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DUTY OF A LIABILITY INSURER TO SETTLE WITHIN POLICY LIMITS—THE PROBLEM OF EXCESS LIABILITY

MARTIN E. SEGAL*

I. INTRODUCTION

The field of liability insurance has transcended its incubatory stages to the extent that it has presently grown to an industry of gargantuan proportions.¹ This fact is readily recognized by the layman who, no doubt, is acquainted with the area in a cursory manner. However, the intricate, indeed more immediate ramifications of liability insurance, embodied in a typical factual situation, frequently go without notice or comprehension.

Suppose a liability insurance policy is issued with a bodily injury liability limit of \$10,000. An injured third party alleges that the insured's negligence caused injuries for which he claims \$25,000, but prior to trial he offers to compromise his claim for \$9,950. The insurance company refuses the settlement offer and the case of injured claimant against insured is tried, resulting in a verdict of \$23,000 for the third party.² The amount of the excess judgment is \$13,000.

During the pendency of the action, a judgment in favor of the injured claimant exceeding policy limits could conceivably be rendered, as above, for which the insured defendant would be personally liable. The insurer must maintain that standard of conduct which the law requires³ in handling compromise negotiations or be similarly subjected to liability for an excess judgment. Settlement of the injured plaintiff's claim within policy limits would be somewhat advantageous to both parties in removing the financial threat of excess liability. However, upon delving into the compromise rationale of insured-insurer, any unity of purpose terminates and conflicting interests spawn.

Since the usual offer of settlement is made at or near policy limits, the insurance company prefers that the case proceed to trial, recognizing

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1. When the term liability insurance is used, the reference is to the entire area of both a public and a private nature. A detailed statistical analysis is beyond the scope of the paper; however, the analogy may be drawn between the rise in mechanization and the growth of insurance against risk of loss. See U.S. Dep't. of Commerce, Bureau of the Census, *HISTORICAL STATISTICS OF THE UNITED STATES* (1960).

2. *American Fire & Cas. Co. v. Davis*, 146 So.2d 615 (Fla. 1st Dist. 1962).

3. It will be evident that the ostensibly definitive classifications of standards as either negligence or good faith, or a combination of the two is highly illusory. Overlapping gradations and court disagreement as to what degrees of consideration for the insured's interests each standard should engender provide great difficulties in the treatment of a liability insurance problem.

the possibility that the claim of the injured third-party could be defeated in its entirety or, at worst, rendition of a verdict for the plaintiff would subject the insurer to the maximum of the policy limitations.⁴ On the other hand, the insured unequivocally desires settlement regardless of the tenuousness of the grounds of liability or the questionable nature of the damages claimed, since the unpleasant prospect of an excess judgment looms everpresent.

This paper will treat some of the more difficult and thought-provoking questions engendered by the common liability insurance factual pattern, with a view toward how they have been answered in the past and what resolution should be made of them in the future. Indeed, upon filing and service of an initial complaint seeking damages in excess of the limits of the policy of an insured, we encounter a situation requiring interrogatory analysis.

Is there a duty owed by the defendant's liability insurer to settle or compromise the claim? If so, what standard should be used by the courts in defining this duty and what factors are indicative thereof? What are the consequences resulting from a breach of duty by the insurer? What is the Florida position with reference to the general prevalence of liability insurance problems and the impact of resultant state precedent? Is there a panacea for the ills engendered by the doctrine of excess liability?

II. DUTY TO SETTLE

Even though the typical liability insurance policy ordinarily reserves to the insurer the power to accept or reject a compromise offer, vesting it with complete control of the right of settlement,⁵ it concomitantly assumes a permissive tenor regarding the insurer's duty to make such a settlement.⁶ Thus, it has been held that the liability insurer has no duty

4. This "possibility" of a minimal judgment and the "probability" of one that is greatly in excess of policy limits serve to highlight the conflict of interest inherent in the relationship of the parties. It has been suggested that, in refusing a settlement offer, the insurer is gambling with the insured's money in a situation in which the comparative monetary risks highly favor the insurer. *Springer v. Citizen's Cas. Co.*, 246 F.2d 123 (5th Cir. 1957); *Radcliffe v. Franklin Nat. Ins. Co.*, 208 Ore. 1, 298 P.2d 1002 (1956); See note 49 *infra*. Conversely, however, it could conceivably be argued that this risk factor is specious due to the possible inflation of the prayer for damages by the injured claimant beyond reasonable limits.

5. The typical liability insurance policy contains a provision essentially similar to that in *Automobile Mut. Indem. Co. v. Shaw*, 134 Fla. 815, 184 So. 852 (1938):

The Company shall have the right to settle any claim or suit at its own cost, and the Assured shall not . . . settle any such claim or suit, except at his own cost, without the written consent of the Company.

6. The dichotomy between the insurer's duty to defend and duty to settle, being absolute in the former and permissive in the latter, results in the court's disagreement as to the imposition of any compromise obligation on the insurer. In *American Fire & Cas. Co. v. Davis*, 146 So.2d 615 (Fla. 1st Dist. 1962), a pertinent provision of the insurance policy before the court stated:

to accept an offer of settlement, and may not be subjected to the imposition of liability for a subsequent judgment in excess of policy limitations.⁷ Of paramount importance to the courts advocating this view, in the event of a conflict of interest between insured and insurer, was the lack of any express assumption of a contractual obligation to settle, the policy limits being recognized as an impenetrable barrier beyond which no action could be maintained. By refusing to settle, the insurer is merely doing what it has a legal right to do under the terms of the policy.⁸

Coexistent with this non-compulsory viewpoint of settlement requirements is a corollary to the effect that the insurer is not required to consider the insured's interests when making a decision regarding settlement.⁹ Therefore, it is argued, since the insurance company controls the defense and settlement of the action, the protective purposes of these provisions would be perverted were it required to consult the insured's interests to the prejudice of its own.¹⁰ However, is not this

[The] Company *shall defend* any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company *may* make such investigation and settlement . . . as it deems expedient. (Emphasis added.)

7. *Rumford Falls Paper Co. v. Fidelity & Cas. Co.*, 92 Me. 574, 43 Atl. 503 (1899), wherein the court treated clear and unambiguous policy language limiting the insurer's liability as an unalterable barrier. See also *St. Joseph Transfer & Storage Co. v. Employer's Indem. Corp.*, 224 Mo. App. 221, 23 S.W.2d 215 (1930) (in conflict of interests, no duty owed to insured except that expressly contracted for); *Royal Indem. Ins. Co. v. McDonald*, 109 N.J.L. 308, 162 Atl. 620 (1931) (insurer didn't agree to settle and thus wasn't obligated to do so); *Countryman v. Breen*, 241 App. Div. 392, 271 N.Y. Supp. 744 (1934) (insurer has absolute authority over settlement and insured can not compel or prevent the effectuation thereof); *Auerbach v. Maryland Cas. Co.*, 236 N.Y. 247, 140 N.E. 577 (1923) (in refusing to settle, insurer did nothing except that which it had legal right to do under policy terms); *Schmidt v. Travelers Ins. Co.*, 244 Pa. 286, 90 Atl. 653 (1914) (insurer is under no obligation to pay in advance of trial, the settlement decision being clearly committed to it under policy terms).

8. Since, by accepting the liability insurance policy, the insured both acquiesces to the fact that he has surrendered absolute and complete control of claims thereunder to the insurer, and recognizes the lack of any express provision obligating the insurer to pay any amount prior to rendition of a verdict, there can be no duty imposed on the insurer to compromise the claim and no action instituted by the insured for the insurer's negligent failure to settle. See cases cited note 7 *supra*.

9. In *Long v. Union Indem. Co.*, 277 Mass. 428, 178 N.E. 737 (1931), the court viewed the liability insurer, who possessed the privilege to handle or settle claims brought against the insured in any manner it wished, as having an absolute right to settle in the manner which appeared to be in its best interests. By the same token, the insurer was not required to consult the interests of the insured to the prejudice of its own, when there was a conflict between the two. *Accord*, *Blue Bird Taxi Corp. v. American Fid. & Cas. Co.*, 26 F. Supp. 808 (E.D.S.C. 1939); *Neuberger v. Preferred Acc. Ins. Co.*, 18 Ala. App. 72, 89 So. 90, *cert. denied*, 206 Ala. 700, 89 So. 924 (1921); *New Orleans & C. Ry. v. Maryland Cas. Co.*, 114 La. 153, 38 So. 89 (1905); *Abrams v. Factory Mut. Liab. Ins. Co.*, 298 Mass. 141, 10 N.E.2d 82 (1937); *Kallas v. Lincoln Mut. Cas. Co.*, 309 Mich. 626, 16 N.W.2d 99 (1944); *Farmers Gin Co. v. St. Paul Mercury Indem. Co.*, 186 Miss. 747, 191 So. 415 (1939); *Auerbach v. Maryland Cas. Co.*, 236 N.Y. 247, 140 N.E. 577 (1923); *Schmidt v. Travelers Ins. Co.*, 244 Pa. 286, 90 Atl. 653 (1914).

10. Since the insured's interests normally dictate an expeditious settlement rather than

position equally untenable from the viewpoint of the insured, whose interest will be sacrificed to the mere whim or caprice of this insurer? Although prevalent in the earlier decisions, this view of non-duty and absolute discretion as to settlement is not favored today.

