The American Law Institute and Good Faith Settlement Duties of Liability Carriers: The Scope of a Duty to Initiate Settlement Negotiations, What the Ali Restatement of the Law of Liability Insurance Has to Say about It, and the ALI Reporters' Notes

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I. The at Least Equal Consideration Standard

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

> A liability insurer must give at least equal consideration to the insured's interests as to its own in determining whether and how to settle the underlying claim against its insureds.[1]

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

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

1. 1 Dennis J. Wall "Litigation and Prevention of Insurer Bad Faith" § 3:1, 2015 Supp. p. 12 (3d ed. Thomson Reuters West).

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

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

The observation is offered in the Reporters' Note that "[t]here is a split of authority on the question of whether the duty to settle includes a requirement that the insurer affirmatively explore settlement negotiations should the claimant or claimants not come forward with a settlement offer."[4]

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

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

As a result of the prevailing one-step "equal considerations" measure of extracontractual liability for breach of a liability carrier's settlement duties, liability insurers are uniformly held to be under a duty to make reasonable settlement offers in response to the settlement demands of third parties.[5] In basic and simple terms, it is universally held in the Courts of the United States that when the injured or damaged claimant makes a settlement demand, the liability carrier must give at least equal consideration to the interests of its insured in settling the third party's claim as it gives to its own interests in not settling the third party's claim.

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

One of the most common claim situations containing a conflict of settlement interests between a carrier and its insured, occurs in the presence of the insured's probable liability and the claimant's "great" damages meaning that the claimant's likely damages will be greater than the policy limits. When these things occur together—"liability is probable and damages are great"—some Courts impose a legal duty on the liability insurance carrier to initiate settlement negotiations with the claimant even if the claimant has not made a settlement demand. Some Courts require a settlement demand within policy limits before any liability carrier will be required to act in good faith concerning settlement.

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

II. Initiate Settlement

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

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

> There is a split of authority on the question of

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

5. *See, e.g.*, *Continental Cas. Co. v. United States Fid. & Guar. Co.,* 516 F. Supp. 384, 390 & n.7 (N.D. Cal. 1981) (applying California law); *Vencill v. Continental Cas. Co*., 433 F. Supp. 1371, 1374 & n.5, 1375 & nn.6 & 7 (S.D.W. Va. 1977) (applying West Virginia law); *Zumwalt v. Utilities Ins. Co*., 360 Mo. 362, 228 S.W.2d 750, 752, 754 (1950).

> whether the duty to settle includes a requirement that the insurer affirmatively explore settlement negotiations should the claimant or claimants not come forward with a settlement offer.[6]

Two authorities are cited for this reflection in Reporters' Note e, one identified by a parenthetical as "discussing the split of authority," and the other noted for its "suggestion" that the duty to initiate settlement negotiations duty is a minority rule:

> In most jurisdictions, the insurer cannot be liable for breaching the duty unless a settlement offer within policy limits is made by the plaintiff. Without a settlement offer, it is not possible for the insurer to have breached its duty.[7]

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

The author of this Article examined every case found in which a Court addressed the issue of whether a liability insurance carrier has a legal duty to initiate settlement negotiations when the claimant did not make a settlement demand.[8] My investigation used the search functions made available by WestlawNext, and included an update of every case on point which is already listed in Section 3:16 and in other Sections of my Book, "Litigation and Prevention of Insurer Bad Faith" (Third Edition, in Two Volumes, published by Thomson Reuters West; 2016 Supplements in process).[9]

III. It All Comes Back to the at Least Equal Consideration Standard

It all comes back to the "at least equal consideration" standard. The overwhelming majority of Courts measure liability carriers' exposure to extracontractual liability or liability beyond their policy limits on account of their settlement conduct, by looking at whether the liability carriers gave equal consideration (or "at least equal consideration") to the interests of their insureds as they give to consideration of their own interests in the course of negotiating the settlement of claims against the insureds.[10]

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

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

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

8. The author gratefully acknowledges the assistance of John K. DiMugno, Esquire in bringing a decision of the Federal Fifth Circuit Court of Appeals to the author's attention during the writing of this Article, which, having been decided by the Fifth Circuit, might well not have received so much as a glance otherwise: *Hemphill v. State Farm Mut. Auto. Ins. Co*., 805 F.3d 535, 542 (5th Cir. 2015), predicting Mississippi law as discussed below.

