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INSURANCE—LIMITED LIABILITY POLICIES— INSURER'S LIABILITY FOR EXCESS JUDGMENTS RESULTING FROM BAD FAITH

Insured, covered by a limited liability policy, negligently injured another. The insurance company refused to accept an offer to settle for less than the amount of the policy and declined to negotiate a settlement. The insured was sued and a judgment was rendered against him in excess of the coverage of the policy. Insured now brings action to recover this excess amount from the insuring company. *Held*, the attitude of the insurer in refusing to settle or negotiate was arbitrary and in bad faith; the insurer could not rightly assume the insured's right to settle and then not exercise that right in a fair and intelligent manner. *Tully v. Travelers Insurance Company*, 118 F. Supp. 568, (N.D. Fla. 1954).

It is a well established principle that, when an insurance company reserves the right to settle and/or defend all claims, the insurer also assumes a duty to the insured.¹ This type of reservation is permitted and necessary to prevent the injured party and the insured from colluding to defraud the insurance company. However, when this right is assumed, the insurer is obligated to consider the interests of the insured as (at least) equal to its own interests.² Whether these duties are found on the basis of a fiduciary³ or a contractual⁴ relationship, they are enforced by the same standards.⁵

According to the reservations of the policy, the insurer may elect to settle or defend the claim.⁶ However, although this right appears to be absolute, it is agreed that the conduct of the insurer may be of such a nature as to make him liable for amounts in excess of the limitations

1. *Maryland Casualty Co. v. Cook-O'Brien Construction Co.*, 69 F.2d 462 (8th Cir. 1934); *Auto Mutual Indemnity Co. v. Shaw*, 134 Fla. 815, 184 So. 852 (1938); *Hilker v. Western Automobile Insurance Co.*, 204 Wis. 1, 231 N.W. 257 (1930).

2. *Ballard v. Citizens Casualty Co. of New York*, 196 F.2d 96 (7th Cir. 1952); *Douglas v. United States Fidelity and Guaranty Co.*, 81 N.H. 371, 127 Atl. 708 (1924); *National Mutual Casualty Co. v. Britt*, 200 P.2d 407 (Okla. 1948).

3. *American Fidelity and Casualty Co. v. G. A. Nichols Co.*, 173 F.2d 830 (10th Cir. 1949); *Douglas v. United States Fidelity and Guaranty Co.*, 81 N.H. 371, 127 Atl. 708 (1924); *Johnson v. Hardware Mutual Casualty Co.*, 109 Vt. 481, 1 A.2d 817 (1938); *Hilker v. Western Automobile Insurance Co.*, 204 Wis. 1, 231 N.W. 257 (1930).

4. *Attleboro Manufacturing Co. v. Frankfort Marine Insurance Co.*, 240 Fed. 573 (1st Cir. 1917); *Foremost Dairies v. Campbell Coal Co.*, 57 Ga. App. 500, 196 S.E. 279 (1938).

5. *Hilker v. Western Automobile Insurance Co.*, 204 Wis. 1, 231 N.W. 257 (1930).

6. *Maryland Casualty Co. v. Cook-O'Brien Construction Co.*, 69 F.2d 462 (8th Cir. 1934); *Best Building Co. v. Employers Liability Assurance Corp.*, 247 N.Y. 451, 160 N.E. 911 (1928); *Johnson v. Hardware Mutual Casualty Co.*, 109 Vt. 481, 1 A.2d 817 (1938).

prescribed on the face of the policy.⁷ There is a split of authority as to when failure or refusal to settle by the insurer (resulting in such excesses) will make it liable for these amounts. Most jurisdictions will not find liability when the refusal and the surplus were the result of an honest mistake or error in judgment;⁸ nor will the insurer be held liable when it is found that the refusal was based on a bona fide belief that there was a chance to defeat the action.⁹ To find the insurer liable, a majority of the courts require that the insured show "bad faith" on the part of the insurer;¹⁰ however, a minority of jurisdictions merely require evidence of "negligence."¹¹

The terms "negligence" and "bad faith" are defined and applied in their usual manner. It has been held to be good faith where the insurer's decision to refuse to settle was based on an honest and intelligent consideration of all the facts, taking into account the nature and extent of the injury.¹² Bad faith was broadly considered as a state of mind, each instance of which must be proven according to specific evidence and decided by the jury.¹³ Failure to settle within the limits of the policy when honest discretion and judgment indicated that such a settlement would be less than that of a judgment, was held to constitute bad faith;¹⁴ refusal to settle when such refusal was maintained against the advice of counsel and adjuster was also held to imply bad faith.¹⁵

As in previous attempts to define negligence in other fields, the "reasonable and prudent man" test is used.¹⁶ This line of decisions leaves to the jury to decide whether or not the insurer acted in a manner befitting

7. *Ballard v. Citizens Casualty Co. of New York*, 196 F.2d 96 (7th Cir. 1952); *National Mutual Casualty Co. v. Britt*, 200 P.2d 407 (Okla. 1948).

8. E.g., *Ballard v. Citizens Casualty Co. of New York*, 196 F.2d 96 (7th Cir. 1952); *Lawson & Nelson Sash & Door Company v. Associated Indemnity Corp.*, 204 Minn. 50, 282 N.W. 481 (1938); *Burnham v. Commercial Casualty Insurance Co.*, 10 Wash.2d 624, 117 P.2d 644 (1941).