It occasionally has been suggested that since the insurer has exclusive control over the right of settlement and is vested with power to exercise that right in any manner it wishes, it is impliedly obligated to accept any settlement offer within policy limits at the risk of being held absolutely liable for any excess judgment.¹¹ Under this approach, the insurer must sacrifice its interests in favor of those of the insured whenever a conflict between the two arises.¹² Since it is to the insured's best interests that the case be settled, thus alleviating the risk of an excess judgment, the insurer is placed in the precarious position of absolute liability following refusal of a settlement offer. Obviously, this approach could encourage collusion between the insured and the injured claimant through the commencement of fanciful actions for damages, accompanied by settlement offers framed in the light of the insurer's dilemma.¹³ An inevitable result would be self-protective action by liability insurers, mainly in the form of increased premiums and reduced policy coverage.

Fortunately, these extreme views of absolute and non-duty have gained little or no acceptance from the courts, and merely constitute the outer limits or boundaries of conduct to which the law demands the liability insurer acquiesce.

The doctrine which occupies the void between these two poles, accorded universal acceptance, requires the insurer to give some consideration to the insured's interests¹⁴ and imposes liability for damages

the risk of liability for a judgment greatly in excess of policy limits, policy provisions would, in effect, be rewritten to impose an absolute duty of settlement rather than the present passivity of wording inherent in the typical policy.

11. There are no decisions expressly based upon absolute duty to settle. The usual situation in which the problem arises is that in which the argument is rejected in favor of either non-duty or partial duty, depending upon the factual circumstances. See *Noshey v. American Auto Ins. Co.*, 68 F.2d 808 (6th Cir. 1934) (rejecting argument that failure to accept settlement offer breached implied contract to so accept); *Kingan & Co. v. Maryland Cas. Co.*, 65 Ind. App. 301, 115 N.E. 348 (1917) (in absence of fraud, liability could not be predicated upon failure to settle); *Rumford Falls Paper Co. v. Fidelity & Cas. Co.*, 92 Me. 574, 43 Atl. 503 (1899) (rejecting argument that policy authorization of complete control over settlement required liability for an excess judgment); *Georgia Cas. Co. v. Cotton Mills Products Co.*, 159 Miss. 396, 132 So. 73 (1931) (rejecting theory that duty of insurance company to settle was absolute).

12. *Zumwalt v. Utilities Ins. Co.*, 360 Mo. 362, 228 S.W.2d 750 (1950); *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933).

13. See *Tyger River Pine Co. v. Maryland Cas. Co.*, *supra* note 12.

14. See note 16 *infra*. In Annot., 40 A.L.R.2d 168, 170-71 (1955), the compiler, after noting the polarity of viewpoints as to duty, states:

[T]he vast majority of the courts have held, and it is probably the accepted rule in all jurisdictions at this time, that the insurer is bound to give some consideration to the insured's interests . . . , and the pronounced split in the decisions involves the question whether the insurer's obligation is only to act in "good faith" to the

resulting from wrongful failure to settle within policy limits.¹⁵ Thus, the liability insurer who assumes control of the right of settlement owes a "duty" to maintain a certain standard of conduct toward the insured, the dereliction of which may result in liability exceeding policy provisions.¹⁶ It further is agreed that this duty, because of the relationship of the parties rather than an express provision in the terms of the liability insurance contract, should be "treated as one sounding in tort, rather than contract."¹⁷ However, there is a considerable split in the decisions as to the scope or extent of this duty and the degree of consideration the interests of the insured demand.¹⁸ Indeed, the courts differ widely in dichotomization of the standard used in defining this duty and its application to varying factual patterns.

Since any liability is predicated upon falling below a standard of conduct required by law where there is a correlative duty to maintain it, we must delineate the broad contours of the insurer's duty through the construction of an appropriate standard of care.

insured in considering such an offer, or whether it is required to exercise "due care" and is liable for a negligent rejection of the compromise.

15. The determination of damages is measured by the excess of the judgment recovered by the injured claimant over the original policy limitations. What is "wrongful" corresponds directly to the jurisdictional adoption of a certain standard. What may be odious to the reasonable man, imposing liability in a negligence state, may conceivably be satisfactory when viewed in the context of the actor's mental state, thus circumventing liability in a good faith state. However, in practical rather than definitional effect, there is little real difference between the two since they are unwittingly used by the courts interchangeably. See note 38 *infra*.

16. In *Hilker v. Western Automobile Ins. Co.*, 204 Wis. 12, 235 N.W. 413 (1931), the court had to determine whether an insured had a cause of action against his insurer for the latter's wrongful refusal to settle a claim against the insured. Concomitantly, it attempted to ascertain the character and limitations of such a cause of action, stating at 414:

In express terms the contract imposes no duty at all a breach of which makes the insurer liable to the insured for a failure to settle or compromise a claim. . . . [The] duty is implied as a correlative duty growing out of certain rights and privileges which the contract confers upon the insurer. . . . So long as the recovery does not exceed the limits of the insurance, the question of whether the claim be compromised or settled, or the manner in which it shall be defended, is a matter of no concern to the insured. However, where an injury occurs for which a recovery may be had in a sum exceeding the amount of the insurance, the interest of the insured becomes one of concern to him. At this point a *duty* on the part of the insurer to the insured *arises*. It arises because the insured has bartered to the insurance company all of the rights possessed by him to enable him to discover the extent of the injury and to protect himself as best he can from the consequences of the injury.

17. "We are of the opinion that this relationship imposes upon the insurer the duty, not under the terms of the contract strictly speaking, but because of and flowing from it. . . ." *American Mut. Liab. Ins. Co. v. Cooper*, 61 F.2d 446, 448 (5th Cir. 1932). See also *American Fid. & Cas. Co. v. Gault*, 196 F.2d 329 (5th Cir. 1952) (interpreting Mississippi law); *American Fid. & Cas. Co. v. All American Bus Lines, Inc.*, 190 F.2d 234 (10th Cir.), *cert. denied*, 342 U.S. 851 (1951) (interpreting Oklahoma law); *Norwood v. Travelers Ins. Co.*, 204 Minn. 595, 284 N.W. 785 (1939); *Zumwalt v. Utilities Ins. Co.*, 360 Mo. 362, 228 S.W.2d 760 (1950); *Southern Fire & Cas. Co. v. Norris*, 35 Tenn. App. 657, 250 S.W.2d 785 (1952); *Evans v. Continental Cas. Co.*, 40 Wash. 2d 614, 245 P.2d 470 (1952).

18. See notes 23-26 *infra* and accompanying text.

III. STANDARDS USED IN DEFINING THE DUTY

A. *Good Faith Test*

In determining whether an insurance company's failure to compromise a claim is a breach of duty to the insured, requiring a response for any judgment recovered against him in excess of the amount limited in the policy, the vast majority of jurisdictions are of the opinion that the insurer must act in "good faith."¹⁹

[The decision] must be honest and intelligent if it be a good faith conclusion. In order that it be honest and intelligent it must be based upon a knowledge of the facts and circumstances upon which liability is predicated, and upon a knowledge of the nature and extent of the injuries so far as they reasonably can be ascertained.

This requires the insurance company to make a diligent effort to ascertain the facts upon which an intelligent and good faith judgment may be predicated.²⁰

19. *Ala.*: Am. Mut. Liab. Ins. Co. v. Cooper, 61 F.2d 446 (5th Cir. 1932); Alabama Farm Bureau Mut. Cas. Ins. Co. v. Dalrymple, 116 So.2d 924 (1959). *Ariz.*: Farmers Ins. Exchange v. Henderson, 82 Ariz. 335, 313 P.2d 404 (1957). *Cal.*: Communale v. Traders & Gen. Ins. Co., 50 Cal. 2d 653, 328 P.2d 198 (1958); Davy v. Public Nat'l Ins. Co., 5 Cal. Rptr. 488, 181 Cal. App. 2d 387 (1960). *Colo.*: Hawkeye-Security Ins. Co. v. Indemnity Ins. Co., 260 F.2d 361 (10th Cir. 1958). *Conn.*: Hoyt v. Factory Mut. Liab. Ins. Co., 120 Conn. 156, 179 Atl. 842 (1935). *Del.*: Chittick v. State Farm Mut. Auto Ins. Co., 170 F. Supp. 276 (D. Del. 1958). *Fla.*: American Fid. & Cas. Co. v. Greyhound Corp., 232 F.2d 89 (1956); 258 F.2d 709 (5th Cir. 1958). *Ga.*: Hall v. Preferred Acc. Ins. Co., 204 F.2d 844 (5th Cir. 1953). *Ill.*: Ballard v. Citizen's Cas. Co., 196 F.2d 96 (7th Cir. 1952). *Ind.*: Kingan & Co. v. Maryland Cas. Co., 65 Ind. App. 301, 115 N.E. 348 (1917). *Iowa*: Henke v. Iowa Home Mut. Cas. Co., 250 Iowa 1123, 97 N.W.2d 168 (1959). *Kan.*: Anderson v. Southern Sur. Co., 107 Kan. 375, 191 Pac. 583 (1920). *Ky.*: Lemons v. State Auto Mut. Ins. Co., 171 F. Supp. 92 (E.D. Ky. 1959). *La.*: Davis v. Maryland Cas. Co., 16 La. App. 253, 133 So. 769 (1931). *Me.*: Rumford Falls Paper Co. v. Fidelity & Cas. Co., 92 Me. 574, 43 Atl. 503 (1899). *Md.*: Lee v. Nationwide Mut. Ins. Co., 184 F. Supp. 634 (D. Md. 1960); 286 F.2d 295 (4th Cir. 1961). *Mass.*: Abrams v. Factory Mut. Liab. Ins. Co., 298 Mass. 141, 10 N.E.2d 82 (1937). *Mich.*: City of Wakefield v. Globe Indem. Co., 246 Mich. 645, 225 N.W. 643 (1929). *Minn.*: Mendota Electric Co. v. New York Indem. Co., 169 Minn. 377, 211 N.W. 317 (1926). *Miss.*: Fidelity & Cas. Co. v. Gault, 196 F.2d 329 (5th Cir. 1952). *Mo.*: Wessing v. American Indem. Co., 127 F. Supp. 775 (W.D. Mo. 1955). *Neb.*: Kleinschmidt v. Farmers Mut. Hail Ins. Co., 101 F.2d 987 (8th Cir. 1939). *N.J.*: Radio Taxi Serv., Inc. v. Lincoln Mut. Ins. Co., 31 N.J. 299, 157 A.2d 319 (1960). *N.Y.*: Auerbach v. Maryland Cas. Co., 236 N.Y. 247, 140 N.E. 577 (1923). *N.C.*: Wynnewood Lumber Co. v. Traveler's Ins. Co., 173 N.C. 269, 91 S.E. 946 (1917). *N.D.*: Milbank Mut. Ins. Co. v. Schmidt, 304 F.2d 640 (8th Cir. 1962). *Ohio*: Hart v. Republic Mut. Ins. Co., 152 Ohio St. 185, 87 N.E.2d 347 (1950). *Okla.*: American Fid. & Cas. Co. v. G. A. Nichols Co., 173 F.2d 830 (10th Cir. 1949). *Pa.*: Schmidt Brewing Co. v. Traveler's Ins. Co., 244 Pa. 286, 90 Atl. 683 (1914). *S.C.*: Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346 (1933). *Tenn.*: Southern Fire & Cas. Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (1953). *Utah*: Paul v. Kirkendall, 6 Utah2d 256, 311 P.2d 376 (1957). *Vt.*: Johnson v. Hardware Mut. Cas. Co., 109 Vt. 481, 1 A.2d 817 (1939). *Wash.*: Burnham v. Commercial Cas. Ins. Co., 10 Wash. 2d 624, 117 P.2d 644 (1941). *Wis.*: Hilker v. Western Auto Ins. Co., 204 Wis. 1, 235 N.W. 413 (1931).

