INSURER'S LIABILITY TO INSURED FOR JUDGMENTS EXCEEDING POLICY LIMITS*

The modern liability insurance contract usually contains provisions reserving exclusively to the insurer the control of the defense and settlement of a claim. Some policies even expressly prohibit the insured from taking part in, or interfering with the insurer's negotiations respecting compromise and settlement. The co-operation clause may in some cases further restrict the freedom of the insured.[1] Such contractual reservations seem to be almost universally upheld and there is, therefore, little question concerning the exclusive *right* of the insurer to compromise and settle claims involving prospective or actual litigation.

It is this exclusive reservation of the right to compromise and settle claims against the insured which creates the problems which are the subject matter of this article. In the typical case, the claimant has made an offer to compromise and settle his claim for an amount which is within the policy limits. This offer may create an immediate conflict of economic interests between the insured and the insurer. If the insurer accepts the offer, the insured is completely protected by the policy. If, on the other hand, the insurer refuses the claimant's offer, in the exercise of its above described exclusive right to control the compromise and settlement of all claims against the insured, the claim may be litigated. If the trial results in a verdict and judgment against the insured in an amount exceeding the limits of the policy, the insured may contend that the insurer has gambled with the insured's money, and by refusing the offer has exposed the insured to a personal liability for which he has no insurance protection. If the insured brings an action against the insurer on this contention he must establish a duty on the part of the insurer to settle. As indicated earlier, there is little question about the contractual *right* of the insurer to refuse to compromise and settle. The problem with which this article is concerned is when and under what circumstances does the insurer have a *duty* to compromise and settle?

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[1] However, the courts have apparently taken a dim view of the contract (policy) exceeding the normal reservation of exclusive rights to control settlements by the insurer. American Fidelity & Cas. Co. v. G. A. Nichols Co., 173 F.2d 830 (10th Cir. 1949) (policy stipulation that no action would lie for refusal to accept an offer of settlement, still does not eliminate possibility of holding insurer liable over policy limits); Traders & General Ins. Co. v. Rudco Oil & Gas Co., 129 F.2d 621 (10th Cir. 1942) (policy provided insurer would be liable only for wilful breach but the court held the insurer to greater duty).

APPROACHES TO THE PROBLEM

Historically,[2] in attempting to determine the extent of this duty, the courts have taken several different approaches to the problem. In most of the early cases,[3] the courts took the position that the problem was entirely one of *contract* law, holding that the insurance contract did not place an absolute contractual duty on the insurer to settle; hence there could be no liability on the part of the insurer for failure to settle.[4] This view has been almost universally rejected by the courts today. It has been held in at least one case, however, that the insurer could be held under either contract or tort law.[5]

A few courts have taken the position that the insurer, by virtue of the insurance contract, becomes an *agent* for the purpose of conducting the insured's defense. Thus, the insurer owes a duty to the insured to use ordinary care and diligence in conducting negotiations for compromise and settlement, and if necessary, his defense.[6]

Some courts have held that a *fiduciary* relationship exists between the insurer and the insured, and if the insurer acts in bad faith he has breached his fiduciary responsibilities.[7]

Most courts are now in agreement that the problem is one of *tort* law exclusively.[8] In attempting to determine the nature of the insurer's duty, two basic theories for testing and measuring this duty have evolved. These are the negligence test and the bad faith test.

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[2] Cases involving this problem have been presented to the court in at least thirty-three states and the majority of this law on the many facets of the problem has come down within the past decade. The Iowa Supreme Court has not yet been presented with this problem.

[3] At least one case involving this problem was decided before the turn of the century. Rumford Falls Paper Co. v. Fidelity & Cas. Co., 92 Me. 574, 43 Atl. 503 (1899).

[4] Belt Automobile Indemnity Ass'n v. Ensley Transfer & Supply Co., 211 Ala. 84, 99 So. 787 (1924); Georgia Cas. Co. v. Mann, 242 Ky. 447, 46 S.W.2d 777 (1932); Smith v. Fidelity & Cas. Trust Co., 227 Ky. 120, 12 S.W.2d 276 (1928); McDonald v. Royal Indemnity Ins. Co., 109 N.J.L. 308, 162 Atl. 620 (1932); Best Bldg. Co. v. Employers Liab. Assurance Corp., 247 N.Y. 451, 160 N.E. 911 (1928); Auerbach v. Maryland Cas. Co., 236 N.Y. 247, 140 N.E. 577 (1923); Schmidt & Sons Brewing Co. v. Travelers Ins. Co., 244 Pa. 286, 90 Atl. 653 (1914).

[5] Abrams v. Factory Mutual Liab. Ins. Co., 298 Mass. 141, 10 N.E. 2d 82 (1937).

[6] Attleboro Mfg. Co. v. Frankfort Marine & Acc. & P.G. Ins. Co., 240 Fed. 573 (1st Cir. 1917); Douglas v. United States Fidelity & Guaranty Co., 81 N.H. 371, 127 Atl. 708 (1924); Cowden v. Aetna Cas. & Surety Co., 103 P.L.J. 317, 34 A.2d 223 (1957) (agency relation exists but case decided on bad faith); G.A. Stowers Furniture Co., v. American Indemnity Co., 15 S.W.2d 544, (Tex. Civ. App. 1929).

[7] American Fidelity & Cas. Co. v. All American Bus Lines, 179F.2d 7 (10th Cir. 1950); American Fidelity & Cas. Co. v. G. A. Nichols Co., 173 F.2d 830 (10th Cir. 1949); Bennett v. Conrady, 180 Kan. 485, 305 P.2d 823 (1957).

[8] See notes 19, 20 & 21, *infra*.

TEST OF AN INSURER'S DUTY

The Negligence Test. In describing the duty of the insurer under the negligence test the courts have usually stated that the insurer must, in the protection of the interests of the insured, use that degree of care and diligence which an ordinary prudent person would exercise in the management of his own business.[9]

The Bad Faith Test. In defining the duties of the insurer under the bad faith test, the courts have stated, in general, that the relationship between the insurer and the insured is such that the insurer must give consideration to the interests of the insured, and must act with good faith in all transactions involving his interests. If the insurer fails to do so liability to the insurer will result.[10]

Tests Which Combine Features of Both Negligence and Bad Faith. These tests, by their very wording, combine bad faith and negligence. For example, the United States Circuit Court of Appeals for the Seventh Circuit, after reviewing the applicable Wisconsin cases, stated:

> ". . . a *good faith* decision on the part of the insurance company upon the question of settlement must be preceded by the exercise of that *degree of care and diligence which a man of ordinary care and prudence* would exer-

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[9] Dumas v. Hartford Acc. & Indemnity Co., 94 N.H. 484, 56 A.2d 57 (1947). The Court said the insurer had the obligation of using due care which in this instance would be the care that a reasonable man would exercise in the management of his own affairs, and then stated: "Something more than an act of judgment is involved in the decision of the insurer to stand trial or to settle. A judgment carefully arrived at must be accompanied by conduct consistent therewith. So far as its interest is concerned there must be a willingness within the policy limit reasonably to spend its money in purchasing immunity for the insured. Due care must be exercised to ascertaining all the facts of the case both as to liability and damages, in learning the law and in appraising the danger to the insured of being obliged to pay the excess portion of a verdict. While the insurer has a reasonable right to try its case in court, it cannot be unduly venturesome at the expense of the insured. The caution of the ordinary person of average prudence should be employed."

