Order in this case.

Recent revelations about behavior of various boards of directors, and various officers of corporations, who have their own fiduciary duties of course, are certain to change the market for directors' and officers' or "D&O" insurance, parenthetically. *See, e.g.*, Bloomberg News, "Brocade Officers Settle Suits Over Options," New York Times Online, www.nytimes.com, Business Section (Aug. 11, 2006); James Bandler & Charles Forelle, "Interested Parties/In Internal Probes of Stock Options, Conflicts Abound," Wall Street Journal, Aug. 11, 2006, Col. 1, Page A1; Liam Pleven, "Options Timing Raises Concern Among Insurers," Wall Street Journal, June 20, 2006, Col. 5, Page C1. *See generally* Dennis J. Wall, "Fiduciary in Settlement and The American Law Institute's Principles of Liability Insurance Law/*Refusing the Shackles of 'Reasonable' Summary Judgments*," 36 Ins. Lit. Rptr. 93 (2014).

5.50 Restatement of the Law, Liability Insurance (2018). The new Restatement has not met with universal approval, however. In what I will call an omnibus bill, the Ohio General Assembly has apparently written the American Law Institute's Restatement of the Law of Liability Insurance out of the law of Ohio before it ever got in it.

Ohio's 132nd General Assembly passed a Substitute for Senate Bill 239 which addresses many subjects (thus an "omnibus" bill), including in this particular case, regional councils of governments and tourism development districts, and naming "portions" of three highways, in addition to the Restatement:

> **AN ACT**
> To amend sections 102.01, 167.02, 167.04, 167.07, 715.014, 940.07, and 2744.07 and to enact sections 3901.82, 5534.403, 5534.811, and 5534.911 of the Revised Code to modify the law concerning regional councils of governments to clarify that a municipal corporation eligible to designate a tourism development district may designate more than one district, ***to specify that the American Law Institute's approved "Restatement of the Law, Liability Insurance" does not constitute the public policy of Ohio,*** to designate a portion of U.S. Route 33 in Meigs County as the "Steve Story Memorial Highway," to designate a portion of Interstate Route 270 in Franklin County as the "Officers Anthony Morelli and Eric Joering Memorial Highway," and to designate the portion of U.S. Route 24 in Henry County as the "Henry County Veterans Highway."

(Emphasis added.) When this bill became law, it enacted a new Ohio statute:

> Sec. 3901.82. The "Restatement of the Law, Liability Insurance" that was approved at the 2018 annual meeting of the American law [*sic*] institute [*sic*] does not constitute the public policy of this state and is not an appropriate subject of notice.

Ohio Rev. Code Ann. § 3901.82, *enacted by* Section 1, Ohio S.B. No. 239. (There are only two sections in Senate Bill 239, the substantive section and the enactment section. Section 1 goes on for nine pages.)

In Texas, according to LegiScan.com, on April 25, 2019 the Texas House reported favorably without amendments on a proposed House Concurrent Resolution 58, titled, "Condemning the American Law Institute's 2018 Restatement of the Law of Liability Insurance and discouraging courts from relying on the Restatement as an authoritative reference regarding established rules and principles of law." TX HCR 58, 2019-2020, 86th Legislature, LegiScan.com.

So, as of the Spring of 2021 as these words are written, it appears that judges in America's courts might be left to decide the law by choosing from among the Ohio General Assembly, the Texas Legislature, or the American Law Institute.

In the interim, the Restatement of the Law of Liability Insurance has attracted widely differing opinions. *See*, in addition, Nautilus Ins. Co. v. Access Med., LLC, 482 P.3d 683 (Nev. 2021) (4-to-3 decision, in which the majority cited to the Restatement on Restitution and Reimbursement but did not cite to the Restatement of the Law of Liability Insurance, although the majority was recognizing a new remedy for insurance carriers in a case of first impression, whereas the dissent did recognize and cited the Liability Insurance Restatement; pinpoint page numbers not available at the time of publication); The ALI Liability Insurance Restatement, 50 The Brief No. 1 (Fall 2020) (collecting many opinions in a single magazine edition published by the American Bar Association Tort Trial & Insurance Practice Section).

6 Smith v Blackwell, 14 Kan. App. 2d 158, 791 P.2d 1343, 1346 (Kan. Ct. App. 1989). *Contra* Morrell Constr., Inc. v Home Ins. Co., 920 F.2d 576, 581 (9th Cir. 1990) (Idaho law).

The rule stated in the text was recently followed in the unique but recurring situation of multiple claimants, in Farinas v. Florida Farm Bureau Gen. Ins. Co., 850 So. 2d 555, 559 (Fla. 4th DCA 2003), review denied, 871 So. 2d 872 (Fla. 2004). The author was thereafter retained as an Expert Witness on behalf of several of the injured claimants in that particular case.

It has recently been held that a third-party carrier's nonrenewal is also subject to duties of good faith and fair dealing:

> As a general principle, we agree that an insurer may choose to nonrenew an insured for any reason. … However, an insurer is required to act in good faith when carrying out its decision not to renew either a single insured or entire blocks of business. In this setting, we believe that good faith should be measured according to the legal standard used in the first-party claims context: unreasonable conduct and either knowledge or reckless disregard of the unreasonableness of the conduct.