20. Hilker v. Western Automobile Ins. Co., 204 Wis. 12, —, 235 N.W. 413, 414 (1931). Some courts, however, advocate bad faith to be the "intentional" disregard of the finan-

Therefore, if the insurer be adjudged as having acted in good faith following the rejection of a settlement offer for an amount within policy limitations, it cannot be held for the amount of any excess judgment subsequently rendered, since it fulfilled the requisite standard of care.

By so limiting the exercise of the insurer's duty, these courts impose a subjective sanction²¹ based upon a critical analysis of the multifarious mental facets of the decision-making process. Rendition of a jury verdict therein is placed on tenuous grounds, however, since it is doubtful that the advocates themselves, let alone the jury, possess sufficient insight regarding the state of mind of the insurer at the time of his non-action. Thus, while we have a definite standard to utilize, there is much difficulty in determining the consistency of its component parts.

Much of the confusion results from the lack of formulation of an acceptable test, gauging what degree of consideration the interests of the insured should command in meeting the requirements of good faith. Some courts say, in the event of a conflict of interests between insured and insurer, the insured's interests must be given priority.²² Other courts adhere to the proposition that the insurer need not sacrifice its interests in favor of the insured.²³ Maintenance of a middleground is advocated by some, arguing that the insured's interests should be given consideration *equal* to that which the insurer accords itself.²⁴ Still others occupy the vacant areas between the trichotomy, requiring the insurance company to give *paramount* consideration to either its own interests²⁵ or those

cial interests of the insured in the hope of escaping full policy responsibility. *Johnson v. Hardware Mut. Cas. Co.*, *supra* note 19. Thus, even when there is some agreement reached as to the adoption of a standard, there is still great controversy as to its composition or consistency. In this context, see 19 *INS. L.J.* 192 (1952), wherein the division of authority among the courts following the "bad faith" rule is discussed.

21. The test is subjective in that the determinative criterion is the state of mind of the representatives of the insurance company at the time they elected not to settle. This fact is of no great import in securing and presenting the evidence, but may bear great weight in instructing the jury. See note 22 *infra*.

22. See note 12 *supra*. This, of course, compels the conclusion that the insurer is charged with strict liability for an excess judgment following refusal of a settlement offer within policy limits.

23. See note 9 *supra*. The insurer normally will force the insured to incur the hazard of excess liability, rather than abandon the hope of non-liability or fall prey to settlement of an unfounded claim.

24. *Ballard v. Citizen's Cas. Co.*, 196 F.2d 96 (7th Cir. 1952) (Illinois law); *American Fid. & Cas. Co. v. G. A. Nichols Co.*, 173 F.2d 830 (10th Cir. 1949); *Wilson v. Aetna Cas. & Surety Co.*, 145 Me. 370, 76 A.2d 111 (1950); *Dumas v. Hartford Acc. & Indem. Co.*, 94 N.H. 484, 56 A.2d 57 (1947); *Radcliffe v. Franklin Nat'l Ins. Co.*, 208 Ore. 1, 298 P.2d 1002 (1956); *Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544 (Tex. Civ. App. 1929). The concept of equal consideration appears more equitable than the other delineations due to the fact that the liability insurance relationship, which was the initiating cause of the conflict of interests, is not based upon a specification of one interest prevailing at the expense of another. For a consideration of the meaning of this variation, see 67 *HARV. L. REV.* 1136, 1146 (1954).

25. *Long v. Indemnity Co.*, 277 Mass. 428, 178 N.E. 737 (1931); *Hilker v. Western*

of the insured.²⁶ In addition, courts not expressly following a definite policy may reflect tacit preference by their treatment of the procedural aspects of applicable litigation.²⁷

B. *Negligence Rule*

A relatively small number of jurisdictions²⁸ measure the insurer's duty by the due care which would be exercised, under the circumstances, by a man of ordinary prudence and caution in the conduct of his own affairs.²⁹ This is the "negligence test," imposing an objective standard through the embodiment of the hypothetical "reasonable man."³⁰ Operational difficulties are rife, since the determination of the insurer's liability may vacillate depending upon whether the test applied is the conduct of the reasonable man in an insured or uninsured status.³¹ Additional

Auto. Ins. Co., 204 Wis. 12, 235 N.W. 413 (1931); *Wisconsin Zinc Co. v. Fidelity & Deposit Co.*, 162 Wis. 39, 155 N.W. 1081 (1916).

26. See *National Mut. Cas. Co. v. Britt*, 203 Okla. 175, 200 P.2d 407 (1948), 218 P.2d 1039 (1950). The "paramount" standard presents ease of administration in that there is a specification of a prevailing interest should the circumstances demand. However, gradations between all the degrees of considerations are not so readily apparent.

27. Many jurisdictions may not relish an expression of acceptance of a proposition similar to requiring the insurance company to sacrifice its interests in favor of the insured. See note 12 *supra*. They may accomplish the same result, however, if they permit a case to be submitted to the jury upon a mere showing that there was no sacrifice of interests made by the insurer. The fact that the case could have been settled within policy limits but was not could, arguably, establish a *prima facie* case for the insured, even though the court is unwilling to outwardly accept the doctrine of strict liability.

28. *Kan.*: *Bennett v. Conrady*, 180 Kan. 485, 305 P.2d 823 (1957). *Me.*: *Wilson v. Aetna Cas. & Sur. Co.*, 145 Me. 370, 76 A.2d 111 (1950). *Mass.*: *Abrams v. Factory Mut. Liab. Ins. Co.*, 298 Mass. 141, 10 N.E.2d 82 (1937). *Minn.*: *Larson v. Anchor Cas. Co.*, 249 Minn. 339, 82 N.W.2d 376 (1957). *N.H.*: *Dumas v. Hartford Acc. & Indem. Co.*, 94 N.H. 484, 56 A.2d 57 (1947); *Duncan v. Lumbermen's Mut. Cas. Co.*, 91 N.H. 349, 23 A.2d 325 (1941). *Ore.*: *Radcliffe v. Franklin Nat'l Ins. Co.*, 208 Ore. 1, 298 P.2d 1002 (1956). *R.I.*: *McGarry v. Rhode Island Mut. Ins. Co.*, 18 Auto. Cas. 2d 1512 (R.I. 1960). *Tex.*: *Fidelity & Cas. Co. v. Robb*, 267 F.2d 473 (5th Cir. 1959).

29. See 5 COUCH, *INSURANCE* § 1175f (Supp. 1945). In adopting the minority view, the court in *Dumas v. Hartford Acc. & Indem. Co.*, 94 N.H. 484, 489, 56 A.2d 57, 60 (1947) stated:

Due care must be exercised in ascertaining all the facts of the case both as to liability and damages, in learning the law and in appraising the damages 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.

30. Since the whole theory of negligence presupposes some uniform standard of behavior, this fictitious person is a representative of a community ideal of reasonable action. He cannot be typed for all possible situations that will be encountered, yet the objective theory of the "reasonable man" may be utilized in the nature of a formula, the application of which is delegated to the judge or the jury. See PROSSER, *TORTS* § 31 (2d ed. 1955); Green, *The Negligence Issue*, 37 *YALE L.J.* 1029 (1928).

31. It would appear that since the "reasonable man" doctrine embodies both the physical attributes of the actor himself and the situation with which he is confronted, the test of due care should be modified to encompass the ordinary "insured" man of prudence and caution. By considering the characteristics of the actor, however, the standard tends to merge into a subjective criterion, wherein the significance between good faith and negligence becomes merely academic.

complexities may arise in the application of the standard by a jury.³² None of the jury members who are to apply the standard may be properly identified with the concept which forms its basis, the reasonable man. No ordinary individual who might occasionally be imprudent and careless is the equivalent of this abstract and mythical person. Indeed, by instructing the jury to avoid a personal standard, they are plagued with an aura of artificiality too ethereal to comprehend.