[10] National Mutual Cas. Co. v. Britt, 203 Okla. 175, 200 P.2d 407 (1948), *rehearing denied*, 218 P.2d 1039 (1950). "If the defendant used its authority over the case of . . . the plaintiffs with an eye solely to its own interests and in disregard of plaintiff's interest it was guilty of bad faith . . . We do not go so far as to say that in every instance where there exists a possibility of a verdict against the insured and the nature of the injuries are such that in the event of such verdict in all probability it will exceed the policy limits, a refusal by the insurer of an offer of settlement within the policy limits constitutes bad faith. But under such circumstances a decision to contest the claim should be subjected to close scrutiny for if based on a mere chance that the claim might be defeated and not on a bona fide belief that the action will be defeated a refusal of such an offer of settlement would not be good faith . . . when viewed in a light most favorable to the plaintiffs it might with reason be said that defendant knew it had no more than an equal chance of success in wholly defeating the action, and that there was no chance of a verdict within the policy limits. In this view, the defendant acted to save itself from as much loss as possible, in disregard of the plaintiffs' interest, consciously risking loss to the plaintiffs to save loss to itself."

cise in the investigation and adjustment of claims, states the duty devolving upon the insurer." (Emphasis added.)[11]

There is considerable disagreement among those who have written on this subject as to which test prevails or is to be preferred.[12] It would be of great benefit to the bench and bar if a clear line of distinction could be drawn between these tests in their application, but this is virtually impossible to do with any degree of accuracy. Although some courts in their opinions have sought to draw clear lines of demarcation,[13] in most instances the courts have in effect adopted both tests, saying in essence that the insurer may be liable if it acts negligently *or* in bad faith.[14]

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[11] Hilker v. Western Automobile Ins. Co., 204 Wis. 1, 231 N.W. 257, (1930), *aff'd on rehearing*, 235 N.W. 413 (1931). Then in Olympia Fields Country Club v. Bankers Indemnity Ins. Co., 325 Ill. App 649, 60 N.E.2d 896 (1945), the Court quoted the *Hilker* case, *supra*, extensively with apparent approval. Following this, Ballard v. Citizens Cas. Co. of New York, 196 F.2d 96 (7th Cir. 1952), again quoted the above passage of the *Hilker* case, *supra*, noting the approval given it in the *Olympia* case, *supra*. Reference was made to these cases because the highest State Court of Illinois had not passed on this problem and a search for the law was made.

[12] 7 ARK L. REV. 142 (1953) (bad faith test is most prevelant but negligence cases are increasing in frequency); 28 CAN. B. REV. 635 (1950) ("trend favors the negligence rule" but Smith of Iowa in the Ins. L. J. of 1946 says bad faith cases are still in the majority); 62 HARV. L. REV. 104 (1948) (the negligence rule is preferred); 67 HARV. L. REV. 1136 (1954) ("A conclusive answer as to a classification of the jurisdictions or as to a trend toward one or the other rule is impossible because so many of the opinions . . . do not conclusively select between rules."); 45 ILL. L. REV. 516 (1950) ("Criterion used by the majority of the courts is the bad faith test." Article points out authority saying the bad faith test is rapidly becoming the minority test, however.); 415 INS. L. J. 483 (1957) (points out that 15 years ago leaders in the field saw the negligence rule replacing the bad faith rule, but the intervening years have proved them in error and further maintains the bad faith rule is now established as the majority rule); 48 MICH. L. REV. 95 (1949) ("While the theories of the negligence and bad faith rules seems to guarantee justice . . . the difficulties of practical application of these standards indicate some other course must be adopted."); 18 MO. L. REV. 192 (1953) ("Which rule is the majority rule is doubtful . . ."); 13 U. CHI. L. REV. 105 (1945) ("More frequently it is said that the test is whether the insurer acted in 'good faith'!"); 60 YALE L. J. 1037 (1951) (advocates the fiduciary approach).

[13] Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Inc., 215 S.W.2 904 (Tex. Civ. App. 1948). "Thus the wrong for which insurer is liable, if at all, is a tort in negligence, and the standard of conduct to be followed by insurer is due care. This is not the same standard of conduct as exists in those jurisdictions which profess to determine by insurer's good faith insurer's liability for rejecting offers of settlement. Good faith apparently implies no more than an absence of an improper motive and some basis in reason for insurer's act; and a comparison of this standard with that declared in the quotations above shows that the standard of conduct governing insurer in Texas is much stricter than is the standard of good faith. . . . Insurer's liability being in negligence, and the standard of conduct being defined as due care, the question, whether insurer did or did not comply with this standard in rejecting . . . [the] . . . offer was one of fact; . . . good faith or rather the ground therefor, is but a circumstance relevant to the issue of negligence . . . "

[14] Hazelrigg v. American Fidelity & Cas. Co., 241 F.2d 871 (10th Cir. 1957) (if insurer acts in good faith and without negligence in refusing

In some cases the courts have discussed both tests of liability and disposed of the cases without specifying which of the tests was applicable.[15] Even more frequently this combination of tests is rather confusingly and erroneously labled as the bad faith test.[16] It seems that the distinction is at best principally one of theory, and, as the Supreme Court of Wisconsin concluded, the confusion between the words "negligence" and "bad faith" is merely tautological.[17] Liability has, at any rate, been imposed or denied in almost identical factual situations under any of the tests.[18]

FACTUAL APPROACHES TO THE APPLICATION OF THE TESTS

As was indicated earlier, the duty of the insurer to settle in good faith or with due care in behalf of the insured, arises because of the conflict of interest that is created *pro tanto* if the claimant offers to settle his claim for an amount within policy limits. An examination of the cases indicates that the duties of the insurer, measured by either test, can be categorized factually into three broad classifications: (1) The duty to exercise due care or good faith in its *investigation* of the facts and legal aspects of the

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settlement it has fulfilled its duty to insured); St. Paul-Mercury Indemnity Co. v. Martin, 190 F.2d 455 (10th Cir. 1951) (good faith is the duty required . . . if insured acts in good faith and without negligence it has fulfilled its duty); American Fidelity & Cas. Co. v. All American Bus Lines, 179 F.2d 7 (10th Cir. 1949) (gross negligence might constitute lack of good faith); J. Spang Baking Co. v. Trinity Universal Ins. Co., 45 Ohio L. Abs. 577, 68 N.E.2d 122 (1946) (Court said the company owed good faith and then quoted numerous negligence cases with negligence tests saying insurer is universally required "to act fairly and exercise reasonable care" to protect the interest of the insured); Boling v. New Amsterdam Cas. Co., 173 Okla. 160, 46 P.2d 916 (1935) (insurers' duty is to exercise "skill, care and good faith" to the extent of making whatever settlement "an honest judgment and discretion dictate . . . "); Burnham v. Commercial Cas. Ins. Co., 10 Wash.2d 624, 117 P.2d 644 (1941) (discussed bad faith in conclusion said there was no liability in the absence of negligence or bad faith).

[15] Henry v. Nationwide Ins. Co., 139 F. Supp. 806 (E.D.N.C. 1956); Hoyt v. Factory Mutual Liab. Ins. Co., 120 Conn. 156, 179 Atl. 842 (1935).