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

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

ation" governs. This is shown by how the Courts treat questions of extracontractual, bad faith liability such as by rejecting the imposition of liability where the liability carrier reasonably awaited receipt of the claimant's medical records which it reasonably requested to evaluate the likely damages,[11] or by rejecting a liability carrier's assertion that calling a wrong number, writing numerous letters to different addresses, and leaving a few voicemails without ever mentioning the carrier's desire to settle the injury claim, meant that settlement negotiations were "initiated" in a case.[12]

In short, even the Courts which follow the majority view and hold that there is a duty to initiate settlement negotiations, treat the way in which a liability insurer might fulfill that duty in a particular case as only one factor in the determination of insurer bad faith in settlement.[13] In making this determination on the basis of all the facts and circumstances presented by particular cases, the Courts follow a flexible approach which allows for a balance of the liability carrier's time to investigate and evaluate the claim against its insured, with the duty to initiate settlement negotiations once the evaluation is made that the insured's liability is probable and the claimant's likely damages are greater than the carrier's liability policy limit.[14]

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

The results of the decided cases also contradict two statements made in one of the above-quoted authorities in the ALI Reporters' Note, to the effect that (1) "[i]n most jurisdictions, the insurer cannot be liable" unless there is a settlement demand within policy limits, and (2) "[w]ithout a settlement offer, it is not possible for the insurer to have breached its duty." The results of the decided cases are actually the opposite of both of these further conclusions, as will be seen below. As a result, the decided cases support a different rule than that stated in Section 24 of the Restatement of the Law of Liability Insurance.

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

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

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

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

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

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

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

Courts can be broken out into three camps of cases in which the Courts have faced the question of declaring whether or not there is a legal duty in their jurisdiction to initiate settlement negotiations even in the absence of a settlement demand from the claimant. For purposes of this Article, the three camps may be labelled "pro," "not in the case at bar," and "con."

1. *Pro*

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

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

1. Arizona;[15]

2. Florida;[16]

3. Georgia;[17]

4. Kansas;[18]

5. Michigan;[19]

6. New Jersey;[20]

7. New Mexico;[21]

8. Oklahoma;[22]

9. Oregon;[23] and

10. The State of Washington.[24]

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15. Although the legal duty has been recognized in Arizona, it is not absolute but instead compliance with this 'duty' is one factor among many to be considered on the question of whether the carrier conducted settlement negotiations in bad faith. *Safeway Ins. Co. v. Botma,* No. CIV00-553-PHX RCB, 2003 WL 24100783, at *11-*12, *18 (D. Ariz. March 7, 2003), *aff'd,* 129 F. Appx. 355 (9th Cir. 2005); *Fulton v. Woodford,* 26 Ariz. App. 17, 22, 545 P.2d 979, 948 (Ariz. Ct. App. Div. 1, Dep't B, 1976).

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

17. *Delancy v. St. Paul Fire & Marine Ins. Co.,* 947 F.2d 1536, 1550-51 (11th Cir. 1991) (noting that "Georgia law does not clearly require the insured to show that the insurer refused an offer within the policy limits to establish liability for tortious failure to settle, but it does not foreclose the argument"; assuming without necessarily deciding that the insured could state such a claim "if the insured alleges facts showing that the insurer knew, or reasonably should have known, that the case could have been settled within the policy limits," but affirming summary judgment in favor of the liability carrier on the record of this case).

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

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

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

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

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

Cases in which the Courts of a given jurisdiction have recognized that at least there might be a legal duty on the liability carrier to initiate settlement negotiations without a settlement demand, particularly where the insured's liability is probable and the claimant's likely damages are great, include the following six States, again listed alphabetically:

1. California, which is often listed in the "con" column on this issue because of the decision in *Reid v. Mercury Insurance Co.*[25] However, the Reid Court was careful to point out that a demand is not required in every case, just that in the case at bar the evidence did not require the liability carrier to make a settlement offer without a demand:

> *And a conflict may also arise, without a formal settlement offer*, when a claimant clearly conveys to the insurer an interest in discussing settlement *but the insurer ignores the opportunity to explore settlement possibilities to the insured's detriment*, or when an insurer has an arbitrary rule or engages in other conduct that prevents settlement opportunities from arising. [Citation omitted.] *But nothing like that happened here.*[26]

2. Idaho;[27]

3. Illinois, often cited as a "con" jurisdiction on this issue, but recognizing an exception that would require liability insurers to initiate settlement negotiations even without a settlement demand where the insured's liability is probable and the claimant's likely damages are great, an exception which has long been recognized in Illinois law including in a case cited for the contrary position in the authority relied on by the ALI Reporters' Note e;[28]

4. Ohio;[29]

5. Pennsylvania;[30] and

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

23. *Goddard v. Farmers Ins. Co.*, 173 Or. App 633, 638, 22 P.3d 1224, 1227 (Or. Ct. App. 2001), *review denied*, 332 Or. 631, 34 P.3d 1178 (2001).