This doctrine was conceived by historical rather than practical considerations³³ and, therefore, has been expressly rejected in many cases adopting the test of good faith.³⁴ Conversely, no cases have been found rejecting the standard of good faith in favor of the negligence test. These same courts who reject negligence as a standard agree, nevertheless, that negligence is a relevant consideration in the determination of whether or not the insurer exercised the requisite good faith,³⁵ the two demonstrating a coalescent tendency toward a hybrid resultant containing elements of the previously separable standards.³⁶ It has been suggested that this new offspring, with the facade of a dual standard,

32. See *Freeman v. Adams*, 63 Cal. App. 225, 218 Pac. 600 (1923); *Warrington v. New York Power & Light Co.*, 252 App. Div. 364, 300 N.Y. Supp. 154 (1937); *Bohlen, Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 113 (1924). In addition, the jury may be considered as having to rule on complicated issues of fact by hindsight, reflecting upon the initial jury.

33. It grew out of a dissatisfaction with the early view that the insurer could further its own interests at the expense of the insured—the "archaic bad faith test." See Note, 62 HARV. L. REV. 104 (1948). The courts recognized the inadequacies of this test and, rather than revise their definition of bad faith, chose negligence as the basis of liability. *Cavanaugh Bros. v. General Acc. Fire & Life Assur. Corp.*, 79 N.H. 186, 106 Atl. 604 (1919); *Douglas v. United States Fid. & Guar. Co.*, 81 N.H. 371, 127 Atl. 708 (1924); *Dumas v. Hartford Acc. & Ins. Co.*, 94 N.H. 484, 56 A.2d 57 (1947).

34. For representative language see *Radio Taxi Serv., Inc. v. Lincoln Mut. Ins. Co.*, 31 N.J. 299, 157 A.2d 319 (1959); *Olympia Fields Country Club v. Bankers-Indem. Ins. Co.*, 325 Ill. App. 649, 60 N.E.2d 896 (1945); *American Mut. Liab. Ins. Co. v. Cooper*, 61 F.2d 446, 447 (5th Cir. 1932).

35. *Ballard v. Citizens Cas. Co.*, 196 F.2d 96 (7th Cir. 1952) (Illinois law); *St. Paul-Mercury Indem. Co. v. Martin*, 190 F.2d 455 (10th Cir. 1951) (Oklahoma law); *Davy v. Public Nat'l Ins. Co.*, 181 Cal. App. 2d 387, 5 Cal. Rptr. 488 (1960); *Southern Fire & Cas. Co. v. Norris*, 35 Tenn. App. 657, 250 S.W.2d 785 (1951); *Burnham v. Commercial Cas. Ins. Co.*, 10 Wash. 2d 624, 117 P.2d 644 (1941).

36. The recent trend of decisions presents several instances wherein "good faith" and "negligence" appear to have been substantially equated. In the most recent expression on this point, *Southern Farm Bureau Cas. Ins. Co. v. Parker*, 232 Ark. 841, 848, 341 S.W.2d 36 (1960), the court held there may be liability under both the rule of bad faith and that of negligence; a joinder of separate counts charging either being permitted. The court stated, at 41:

It may be negligence to refuse to settle, even though the negligent person may be acting in good faith. One may in good faith make an honest mistake which hurts another, and still be liable for negligence in making the mistake even though no harm was intended.

By giving weight to the negligence theory in determining whether good faith was the motivational element in the approval or rejection of a compromise offer, the two tests tend to coalesce. See *Southern Fire & Cas. Co. v. Norris*, 35 Tenn. App. 657, 250 S.W.2d 785 (1952).

may incidentally affect both judge and jury, since the difference between the two rules would now seem to have been merely a matter of differing methods of expression.³⁷ However, this is a truism, expressly recognized in the last decade,³⁸ since the practical operation of the two rules is strikingly similar and they appear interrelated.

The doctrinal classification accorded the two standards appears to be a specious defense mechanism, resorted to by the courts to enable them to put their decisions on a more tangible semantic basis, because the factual variations of both rules are almost as numerous as the decisions rendered.

The futility of applying one standard or another according to a rigid principle or "rule" is given credence by the myriad of cases in which a decision has been reached arbitrarily due to unique factual circumstances, even though these cases ostensibly exemplify a controlling standard. The courts utilize either bad faith or negligence as a convenient "peg upon which to hang their hat," camouflaging the fact that they cannot adequately discern the elements of the standards. Indeed, the dilemma is incisively described by the following statement:

Asking what constitutes negligence, bad faith, or lack of good faith is somewhat like asking what constitutes sin. From Mount Sinai, we have the basic prohibitions against sin, but these have been implemented and changed by reason of man-made laws in various jurisdictions . . . it suffices to say that only the facts of each case and the judgment of a jury or court will determine.³⁹

C. Factors

The necessity for discriminating inquiry into the precise facts and posture of the particular decisions, and the impossibility of resolution by any semantic cataloguing become readily demonstrable when guidelines for the application of a particular standard are sought. Should certain factual patterns be unequivocally branded as "bad faith" or "negligence," or should judicial resolution proceed on an *ad hoc* basis in the determination of those acts or circumstances which are sufficient to charge the insurer with liability to the insured?

37. See Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1141 (1954).

38. What may be considered negligence on one hand may also be considered as evidence of bad faith, and what is typed bad faith in one jurisdiction may be considered negligence in another. The facts that give rise to liability in excess of policy limits are usually susceptible to either construction. No matter which term is employed by the courts, there is little or no distinction in their meaning as applied to a given fact pattern. The facts can be used as a basis to correspond to the manipulation of terms.

39. Wymore, *Safeguarding Against Claims in Excess of Policy Limits*, 28 INS COUNSEL J. 44 (1961).

In the past, the courts have proceeded sporadically, case-by-case,⁴⁰ rather than in a uniform manner, although factors relied upon in decisions finding failure of the insurance company to exercise good faith have been accorded similar weight where the insurer has been negligent in refusing to accept a settlement proposal. Some factors⁴¹ indicative of liability have been:

(1) Inadequate investigation of the claim, so that all the facts and their ramifications could not be intelligently assessed.⁴²

(2) Liability of the insured to the injured claimant was highly probable and the evidence presented a clear case of liability.⁴³

(3) The seriousness of the injuries and amount of damages claimed by the injured party were of sufficient magnitude to indicate that rendition of a verdict in his favor would probably exceed policy limits.⁴⁴

(4) Suggestions of settlement by the insurer's attorneys, officers, or claim adjusters before trial were expressly rejected.⁴⁵

(5) The insurer recognized the advisability of effectuating a settlement, but failed to do so because the insured would not contribute thereto.⁴⁶

40. However, such a treatment appears inconsequential since no resolution is ever attained. For a precedential analysis, see Comment, 3 W. & M.L. Rev. 357 (1962).

41. Evidence of the myriad of factors to consider and the stubborn, albeit futile, attempts to catalogue them for future reference in applicable factual patterns is presented by *Brown v. Guaranty Ins. Co.*, 155 Cal. App. 2d 679, 689, 319 P.2d 69, 75 (1957), wherein the court stated:

In deciding whether the insurer's refusal to settle constitutes a breach of its duty to exercise good faith, the following factors should be considered: the strength of the injured claimant's case on the issues of liability and damages; attempts by the insurer to induce the insured to contribute to a settlement; failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured; the insurer's rejection of advice of its own attorney or agent; failure of the insurer to inform the insured of a compromise offer; the amount of financial risk to which each party is exposed in the event of a refusal to settle; the fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and *any other factors* tending to establish or negate bad faith on the part of the insurer. (Emphasis added.)

42. *American Mut. Liab. Ins. Co. v. Cooper*, 61 F.2d 446 (5th Cir. 1932); *Dumas v. Hartford Acc. & Ins. Co.*, 94 N.H. 484, 56 A.2d 57 (1947); *Radio Taxi Serv., Inc. v. Lincoln Mut. Ins. Co.*, 31 N.J. 299, 157 A.2d 319 (1960); *Auerbach v. Maryland Cas. Co.*, 236 N.Y. 247, 140 N.E. 577 (1923); *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933); *Southern Fire & Cas. Co. v. Norris*, 35 Tenn. App. 657, 250 S.W.2d 785 (1952).

43. *American Fid. & Cas. Co. v. G. A. Nichols Co.*, 173 F.2d 830 (10th Cir. 1949); *Maryland Cas. Co. v. Cook-O'Brien Constr. Co.*, 69 F.2d 462 (8th Cir. 1934); *Attleboro Mfg. Co. v. Frankfort Marine & Plate Glass Ins. Co.*, 240 F.2d 573 (1st Cir. 1917); *Brown v. Guaranty Ins. Co.*, 155 Cal. App. 2d 679, 319 P.2d 69 (1957); *National Mut. Cas. Co. v. Britt*, 203 Okla. 175, 200 P.2d 407 (1948).

44. *Royal Transit Inc. v. Central Sur. & Ins. Corp.*, 168 F.2d 345 (7th Cir. 1948); *G. A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544 (Tex. Com. App. 1929); *Johnson v. Hardware Mut. Cas. Co.*, 109 Vt. 481, 1 A.2d 817 (1938).

45. *Royal Transit Inc. v. Central Sur. & Ins. Corp.*, *supra* note 44; *Attleboro Mfg. Co. v. Frankfort Marine Acc. & Plate Glass Ins. Co.*, 240 F.2d 573 (1st Cir. 1917); *Brown v. Guaranty Ins. Co.*, 155 Cal. App. 2d 679, 319 P.2d 69 (1957).