[16] Royal Transit v. Central Surety & Ins. Corp., 168 F.2d 345 (7th Cir. 1948) (insurer owes good faith as a duty and that includes the obligation of exercising diligence and intelligence); Bartlett v. Travelers Ins. Co., 117 Conn. 147, 167 Atl. 180 (1933) (insurer's duty extends to good faith plus intelligent action); Lawson & Nelson Sash & Door Co. v. Associated Indemnity Corp., 204 Minn. 50, 282 N.W. 481 (1938) (good faith standard used but this includes a "standard of due care . . . to the exercise of honest judgment"); Mendota Electric Co. v. New York Indemnity Co., 169 Minn. 377, 211 N.W. 317 (1926), *opinion on subsequent appeal*, 175 Minn. 181, 221 N.W. 61 (1928) (an offer of compromise must be considered in good faith and "upon reasonable grounds"); Hart v. Republic Mutual Ins. Co., 152 Ohio St. 185, 87 N.E.2d 347 (1949) (rejected negligence test for good faith test but say to be in good faith decisions must be based on "reasonable justification"); Southern Fire & Cas. Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (1951) (insurer owes duty of good faith and "diligence").

[17] Hilker v. Western Automobile Ins. Co., 204 Wis. 1, 235 N.W. 413 (1931).

[18] See notes 19, 20 and 21, *infra*.

case, so as to acquire a realistic understanding of the facts and law;[19] (2) the duty to exercise due care or good faith to adequately protect the interest of the insured in all *negotiations* concerning

[19] The insurer must exercise reasonable diligence in making its investigation, interviewing witnesses, and otherwise ascertaining the facts, and its decision must be based on the facts thus ascertained; failure to do so may be evidence of negligence or bad faith. *Federal*, American Mutual Liab. Ins. Co. v. Cooper, 61 F.2d 466, 289 U.S. 736 (1938) (insurer received prompt notification with names of witnesses, but did not interview them or investigate the case—bad faith); Ballard v. Citizens Cas. Co., 196 F.2d 96 (7th Cir. 1952) (insurer failed to take statement of key witness until two days before trial at which time that witness refused to talk to insurer—bad faith); Roberts v. American Fire & Cas. Co., 89 F. Supp. 827 (M.D.Tenn. 1950), *aff'd* 186 F.24 921 (6th Cir. 1951) (even though liability of insured was certain, insurer made no attempt to ascertain the medical facts and arbitrarily refused to consider any offer over $3,500, taking the position that since the claimants were Negroes no jury would return a verdict in excess of this amount—bad faith); Royal Transit v. Central Surety & Ins. Corp., 168 F.2d 345 (7th Cir. 1948) (primary insurer failed to make adequate investigation when secondary re-insurer and insured offered to pay all overages above the primary insurance—bad faith); Maryland Cas. Co. v. Wyoming Valley Paper Co., 84 F.2d 633 (1st Cir. 1936) (insurer relied chiefly on its own opinion before investigation file was prepared—negligence); Maryland Cas. Co. v. Elmira Coal Co., 69 F.2d 616 (8th Cir. 1934) (insurer placed a value on a claim before an adequate investigation had been made—bad faith); *Arkansas*, Home Indemnity Co. v. Snowden, 233 Ark. 64, 264 S.W.2d 642 (1954) (insurer failed to make adequate investigation which the court found released insured from policy provision forbidding insured to make a settlement and which validated settlement made by insured with claimant—bad faith and negligence); *Maine*, Wilson v. Aetna Cas. & Surety Co., 145 Me. 370, 76 A.2d 111 (1950) (evidence indicated that insurer did not interview police officers who had investigated the accident, did not visit site of accident, and the doctor for insurer gave claimant only cursory examination—insufficient to show bad faith or negligence); *Minnesota*, Aetna Life Ins. Co. v. Flour City Ornamental Iron Works, 120 Minn. 463, 139 N.W. 955 (1913) (evidence indicated insurer had failed to contact claimant for some time—insufficient evidence of negligence); *Mississippi*, Farmers Gin Co. v. St. Paul-Mercury Indemnity Co., 186 Miss. 747, 191 So. 415 (1939); *New Hampshire*, Dumas v. Hartford Acc. & Indemnity Co., 94 N.H. 484, 56 A.2d 57 (1947) (due care is required in the investigation phase); *New York*, Auerbach v. Maryland Cas. Co., 236 N.Y. 247, 140 N.E. 577 (1923) (dictum indicating insurer might be held liable if it's negligent in investigating the facts); *Oklahoma*, National Mutual Cas. Co. v. Britt, 203 Okla. 175, 200 P.2d 407 (1948), *rehearing denied*, 218 P.2d 1039 (1950) (failure of insurer to have available eyewitnesses support its claim of non-liability—bad faith; *Tennessee*, Southern Fire & Cas. Co. v. Norris, 35 Tenn. App. 657, 250 C.W.2d 785 (1951) (insurer failed to contact principal witnesses until shortly before trial and had only the weak testimony of the driver of insured's car to support claim of non-liability—bad faith); *Washington*, Burnham v. Commercial Cas. Ins. Co., 10 Wash.2d 624, 117 P.2d 644 (1941) (insurer's failure to see claimant before claimant secured counsel—not sufficient evidence of bad faith); *Wisconsin*, Berk v. Milwaukee Automobile Ins. Co., 245 Wis. 597, 15 N.W.2d 834 (1944) (insurer made full investigation and acted upon basis of evidence ascertained—insufficient evidence of bad faith); Hilker v. Western Automobile Ins. Co., 204 Wis. 1, 235 N.W. 413 (1931) (insurer failed to locate and interview several eyewitnesses who gave testimony at the trial which clearly indicated negligence of the insured—bad faith).

settlement;[20] (3) the duty to exercise due care or good faith to

[20] In analyzing the duty of the insurer to act in good faith and/or exercise due care to see that the interest of the insured is protected by the insurer during negotiations with the claimant, the courts have used several typical approaches to describe the attitudes and conduct required of the insurer.

a. It has been held to be evidence of bad faith and negligence for the insurer to offer to settle with the claimant on the condition that the insured contribute to the settlement. The same is true when the insured has actually contributed. *Federal*, Maryland Cas. Co. v. Cook, O'Brien Construction Co., 69 F.2d 462 (8th Cir. 1934), *cert. denied* 293 U.S. 569 (insurer admitted there was only a slight chance of escaping liability and still insisted insured must contribute $1,000 of a $3,500 settlement within policy limits—bad faith); Brown & McCabe Stevodores v. London Guarantee & Acc. Co., 232 Fed. 298 (D.C.Ore. 1915); *Louisiana*, Davis v. Maryland Cas. Co., 16 La. App. 253, 133 So. 769 (1931) (Claimant recovered a $1,000 judgment in excess of policy limits but offered to compromise for policy limits. The insurer refused to accept it unless the insured contributed. The Court said the insurer should not be penalized for exercising a contractual right—no bad faith); *Minnesota*, Lawson & Nelson Sash & Door Co. v. Associated Indemnity Corp., 204 Minn. 50, 282 N.W. 481 (1938) (insurer not liable over policy limits even though he refused a settlement unless the insured contributed where there was a good chance to avoid all liability—no bad faith); Mendota Electric Co. v. New York Indemnity Co., 169 Minn. 377, 211 N.W. 317 (1926) (appellant insurer showed it refused to contribute primarily because joint tortfeasor's insurer refused to contribute and the insurer's action was directed against the coinsurer so the Court reversed judgment—no bad faith); *Missouri*, McCombs v. Fidelity & Cas. Co., 231 Mo. App. 1206, 89 S.W.2d 114 (1935) (after the insurer had refused a compromise offer for the face amount of the policy unless the insured contribute the Court pointed out that the insurer had the insured tied hand and foot and was now seeking to coerce him into contributing—bad faith); St. Joseph Transfer & Storage Co. v. Employees' Liab. Assurance Corp., 224 Mo. App. 221, 23 S.W. 2d 215 (1930) (where there was the slightest possibility that all liability might be avoided by suit, insurer was justified in refusing to accept the settlement within policy limits unless the insured contributed—no bad faith): *New York*, Auerbach v. Maryland Cas. Co., 236 N.Y. 247, 140 N.E. 577 (1923) (contract approach used saying it was within the option given by the policy for insurer to refuse compromise unless insured contributed—no bad faith); Brunswick Realty Co. v. Frankfort Ins. Co., 99 Misc. 639, 166 N.Y.Supp. 36 (1917) (insurer attempted to get insured to contribute one half of proposed settlement for policy limits—bad faith); Levin v. New England Cas. Co., 101 Misc. 402, 166 N.Y.Supp. 1055 (1917) (insurer allowed to use a threat of an excess judgment to get such a contribution from the insurer—no bad faith); *Ohio*, J. Spang Baking Co. v. Trinity Universal Ins. Co., 45 Ohio L. Abs. 577, 68 N.E.2d 122 (1946) (Insurer admitted a judgment over the limits of a $10,000 policy was likely but refused to contribute more than $4,500. Insurer reasoned that since it had re-insured for $5,000 it stood to lose at most that amount and insured could contribute the balance—bad faith); *South Carolina*, Cherry v. Shelby Mutual Plate Glass & Cas. Co., 191 S.C. 177, 4 S.E.2d 123 (1939) (Facing a $100,000 suit insured urged insurer to settle for $20,000 and volunteered to pay half. Insurer got the compromise lowered to $17,000 and the Court said insured was not entitled to a $3,000 return as there was no evidence of duress—no bad faith); *Vermont*, Johnson v. Hardware Mutual Cas. Co., 109 Vt. 481, 1 A.2d 817 (1938) (adjuster requested insured to contribute, saying if insurer could not make more out of it than it could by settling, it would take the case to trial and the judgment over policy limits would probably result—bad faith); *Washington*, Evans v. Continental Cas. Co., 40 Wash.2d 614, 245 P.2d 470 (1952) (insurer knew it would escape liability if insured was proved negligent in renting a car to an intoxicated