Ballow v. PHICO Ins. Co., 875 P.2d 1354, 1363 (Colo. 1993) (en banc). *See* Riverport Ins. Co. v. Oakland Community Housing, Inc., 668 F. Supp. 2d 1235, 1238–39 (N.D. Cal. 2009) (no bad faith as claimed in alleged failure to provide notice concerning cancellation where Plaintiffs, additional insureds as "Real Estate Managers" under a CGL issued to another entity, were not entitled to notice of cancellation). The legal standards used throughout the nation in the first-party claims context to measure extracontractual liability are discussed in Chapter 9 and legal standards for defenses are discussed in Chapter 11.

[7] Kelley v. British Commercial Ins. Co., 221 Cal. App. 2d 554, 563, 34 Cal. Rptr. 564, 569 (Cal. 1st DCA, Div. 2, 1963) (case included bad-faith claim against an excess liability insurer).

[8] *E.g.*, Continental Cas. Co. v United States Fid. & Guar. Co., 516 F. Supp. 384, 387 (N.D. Cal 1981) (applying California law); Zumwalt v Utilities Ins. Co., 360 Mo. 362, 228 S.W.2d 750, 753 (1950); Kranzush v Badger State Mut. Cas. Co., 103 Wis. 2d 56, 307 N.W.2d 256, 259 (1981). As one Court has succinctly described the situation prevailing under the law in California, where Third-Party Bad Faith Cases are treated similarly to the way First-Party Bad Faith Cases are analyzed:

> Bad faith cases are analyzed in a three-step process: First, was there a breach at all so as to warrant contract damages? Second, was the breach unreasonable so as to warrant tort damages? Third, was the breach so egregious that there is evidence of "oppression, fraud or malice" under Civil Code section 3294, subdivision (a) so as to warrant punitive damages?

Griffin Dewatering Corp. v. Northern Ins. Co., 176 Cal. App. 4th 172, 194–95, 97 Cal. Rptr. 3d 568, 585 (Cal. 4th DCA, Div. 3, 2009).

The Supreme Court of Wisconsin has extended this standard of extracontractual liability to a case in which the policyholder-insured had a deductible and the liability insurance company settled within the limits of the policy but allegedly settled in such a way as to cause the policyholder extracontractual damages:

> We hold as follows:
>
> > (1) Roehl Transport, an insured with a deductible for its liability coverage, has a cognizable bad faith claim against its insurance company when the company has control over settlement of a third-party claim and engages in bad faith conduct toward the insured, even though the judgment does not exceed the policy limits.

Roehl Transport, Inc. v. Liberty Mut. Ins. Co., ¶ 7, 2010 WI 49, 325 Wis. 2d 56, 784 N.W.2d 542, 547 (2010).

[9] Northwestern Mut. Ins. Co. v Farmers Ins. Grp., 76 Cal. App. 3d 1031, 1043, 143 Cal. Rptr. 415, 422 (Cal. 4th DCA, Div. 2, 1978). *E.g.*, Eastwood v. American Family Mut. Ins. Co., 2007 WL 1731480 *4 (D. Or. June 14, 2007) (in case involving Oregon substantive law, court held: "As here, where the probability of an excess judgment against the insured is high, an insurance company is not justified in ignoring an unequivocal demand letter."); Myers v Ambassador Ins. Co., 146 Vt. 552, 508 A.2d 689, 691 (1986); *see, e.g.*, Continental Cas. Co. v United States Fid. & Guar. Co., 516 F. Supp. 384, 387 (N.D. Cal. 1981) (applying California law); General Accident Fire & Life Assurance Corp. v American Cas. Co., 390 So. 2d 761, 764 (Fla. 3d DCA 1980), review denied, 399 So. 2d 1142 (Fla. 1981).

[10] Coleman v Holecek, 542 F.2d 532, 537 (10th Cir. 1976) (applying Kansas law); *see* General Accident Fire & Life Assurance Corp. v American Cas. Co., 390 So. 2d 761, 765 (Fla. 3d DCA 1980), review denied, 399 So. 2d 1142 (Fla. 1981); Comment, Expanding the Insurer's Duty to Attempt Settlement, 49 U. Colo. L. Rev. 251, 258–59 (1978). *See also* § 3:16, *infra*.

[11] *E.g.*, Central Illinois Pub. Serv. Co. v. Agricultural Ins. Co., 378 Ill. App. 3d 728, 880 N.E.2d 1172, 1180, 317 Ill. Dec. 180, 188 (Ill. 5th DCA 2008): "The duty of an insurer arises when there is a reasonable probability that a recovery in excess of policy limits will expose the insured." The Supreme Court of Louisiana similarly observed in the case of Smith v. Audubon Ins. Co., 679 So. 2d 372, 377 (La. 1996):

> The determination of good or bad faith in an insurer's deciding to proceed to trial involves the weighing of such factors, among others, as the probability of the insured's liability, the extent of the damages incurred by the claimant, the amount of the policy limits, the adequacy of the insurer's investigation, and the openness of communications between the insurer and the insured.

