TO THE POLICY LIMITS AND BEYOND

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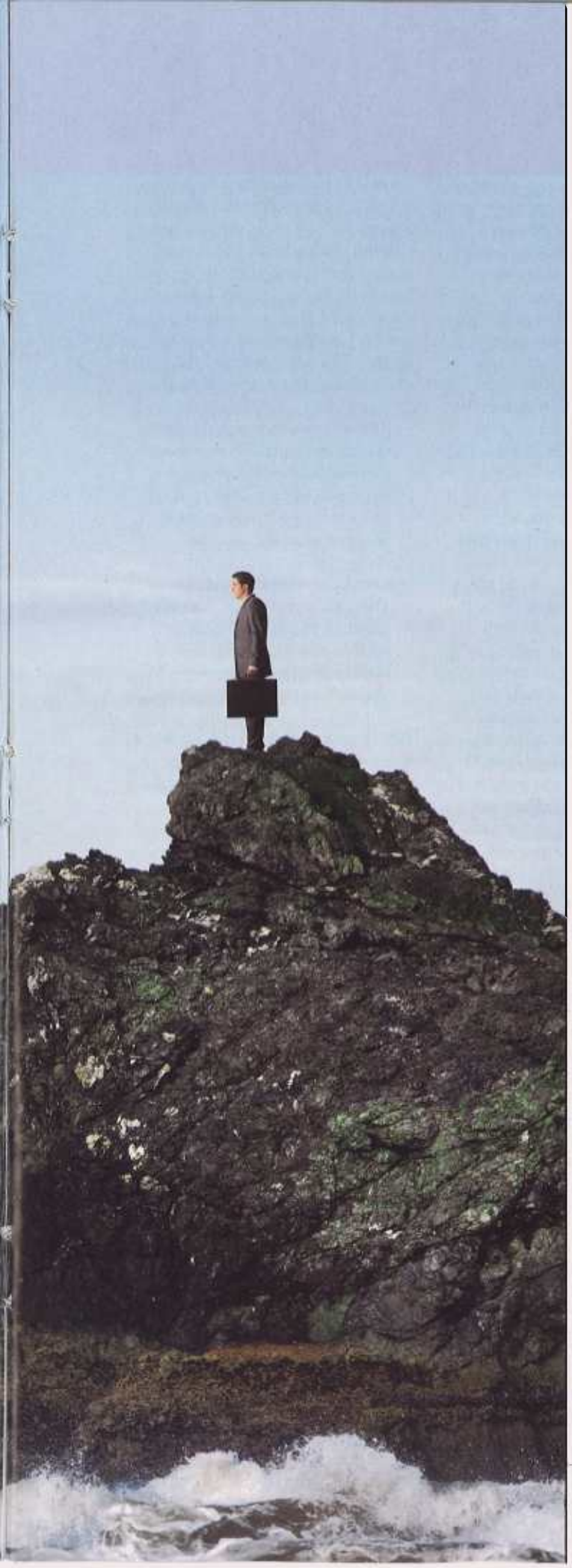

How often does a plaintiff have an opportunity to collaborate with an insured defendant to pressure the defendant's insurance company into settlement? What are the elements necessary to support an agreement to settle for the policy limits without the insurer's consent? More critically, is there a strategy that would allow the plaintiff and the defendant to agree to settle for more than the policy limits, limit collection against the insurer only, and provide the defendant with a full release and covenant not to execute? This article discusses the answers to these questions and outlines strategies that plaintiffs and defendants can follow to maximize the likelihood of settlement.

Insurer's Right to Control Defense and Settlement

Most primary liability insurance policies expressly give the insurer control over the defense of any potentially covered claim against the insured and preclude the insured from settling without the insurer's consent, except at the insured's own expense. When the insurer defends and is in compliance with its obligations under the policy, such clauses are often enforceable.[1] The purpose behind a consent-to-settle clause is to "give the insurer the opportunity to contest liability, to participate in settlement negotiations and to have input as to the value of the claim."[2]

When there are no disputed coverage issues and the insured's potential liability is less than the available policy limits, precluding an insured from settling without the insurer's consent, except at the insured's own expense, makes sense. If the insured is insulated from the risk of an uncovered excess judgment, the insurer should be permitted to attempt to minimize its liability by taking a case to trial rather than settling.