inform the insured that an offer to settle within policy limits has

person, wrote its agent to get a statement from the person who had rented the car admitting he was intoxicated, and then use this deposition to get a larger contribution from the insured—bad faith).

b. When there is clear liability on the part of the insured it may be bad faith or negligence for the insurer to refuse to settle. This consideration is involved in many of the cases cited elsewhere. The following case is cited as an example. Royal Transit v. Central Surety & Ins. Corp., 168 F.2d 345 (7th Cir. 1948).

c. It may be bad faith or negligence to refuse settlement where there are serious injuries that would, if a recovery was sustained, far exceed policy limits. This consideration is involved in many of the cases cited elsewhere. The following cases are cited as examples. Ballard v. Citizens Cas. Co. of New York, 196 F.2d 96 (7th Cir. 1952) (failure to settle under Illinois Dram Shop Law); Royal Transit v. Central Surety & Ins. Corp., 168 F.2d 34 (7th Cir. 1948); National Mutual Cas. Co. v. Britt, 203 Okla. 175, 200 P.2d 407 (1948); Boling v. New Amsterdam Cas. Co., 173 Okla. 160, 46 P.2d 916 (1935).

d. It may be bad faith or negligence for an insurer to fail to make or unduly delay an offer or counter-offer to settle. Royal Transit v. Central Surety & Ins. Corp., 168 F.2d 345 (7th Cir. 1948); Maryland Cas. Co. v. Cook-O'Brien Construction Co., 69 F.2d 462 (8th Cir. 1943); Olympia Fields Country Club v. Banker's Indemnity Ins. Co., 325 Ill. App. 649, 60 N.E.2d 896 (1945); Hilker v. Western Automobile Ins. Co., 204 Wis. 1, 235 N.W. 413 (1931).

e. It may be evidence of bad faith or negligence to show that the insurer's home office failed to give consideration to all of the facts as in City of Wakefield v. Globe Indemnity Co., 246 Mich. 648, 225 N.W. 643 (1929). However, where insurer sent a trainee-adjuster, without authority to settle, to see a claimant and claimant agreed to settle for $1,000 but three days later when an adjuster returned with authority to settle, claimant refused the insurer was not held guilty of either bad faith or negligence in Henry v. Nationwide Ins. Co., 139 F.Supp. 806 (E.D.N.C. 1956).

f. The fact that the claimant and insured were Negroes had considerable bearing on the question of the bad faith of the insurer in Roberts v. American Fire & Cas. Co., 89 F.Supp. 827, (M.D. Tenn. 1950). *aff'd,* 186 F.2d 921 (6th Cir. 1951) (improper investigation).

g. It has been held bad faith when a rejection of settlement was shown to be motivated in whole or in part by the fact that the risk was partially reinsured and therefore the company had nothing to lose by refusing to settle. Royal Transit v. Surety & Ins. Corp., 168 F.2d 345 (7th. Cir. 1948); Zumwalt v. Utilities Ins. Co., 360 Mo. 362, 228 S.W.2d 750 (1950).

h. The insurer cannot refuse settlement in good faith or without negligence if it knows that it has no more than an equal chance of winning and that if it loses, the verdict against the insured will exceed policy limits. This was pointed out in National Mutual Cas. Co. v. Britt, 203 Okla. 175, 200 P.2d 407 (1948), *rehearing denied,* 218 P.2d 1039 (1950). But, an insurer may refuse settlement if it does so with an honest belief that it can defeat the resulting action, if this belief is based on a fair review of the facts after reasonable diligence in ascertaining evidence according to Christian v. Preferred Acc. Ins. Co., 89 F. Supp. 888 (N.D.Cal. 1950).

i. The enforcement of a company rule not to settle for any amount in excess of a stated proportion of the policy coverage may be bad faith or negligence. McCombs v. Fidelity & Cas. Co., 231 Mo. App. 1206, 89 S.W.2d 114 (1935); G. A. Stowers Furniture Co. v. American Indemnity Co., 15 S.W.2d 544 (Tex. Com. App. 1929).

j. Inasmuch as the obligation of the insurer is based on principles of fair dealing, the insurer must give equal consideration to the interests of the insured, or he will be held guilty of negligence and bad faith. *Federal,* American Fidelity & Cas. Co. v. All American Bus Lines, 190 F.2d 234 (10th Cir. 1951), *cert. denied,* 342 U.S. 851 (1951); Farm

been made by the claimant, and to advise the insured as to the

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Bureau Mutual Ins. Co. v. Violano, 123 F.2d 692 (2d Cir. 1941), *cert. denied*, 316 U.S. 672 (1942); Vanderbilt University v. Hartford Acc. & Indemnity Co., 109 F. Supp. 565 (M.D.Tenn. 1952); American Fidelity & Cas. Co. v. G. A. Nichols Co., 173 F.2d 830 (10th Cir. 1949); American Mutual Liab. Ins. Co. v. Cooper, 61 F.2d 446 (5th Cir. 1932); *Arizona*, Farmers Ins. Exchange v. Henderson,—Ariz.—, 313 P.2d 404 (1957); *Missouri*, McCombs v. Fidelity & Cas. Co., 231 Mo. App. 1206, 89 S.W.2d 114 (1935); *New York*, Brassil v. Maryland Cas. Co., 210 N.Y. 235, 104 N.E. 622 (1914); *Oklahoma*, National Mutual Cas. Co. v. Britt, 203 Okla. 175, 200 P.2d 407 (1948), *rehearing denied*, 218 P.2d 1039 (1950); *Pennsylvania*, Cowden v. Aetna Cas. & Surety Co., 103 P.L.J. 317, 134 A.2d 223 (1957); *Vermont*, Johnson v. Hardware Mutual Cas. Co., 109 Vt. 481, 1 A.2d 817 (1938).