E.g., Ross Neely Systems, Inc. v. Occidental Fire & Cas. Co. of North Carolina, 196 F.3d 1347, 1351 (11th Cir. 1999) (Alabama law); Haddick v. Valor Ins., 198 Ill. 2d 409, 763 N.E.2d 299, 304–05, 261 Ill. Dec. 329 (2001); *see, e.g.*, Brown v United States Fid. & Guar. Co., 314 F.2d 675, 678–79 (2d Cir. 1963) (case involved substantive law of New York); Henke v Iowa Home Mut. Cas. Co., 250 Iowa 1123, 97 N.W.2d 168, 174, 179 (1959); American Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 849 (Tex. 1994). *See* §§ 3:36 to 3:44.

12 *See* § 3:58. *See* Zurich Ins. Co. v. Texasgulf, Inc., 233 A.D.2d 180, 649 N.Y.S.2d 153 (N.Y. App. Div. 1st Dep't 1996).

13 *See* Mattadeen v. State Farm Mut. Auto. Insurance Co., No. 04-80034-Civ-Hurley/Hopkins (S.D. Fla. filed 2004), December 17, 2004 "Order Granting Defendants' Motion For Final Summary Judgment," at 13. The author filed a Report as an Expert Witness for the defendant in that particular case.

It has been held that in order to collect on an indemnity agreement with a bonded party, a surety on a payment bond was required to settle the claim on the bond in good faith. As applied by the Court in this case, good faith-bad faith distinctions have a different meaning than in the field of Third-Party Bad Faith, holding in this case "that bad faith requires an improper motive or dishonest purpose on the part of the surety. [Citation omitted.] Moreover, improper motive can be evidenced by unreasonable conduct on the part of the surety. [Citation omitted.] However, unreasonable conduct, including a negligent investigation of a claim, does not by itself constitute bad faith." Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc., 571 F.3d 1143, 1146 (11th Cir. 2009) (addressing surety's duty of good faith in handling a bond claim). To the contrary, "to give rise to an inference of bad faith, such conduct must be accompanied by other evidence of improper motive, such as a self-interested settlement." Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc., 571 F.3d 1143, 1146 (11th Cir. 2009). "I am aware that [a particular insurance company] is a 'frequent flier' in the universe of litigated insurance coverage disputes. But each case must be judged on its own facts, not on someone's perception that [particular insurance companies] or other related companies are bad actors in general." Wahlert v. American Standard Ins. Co. of Wis., 173 F. Supp. 3d 1187, 1198 (D. Colo. 2016).

In this case, the District Judge dismissed a Colorado common law claim of insurer bad faith, and dismissed in part but retained in part a statutory claim for double damages plus policy benefits, attorney's fees, and costs. *See* Elizabeth A. Nowicki, "A Director's Good Faith" 55 Buff. L. Rev. 457, 478 n.47, 479 n.49 (2007):

> This "good faith" obligation imposed on directors is nothing new, as fiduciaries have always been obligated to act in good faith, and directors qua fiduciaries are no exception. For this reason, it is interesting that the Delaware Supreme Court has not yet defined "good faith" in the context of director liability, given the reputation of the Court to be the ultimate arbiter of corporate law. To be fair, I have found no evidence that the Delaware Supreme Court has been directly asked to define good faith. Indeed, in the recent Disney shareholder litigation where the issue of whether the directors acted in good faith was crucial, plaintiff-appellant's counsel did not propose an affirmative definition of good faith even one time.
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> I am not sympathetic to the argument that "good faith" is too difficult to define.

See Jonathan R. Cohen, The Culture of Legal Denial, 84 Neb. L. Rev. 247, 283 n.116 (2005), CITING THIS BOOK. *See also* Jay M. Feinman, "Delay, Deny, Defend" (2010), particularly Ch. 9, "Hurricane Katrina and Other Insurance Catastrophes"; Jay M. Feinman, The Regulation of Insurance Claim Practices, 5 U.C. Irvine L. Rev. 1319 (2015).

14 Auto Mut. Indem. Co. v Shaw, 134 Fla. 815, 184 So. 852, 859 (1938). *Accord* Bennett v Conrady, 180 Kan. 485, 305 P.2d 823, 827 (1957); Ranger County Mut. Ins. Co. v Guin, 704 S.W.2d 813, 821 (Tex. Ct. App. 1985), aff'd, 723 S.W.2d 656 (Tex. 1987); Kranzush v Badger State Mut. Cas. Co., 103 Wis. 2d 56, 307 N.W.2d 256, 259 (1981). *E.g.*, Stetler v Fosha, 809 F. Supp. 1409, 1421 (D. Kan. 1992), aff'd per curiam in published but stated "non-precedential" opinion, 7 F.3d 1045 (10th Cir. 1993). *See* Helfand v National Union Fire Ins. Co., 10 Cal. App. 4th 869, 13 Cal. Rptr. 2d 295, 317 (Cal. 1st DCA, Div. 4, 1992), review denied (unreported) (Cal. Feb. 11, 1993), cert. denied, 510 U.S. 824, 114 S. Ct. 84 (1993) (arbitrary cancellation is a breach of covenant of good faith and fair dealing). The *Helfand* decision was distinguished on the facts of the claim pleaded in the case of Van Etta v. State Farm Mut. Auto. Ins. Co., 2014 WL 1089560 (N.D. Cal. March 17, 2014). "Accordingly, there is no evidence that State Farm was attempting to

avoid a known, imminent liability, which could have demonstrated a breach of the implied covenant of good faith and fair dealing. Thus, *Helfand* is of little use to Van Etta [the plaintiff and policyholder] here." Van Etta v. State Farm Mut. Auto. Ins. Co., 2014 WL 1089560 *5 (N.D. Cal. March 17, 2014).