46. *Royal Transit Inc. v. Central Sur. & Ins. Corp.*, 168 F.2d 345 (7th Cir. 1948);

(6) Non-disclosure of relevant facts to the insured, such as settlement offers that have been made or the fact that excess liability may follow a compromise rejection.⁴⁷

(7) The insurer sacrifices a sizable amount of the insured's money to salvage a small amount of its own.⁴⁸

Factors accorded emphasis in determining non-liability have been:

(1) Distinctly litigable issues as to liability and the amount of damages.⁴⁹

(2) Reasonable prospects for non-liability due to exclusionary provisions of the insurance policy.⁵⁰

(3) Active concurrence by the insured in rejection of a compromise offer.⁵¹

(4) Expert testimony supporting non-settlement.⁵²

(5) Actions by the insured which induce or reinforce rejection of an offer of settlement.⁵³

(6) Mere errors in judgment on the part of the insurer.⁵⁴

It is readily apparent that no compendium of factors can be all-inclusive, since new ones may originate as rapidly as applicable factual situations arise. Suffice it to say that, given some insight into how the courts weigh various circumstances, energy should be directed toward

Brown and McCabe Stevedores, Inc. v. London Guar. & Acc. Co., 238 Fed. 298 (D.C. Ore. 1915); *Brown v. Guaranty Ins. Co.*, *supra* note 45; *Zumwalt v. Utilities Ins. Co.*, 360 Mo. 362, 228 S.W.2d 750 (1950).

47. *American Fid. & Cas. Co. v. Greyhound Corp.*, 258 F.2d 705 (5th Cir. 1958) (Florida law); *Maryland Cas. Co. v. Wyoming Valley Paper Co.*, 84 F.2d 683 (1st Cir. 1936); *Brown v. Guaranty Ins. Co.*, 155 Cal. App. 2d 679, 319 P.2d 69 (1958); *Douglas v. United States Fid. & Guar. Co.*, 81 N.H. 371, 127 Atl. 708 (1924); *Johnson v. Hardware Mut. Cas. Co.*, 109 Vt. 481, 1 A.2d 817 (1938); *Hilker v. Western Auto Ins. Co.*, 204 Wis. 1, 235 N.W. 413 (1931).

48. This involves a comparison of the risks involved to the various parties; the greater danger usually being attributed to the insured. See *Communale v. Traders and Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198 (1958); *Douglas v. United States Fid. & Guar. Co.*, *supra* note 47; *Wisconsin Zinc Co. v. Fidelity & Deposit Co.*, 162 Wis. 39, 155 N.W. 1081 (1916).

49. The courts consider whether a "fighting chance" exists to defeat the claim against the insured. *American Cas. Co. v. Howard*, 187 F.2d 322 (4th Cir. 1951); *White v. New York Life Ins. Co.*, 91 F. Supp. 125 (N.D. Ga. 1950).

50. *Fidelity & Cas. Co. v. Stewart Dry Goods Co.*, 208 Ky. 429, 271 S.W. 444 (1925) (policy exclusions); *Sones v. Maryland Cas. Co.*, 16 La. App. 253, 133 So. 769 (1931); *Auerbach v. Maryland Cas. Co.*, 236 N.Y. 247, 140 N.E. 577 (1923).

51. See *Royal Transit Inc. v. Central Sur. & Ins. Corp.*, 168 F.2d 345 (7th Cir. 1948).

52. See *Douglas v. United States Fid. & Guar. Co.*, 81 N.H. 371, 127 Atl. 708 (1924).

53. Insured refuses to give insurer the true facts: *Hall v. Preferred Acc. Ins. Co.*, 204 F.2d 844 (5th Cir. 1953); *Buffalo v. United States Fid. & Guar. Co.*, 84 F.2d 883 (10th Cir. 1936); Insured fails to cooperate with insurer in defense of the claim: *United States Fid. & Guar. Co. v. Wyer*, 60 F.2d 856 (10th Cir. 1932); *Ohrbach v. Preferred Acc. Ins. Co.*, 227 App. Div. 311, 237 N.Y. Supp. 494 (1929).

54. *American Cas. Co. v. Howard*, 187 F.2d 322 (4th Cir. 1951); *Christian v. Preferred Acc. Ins. Co.*, 89 F. Supp. 888 (N.D. Cal. 1950); *Georgia Cas. Co. v. Mann*, 242 Ky. 447, 46 S.W.2d 777 (1932).

the formulation of a basic sequence of criteria, adaptable to the creation of a standard that will not be susceptible to vacillation or dilution. The need is for a standard which the courts may realistically apply in determining the tort liability of the insurer—a difficult task indeed, if not an impossible one.

IV. REMEDIAL ACTION FOLLOWING BREACH OF DUTY TO SETTLE

Should it be determined that the conduct of the insurer in rejecting an offer of settlement within policy limitations was wrongful, we encounter the equally intricate question whether this is an actionable tort.⁵⁵

A. *Suit Instituted by Insured*

Under the usual sequence of events, following the rejection of a compromise offer by the insurer and rendition of a verdict against the insured in excess of policy limitations, the insured brings suit against his insurer for its negligence or bad faith in refusing to settle within policy limits, damages being predicated upon the excess by which the judgment in favor of the injured claimant exceeds policy limitations.⁵⁶ The insured usually satisfies the claimant's judgment against him before suing the insurance company for reimbursement, and bases the greater part of his prayer for damages on this out-of-pocket loss. But what if the insured desires to institute his action against the insurance company prior to making any payment on the excess judgment, or at a time when he has insufficient assets subject to levy of execution to satisfy the judgment against him?

A number of jurisdictions say there must be an actual out-of-pocket loss suffered by the insured before his cause of action arises,⁵⁷ there being only a *possibility* of injury until the excess judgment is paid or its collectibility sufficiently proven.⁵⁸ Representative language

55. A cause of action in negligence is not unitary in scope; rather there is a duality of criteria. Initially, it must be determined that the actor fell below a standard of care where there was a duty not to. Should the tort thus be established, the victim of the wrong must satisfy those requirements imposed by law to render the tort legally actionable.

56. Elements of damages in addition to the excess judgment itself may be expenses and attorney's fees incurred by the insured in connection with the suit instituted by the injured claimant. These would not have occurred had the insurance company not breached a duty by refusing to settle. In addition, should the insured satisfy the claimant's outstanding judgment by withdrawing capital from his business, the resulting disruption thereof could be equally compensable. See RESTATEMENT, TORTS §§ 912, 913, 916 (1939).

57. This is the "prepayment doctrine," wherein payment of the outstanding judgment by the insured is regarded as a condition precedent to his institution of an action against the insurer for its negligent or bad faith refusal to settle. The actual out-of-pocket loss required is the actual payment to the injured claimant.

58. *N.C.*: State Auto. Mut. Ins. Co. v. York, 104 F.2d 730 (4th Cir.), *cert. denied*, 308 U.S. 591 (1939) (North Carolina law as alternate holding). *N.H.*: Dumas v. Hartford Acc. & Indem. Co., 94 N.H. 484, 56 A.2d 57 (1947). *N.Y.*: Harris v. Standard Acc. and Ins. Co., 297 F.2d 627 (2d Cir. 1961) (although recognizing that New York courts had not

is presented in *Dumas v. Hartford Acc. & Indem. Co.*,⁵⁹ wherein the court stated:

A right of action for negligence accrues only when the plaintiff has suffered an injury. The possibility of injury is not injury itself. . . . the injury will remain merely possible and conjectural until the plaintiff has paid the excess judgment, or at least until his financial status is such that the excess judgment is sure to be collected. The mere existence of an outstanding judgment, which may never be paid, is not a legal injury, for the essence of the injury in such a case is pecuniary loss.^{59a}

This principle of payment of the outstanding debt as a prerequisite to recovery recognizes that the insurer has violated a legal right of the insured, but imposes upon the latter the necessity of showing an actual injury in order to render the insurer's wrong actionable. Its origin may be attributed to the historically chameleon-like concept of liability insurance in which the original thrust was that of indemnification of the insured for a loss he actually sustained,⁶⁰ while, on the other hand, the modern philosophy is governed by a greater public-policy consciousness with the protection of the insured providing foremost emphasis.⁶¹ In this context, although it has been suggested that the rigors of the prepayment principle may be circumvented by utilizing borrowed funds to satisfy the claimant's judgment,⁶² analysis reveals the supposition that the insured will be able to borrow. But that is not always the case, in which event requirements of prepayment would produce an anomalous situation where the insured would have a "right without a remedy."⁶³ If borrowing is actually possible, it nevertheless might not be feasible due to a resultant imbalance of financial liquidity or the uncertainty of favorable determination of the complex issues of fact involved in the future litigation against the insurer.

passed on the question, the court adopted the view requiring payment as more persuasive—only recent decision to so hold). *Minn.*: *Norwood v. Travelers Ins. Co.*, 204 Minn. 595, 284 N.W. 785 (1939). *Tex.*: *Universal Auto Ins. Co. v. Culberson*, 126 Tex. 282, 87 S.W.2d 475 (1935).

59. 92 N.H. 140, 26 A.2d 361 (1942).

59a. *Id.* at 141, 26 A.2d at 362.

60. See *Malley v. American Indem. Corp.*, 297 Pa. 216, 146 Atl. 571 (1929).

61. Since the liability insurance company, by the terms of its policy, obtains an irrevocable power to determine whether a compromise offer should be accepted or rejected, a fiduciary relationship between it and the insured is created. The duties growing out of such a relationship encompass the recognition that injuries may be sustained and that recovery based thereon may be effectuated without a rigid observance of technical formalities and concepts of payment. *American Fid. & Cas. Co. v. G. A. Nichols Co.*, 173 F.2d 830 (10th Cir. 1949). See note 66 *infra*.