k. The action of the insurer must not be arbitrary or capricious; reckless or contumacious. Farm Bureau Mutual Ins. Co. v. Violano, 123 F.2d 692 (2d Cir. 1941), *cert. denied*, 316 U.S. 672 (1942); Maryland Cas. Co. v. Elmira Coal Co., 69 F.2d 616 (8th Cir. 1934); Krutsinger v. Illinois Cas. Co., 10 Ill.2d 518, 141 N.E.2d 16 (1957); Hart v. Republic Mutual Ins. Co., 157 Ohio St. 185, 87 N.E.2d 347 (1949); Wisconsin Zinc Co. v. Fidelity & Deposit Co., 162 Wis. 39, 155 N.W. 1081 (1916).

l. The action of the insurer must not be fraudulent or dishonest. Noshey v. American Automobile Ins. Co., 68 F.2d 808 (6th Cir. 1934); Maryland Cas. Co. v. Elmira Coal Co., 69 F.2d 616 (8th Cir. 1934); Zumwalt v. Utilities Ins. Co., 360 Mo. 362, 228 S.W.2d 750 (1950); Johnson v. Hardware Mutual Cas. Co., 109 Vt. 481, 1 A.2d 817 (1938); Wisconsin Zinc Co. v. Fidelity & Deposit Co., 162 Wis. 39, 155 N.W. 1081 (1916).

m. Mere impolitic conduct, without more, is not sufficient evidence of bad faith. Levin v. New England Cas. Co., 101 Misc. 402, 166 N.Y. Supp. 1055, *aff'd*, 233 N.Y. 631, 135 N.E. 948 (1922).

n. Bad faith requires more than a showing of inadvertance or mistake. *Federal*, American Cas. Co. v. Howard, 187 F.2d 322 (4th Cir. 1951) (also pointed out if insurer wished to protect himself he could have readily purchased a policy with higher limits); *Alabama*, Waters v. American Cas. Co., 261 Ala. 252, 73 So.2d 525 (1953); *Michigan*, Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N.W. 643 (1929); *Minnesota*, Larson v. Anchor Cas. Co., — Minn. —, 82 N.W.2d 376 (1957); Lawson & Nelson Sash & Door Co. v. Associated Indemnity Corp., 204 Minn. 50, 282 N.W. 481 (1938); Mendota Electric Co. v. New York Indemnity Co., 175 Minn. 181, 221 N.W. 61 (1928); *North Carolina*, Wynnewood Lumber Co. v. Travelers Ins. Co., 173 N.C. 269, 91 S.E. 946 (1917); *Vermont*, Johnson v. Hardware Mutual Cas. Co., 109 Vt. 481, 1 A.2d 817 (1938).

o. Failure of the insurer to make whatever payment and settlement honest judgment and discretion dictate may be evidence of bad faith and negligence. Maryland Cas. Co. v. Cook-O'Brien Construction Co., 69 F.2d 462 (8th Cir. 1934), *cert. denied*, 293 U.S. 569 (1934); Maryland Cas. Co. v. Elmira Coal Co., 69 F.2d 616 (8th Cir. 1934); American Mutual Liab. Ins. Co. v. Cooper, 61 F.2d 446 (5th Cir. 1932); Boling v. New Amsterdam Cas. Co., 173 Okla. 160, 46 P.2d 916 (1935). *Contra*, Rumford Falls Paper Co. v. Fidelity & Cas. Co., 92 Me. 574, 43 Atl. 503 (1899).

p. Rejecting settlements when the evidence shows the insurer subjectively knew the offers of settlement were reasonable may be evidence of negligence or bad faith such as in Noshey v. American Automobile Ins. Co., 68 F.2d 808 (8th Cir. 1934) where the insured was advised by the insurer to place his property beyond reach of an anticipated judgment. The same was true in Lanferman v. Maryland Cas. Co., 222 Wisc. 406, 267 N.W. 300 (1936) where a reserve fund over policy limits was set up.

Refusal to accept an offer when acceptance of the offer has been recommended by the insurer's adjuster or counsel like the above situations may be evidence of negligence or bad faith and has been fre-

state of negotiations, so that he can protect his own interests by retaining separate counsel, or contributing to the settlement.[21]

However, if the insured's own actions or misstatements are the cause of the insurer's failure to settle, the insurer cannot be

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quently litigated. In Royal Transit v. Central Surety & Ins. Corp., 168 F.2d 345 (7th Cir. 1948) the insured, insurer's attorney and the reinsurer, which would bear the majority of any liability, all urged settlement to no avail, while in Olympia Fields Country Club v. Bankers Indemnity Ins. Co., 325 Ill. App. 649, 60 N.E.2d 896 (1945) an offer to compromise before and after the verdict were rejected by the insurer contrary to the advice of insurer's attorney. However, in Lawson & Nelson Sash & Door Co. v. Associated Indemnity Corp., 204 Minn. 50, 282 N.W. 481 (1938), where the evidence indicated the insurer's counsel had recommended settlement, not because of merit in the case of the claimant, but because of "good practical business" since claimant's attorney was known to recover large verdicts in this type of case, the Court found no bad faith. Also where the advice of the insurer's attorneys was rejected, the insurer was not held liable for the entire judgment in Georgia Cas. Co. v. Cotton Mills Products Co., 159 Miss. 396, 132 So. 73 (1931), when the attorneys had also said the verdict would undoubtedly be reduced.

[21] The failure to advise the insured of possible excess liability and to disclose to him the status of settlement negotiations may be negligence or bad faith. (This consideration is involved in many of the cases cited elsewhere. The following cases are cited as examples.) Pennix v. Winton, 61 Cal. App. 2d 761, 143 P.2d 940 (1943); Southern Fire & Cas. Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (1952); Hilker v. Western Automobile Ins. Co. 204 Wis. 1, 235 N.W. 413 (1931). In Douglas v. United States Fidelity & Guaranty Co., 81 N.H. 371, 127 Atl. 708 (1924) it was decided an insurer may be liable for failure to inform its own counsel of all the facts. A more recent question has been whether the failure of the insurer to notify the insured of an offer to settle, without more, constitutes negligence or bad faith. *Federal*, Springer v. Citizens Cas. Co., 246 F.2d 123 (5th Cir. 1957) (insured with a $5,000 policy coverage was not informed of insurer's field representatives' report until long after the verdict for $75,000—sufficient evidence to take to the jury); Strode v. Commercial Cas. Ins. Co., 102 F. Supp. 240 (W.D. Ky. 1952), *aff'd*, 202 F.2d 599 (6th Cir. 1953) (Court agreed there might ordinarily be an obligation to inform but here case lacked merit); Home Indemnity Co. v. Williamson, 183 F.2d 572 (5th Cir. 1950) (insurer intended to deny liability but took a nonwaiver agreement from insured and then did not inform insured of compromise offer—evidence sufficient to go to jury); Kleinschmit v. Farmers Mutual Hail Ins. Ass'n., 101 F.2d 987 (8th Cir. 1939) (contract approach, *i.e.* there was no provision in the policy saying insurer must inform insured of an offer, so he need not); *Minnesota*, Larson v. Anchor Cas. Co., — Minn. —, 82 N.W.2d 376 (1957) (. . . "insurer owes a duty to inform the insured of the receipt of a settlement offer whenever an excess verdict is sought . . ."); Norwood v. Travelers Ins. Co., 204 Minn. 595, 284 N.W. 785 (1939) (after $7,000 judgment claimant informs insurer it will settle for $5,000 policy limit . . . insurer does not inform insured . . . appeal fails . . . now insured sues insurer and courts say insurers conduct was reasonable and insurer knew insured was judgment proof anyhow); *New York*, Best Bldg. Co. v. Employers' Liab. Assurance Corp., 247 N.Y. 451, 160 N.E. 911 (1928) (insurer contended that had he been informed he would have been willing to contribute so as to effect a settlement . . . still no duty on insurer to inform); Streat Coal Co. v. Frankfort General Ins. Co., 237 N.Y. 60, 142 N.E. 352 (1923) (contract approach—further, insurers privilege may be paramount to right of insured); *Wisconsin*, Hilker v. Western Automobile Ins. Co., 204 Wis. 1, 231 N.W. 257 (1930), *aff'd on rehearing*, 235 N.W. 413 (1931) (insurer's duty is to inform insured so he might take steps to protect himself).