15 *E.g.*, Torrez v State Farm Mut. Auto. Ins. Co., 705 F.2d 1192, 1195 (10th Cir. 1982) (applying New Mexico law); Young v American Cas. Co., 416 F.2d 906, 910 (2d Cir. 1969), cert. dismissed, 396 U.S. 997 (1970) (applying New York law); American Fid. & Cas. Co. v All Am. Bus Lines, Inc., 190 F.2d 234, 238 (10th Cir.), cert. denied 342 U.S. 851 (1951) (applying Oklahoma law); Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 659, 328 P.2d 198, 201, 68 A.L.R.2d 883 (1958); Northfield Ins. Co. v. St. Paul Surplus Lines Ins. Co., 545 N.W.2d 57, 60 (Minn. Ct. App. 1996), review denied (Minn. June 19, 1996); Pavia v State Farm Mut. Auto. Ins. Co., 82 N.Y.2d 445, 454, 626 N.E.2d 24, 605 N.Y.S.2d 208, 212 (1993); *see, e.g.*, Camp v St. Paul Fire & Marine Ins. Co., 616 So. 2d 12, 14 (Fla. 1993); Kumar v. American Transit Ins. Co., 2008 WL 5413710 *1 (N.Y. App. Div., 4th Dep't, Dec. 31, 2008); Warren v American Family Mut. Ins. Co., 122 Wis. 2d 381, 361 N.W.2d 724, 727, 728 (Ct. App. 1984):

> Bad faith has been described as being more than mere negligence on the part of the insurance company in deciding to litigate rather than settle. It is only when conduct evidences a significant disregard of the insured's interests that bad faith may be found … The trial court properly noted that this is not the "bandana and pistol" type of dishonesty, and said when an insurance company's conscious decision not to settle a case within policy limits is the product of egregious failure on the company's part to perform the duties that it owes to its insured, then that conscious decision to expose its insured to a trial is deceitful and dishonest in the law. We agree with the trial court's statement that the "suggestion of dishonesty" is the equivalent of bad faith.

Factors involved in the "equality of consideration" standard, which are followed in most jurisdictions, are set out at length under Idaho law in Truck Ins. Exch. v. Bishara, 128 Idaho 550, 555, 916 P.2d 1275, 1280 (1996). As the court described it in the case of State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62–63 (Fla. 1995), the standards in Florida are unique in that bad faith claims of third-party settlement are treated the same as all other situations of alleged bad faith:

> Florida differs, however, from most jurisdictions given that first-party bad faith actions are actionable only under section 624.155 and not the common law. … Additionally, as previously discussed, section 624.155 provides remedies for *both* first- and third-party causes of actions. Section 624.155 provides that an insurer has acted in bad faith if it has "[n]ot attempt[ed] in good faith to settle claims when, under all the circumstances, it could and should have done so had it acted fairly and honestly toward its insured and with due regard for [the insured's] interest." § 624.155(1)(b)1. Because this specific standard is set forth in section 624.155, we find it unnecessary and inappropriate to apply the "fairly debatable" standard to bad faith actions in Florida.
>
> Recently, several district courts have also rejected the fairly debatable standard in both first-party unfair insurance trade practices and third-party bad faith actions, applying instead a totality-of-the-circumstances standard somewhat similar to the standard set forth in the statute. John J. Jerue Truck Broker v. Insurance Co. of N. Am., 646 So. 2d 780 (Fla. Dist. Ct. App. 2d Dist. 1994); Robinson [Robinson v. State Farm Fire & Cas. Co., 583 So. 2d 1063 (Fla. Dist. Ct. App. 5th Dist. 1991)]. In *Robinson*, the Fifth District Court of Appeal evaluated a number of Florida cases in concluding that a totality-of-the-circumstances approach should be used in evaluating third-party bad faith actions. The court determined that at least five factors should be taken into account: (1) whether the insurer was able to obtain a reservation of the right to deny coverage if a defense were provided; (2) efforts or measures taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit any potential prejudice to the insureds; (3) the substance of the coverage dispute or the weight of legal authority on the coverage issue; (4) the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage; and (5) efforts made by the insurer to settle the liability claim in the face of the coverage dispute. 583 So. 2d at 1068. In *Jerue*, the Second District Court of Appeal adopted this same approach, finding that the second, third, and fourth factors promulgated in *Robinson* should likewise be considered in a first-party cause of action. We agree, finding that a determination of whether an insurer has acted "fairly and honestly toward its insured and with due regard for [the insured's] interests" includes a consideration of these factors. Consequently, we reject the fairly debatable standard of determining whether a reasonable basis exists for rejecting coverage.
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> *** * ***
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> Interestingly, in the 1990 amendment to section 624.155, the Legislature, in addition to other changes, provided that "any person may obtain a judgment under either the common law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies." § 624.155(7), Fla. Stat. (Supp. 1990). Because the statute otherwise makes specific reference to third-party causes of action brought under the statute, *see, e.g.*, 624.155(2)(b)4., it is clear that a third-party cause of action can now be brought under either section 624.155 or the common law. This is untrue for first-party

actions because, as discussed previously, first-party actions do not exist at common law. For consistency, however, we find that the standard set forth in this opinion should apply equally to third-party actions brought at common law.