62. See Keeton, *Liability Insurance and Responsibility For Settlement*, 67 HARV. L. REV. 1136, 1180 (1954), wherein the problem of the insolvent insured is accorded detailed analysis.

63. The right is based upon the wrongful conduct of the insurer in failing to settle within policy limitations. In this context, the remedy is activated only if the insured has

The majority of those jurisdictions who have encountered the problem do not treat the absence of satisfaction of the residue of the judgment as determinative.⁶⁴ "More acceptable . . . is the view treating the extant, unpaid judgments as injuries in themselves, their overburden measuring the pecuniary damages."⁶⁵ These damages correspond with the increase in the insured's debts caused by liability for the excess judgment. The mere entry of judgment against the insured is sufficient to establish the requisite loss, since his credit rating is damaged and his name beclouded.⁶⁶ Thus, a cause of action in his favor arises and his damage occurs when the liability becomes fixed, neither the right of action nor the measure of damages depending upon the fact of payment.⁶⁷ Were there a requirement of prepayment of the excess judgment, the insured would be faced with an odious dilemma:

The claim is now an adjudged liability which he can escape only by a discharge in bankruptcy or by payment. If he chooses the former course his credit is impaired. If he does not the outstanding judgment against him is likely to prove an insurmountable barrier to payment. If prepayment is required in cases of this kind the insurer is likely to be less responsive to its trust duties in cases where the insured is insolvent than in cases where the insured is able to discharge any judgment in excess of the policy limit which may be rendered against him.⁶⁸

suffered an actual pecuniary loss—normally payment of the outstanding judgment rendered against him. Admittedly the insurer has engaged in tortious conduct, but this fact alone is not sufficient to permit the insured to institute an action for damages. The gist of tort liability is recompense for harm *actually* sustained.

64. *Ala.*: Alabama Farm Bureau Mut. Cas. Ins. Co. v. Dalrymple, 116 So.2d 924 (Ala. 1959). *Ariz.*: Farmers Ins. Exchange v. Henderson, 82 Ariz. 335, 313 P.2d 404 (1957). *Cal.*: *Commune v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198 (1958); *Brown v. Guaranty Ins. Co.*, 155 Cal. App. 2d 679, 319 P.2d 69 (1958). *Fla.*: *American Fire & Cas. Co. v. Davis*, 146 So.2d 615 (Fla. 1st Dist. 1962). *Ga.*: *Smoot v. State Farm Mut. Auto. Ins. Co.*, 299 F.2d 525 (5th Cir. 1962). *Iowa*: *Henke v. Iowa Home Mut. Cas. Co.*, 250 Iowa 1123, 97 N.W.2d 168 (1959). *Md.*: *Lee v. Nationwide Mut. Ins. Co.*, 286 F.2d 295 (4th Cir. 1961). *Mo.*: *Wessing v. American Indem. Co.*, 127 F. Supp. 775 (W.D. Mo. 1955). *Tenn.*: *Southern Fire & Cas. Co. v. Norris*, 35 Tenn. App. 657, 250 S.W.2d 785 (1952). *Wash.*: *Murray v. Mossman*, 355 P.2d 985 (Wash. 1960). *Wis.*: *Schwartz v. Norwich Union Indem. Co.*, 212 Wis. 593, 250 N.W. 446 (1933).

65. *Lee v. Nationwide Mut. Ins. Co.*, *supra* note 64.

66. See *Southern Fire & Cas. Co. v. Norris*, 35 Tenn. App. 657, 250 S.W.2d 785 (1952); *Schwartz v. Norwich Union Indem. Co.*, 212 Wis. 593, 250 N.W. 446 (1933).

67. Under this view, it is actually immaterial what arrangement the plaintiff may have made for payment of the excess judgment or whether he ever pays at all, since the critical factor is the existence of the legal liability to pay. See *Schwartz v. Norwich Union Indem. Co.*, *supra* note 66.

68. *Southern Fire & Cas. Co. v. Norris*, 35 Tenn. App. 657, 672, 250 S.W.2d 785, 791 (1952). This argument has been expressly rejected in *Harris v. Standard Acc. & Ins. Co.*, 297 F.2d 627, 633 (2d Cir. 1961), wherein the court reasoned that it is only a very small percentage of the cases in which the insured is insolvent at the time of settlement negotiations. The court also emphasized the diversionary nature of the argument, saying it obscured the essential question of whether the insured actually has been harmed by the insurer's refusal to settle.

The insolvent insured presents special problems which have formed the basis for arguments both favoring and denouncing the prepayment theory.⁶⁹ Because the insured has no assets which may be subjected to legal process for collection of the judgment, he is judgment-proof and, in jurisdictions following the payment prerequisite has been characterized as "a nonresponsible arbiter of the conflicting interests of two other parties; claimant and company."⁷⁰ Because he cannot be compelled to pay, the insured will favor the insurance company by doing nothing; especially in those jurisdictions not permitting the injured claimant to sue the insurer directly.⁷¹ If he borrows the funds necessary to satisfy the excess judgment, the insured favors the claimant and correspondingly subjects the insurer to a duty of reimbursement. Since the insured is thus possessed of this ability to affect the interests of the other parties to the insurance relationship, the necessity for preventing an abuse of this power is apparent. Suggestions have been noticeably scarce.⁷²

The insolvency of the insured, when coupled with prepayment requirements, has also led to criticism based upon the "windfall" to an insurer fortunate enough to have insured an insolvent individual.⁷³ The term is not semantically precise, in that it implies an unexpected positive gain, whereas "windfall" in the insurance context means a gratuitous escape from liability. The insurer gains freedom from litigation since he is only susceptible to suit when the excess judgment has been paid—an extremely remote possibility due to the financial condition of the insured.

However, the chameleon-like duality of the "windfall" concept is evident when criticism is leveled at those jurisdictions permitting the commencement of an action by the insured prior to payment of the outstanding judgment.⁷⁴ Since the insured is under no compulsion to pay, the creditor is remediless unless he can convince him to institute a suit against the insurer, based upon the excess judgment. The prime

69. See note 62 *supra*.

70. *Ibid.*

71. See note 58 *supra*.

72. The most plausible reason that this area of the problem has been overlooked is the greater preoccupation the courts have with the determination of a standard. Prior to deciding whether the tort is actionable, they must necessarily encounter the difficulties inherent in analyzing what the tort encompasses. If no adequate solution is reached as to the ingredients of the wrong, concern with maintenance of an action based upon it is ludicrous.

73. *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Dalrymple*, 270 Ala. 119, 116 So.2d 924 (1959); *Southern Fire & Cas. Co. v. Norris*, 35 Tenn. App. 657, 250 S.W.2d 785 (1952). The clearer argument would seem to be, however, that there is no unjustified windfall since the insurer has received premiums only upon the face amount of the policy, and this much it is required to pay regardless of the insured's financial condition. See *Harris v. Standard Acc. & Ins. Co.*, 297 F.2d 627, 633 (2d Cir. 1961).

74. See note 64 *supra*.

mover could well be a bargaining agreement in which the judgment creditor is forced to accept less than full payment of the judgment in satisfaction. Thus, the insured would be the recipient of a "windfall" by recovering the full amount of the excess in his action against the insurer, his profit being the difference between the amount received from the insurer and the sum which the claimant agreed to accept.⁷⁵ Under these circumstances, we encounter, paradoxically, a settlement resulting from the insurer's initial failure to settle.

It is evident that as many difficulties are inherent in the actionability of the insurer's tortious failure to settle within policy limits as were previously encountered in both the composition and implementation of the tort's standards. Thus far, no unequivocally adequate solutions have been formulated, and drastic action may be the only panacea⁷⁶ since, prior to the consideration of factual variations, the doctrine itself must be reduced to a definitive concept—one receptive to application in a uniform manner.

However, some courts suggest an assertion of the cause of action by the injured claimant,⁷⁷ rather than the insured, as a palliative measure for the jurisdictional dichotomy regarding payment as a prerequisite to suit.

B. *Suit Instituted By Injured Claimant*

A liability insurance policy may contain an express provision with wording of the following or similar import:

[If] an execution on a judgment against Assured is returned unsatisfied, the judgment creditor shall have a right of action against the Company to recover the amount of said judgment to the same extent that Assured would have had if he paid the judgment.⁷⁸

In that event, the claimant is entitled to recover directly from the insurer on the same cause of action the insured would have been entitled to under the doctrine of excess liability. By giving full force to the contractual agreement, most courts effectuate the intent of the parties and allow the claimant's suit against the insurer under these circumstances.

75. [P]laintiff is lord of the litigation. If he does not choose to sue, the creditor is remediless. Hence plaintiff can bargain with the judgment creditor, and well force an agreement for the judgment creditor to accept less than full payment of the judgment in satisfaction thereof. . . .

Lee v. Nationwide Mut. Ins. Co., 184 F. Supp. 634, 642 n.6 (D. Md. 1960). The windfall to the insured is unlikely, however, when viewed in time sequence. If the settlement agreement with the claimant is made before the insurer's action against the company, the court will logically use the settlement figure as the measure of damages. If settlement is made after the insured's action for the full amount of the outstanding judgment, the claimant probably will not be willing to accept less than the full amount.