charged with bad faith or negligence.[22] It has also been held that where the offer of the claimant to settle or his willingness to do so does not clearly appear, or appears to be conditional, the insurer cannot be said to have refused to settle within policy limits.[23] The same has been held to be true where the case lacked merit as to the law and facts and the insurer was justified in placing no importance on the offer of settlement.[24]

MISCELLANEOUS PROBLEMS

a. Duty to defend and duty to pay. A number of cases hold that the insurer's duty to defend is separate and distinct from the duty to pay a judgment. This being so, the insurer might well become liable for negligence or bad faith in conducting litigation or negotiations for the insured even though the insurer paid the full amount of the coverage, or even though the insurer had a policy defense. The recovery, in this event, would be the amount of the claimant's judgment exceeding the policy limits.[25]

b. Must the insured pay the judgment before he has a cause of action against the insurer? Many of the earlier cases indicate that an insured has no cause of action against the insurer until he can show that he has sustained a loss by payment of the full amount of the judgment.[26] The modern trend of cases is contrary to this position, the cases indicating that the judgment is a sufficient loss in itself.[27]

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[22] Royal Transit v. Central Surety & Ins. Corp., 168 F.2d 345 (7th Cir. 1948), *cert. denied*, 335 U.S. 844 (1948) (court inquired as to how insurer could be in bad faith in refusing a settlement when insured had joined or agreed to such action); Hall v. Preferred Acc. Ins. Co., 204 F.2d 844 (5th Cir. 1953) (insured misrepresented employment status of person driving his automobile); Home Indemnity Co. v. Standard Acc. Ins. Co., 167 F.2d 919 (9th Cir. 1948); Williams v. Employers Mutual Liab. Ins. Co., 131 F.2d 601 (5th Cir. 1943); State Farm Mutual Automobile Ins. Co. v. Bonacci, 111 F.2d 412 (8th Cir. 1940); Ohio Cas. Ins. Co. v. Gordon, 95 F.2d 605 (10th Cir. 1938) (detrimental reliance on insured's statements); Buffalo v. United States Fidelity & Guaranty Co., 84 F.2d 883 (10th Cir. 1936). But see Ballard v. Citizens Cas. Co., 196 F.2d 96 (7th Cir. 1952) where insured's attorney helped prepare and try the case and insured was not estopped from asserting insurer was in bad faith by refusing a compromise. The Court found the insured's attorney was never given any authority in the area of settlement and therefore the insured's action was good.

[23] Jones v. Highway Ins. Underwriters, 253 S.W.2d 1018 (Tex. Civ. App. 1953).

[24] Strode v. Commercial Cas. Ins. Co., 102 F. Supp. 240 (W.D. Ky. 1952), *aff'd*, 202 F.2d 599 (6th Cir. 1953).

[25] This problem is more fully discussed in an excellent article entitled, "Excess Liability," by James Dempsey appearing in the 1950 Ins. L. J. at page 734.

[26] State Automobile Mutual Ins. Co. v. York, 104 F.2d 730 (4th Cir. 1939), *cert. denied*, 308 U.S. 591 (1939) (wife sued husband and he vows he'll never pay); Dumas v. Hartford Acc. & Indemity Co., 92 N.H. 140, 26 A.2d 361 (1942); Duncan v. Lumberman's Mutual Cas. Co., 91 N.H. 349, 23 A.2d 325 (1941).

[27] See note 25 *supra*. Southern Fire & Cas. Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (1951); Schwartz v. Norwich Union Indemnity Co., 212 Wis. 593, 250 N.W. 446 (1933); *cf.* Dotschay v. National Mutual

c. Can the claimant sue the insurer? A plaintiff who recovers a judgment for an amount over and above the limits of the defendant-insured's liability policy after the insurer has refused to settle, encounters a minimum of trouble in collecting the whole amount when the defendant is solvent. This type of defendant either has sufficient assets out of which the judgment can be satisfied, or in order to protect his credit standing, will bring an action against his insurer for the amount of the judgment above policy limits. The majority of reported cases fall into this category. A real difficulty arises, however, when the defendant-insured is judgment proof. This type of defendant may have little incentive to sue on his cause of action against the insurer in order to satisfy the judgment rendered against him. In this situation, if the plaintiff is to collect the amount of the judgment over the contracted policy limits, he must find a procedure permitting him to proceed directly against the insurer. An examination of the cases and statutes indicates that there are several approaches which have been used, or may be used, by the injured party to maintain an action against the insurer. They are: (1) by joinder or direct action; (2) by subrogation or substitution; (3) by assignment; (4) by levy and purchase at execution sale; (5) by garnishment; (6) by suit as a third party beneficiary; (7) by appointment of a receiver through judgment debtor examination proceedings; (8) by a creditor's bill for equitable execution.

A few states have passed what could be called "pure" direct action statutes.[28] These allow the injured party either to join the insurer in the same action as the insured, or to proceed directly. Although Iowa expressly prohibits joinder of the insured and insurer in the same action,[29] it does have a statute which permits an action against an insurer by the injured party after an execution against the insured is returned unsatisfied.[30] While this latter statute is a variation of the "pure" direct action statute, it does not permit joinder of both the insured and insurer in the same action.[31]

A second method is by subrogation or substitution. This is based on an interpretation given direct action statutes which would allow the injured party to bring an action against the insurer to the *same extent* that the insured could have enforced the claim if the insured had paid the judgment.[32] In *Turgeon v. Shelby*

Ins. Co., 246 F.2d 221 (5th Cir. 1957) (court notes the conflict, but declines to answer the question "in advance of the state courts").

[28] WISC. STAT. ANN. § 260.11 (1957); LA. REV. STAT. §§ 22.655 (1950), as revised by La. Sess. Law 1956 Act 475; offer examples of this type.

[29] IOWA CODE R.C.P. 28 (1954).

[30] IOWA CODE § 516.1 (1954).

[31] Hoosier Cas. Co. of Indianapolis, Ind. v. Fox, 102 F. Supp. 214 (N.D. Iowa 1952).