Florida's common law "standard of care" to be followed by insurers handling claims against their insureds, was recently stated to be "further reflected" in Florida Statute Section 624.155(b)(1). Farinas v. Florida Farm Bureau Gen. Ins. Co., 850 So. 2d 555, 559 (Fla. 4th DCA 2003), review denied, 871 So. 2d 872 (Fla. 2004). After this opinion, the author was retained as an Expert Witness on behalf of several of the injured claimants in that case, and the case which had involved years of litigation among the parties settled a short time thereafter.

In a bad faith failure-to-settle case arising under Florida law, a Federal District Court applied the nationally predominant standard for measuring extracontractual liability in such cases: "Here, there is a complete absence of evidence that State Farm acted solely on the basis of its own interests as to Coulter's claim." Coulter v. State Farm Mut. Auto. Ins. Co., 2014 WL 197693 *6 (N.D. Fla. January 16, 2014).

To put it another way: "To fulfill the duty of good faith, an insurer does not have to act perfectly, prudently, or even reasonably. Rather, insurers must 'refrain from acting solely on the basis of their own interests in settlement.'" Novoa v. GEICO Indemnity Co., 542 Fed. Appx. 794, 796 (11th Cir. 2013), *quoting* State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 58 (Fla. 1995).

16 *E.g.*, Employers Nat'l Ins. Corp. v Zurich Am. Ins. Co., 792 F.2d 517, 519 & n.2 (5th Cir. 1986) (Texas law); Bohemia, Inc. v Home Ins. Co., 725 F.2d 506, 512 (9th Cir. 1984) (applying Oregon law); North River Ins. Co. v St. Paul Fire & Marine Ins. Co., 600 F.2d 721, 724 (8th Cir. 1979) (applying South Dakota law); Coleman v Holecek, 542 F.2d 532, 537 (10th Cir. 1976) (applying Kansas law); Eastwood v. American Family Mut. Ins. Co., 2007 WL 1731480 *2 (D. Or. June 14, 2007) (Oregon law); Betts v Allstate Ins. Co., 154 Cal. App. 3d 688, 706, 201 Cal. Rptr. 528, 538 (Cal. 4th DCA, Div. 1, 1984); Wierck v Grinnell Mut. Reins Co., 456 N.W.2d 191, 195 (Iowa 1990); Kissoondath v. United States Fire Ins. Co., 620 N.W.2d 909, 916 (Minn. Ct. App. 2001), review denied (Minn. April 17, 2001); Maine Bonding & Cas. Co. v Centennial Ins. Co., 298 Or. 514, 693 P.2d 1296, 1299, 1303 (1985) (en banc); Keeton, Liability Insurance and Responsibility for Settlement, 67 Harv. L. Rev. 1136, 1146–48 (1954).

In Tanaka v. GEICO Gen. Ins. Co., 2013 WL 3701219 (M.D. Fla. July 12, 2013), a Federal District Judge denied the liability carrier's motion for summary judgment on a count of alleged bad faith in settlement under Florida law. That claim was assigned from the insured to the injured claimant. Their assignment did not extinguish the bad faith claim. Tanaka v. GEICO Gen. Ins. Co., 2013 WL 3701219 *2 (M.D. Fla. July 12, 2013) (Presnell, J.).

The Court held that the standard of extracontractual liability on the claim of bad faith in settlement was, in basic terms, that a liability carrier owes an insured a duty of good faith to settle, if possible, where a reasonably prudent person would do so if faced with the prospect of paying the total recovery. Tanaka v. GEICO Gen. Ins. Co., 2013 WL 3701219 *2 (M.D. Fla. July 12, 2013).

Exposure to extracontractual liability, or to "bad faith" damages, is not necessarily the fault of any particular liability carrier, including the one whose motion for summary judgment on a claim of alleged bad-faith-in-settlement was denied once again, in Lemoine v. GEICO Indemnity Co., No. 14-80694-CIV-ZLOCH, 2016 WL 4240044 (S.D. Fla. February 18, 2016). One particular issue involved in the case was the carrier's alleged failure to advise the insured of settlement offers and opportunities. The District Judge called this "the necessity of settlement offer disclosures."

The liability carrier candidly admitted in the bad-faith case that there was no evidence that it had communicated some of the settlement offers that were made during the underlying case in which its insured was sued. Failure to advise the insured of settlement offers, if true, is however only one fact in the totality of the circumstances approach taken under Florida law to claims that liability carriers acted in bad faith during settlement negotiations of the underlying claim that the insured was facing.