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

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

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

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

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

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

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

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

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

6.Texas.[31] Texas is a State in which the Supreme Court seems to have spent a great deal of time wrestling with this question. Texas is also listed in this Article as one of three "con" jurisdictions due to a holding in another case, discussed below, which is relied on by one of the ALI's Reporters' Note e authorities, for the proposition that this is the rule "[i]n most jurisdictions," which as can be seen from the decided cases, it is not.

3. Con

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

1. Perhaps Alaska, in a case in which the Alaska Supreme Court said that the presence of "a policy limits demand" in a case where "there is a substantial likelihood of an excess verdict" against the policyholder "places a duty on an insurer to *tender* maximum policy limits" and also that it requires the insurer to *settle* the claim, statements which together probably go beyond anything any other Court has ever said about the consequences of a settlement demand in such a case;[32]

2. Perhaps Mississippi;[33] and

3. Texas.[34]

Submitting the lineup.

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

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

Clearly, the majority view is that a settlement demand is not required before a liability carrier should initiate settlement negotiations to protect its insureds, particularly where the insured's liability is probable and the claimant's likely damages are great. The effect of the evidence on the ALI Restatement and

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

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

33. In *Hemphill v. State Farm Mut. Auto. Ins. Co*., 805 F.3d 535, 542 (5th Cir. 2015), the Federal Fifth Circuit Court of Appeals ventured a guess that the Mississippi Supreme Court would not hold that the defendant liability insurer in the case at bar, should have made a settlement offer earlier than it actually did. The case is distinguishable on various grounds. For one thing, the liability carrier in the *Hemphill* case actually made a settlement offer; the dispute was about whether it should have made the offer sooner than it did. For a second thing, the Fifth Circuit's ability to forecast how the Mississippi Supreme Court will rule on any given issue is demonstrably open to question if not downright faulty. See John K. DiMugno, Steven Plitt & Dennis J. Wall, CATASTROPHE CLAIMS / insurance Coverage for Natural and Man-Made Disasters § 7:5, "ACCC or 'lead-in language'" (Thomson Reuters West November 2015), where the Fifth Circuit's prediction of how the Mississippi Supreme Court would bar all insurance coverage under Mississippi law based on the anti-concurrent cause clause exclusion, and the Supreme Court's rejection of that prediction by name, are well-documented.

34. As was noted earlier, Texas addressed this issue seemingly head-on in its 5-2-2 decision *in Rocor Int'l, Inc. v. National U. Fire Ins. Co.*, 77 S.W.3d 253, 261-62 (Tex. 2002).

Reporters' Note is discussed below, but the evidence of the decided cases clearly mandates that, in order to be an accurate restatement of applicable law, Restatement Section 24 needs to be changed from what has been written there.

B. The role of Jury Instructions in reconciling the cases

The Courts have noted that in most cases, claimants make settlement demands and so in most cases there is simply no issue surrounding the absence of a demand to settle.[35] The experience of the Courts in reported cases is the same as the experience of lawyers and litigants trying bad faith cases which may or may not ever be reported: Claimants make settlement demands in most cases.

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

> 404.4 INSURER'S BAD FAITH (FAILURE TO SETTLE)
>
> Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward [its policyholder] [its insured] [an excess carrier] and with due regard for [his] [her] [its] [their] interests.[36]

The fact that claimants make settlement demands in most cases is not to be confused, however,[37] with a manufactured legal requirement that a finding of insurer bad faith in settlement *requires* a settlement demand within policy limits. The overall standard once again governs the outcome: In basic and simple terms, did the liability carrier give at least equal consideration to the interests of its insured as it gave to its own interests when the carrier evaluated the case and attempted to settle it, or evaluated the case and did not attempt to settle it?

An additional way to manage the lineup of these Courts and decisions in cases in which no settlement demand has been made, may be to request a special jury instruction to be added to the standard instruction. In jurisdictions which recognize a legal duty to initiate settlement negotiations, the parties can request a special jury instruction on the issue in a bad faith case, a request more likely to come from the plaintiff than from the insurance carrier. Such a special instruction might be based on the language of what is perhaps the leading case to recognize a duty to initiate settlement negotiations, *Powell v. Prudential Property & Casualty Insurance Co.*[38]

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

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

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

36. Florida Standard Jury Instruction 404.4 (Fla. Bar 2d ed. published December, 2013; last accessed online on Thursday, December 17, 2015).