[32] See note 3, *supra*. It should be noted that in the absence of such a statute the rights of an injured party might be materially affected if the insured's policy was one for indemnity against loss, since the creditor has no higher rights than the insured and the injured party

Mutual Plate Glass and Cas. Co.,[33] the injured party brought a suit against the insurer for the amount of the judgment above policy limits under such a statute. The Court held, that because the purpose of the statute was to protect those injured by judgment proof insureds, the injured party was subrogated to *all* the insured's rights against his insurer. In *Kleinschmit v. Farmers Mutual Hail Ins. Ass'n of Iowa*,[34] the policy expressly provided that an injured party would have a cause of action against the insurer "to the same extent" as the insured. The Court held that the words in the policy served to substitute the injured party to all the rights of the insured including the cause of action against the insurer for the excess of the judgment over policy limits. The case also indicates that the injured party is subject to any policy defenses the insurer might have against its insured. It could be argued that the words "to the same extent" as used in the Iowa statute are incorporated into the liability policy, so as to subrogate the injured party to all the rights of the defendant-insured even though these words do not appear in the policy.[35]

The third approach is by an assignment from the defendant-insured to the injured party plaintiff. It is likely that the plaintiff would be met by the defense that a tort action is so personal in nature that it is nonassignable. The Iowa Court, however, has permitted the assignment of tort actions notwithstanding the personal nature of the damage.[36] There is also dicta to the effect that a tort action arising out of a contract is assignable.[37]

A fourth approach is by levy and purchase at execution sale. A judgment creditor is given the power by statute to levy upon the chose in action of his judgment debtor. The obstacle to this remedy is whether or not the tort action held by the defendant-insured is such a chose in action.[38] In *Francis v. Todd & Kraft Co.*, the Court permitted a judgment creditor to levy upon his judgment debtor's cause of action for wrongful attachment by a third party.[39] The case of *Brenton Bros. v. Dorr* permitted a judgment creditor to levy on a cause of action for breach of contract held by his judgment debtor and although the Court's comments were dicta, it cited with approval cases to the effect that a tort action was as much a chose in action as a contract action.[40]

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could not recover from the insured unless the insured had paid on the judgment.

[33] 112 F. Supp. 355 (D. Conn. 1953).

[34] 101 F.2d 987 (8th Cir. 1939).

[35] Schmid v. Automobile Underwriters, Inc., 215 Iowa 170, 244 N.W. 729 (1932).

[36] Albert v. Maher Brothers Transfer Co., 215 Iowa 197, 243 N.W. 561 (1932); Lake v. Moots, 215 Iowa 126, 244 N.W. 693 (1932); Kithcart v. Kithcart, 145 Iowa 549, 124 N.W. 305 (1910).

[37] Brenton Bros. v. Dorr, 213 Iowa 725, 239 N.W. 808 (1931). In connection with this case see IOWA CODE § 4.1(9) (1954).

[38] IOWA CODE § 626.21 (1954).

[39] 219 Iowa 672, 259 N.W. 249 (1935).

[40] See Note 37, *supra*.

The fifth approach is by garnishment. A limitation is encountered in the requirement that there be a fixed obligation before garnishment can be used. It can be argued that the difference between the face of the policy and the judgment rendered satisfies the requirement of a fixed and liquidated obligation.[41] Generally speaking, however, the right to garnish is measured by the right of the judgment debtor to demand and receive the obligation from the garnishee as of the time notice is served on the garnishee.[42] There are Iowa cases which have denied to a plaintiff the right to garnish when the indebtedness of the garnishee to the principal defendant was so contingent as to permeate the obligation itself.[43] This element of contingency would seemingly be raised as a defense if a plaintiff tried to garnish the insurer prior to an adjudication of the insurer's bad faith or negligence in failing to settle. A plaintiff unsuccessfully tried to garnish his judgment debtor's insurer in a recent Utah case in which the plaintiff's judgment exceeded policy limits.[44] The Court held that the insurer did not hold a cause of action against itself. Since this cause of action was owned and held by the insured, there was no property that could be subjected to garnishment. The Court further held that the garnishment statute did not contemplate the adjudication of the insurer's tort liability in a garnishment proceeding.

A sixth method is to bring an action as a third party beneficiary. It has been held that under a liability policy the insurer owes the injured party no duty since he was not a party to the contract,[45] and that furthermore the injured party was not damaged by the insurer's breach of duty because, since the injured party was at one time willing to settle within policy limits he now stands to profit by the judgment exceeding policy limits.[46] However, *Automobile Mutual Indemnity Co. v. Shaw*,[47] inferred that an injured party can maintain the action as a third party beneficiary. The argument under this approach is that the defendant's liability policy is intended to benefit the public as well as the insured.[48]

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[41] See Zimek v. Illinois Nat. Casualty Co., 370 Ill. 572, 19 N.W.2d 620 (1939).

[42] What Cheer Savings Bank v. Mowery, 149 Iowa 114, 128 N.W. 7 (1910).

[43] Malone v. Moore, 204 Iowa 625, 215 N.W. 625 (1927); Armstrong v. Armstrong, 196 Iowa 947, 192 N.W. 887 (1923).

[44] Paul v. Kirkendall, 311 P.2d 376 (Utah 1957). However, *compare with* Francis v. Newton, 75 Ga. 341, 43 S.E.2d 282 (1947), where it is intimated that garnishment proceedings are maintainable.

[45] Duncan v. Lumberman's Mutual Cas. Co., 91 N.H. 349, 23 A.2d 325 (1941).

[46] Wessing v. American Indemnity Co. of Galveston Tex., 127 F. Supp. 775 (W.D. Mo. 1955).

[47] 134 Fla. 815, 184 So. 852 (1938). Cases arising under automobile liability insurance should be distinguished from those allowing third party beneficiaries to sue on compulsory insurance such as bonds executed in favor of the public. See Lopez v. Townsend, 37 N.M. 574, 25 P.2d 809 (1933).

[48] See Venz v. State Automobile Ins. Assn. of Des Moines, 217 Iowa 662, 251 N.W. 27 (1933).

Thus, once a plaintiff has a judgment against a defendant-insured, the plaintiff becomes an ascertained third party beneficiary and can sue the insurer on the policy in his own right.

A seventh possibility is by appointment of a receiver through judgment debtor examination proceedings. This could be done under the statutory provisions for examination of the judgment debtor after the writ of execution is returned unsatisfied.[49] The examination procedure enables a judgment creditor to discover property of his judgment debtor, tangible and intangible.[50] The Iowa Court has stated that this property should ordinarily be reached by execution, reserving court orders compelling the delivery of property, the appointment of receivers or the issuance of an injunction for situations where the ordinary processes of the law are not adequate to subject the judgment debtor's property to the payment of the debt.[51] The fact that the use of a receiver is limited to situations where the usual methods of applying the judgment debtor's property to the satisfaction of the judgment have failed, might lead to a conclusion that if the defendant-insured's tort action against his insurer could not be reached by any other methods, then a receiver could be appointed to sue on this right and apply the proceeds to the satisfaction of the judgment.[52]

The eighth and final alternative is by a creditor's bill for equitable execution. The creditor's bill is an independent equitable action that has been incorporated into statutory form in many states.[53] The court may, as in debtor's examination, appoint a receiver to aid in the collection of the judgment. While the application for appointment is addressed to the discretion of the court, it will be granted when the judgment creditor has exhausted his legal remedies.[54] The receiver is appointed, as in debtor examination proceedings, for the sole benefit of the plaintiff creditor, and is to reduce to his possession enough of the debtor's intangible and equitable assets as are necessary to satisfy the judgment creditor's claim.[55] The generally accepted principle is that all property in which the debtor has a proprietary interest, assignable or merely