"This is one factor among many, but the cases also indicate that the weighing of factors and evaluation of an insurance company's entire treatment of a claim is not a question of law, but one of fact, normally reserved for the jury." Lemoine v. GEICO Indemnity Co., No. 14-80694-CIV-ZLOCH, 2016 WL 4240044 at *5 (S.D. Fla. February 18, 2016). The Court accordingly denied the carrier's motion for summary judgment on the bad faith claim.

17 Bowers v Camden Fire Ins. Ass'n, 51 N.J. 62, 237 A.2d 857, 861 (1968). *Accord* McChristian v State Farm Mut. Auto. Ins. Co., 304 F. Supp. 748, 753 (W.D. Ark. 1969) (applying Arkansas law); Shearer v Reed, 286 Pa. Super. 188, 428 A.2d 635, 638 (Pa. Super. Ct. 1981); *see* Boston Old Colony Ins. Co. v Gutierrez, 386 So. 2d 783, 785 (Fla. 1980), cert. denied, 450 U.S. 922 (1981).

18 Bowers v Camden Fire Ins. Ass'n, 51 N.J. 62, 237 A.2d 857, 862 (1968). *Accord* State Farm Mut. Auto. Ins. Co. v Brewer, 406 F.2d 610, 612–13 (9th Cir. 1968) (applying Oregon law); Hazelrigg v American Fid. & Cas. Co., 241 F.2d 871, 873 (10th Cir. 1957) (applying Oklahoma law). *See* Stryker Corp. v. XL Insurance Am., Inc., No 1:17-CV-66, 2018 WL 3950899, at *7 (W.D. Mich. Aug. 17, 2018).

19 *E.g.*, Troutt v. Colorado W. Ins. Co., 246 F.3d 1150, 1161, 1163 (9th Cir. 2001) (noting in particular in this case arising under Montana law: "With respect to this last contention, Troutt is trying to impose oracle-like skills on CWIC, and then holding CWIC to the fact that its ESP is lacking."); Ross Neely Systems, Inc. v. Occidental Fire & Cas. Co. of North Carolina, 196 F.3d 1347, 1352 (11th Cir. 1999) (Alabama law); American Fid. & Cas. Co. v Greyhound Corp., 258 F.2d 709, 716 (5th Cir. 1958) (applying Florida law); Behn v. Legion Ins. Co., 173 F. Supp. 2d 105, 113 (D. Mass. 2001) ("The relevant inquiry is what the insurance company reasonably believed at the time in question, not

what the jury ultimately found."); Certain Underwriters of Lloyd's v General Accident Ins. Co. of Am., 699 F. Supp. 732, 742 (S.D. Ind. 1988), aff'd with opinion, 909 F.2d 228 (7th Cir. 1990); Camelot by the Bay Condo. Owners' Ass'n. v. Scottsdale Ins. Co., 27 Cal. App. 4th 33, 32 Cal. Rptr. 2d 354, 361 (Cal. 4th DCA, Div. 1 1994); Glenn v Fleming, 247 Kan. 296, 799 P.2d 79, 85 (1990); Commercial Union Ins. Co. v Liberty Mut. Ins. Co., 426 Mich. 127, 393 N.W.2d 161, 166 (1986); Continental Cas. Co. v Reserve Ins. Co., 307 Minn. 5, 238 N.W.2d 862, 867 (1976); Campbell v. State Farm Mut. Auto. Ins. Co., 840 P.2d 130, 139 (Utah Ct. App.), cert. denied, 853 P.2d 897 (Utah 1992).

Cf. Allstate Ins. Co. v. Western Am. Ins. Co., 2010 WL 3001902 ¶ 8, *2 (D. Colo. July 29, 2010) (Watanabe, M.J.; in action under Director's and Officer's Liability Insurance Policy, striking expert's supplemental report containing opinions exceeding the scope of expert's opinions in underlying liability case, a construction defect action now settled and the subject of an insurance coverage dispute; evidence regarding potential liability of one Mountain West Lodging "is limited to that information available to the insurers up to, and at the time of, the settlement in the underlying action."); Commonwealth v. Fremont Investment & Loan, 452 Mass. 733, 734–35, 897 N.E.2d 548, 550–51 (2008), a "consumer protection enforcement action" against Fremont, "claiming that Fremont, in originating and servicing certain 'subprime' mortgage loans between 2004 and 2007 in Massachusetts acted unfairly and deceptively in violation of" the Massachusetts unfair and deceptive practices statute. Fremont argued that "unfair" is a term that must be applied under the Massachusetts statute as of the time that the conduct complained of took place, not under a standard prevailing at the present time. "We do not agree that the judge applied a new standard retroactively," wrote the Supreme Judicial Court. Acts made unlawful by the Massachusetts statute are any unfair or deceptive acts or practices in the conduct of a trade or commerce, the Court wrote, noting: "What is significant is the particular circumstances and context in which the term is applied." Commonwealth v. Fremont Investment & Loan, 452 Mass. 733, 742–43, 897 N.E.2d 548, 555–56 (2008).