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

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

REQUESTED PROPOSED SPECIAL JURY INSTRUCTION BASED ON THE FACTS OF THIS CASE[39]

> The lack of a formal offer to settle does not preclude a finding of bad faith. Bad faith may be inferred from a delay in settlement negotiations which is willful and without reasonable cause. Where liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations.

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

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

> Bad faith liability for failure to settle does not attach if an insurer fails to initiate settlement discussions, or offer its policy limits, as soon as an insured's liability in excess of policy limits has become clear.[40]

C. Another opportunity to reconcile the cases: The Verdict Form[41]

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

> 1.Do you find from a preponderance of the evidence that
>
> [the defendant liability insurance company] acted in bad faith regarding settlement of the [underlying case] [case against its insured(s)]:
>
> YES _____
>
> NO _____
>
> If your answer to question 1 is "yes," go on to question 2. If your answer to question 1 is "no," you should not proceed further except to sign and date this verdict form and return it to the courtroom.

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

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

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

39. So-called "special jury instructions" are written in this Article to illustrate and highlight points made in the text of this Article. They are not offered nor should they be taken as something to offer to a Court for the Court's consideration in any particular case.

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

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

[the insured]?

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

YES _____

NO _____

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

IV. Whether the Defendant Insurance Company's Settlement Conduct Was a Legal or Proximate Cause of the Plaintiff's Injuries, I.e., Did the Liability Carrier Have a Reasonable Opportunity to Settle the Underlying Case Within the Policy Limits?

In some cases, Courts have held that the focus of an insurance bad faith case involving settlement issues is on the liability insurance company's "observable" conduct.[42] The focus is objective in such cases. Any issue of whether the liability carrier had a reasonable opportunity to settle the case against its insured within its policy limits is an affirmative defense in such jurisdictions, where evidence on the issue is admissible at all.[43]

In other jurisdictions a reasonable opportunity to settle within policy limits is an element of the plaintiff's bad faith case when there is no settlement demand within policy limits.[44] In jurisdictions which require proof of a reasonable opportunity to settle within policy limits but there is no settlement demand, the absence of evidence that there was a reasonable opportunity to settle within policy limits is fatal to a claim of insurer bad faith in settlement.[45]

To sum it all up, the great majority of jurisdictions

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

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

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

45. *E.g., American Physicians Assur. Corp. v. Schmidt,* 187 S.W.3d 313, 317 (Ky. 2006); *see, e.g., Delancy v. St. Paul Fire & Marine Ins. Co.,* 947 F.2d 1536, 1544-45 (11th Cir. 1991) (case involved Georgia substantive law).

The *American Physicians* decision of the Kentucky Supreme Court is relied on in the "Understanding Insurance Law" treatise relied on in the ALI Restatement's Reporters' Note e. There, the treatise is quoted as standing instead for the legal proposition that the liability insurer cannot be liable for breach of settlement duties without a settlement demand from the claimant.

In *Delancy*, the Eleventh Circuit "assumed" that Georgia law would allow a claim for a liability insurer's bad faith in settlement even where there was no settlement demand, but held that the absence of proof of a reasonable opportunity to settle was fatal to the claim of the plaintiffs at bar:

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

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

recognize that a liability carrier has a duty to initiate settlement negotiations even when the claimant does not make a settlement demand, where the insured's liability is probable and the claimant's likely recoverable damages are greater than the liability policy limits. Whether and how the liability insurer fulfills that duty in any given case will depend on all the facts, like the question of bad faith itself. In many cases, the facts to be considered can include the analogous but separate issue of whether the liability carrier had a reasonable opportunity to settle within policy limits.[46]

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

V. The Closest Thing to a Conclusion Here: Change Section 24 of the Restatement and Remove Reporters' Note e.

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

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

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

> (5) Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances, it could[47] and should have done so, had it acted fairly and honestly toward [its policyholder] [its insured] [an excess carrier] and with at least equal consideration[48] for [his] [her] [its] [their] interests.
>
> (6) The lack of a formal settlement demand is only one factor to be considered in determining bad faith. Where liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations. Whether and how a liability insurer initiates settlement negotiations, if at all, depends on the facts of each particular case.

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

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

48. 8 Expressly injecting the "at least equal consideration" wording into the "without policy limits" notion already expressed in Restatement Section 24 strengthens the section's position as a Restatement of the law, and not as an advocate for what the law has never been, but what it might be in the future.

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