76. For suggestions, see note 110 *infra* and accompanying text.

77. See note 79 *infra*.

78. Automobile Mut. Indem. Co. v. Shaw, 134 Fla. 815, 821, 184 So. 852, 855 (1938).

By permitting the claimant to sue directly, abrogating the requirement of payment by the insured as a condition precedent to suit, the courts produce the attendant result of nullification of those difficulties which formerly arose in connection with the prepayment doctrine.⁷⁹

However, in the absence of an express declaration of recovery, the great majority of jurisdictions do not permit the injured party to institute a direct suit against the insurer for the excess judgment rendered, either in his own right⁸⁰ or as an assignee of the insured.⁸¹ They base this viewpoint upon the fact that the excess liability of the company was purely a creature of the relationship between insured and insurer. The obligation to settle arises out of the policy, to which the claimant is a stranger, and to whom no duty is owed. It would be highly unjustifiable to permit the claimant to sue the insurer directly in his own right for an amount above policy limits since:

The judgment creditor has not suffered because of the insurer's failure, but has, if anything, *gained thereby*. The judgment creditor would be in an anomalous position, for typically he would be claiming damages for the insurer's failure to settle the case for much less than the verdict he himself actually won.⁸²

The same result is indirectly achieved if the insured assigns his cause of action against the insurance company to the claimant. Since an assignee gets no greater rights than his assignor, this view would fail in a jurisdiction requiring prepayment where the assignor-insured had not satisfied the outstanding judgment. However, when the courts impose no prepayment restrictions, the effectiveness of the transfer is not inhibited. California expressly permits the injured party to sue the insurer on an assignment theory.⁸³

79. On its face, the institution of a direct suit by the claimant, bypassing the insured, has the advantage of allowing both the parties to be saved harmless. At the claimant's option, the burden of asserting the claim against the insurer will be transferred, and the claimant will be in charge of the litigation. However, should the claimant be accorded the benefits of direct suit even though he is a remote party to the original contractual relationship and was not harmed by the insurer's refusal to settle? Most courts who have encountered this situation respond in the negative. See note 80 *infra*.

80. Chittick v. State Farm Mut. Auto. Ins. Co., 170 F. Supp. 276 (D. Del. 1958); Francis v. Newton, 75 Ga. App. 341, 45 S.E.2d 282 (1947); Canal Ins. Co. v. Sturgis, 114 So.2d 469 (Fla. 1st Dist. 1959); Duncan v. Lumbermen's Mut. Cas. Co., 91 N.H. 349, 23 A.2d 325 (1941); Universal Auto. Ins. Co. v. Culberson, 126 Tex. 282, 87 S.W.2d 475 (1935); Paul v. Kirkendall, 6 Utah2d 256, 311 P.2d 376 (1957). *Contra*, American Fid. & Cas. Co. v. All American Bus Lines, 179 F.2d 7 (10th Cir. 1949) (Oklahoma law); Lemons v. State Auto. Mut. Ins. Co., 171 F. Supp. 92 (E.D. Ky. 1959).

81. The critical factor from the point of view of the assignee is the court's viewpoint concerning prepayment. If payment of the outstanding judgment is *not* a prerequisite to suit, the assignee-claimant could assert the insured's claim under the theory of assignability of a chose in action. At least one jurisdiction utilizes such an approach, and has upheld a suit by an assignee thereunder. See note 83 *infra*.

82. Canal Ins. Co. v. Sturgis, 114 So.2d 469, 471 (Fla. 1st Dist. 1959). (Emphasis added.)

83. See *Commune v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198 (1958).

A novel argument propounded by the Florida courts would make most liability insurance policies third-party beneficiary contracts, entitling the judgment creditor to recover directly from the insurer.⁸⁴ This suggestion is susceptible, however, to logical criticism based upon the fact that the claimant reaping the benefits of that doctrine is not harmed by the insurer's failure to settle.⁸⁵

V. FLORIDA'S POSITION AND THE IMPACT OF ITS DECISIONS

A. *Tortious Conduct of the Insurer*

It was not until 1938 that a Florida court treated the question of possible liability of an insurer for its failure, prior to trial and entry of an excess judgment, to accept an offer of settlement within policy limits. In *Automobile Mut. Indemnity Co. v. Shaw*⁸⁶ the Florida Supreme Court was confronted with a fact pattern in which the liability policy was limited to \$6,000. A compromise offer of \$5,000 was made by the injured claimant, refused prior to trial, and there followed a verdict of \$9,500 which the insured could not satisfy. A direct suit for the judgment was instituted by the injured claimant against the liability insurer, since the policy expressly provided for the action. In holding the evidence to be insufficient to sustain a verdict for the plaintiff, the court noted the exclusive control which the insurer had over both settlement and defense of the claim against the insured, and recognized the duty imposed upon the insurer due to this relationship. In addition, the court purportedly established due care as the standard by which the failure of the insurer to settle would be judged:

It appears that the insurance company in the settlement of claims . . . should be held to that degree of care and diligence which a man of ordinary prudence and care should exercise in the management of his own business.⁸⁷

However, in the same opinion the court made the following statement: "The prevailing rule seems to be, however, that the insurer must act in good faith toward the assured in its effort to negotiate a settlement."⁸⁸ What was the nature and extent of proof which it was incumbent upon the plaintiff to make—that of establishing negligence or the insurer's bad faith? The opinion was susceptible of either interpretation, the practical effect being that the jury would be required to view the case from either of two mutually exclusive viewpoints,⁸⁹ depending upon which test was applied.

84. See note 100 *infra*.

85. See note 82 *supra* and accompanying text.

86. 134 Fla. 85, 184 So. 852 (1938).

87. *Id.* at 859.

88. *Ibid.*

89. In a "good faith" jurisdiction, subjective analysis is demanded, wherein the jurors

The next Florida decision provided some degree of enlightenment as to the standard to be utilized, although still evidencing considerable confusion in differentiating the two. *Tully v. Traveler Ins. Co.*⁹⁰ involved a suit by the insured to recover the difference of \$5,000 between the amount of a judgment paid to the injured claimant and the amount of the liability insurance policy issued by the defendant company. In holding that the evidence supported the plaintiff's claim of negligence and bad faith in the insurer's refusal to settle within policy limits, a Federal District Court sitting in Florida said:

By the great weight of authority, an insurer must act in good faith towards the insured in the defense and settlement of claims which, under its policy, it has the exclusive right to defend and settle, and is liable in damages to the assured for failure to do so.⁹¹

Taken by itself, this statement would indicate the adoption of the good faith test as a yardstick. However, in allowing recovery based upon the dual tenets, the court explicitly held that the defendant-insurer was "negligent to the extent of bad faith," thus merging the two standards into a quasi-hybrid concept.⁹²

In the highly complex case of *American Fid. & Cas. Co. v. Greyhound Corp.*,⁹³ a Federal court applying Florida law reflected non-comprehension of the standard postulated by *Shaw*. The lower court instructed the jury that the duty of the appellant-insurer in settlement negotiations was that of due care. Counsel for the defendant objected, saying that the instruction was not the law of Florida and only served to confuse the jury. The court answered: "It is confusing to me, not only the jury."⁹⁴ The court then *agreed* that mere negligence was not sufficient, but nevertheless defended its charge to the jury by saying it closely paraphrased the *Shaw* case. On appeal, the Fifth Circuit held the instruction, requiring the insurer to exercise due diligence, to be wrong and a source of confusion to the jury which could have formed the basis for a verdict contrary to law. In reversing and remanding for a new trial, the court stated:

It thus appears quite clear that the Florida Supreme Court, in the *Shaw* case, aligned itself with the majority of jurisdictions adhering to the good faith test of the duty placed upon an

can identify themselves with the participants. However, an objective standard is imposed by the negligence test and identification is limited to the hypothetical reasonable man.

90. 118 F. Supp. 568 (N.D. Fla. 1954).

91. *Id.* at 569.

92. See note 36 *supra*.

93. 232 F.2d 89 (5th Cir. 1956) (reversed lower court's erroneous instruction and granted a new trial), 258 F.2d 709 (5th Cir. 1958) (appeal from the new trial previously granted).

94. *American Fid. & Cas. Co. v. Greyhound Corp.*, 232 F.2d 89, 93 (5th Cir. 1956).

insurer, rather than the negligence test . . . [Even though] evidence of negligence is admissible on the question of good faith, the test is . . . [still not] in effect converted from good faith to due care.⁹⁵

Thus, it was not until 1956 that Florida's posture in the *Shaw* case was definitely resolved to have been good faith, an alignment consistent with the majority of jurisdictions.⁹⁶

During the second trial, the court struck from the complaint all claims for relief except those alleging bad faith by the insurer in settlement negotiations. Verdict and judgment were rendered for the plaintiff. In affirming the decision of the lower tribunal, the appellate court advanced a reasonable explanation for the perplexing use of "due care" terminology in the *Shaw* case:

[F]rom the recitation of it by the Florida Court we reach the conclusion that it has adopted the rule that in application of the good faith test consideration may be given to the negligence of the insurer in determining whether it has conducted settlement negotiations in good faith.⁹⁷

A somewhat pragmatic directive toward implementation of the good faith test, though admittedly tenuous, is the comparative risk theory which was suggested in *Springer v. Citizen's Cas. Co.*⁹⁸ In that case the insurer spurned the opportunity to settle within policy limits of \$5,000 on at least three occasions. Subsequently, a verdict of \$80,000 was rendered for the injured claimant, the insured being required to respond for the excess. The bad faith of the insurer was a jury question which should have been so submitted in the light of a consideration of

the comparative risks to which the insurer and the insured would be subjected by refusal to settle. The insurer stood the chance of losing by its bold gamble only \$5,000 while the insured was subjected to a risk ten or more times that figure.⁹⁹

B. *Insured's Right to Recover*

Having aligned itself with the majority of jurisdictions with reference to the basis of the insurer's liability for failing to settle within policy limitations, Florida maintains a similar posture in dealing with the actionability of that tort by the insured, although conflicting dicta both favor and reject the prepayment doctrine.