The same standard is now being applied to first-party insurers' extracontractual liability for denial of covered claims. *E.g.*, Erwin v State Farm Fire & Cas. Co., 618 F. Supp. 1040, 1042 (E.D. Mo. 1985); Duckett v Allstate Ins. Co., 606 F. Supp. 728, 731 (W.D. Okla 1984); Nationwide Mut. Ins. Co. v Clay, 525 So. 2d 1339, 1342 (Ala 1987), cert. denied, 488 U.S. 1040 (1989). *See* §§ 9:1, 9:6, 11:4.

A United States Magistrate Judge's Order And Memorandum predicted Montana substantive law in EOTT Energy Operating Ltd. v. Certain Underwriters at Lloyd's of London, 59 F. Supp. 2d 1072 (D. Mont. 1999), concerning the issue of evidence in certain categories which may *not* serve as evidence of "reasonableness" of a denial of coverage. The insured in that case settled the underlying liability case. The insured then "sought indemnification from its excess insurance carriers" for the settlement amount it paid. EOTT Energy Operating Ltd. v. Certain Underwriters at Lloyd's of London, 59 F. Supp. 2d at 1074. The insured's alleged causes of action included breach of contract and asserted violations of Montana's Unfair Trade Practices Act. The insured's causes of action, more specifically, were based on allegations that (1) the defendants had failed to indemnify the Plaintiff Policyholder without conducting a reasonable investigation and (2) the defendants had refused to attempt to effectuate prompt and equitable settlement of the Policyholder's claims to indemnification, in good faith, when liability had become reasonably clear. EOTT Energy Operating Ltd. v. Certain Underwriters at Lloyd's of London, 59 F. Supp. 2d at 1074.

The basis for each of the pertinent holdings in the EOTT case is crucial to understand. The Magistrate Judge clearly bottomed all of the following decisions in the case on the stated understanding that Montana law requires a determination of Bad Faith, as of the time the decision to deny coverage was made. The following rulings were made concerning admissibility of evidence on the question of "reasonableness" of the insurance carriers' denial of coverage in the EOTT case:

(1) *Not* facts *known after* the time the Defendants made their decision to deny coverage, EOTT Energy Operating Ltd. v. Certain Underwriters at Lloyd's of London, 59 F. Supp. 2d at 1075–76;

(2) *Not* law in terms of cases *published after* the defendants made their decision to deny coverage, EOTT Energy Operating Ltd. v. Certain Underwriters at Lloyd's of London, 59 F. Supp. 2d at 1077, and

(3) *Not* a favorable *prior* ruling on coverage by the trial court in the same case, or the result in the appeal of that ruling. EOTT Energy Operating Ltd. v. Certain Underwriters at Lloyd's of London, 59 F. Supp. 2d at 1080.

Cf. CalFarm Ins. Co. v. Krusiewicz, 131 Cal. App. 4th 273, 287, 31 Cal. Rptr. 3d 619, 629 (Cal. 4th DCA, Div. 3, 2005), review denied (unreported) (Cal. Oct. 19, 2005):

> If the conduct of the insurer in denying coverage was objectively reasonable, its subjective intent is irrelevant. [Citation omitted.] When the issue of the insurer's objective reasonableness depends on an analysis of legal precedent, reasonableness is a legal issue reviewed de novo. [Citation omitted.] That is the situation here.

[20] *E.g.*, Pace v Insurance Co. of N. Am., 838 F.2d 572, 580 (1st Cir. 1988) (Rhode Island law); St. Paul-Mercury Indem.

Co. v Martin, 190 F.2d 455, 458 (10th Cir. 1951) (applying Oklahoma law); Continental Cas. Co. v United States Fid. & Guar. Co., 516 F. Supp. 384, 390 n.7 (N.D. Cal 1981) (applying California law); Higgs v Industrial Fire & Cas. Ins. Co., 501 So. 2d 644, 645 (Fla. 3d DCA 1986), review denied, 511 So. 2d 298 (Fla. 1987); Ranger Ins. Co. v Travelers Indem. Co., 389 So. 2d 272, 277 (Fla. 1st DCA 1980); Smith v. Audubon Ins. Co., 679 So. 2d 372, 377 (La. 1996); Grant v Transit Cas. Co., 71 Or. App. 777, 693 P.2d 1328, 1329–30 (1985); Myers v Ambassador Ins. Co., 146 Vt. 552, 508 A.2d 689, 692 (1986); Mowry v Badger State Mut. Cas. Co., 129 Wis. 2d 496, 385 N.W.2d 171, 181 (1986); *see, e.g.*, Wilson v. 21st Century Ins. Co., 42 Cal. 4th 713, 723, 171 P.3d 1082, 1088, 68 Cal. Rptr. 3d 746, 753 (2007) ("An insurer's good or bad faith must be evaluated in light of the totality of the circumstances surrounding its actions."); Maine Bonding & Cas. Co. v Centennial Ins. Co., 298 Or. 514, 693 P.2d 1296, 1303 (1985) (en banc); 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); Dennis J. Wall & Edward J. McKinnon, "Big Claim, Low Limits?" Declarations 3 (Summer 2008). *See generally* Syverud, The Duty to Settle, 76 Va. L. Rev. 1113 (1990).