When an insured's own assets are potentially at stake, however, due to either disputed coverage issues or potential liability in excess of policy limits, an insured's noncompliance with a consent-to-settle clause often is not a bar to coverage. The rules regarding when an insured may settle without an insurer's consent vary somewhat by jurisdiction, but they are all variations on the same theme: an insured is entitled to take steps to protect itself from uninsured liability by settling an underlying action. In some jurisdictions, an insurer that defends subject to a reservation of rights cannot rely on an insured's noncompliance with a consent-to-settle clause as a defense to coverage.[3] In other jurisdictions, an insurer loses the right to enforce a consent-to-settle clause when a conflict of interest precludes the insurer from controlling the insured's defense.[4] An insurer's filing of a declaratory judgment action also may permit the insured to settle without the insurer's consent.[5] And most, if not all, jurisdictions hold that an

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TIP
An insurer that exposes its insured to excess liability by failing to settle may have to pay a judgment or settlement in excess of limits.

insurer loses the right to enforce a consent-to-settle clause when it improperly refuses to defend or denies coverage.[6]

Insurer's Duty Regarding Liability in Excess of Limits

Although liability insurance policies do not contain express provisions requiring the insurer to settle on behalf of its insured, most jurisdictions recognize that an implied correlative of an insurer's right to control its insured's defense is the duty not to gamble with the insured's money by forgoing reasonable opportunities to settle a claim on terms that will protect the insured against an excess judgment.[7] The liability of an insurer that forgoes a reasonable settlement opportunity that would have protected its insured from an excess judgment is not limited to the policy limits.[8] The U.S. Court of Appeals for the Seventh Circuit cogently explained the rationale for imposing a duty to settle on liability insurers as follows:

> Were it not for this duty, a duty fairly implied in the insurance contract, in a case in which a claim could be settled at or near the policy limit, yet there was a good although not certain chance that it could be beaten at trial, the insurance company would be sorely tempted to take the case to trial. For that would place it in a "Heads I win, tails you lose," position. Suppose the claim was for $2 million, the policy limit was $1 million, the plaintiff was willing to settle for this amount, but the defendant's insurer believed that if the case was tried the plaintiff would have a 50 percent chance of winning $2 million and a 50 percent chance of losing. The insurer's incentive would be to refuse to settle, since if it lost the trial it would be no worse off than if it settled—in either case it would have to pay $1 million—but if it won it would have saved itself $1 million. It is in order to quench [*sic*] this kind of temptation that the liability insurer's duty to settle in good faith was read into liability insurance contracts.[9]

As noted above, an insured typically must obtain the insurer's consent before settling with an injured plaintiff in the absence of a breach of the duty to defend or coverage disputes. Nevertheless, courts have consistently recognized that where an insurer unreasonably refuses to settle, "the insured may effect a reasonable settlement himself without breaching any conditions of the policy."[10] Even if there is no reservation of rights or denial of coverage, there is authority for the proposition that a failure to settle can be a breach of the insurer's obligations.[11]

The decision in *SwedishAmerican Hospital Ass'n of Rockford v. Illinois State Medical Interinsurance Exchange* (*ISMIE*)[12] is illustrative. In *ISMIE*, a doctor settled a medical malpractice action for his policy limits after the doctor's insurer refused to participate in settlement discussions. The insurer argued that the settlement agreement was unenforceable because the doctor failed to obtain the insurer's prior consent before settling.[13] The court rejected the insurer's argument, reasoning that

> [i]f the circumstances at the time of settlement establish that the potential loss and the proposed settlement by far exceed . . . the limits of the policy, the insured need not await the outcome of the trial and may proceed to make a prudent settlement. Then, upon proof of the insurer's breach of its good-faith duty to settle, it may recover the amount of the policy limits from the insurer.[14]

ISMIE makes clear that even if the insurer fulfills its duty to defend, the insured may still effect a reasonable settlement where the insurer breaches its duty to settle.[15]

Excess Insurance and Bad Faith Failure-to-Settle Claims

If the insured has excess insurance, the insured and the primary insurer may decide to negotiate a settlement with a plaintiff for an amount that exceeds primary coverage and triggers the excess coverage. As explained by the U.S. Court of Appeals for the Ninth Circuit, an excess insurer that is presented with a proposed settlement requiring contribution from its layer has three options: (1) approve the proposed settlement; (2) reject it and take over the defense; or (3) reject it, decline to take over the defense, and face a potential lawsuit by the insured seeking contribution toward the settlement.[16] According to the Ninth Circuit, an excess insurer that fails to take one of the first two options will be liable for the settlement, if covered, if the