9. *New Orleans & Carrollton R.R. v. Maryland Casualty Insurance Co.*, 114 La. 153, 38 So. 89 (1905); *City of Wakefield v. Globe Indemnity Co.*, 246 Mich. 645, 225 N.W. 643 (1929).

10. E.g., *Maryland Casualty Co. v. Cook-O'Brien Construction Co.*, 69 F.2d 462 (8th Cir. 1934); *Auto Mutual Indemnity Co. v. Shaw*, 134 Fla. 815, 184 So. 852 (1938); *Mendota Electric Co. v. New York Indemnity Co.*, 169 Minn. 377, 211 N.W. 317 (1926); *Best Building Co. v. Employers Liability Assurance Corp.*, 247 N.Y. 451, 160 N.E. 911 (1928); *Johnson v. Hardware Mutual Casualty Co.*, 109 Vt. 481, 1 A.2d 817 (1938); *Hilker v. Western Automobile Insurance Co.*, 204 Wis. 1, 231 N.W. 257 (1930).

11. E.g., *Attleboro Manufacturing Co. v. Frankfort Marine Insurance Co.*, 240 Fed. 573 (1st Cir. 1917); *Douglas v. United States Fidelity and Guaranty Co.*, 81 N.H. 371, 127 Atl. 708 (1924); *Tyger River Pine Co. v. Maryland Casualty Co.*, 170 S.C. 286, 170 S.E. 346 (1933); *G. A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544 (Tex. 1929).

12. E.g., *Hilker v. Western Automobile Insurance Co.*, 204 Wis. 1, 231 N.W. 257 (1930).

13. *Johnson v. Hardware Mutual Casualty Co.*, 109 Vt. 481, 1 A.2d 817 (1938).

14. *Traders and General Insurance Co. v. Rudco Oil and Gas Co.*, 129 F.2d 621 (10th Cir. 1942).

15. See note 13 *supra*.

16. See note 11 *supra*.

a reasonable and prudent man.¹⁷ It is difficult to draw any conclusions from this line of decisions other than to note that the layman's rulings have been prone to be adverse to the interests of the insurance companies.

The court (in this case of first impression), in holding the insurance company liable in the instant case, (by requiring evidence of bad faith) has adopted the majority rule. In *Auto Mutual Indemnity Co. v. Shaw*,¹⁸ the Florida Supreme Court announced that, although there was insufficient evidence to hold the insurer liable, the court would follow the "bad faith" rule. In the instant case, the insurance company flatly refused to negotiate or compromise; such arbitrary refusal has been held to constitute bad faith *per se*¹⁹ and it was so held here.

It is submitted that Florida, by selecting and subscribing to the majority view, has chosen the fairer and more equitable of the two theories. This rule does hold the insurer liable for serious breach of faith but does not make this liability dependent upon mere negligence as decided by the nebulous and often emotional "reasonable man" test.

Richard H. Parker

REAL PROPERTY—EASEMENTS—ORAL— FRAUD ACTIONS

The plaintiff purchased land from the defendant, who orally agreed to develop bathing beach facilities and give an easement for use thereof. When the vendor refused to perform, the plaintiff brought action in fraud and deceit, which was dismissed by trial court. *Held*, on appeal, affirmed. Agreements creating easements are within the Statute of Frauds and are unenforceable directly or indirectly, unless in writing. *Canell v. Arcola Housing Corp.*, 65 So.2d 849 (Fla. 1953).

Most courts hold that if at the time of making a promise to do future acts, no intention to perform existed, an action for fraud and deceit will lie.¹ A minority of jurisdictions maintain that whether or not performance was intended, future promises are not a basis for fraud.²

17. *Ibid*.

18. 134 Fla. 815, 184 So. 852 (1938).

19. *Maryland Casualty Co. v. Elmira Coal Co.*, 69 F.2d 616 (8th Cir. 1934); *Douglas v. United States Fidelity and Guaranty Co.*, 81 N.H. 371, 127 Atl. 708 (1924); *Hilker v. Western Automobile Insurance Co.*, 204 Wis. 1, 231 N.W. 257 (1930).

1. *O'Melia v. Adkins*, 73 Cal. App.2d 143, 166 P.2d 298 (1946); *Day v. Weadock*, 101 Fla. 333, 134 So. 525 (1931); *Feldman v. Witmark*, 254 Mass. 480, 150 N.E. 329 (1926); *Rutan v. Strachly*, 289 Mich. 341, 286 N.W. 639 (1939); *Brittingham v. Huylers*, 120 N.J. Eq. 198, 184 Atl. 529 (Ct. Err. & App. 1936); *Zora Realty Co. v. Green*, 186 Misc. 1044, 60 N.Y.S.2d 440 (Sup. Ct. 1946); *Harris v. Sanderson*, 178 S.W.2d 315 (Texas 1944); *Kritzer v. Moffat*, 136 Wash. 410, 240 Pac. 355 (1925); *Davis v. Alford*, 113 W.Va. 30, 166 S.E. 701 (1932).

2. *Sachs v. Blewett*, 206 Ind. 151, 185 N.E. 856 (1933); *Jeck v. O'Meara*, 341 Mo. 419, 107 S.W.2d 782 (1937); *Woods v. Scott*, 107 Vt. 249, 178 Atl. 886 (1935).