"Under Florida law, a [Third Party] bad-faith action against an insurer is based on statute and common law." Maldonado v. First Liberty Ins. Corp., 342 Fed. Appx. 485, 487 (11th Cir. 2009). With respect to Third Party Bad Faith in Settlement Claims, such as was at issue in Maldonado itself, this is a correct statement of Florida Law.

"Both the bad-faith statute [Fla. Stat. § 624.155] and common-law precedents establish that, as a prerequisite to bringing this suit, the Estate [of the Decedent, the Claimant] would have to show that the excess judgment against the Clinches [the Insureds] was caused by First Liberty's [the Liability Insurer's] bad faith." Maldonado v. First Liberty Ins. Corp., 342 Fed. Appx. 485, 487 (11th Cir. 2009).

Since causation could not be shown in the Maldonado case, the Eleventh Circuit Court of Appeals affirmed a Summary Judgment in favor of the Defendant Liability Insurance Company in that case.

Liability under unfair claims-handling statutes has been similarly held to generally present questions of fact. Kyriss v Aetna Life & Cas. Co., 624 F. Supp. 1130, 1133 (D. Mont. 1986). *See* §§ 3:25, 3:68, 3:97.

Moreover, application of this same standard in a first-party case is likewise ordinarily left to the trier of fact. *E.g.*, Suggs v State Farm Cas. Co., 833 F.2d 883, 891 (10th Cir. 1987) (New Mexico law), cert. denied, 486 U.S. 1007 (1988); Erwin v State Farm Fire & Cas. Co., 618 F. Supp. 1040, 1042 (E.D. Mo. 1985). *See* §§ 9:1, 9:6, 11:4.

[21] Berg v. Nationwide Mut. Ins. Co., 2012 PA Super. 88, 44 A.3d 1164 (Pa. Super. 2012), app. denied, 619 Pa. 719, 65 A.3d 412 (2013).

The *Berg* decision has a startling history, and what remains the law in Pennsylvania from among the rulings in 2012 is open to argument by lawyers and judges called upon to apply the 2012 decision under Pennsylvania law.

In later developments in the same case, the trial judge subsequently entered judgment in favor of the policyholders-plaintiffs. In 2018, the Pennsylvania Superior Court reversed the trial court and vacated the judgment in 2018 in Berg v. Nationwide Mut. Ins. Co., 2018 PA Super. 153, 189 A.3d 1030 (Pa. Super. Ct. 2018). The Superior Court's decision was in turn appealed and in 2020 the Pennsylvania Supreme Court dismissed that appeal in a Per Curiam opinion with an extraordinary statement.

The Pennsylvania Supreme Court announced its dismissal of the appeal in 2020 because it could not reach a decision, it said; "the Court being divided in a fashion which prevents a majority disposition, the appeal is DISMISSED." Berg v. Nationwide Mut. Ins. Co., 235 A.3d 1223, 1223 (Pa. 2020) (Mem.). The number of amici reflect what must have been tremendous pressure on the Justices to come to a conclusion. Nonetheless, they did not reach a disposition and instead dismissed the appeal in that case. The opinion being Per Curiam and the decision being a Memorandum only, it is reported in Atlantic Third without any report in the Pennsylvania Reports.

[22] Berg v. Nationwide Mut. Ins. Co., 2012 PA Super. 88, 44 A.3d 1164, 1170 (Pa. Super. 2012), app. denied, 619 Pa. 719, 65 A.3d 412 (2013).

[23] Berg v. Nationwide Mut. Ins. Co., 2012 PA Super. 88, 44 A.3d 1164, 1176–77 (Pa. Super. 2012), app. denied, 619 Pa. 719, 65 A.3d 412 (2013).

[24] Berg v. Nationwide Mut. Ins. Co., 2012 PA Super. 88, 44 A.3d 1164, 1177 (Pa. Super. 2012), app. denied, 619 Pa. 719, 65 A.3d 412 (2013).

[25] Mega Constr. Corp. v. Quincy Mut. Fire Ins. Co., 2012 WL 3994473 (E.D. Pa. September 12, 2012).

[26] Mega Constr. Corp. v. Quincy Mut. Fire Ins. Co., 2012 WL 3994473 *11 (E.D. Pa. September 12, 2012).

[27] Mega Constr. Corp. v. Quincy Mut. Fire Ins. Co., 2012 WL 3994473 *11 (E.D. Pa. September 12, 2012) (applying both Pennsylvania and New Jersey law in this regard).

[28] Mega Constr. Corp. v. Quincy Mut. Fire Ins. Co., 2012 WL 3994473 *13 (E.D. Pa. September 12, 2012).

[29] *See* §§ 3:31 to 3:35, *infra*.

[30] Cincinnati Ins. Co. v. Amerisure Ins. Co., 2012 WL 4033724 (S.D. Ala. September 12, 2012).

[31] Cincinnati Ins. Co. v. Amerisure Ins. Co., 2012 WL 4033724 *1 (S.D. Ala. September 12, 2012).