95. *Ibid.*

96. See note 19 *supra*.

97. *American Fid. & Cas. Co. v. Greyhound Corp.*, 258 F.2d 709, 716 (5th Cir. 1958).

98. 246 F.2d 123 (5th Cir. 1957).

99. *Id.* at 128.

*Canal Ins. Co. v. Sturgis*¹⁰⁰ treated the right of the injured claimant to directly sue the insurance company, but stated: "If he [the insured] has had to pay a part of the judgment, he has indeed suffered damages because of such failure of the insurer . . .,"¹⁰¹ thus tacitly requiring prepayment of the excess judgment. A contrary viewpoint was expressed in *National Mutual Ins. Co. v. Dotschay*,¹⁰² wherein the court recognized that Florida had not decided the question of whether an insured must pay his judgment creditor the excess judgment prior to recovering from his insurer, but was of the opinion that the better view was that of recognizing the insured's cause of action against the insurer without requiring prepayment.

*American Fire & Cas. Co. v. Davis*¹⁰³ was the first decision to treat the prepayment doctrine specifically, resulting in Florida becoming incontrovertibly aligned with the majority¹⁰⁴ of jurisdictions. In that decision, the injured claimant recovered an excess judgment of \$12,000 which the insured was unable to satisfy. Thereafter, the insured sought to recover that amount from the insurer prior to making any payment to the injured third-party. In affirming a verdict and judgment for the insured, the court rebutted the argument that the injured has not sustained any damages until he pays the outstanding judgment, by equating his damaged credit with pecuniary loss.

A man's credit in this day and age is one of his most valuable assets and without it, a substantial portion of the American people would be without their homes, washing machines, refrigerators, automobiles, television sets, and other mechanical paraphernalia that are now regarded as necessities of life. We hold that prior satisfaction of the excess judgment is not a prerequisite to bringing an action against one's insurer for damages due to negligence or bad faith in failing to settle a claim within the policy limits.¹⁰⁵

C. *Injured Claimant's Right to Recover*

The injured claimant is not looked upon in a benevolent manner by the Florida courts, and may not institute a direct action against the liability insurer to recover his outstanding judgment. *Canal Ins. Co. v. Sturgis*¹⁰⁶ expressly treated the question and recognized that the judgment creditor does not suffer because of the insurer's failure to settle, but paradoxically gains thereby because his verdict exceeds the settlement offer previously made. The *Shaw* case was distinguished on the basis

100. 114 So.2d 469 (Fla. 1st Dist. 1959).

101. *Id.* at 471.

102. 134 So.2d 248, 252 (Fla. 3d Dist. 1961).

103. 146 So.2d 615 (Fla. 1st Dist. 1962).

104. See note 64 *supra*.

105. *American Fire & Cas. Co. v. Davis*, 146 So.2d 615, 619 (Fla. 1st Dist. 1962).

106. 114 So.2d 469 (Fla. 1st Dist. 1959).

of the provisions of its liability policy, which expressly gave the injured claimant a cause of action. However, it could be forcefully contended that, irrespective of its provisions, every automobile liability insurance policy should be construed as a third-party beneficiary contract entitling a judgment creditor to recover in a direct action against the insurer for the excess of his judgment over policy limits.¹⁰⁷

The argument is predicated on the public policy of Florida as proclaimed in the Florida Financial Responsibility Law,¹⁰⁸ which requires the owner of a motor vehicle to have the financial ability to respond for any damages caused by its operation. Automobile liability insurance is adequate proof of the requisite financial responsibility, and the insurance serves primarily to protect and benefit third parties. Therefore, liability insurance policies should be considered third-party beneficiary contracts, subject to enforcement by a judgment creditor in a direct action against the insurer. Unfortunately, the Florida courts have not yet made that type of a judicial pronouncement.

Since the Florida Supreme Court has not had the occasion to treat the prepayment doctrine and its ramifications, some doubt may linger as to the finality of Florida's position when the proper case presents itself to that tribunal. However, it is inconceivable that the Court would recede from the *Davis* case, since the majority viewpoint therein expressed is as close a representation of logical pragmatism as the doctrine itself allows.

While the courts remain within the narrow perimeters of the "liability insurance" concepts as they are presently understood, latent inconsistencies and patent ambiguities will continue to abound. A drastic modification, effectuating freedom from their bonds, must be sought and forcefully applied.

VI. CONCLUSION

Analytical introspection lends credence to a conclusive determination that the doctrine of excess liability, encompassing the perplexing trichotomy of duty, standard and prepayment, is unacceptable in its present form. Judicial irresolution in both the definition of the concepts involved and methods of implementation emphasizes its vacuousness.

One avenue of improvement could be refinement of the standards presently utilized into a more cogent and workable form which the courts could rationally apply. This would circumvent any drastic modification of the liability insurance doctrine as it now stands. However, it is the opinion of this writer that the confusion in the application of the stand-

107. *Id.* at 472.

108. FLA. STAT. ch. 324 (1961).

ards and the uncertainty as to their composition indicates the futility of attempting such a reform. In most cases, the nature of the insurer's disputed acts cannot be reasonably evaluated by bench or bar. Could there not be obviation through the utilization of expert testimony of those familiar with the field, thus giving the jury some insight into the technical aspects of the insurer's conduct? Probably not, since a proverbial "battle of experts" would likely result, in which the insurance company might have the advantage in obtaining testimony. In addition, it may be argued that the insurer is subjected to the likelihood of an adverse judgment due to the hindsight of the jury trying the case of the insured against the insurer. It is likely to rely on the verdict of the jury in the original suit instituted by the injured claimant and since the subjective consideration of the earlier litigation is unavailable, the second jury may unduly emphasize its finding.

Since the insurer normally possesses the greater part of the factual information plus the expertise necessary to evaluate the facts, the approach utilized should be one of absolute liability, requiring the insurer to bear the risk of a judgment exceeding policy limitations which follows its rejection of a compromise offer submitted by the injured claimant. This position is further justified by the fact that the interests of the insured are completely at the mercy of the insurer, who can absorb the increased costs resulting from his absolute liability by shifting the risks to the driving public.¹⁰⁹ Thus, not only will the difficult factual issues be removed from the purview of the jury, and the use of illusory standards be eliminated, but the risk of rejecting a settlement offer will be equitably placed upon the party having exclusive control of the situation. Failure to settle would be regarded as a tortious act, and the jury's role would be limited to the factual determination of whether a bona fide offer to settle was submitted to the insurer.

This policy of absolute liability has been the most prevalent suggestion of textual writers as a panacea for the ills engendered by the liability insurance doctrine. Its application has frequently been advocated in the context of contractual modifications.¹¹⁰ Using the contract approach, the stated policy limits could be considered the ceiling value as to settlement; the insurer being held absolutely liable for the amount of any judgment against the insured if it declined to accept a settlement offer. Thus, rather than imply an agreement to accept all sub-coverage compromise offers, the insurer's exclusive control would form the basis for an express contractual provision.

109. See Fleming, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 *YALE L.J.* 549, 552 (1948); Douglas, *Vicarious Liability and Administration of Risk*, 38 *YALE L.J.* 584, 720 (1929).

110. See *Georgia Life Ins. Co. v. Mississippi Cent. R.R.*, 116 *Miss.* 114, 76 *So.* 646 (1917). For suggestions as to policies with more than one limit, see Keeton, *Liability Insurance and Responsibility for Settlement*, 67 *HARV. L. REV.* 1136, 1183 (1954).

This solution leaves much to be desired, however, since it is limited in scope to only those situations where an applicable policy is involved. The intricacies of policy values and possible manipulations therein leads to the conclusion that a more general and effective use of absolute liability is necessary. The most emphatic and all-encompassing solution is a legislative pronouncement graphically demonstrating the public policy of the jurisdiction involved.

The basic premise involved is whether or not it is fair to allow the liability insurer to both limit its liability *and* retain full power and control over the right of settlement. Since "the conflict of interest between the parties is bound to continue so long as policies are written for limited protection,"¹¹¹ it could be argued that some concept other than liability insurance might be desirable. In furtherance of this possible contention, the enactment of a measure similar to workman's compensation statutes would be feasible in order to provide the best means of affording protection against the risk of injuries, thus abandoning the liability insurance principle.¹¹²

Rather than eradicate the concept of liability insurance entirely, however, the better approach is that of allowing the insurer to retain control over settlement, risking liability for any excess judgment rendered following rejection of a settlement offer. In addition, this element of absolute liability,¹¹³ should the insurer reject an offer of compromise, would be a potent coercive force guaranteeing competent investigation and determination of all claims against the insured and would also eliminate any mysticism regarding the bases of liability. This proposed legislative catholicon would take the following form:

Any liability insurance policy hereafter issued or renewed to any person in the State shall provide as follows: The insurer shall have the power to negotiate and settle any claim within the limits of the policy, but if the insurer rejects an offer of settlement by the injured claimant within the limits of the policy and the claim is prosecuted to judgment against the insured, he shall have a judgment over against the insurer for the full amount of the judgment rendered against him.

111. *Brown v. Guaranty Ins. Co.*, 155 Cal. App. 2d 679, 683, 319 P.2d 69, 71 (1957).

112. See GREEN, *TRAFFIC VICTIMS: TORT LAW AND INSURANCE* (1958), wherein Compulsory Comprehensive loss insurance is proposed as a remedial device for traffic casualties, supplanting liability insurance and the common law jury trial under the law of negligence.

113. See note 11 *supra* and accompanying text.