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[49] IOWA CODE § 630.1 (1954).
[50] IOWA CODE § 630.6 (1954).
[51] IOWA CODE § 630.6-7 (1954); Bennett v. Valley Mining Co., 142 Iowa 53, 120 N.W. 654 (1909); Reardon v. Henry, 82 Iowa 134, 47 N.W. 1022 (1891).
[52] IOWA CODE § 630.4 (1954).
[53] IOWA CODE § 630.16-.19 (1954). In Estey v. Fuller Implement Co., 82 Iowa 678, 46 N.W. 1090 (1890), it was held that the creditor's bill could be brought contemporaneously with a judgment debtor examination.
[54] Jones v. American Tire Co. of Buckhead, 210 Ga. 110, 78 S.E.2d 10 (1953).
[55] Stevens v. Carolina Scenic Stages, 208 F.2d 332 (4th Cir. 1953).

alienable, may be reached by these equitable proceedings,[56] and choses in action have been held to be such property.[57]

d. Excess insurance—real party in interest? In *American Fire and Cas. Co. v. Roberts*,[58] a bus company carried insurance up to a $10,000 limit with Company *A* and excess insurance of $100,000 with Company *B*. After an accident, a claimant sued the bus company, and recovered a judgment for $25,000. The judgment was compromised to $17,500. The excess insurer paid the difference of $7,500 and then persuaded the insured bus company to sue the primary insurer, Company *A*, for bad faith in conducting litigation and negotiations. It was held that the insured was not the real party in interest and the action properly belonged to Company *B*.[59]

e. The conflicting interests problem as it bears directly on the attorney. Since the company attorney is hired and paid by the insurance company, it is arguable that his representation of the insured is in name only. The insurer may deem it advisable to refuse to accept a settlement within policy limits, while at the same time it is to the best interests of the insured to avoid an exposure to a judgment over policy limits. The attorney, therefore, finds himself in the embarrassing position of representing conflicting interests. If the insured retains a personal attorney to represent him in the trial, the conflict still exists, but it is now a conflict between attorneys. The insured's personal attorney may contact the attorney for the plaintiff as to his settlement demand. If the plaintiff offers to settle within policy limits, the insured's personal attorney may then make a demand upon the attorney for the insurer that he settle. A direct conflict of interests exists and the personal attorney of the insured, acting in the best interests of his client, must do all that he can, even though he is co-counsel on the case, to protect his client's interests.

If the insurance company is sued by the insured for excess liability, the attorney may find himself in the position of being the key witness for the insurer, and at the same time, having to testify against his own client if he has advised the insurer that the case was dangerous and that he recommended a settlement.

In the Texas case of *Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Inc.*,[60] the Court indicated that there was a possibilty that the attorney himself may owe virtually the same duties to the insured as the insurer. He may be required to keep both the insurer and the insured advised of developments

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[56] Bradshaw v. American Advent Christian Home and Orphanage, 145 Fla. 270, 199 So. 329 (1941).

[57] Thomas P. Nichols & Son Co. v. National City Bank of Lynn, 313 Mass. 421, 48 N.E.2d 49 (1943); Bridgman & Co. v. McKissick, 15 Iowa 260 (1863).

[58] 186 F.2d 921 (6th Cir. 1951).

[59] See American Fidelity & Cas. Co. v. All American Bus Lines, 190 F.2d 234 (10th Cir. 1951), *cert denied*, 342 U.S. 851 (1951).

[60] 215 S.W.2d 904 (Tex. Civ. App. 1948).

in the case, of potential dangers and probable results, and keep both advised of all settlement negotiations.

Several questions are apparent: (1) What are the moral and ethical responsibilities of the defense attorney in seeing that the insured is kept fully aware of conflicting interests that may develop, and of the advisability of the insured's seeking separate counsel, even though this might conflict with the interests of the insurer? (2) What should he do to preserve the evidence that he has fully discharged his moral and ethical responsibilities to both parties? (3) What is the position of the defense attorney if the insured does not elect to retain separate counsel? (4) What is the obligation of the attorney for the insurer as to the views, suggestions and recommendations of the insured's personal counsel? (5) What, if any, are the obligations of the claimant's attorney? For example, is it morally and ethically proper for the plaintiff's attorney to force a high settlement within policy limits by placing his demand within policy limits and thereby creating a conflict between the insurer and the insured and forcing the insurer to pay or take the risk of excess liability? (6) Inasmuch as it may be to the best interest of the insured or the insured's personal attorney to obtain a settlement within policy limits, to what extent, if at all, can the plaintiff's attorney co-operate with the insured or insured's attorney in forcing a settlement?[61]

f. Are attorney fees assessable as a part of the damage? There are very few cases on this question. In *Employers Cas. Co. v. Hicks Rubber Co.*,[62] the Texas Court allowed the insured an additional recovery of $750 for attorney fees.[63] It is to be noted that in a subsequent case the Texas Court changed its ruling and did not allow attorney fees as an element of damages. [64] This latter position has been adopted in at least three other cases.[65]

g. Law or fact? The courts have usually held that the question of the insurer's bad faith or negligence is a question of fact for jury determination.[66] There are obvious inequities and difficulties involved in the presentation of the question, many of them growing out of the contention that the jury is incompetent to decide such

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[61] For an excellent report on a panel discussion of the same problems, see, *"Where Does a Defense Attorney's Responsibility Lie?"*, 4 FEDERATION OF INSURANCE COUNSEL QUARTERLY 2 (1954).

[62] 160 S.W.2d 96 (Tex. Civ. App. 1942).

[63] Attorneys fees were also allowed recoverable as damages in Maryland Cas. Co. v. Elmira Coal Co., 69 F.2d 616 (8th Cir. 1934).

[64] Traders & General Insurance Co. v. Hicks Rubber Co., 140 Tex. 586, 169 S.W.2d 142 (1943).

[65] Christian v. Preferred Acc. Ins. Co., 89 F. Supp. 888 (N.D.Cal. 1950); Zumwalt v. Utilities Ins. Co., 360 Mo. 362, 228 S.W.2d 750 (1950); McCabe v. Employer's Liab. Assurance Corp., 212 N.C. 118, 192 S.E. 687 (1937).

[66] See 3 VAND L. REV. 329 (1950); Hazelrigg v. American Fidelity & Cas. Co., 241 F.2d 871 (10th Cir. 1957); Southern Fire & Cas. Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (1952).

questions.[67] However, it has been held that the fact question of negligence or bad faith is not too technical for the jury.[68]

h. Burden of proof. The cases are quite uniform in holding that the burden of proof is upon the insured to prove negligence or bad faith, and not upon the insurer to prove lack of it.[69]*

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[67] See, for example, the comment by Appleman in, *"Duty of Liability Insurer to Compromise Litigation,"* 26 KY. L. J. 100. Other writers have deplored the fact that the acts of the insurer will almost invariably be measured by hindsight.

[68] Waters v. American Cas. Co., 261 Ala. 252, 73 So.2d 524 (1953) (Judgment for insurer was reversed on grounds that the admission of testimony of two lawyers, as defendant's witnesses, amounted to testimony upon the ultimate issue and invaded the province of the jury. However, the Court did concede that proper expert estimony would be admissible.); Dumas v. Hartford Acc. & Indemnity Co., 94 N.H. 484, 56 A.2d 57 (1947) (The contention was made that cases of this nature were like malpractice cases and should not be tried without expert legal testimony. It was held, however, that the jury can understand with the aid of argument of counsel and appropriate instructions from the court.); Douglas v. United States Fidelity & Guaranty Co., 81 N.H. 371, 127 Atl. 708 (1924) (The contention was advanced that the issue of negligence in refusing a compromise offer was one that could not be fairly and intelligently passed on by a jury but the Court concluded that with some exceptions the right to a trial by jury was absolute.)

[69] See, for example, Ohio Cas. Ins. Co. v. Gordon, 95 F.2d 605 (10th Cir. 1938).

*For a recent development see the Editorial Notes on page 48 of this Review.