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excess insurer was given a reasonable opportunity to evaluate the proposed settlement and the settlement was reasonable and not the product of collusion.[17]

The fact that the insured has excess insurance may not insulate the primary insurer from bad faith failure-to-settle liability, even if the case settles for an amount within the excess layer.[18] As one court explained, there is

> no reason why [the fact that the insured was financially protected] should excuse the insurer from exercising the same good faith it would be expected to exercise, were the insured fully financially [liable].[19]

Invocation of Insurer's Good Faith Duty to Settle

Particularly where an insured has insufficient assets to satisfy an adverse judgment, an insurer's good faith duty to settle can present the plaintiff with a valuable win-win opportunity. If the plaintiff makes a settlement offer within policy limits and the insurer accepts the offer, then the plaintiff will recover the amount of its offer, eliminating the risk that it will lose at trial or be unable to collect a judgment against the insured's own assets. And if the insurer refuses to settle and the case results in an adverse judgment against the insured in excess of limits, the plaintiff may be entitled to recover damages in excess of the insurer's policy limits from the insurer.

Typically, if a plaintiff gives an insurer the opportunity to settle and the insurer refuses, the plaintiff will be willing to take an assignment from the defendant of its rights against the insurer in exchange for a covenant not to execute against the defendant's assets and an agreement to collect the entire judgment from the insurer. The benefit to the plaintiff is that it may be able to recover more than the policy limits from the insurer. The risk to the plaintiff is that if it recovers nothing from the insurer, it has no recourse against the insured. Generally, in claims against insureds with fewer assets than their potential liability, this is a worthwhile pursuit for the plaintiff.

The fact that the insured has excess insurance may not insulate the primary insurer from bad faith failure-to-settle liability.

However, in order to prevail on a claim against the insurer for a breach of the good faith duty to settle, the plaintiff must first make a policy limits demand and have the insured communicate its demand that the insurer settle. The four components for establishing the plaintiff's entitlement to collect its excess verdict against the insurer are as follows:

1. The plaintiff and the defendant have to agree, in advance, on all of the conditions of settlement other than what the insurance company must pay.
2. The plaintiff has to make a demand within remaining policy limits and provide the insurer with a specific reasonable time limit in which to respond.
3. The defendant has to put in writing its demand on the insurance company to accept the plaintiff's demand within the policy limits. It must acknowledge the risk to it, as the insured, that if the jury finds against it, the judgment will be in excess of the policy limits. The defendant must provide a reasoned basis to support the contention that the risk is greater that a jury verdict will exceed policy limits than the probability that it will not.
4. The insurance company must have an opportunity to negotiate with a neutral for a settlement within policy limits.

What is the incentive for a defendant to present the plaintiff's demand to the insurer with its own demand that the case settle? Obviously, having the case settled within policy limits is a reasonable goal of the policyholder that faces potential liability in excess of the policy limits. Even greater incentive exists for the policyholder to protect its assets from collection in cases in which the insurer has issued a reservation of rights indicating that some or all of the potential judgment may not be covered.

In order to start the settlement process, the plaintiff must make a settlement demand that (1) explains why a potential jury award is reasonably likely to exceed available policy limits, (2) sets a reasonable deadline for a response so that the claims adjuster has sufficient time to evaluate the defense file and procure adequate settlement authority, (3) makes a demand for policy limits (subject to confirmation of the amount of remaining limits), (4) provides a full release for the policyholder or sufficient consideration to support payment, and (5) expresses a willingness to participate in mediation with a neutral in order to provide the insurer with an opportunity to explore the potential to settle for less than policy limits.

Arguably, the only downside for the plaintiff in initiating this process is if the insurer agrees to pay

limits. Once the insurer has made an acceptable offer and the plaintiff has accepted it, the defendant and its insurer are released from any further liability. The plaintiff will not be able to try the case and obtain a verdict in excess of the policy limits.[20] The good news, though, is that the case settles without trial or risk to either side.

Lack of Acceptable Settlement Offer from Insurer

What happens, however, if the insurer is unwilling to make an acceptable settlement offer in response to the plaintiff's policy limits demand? The plaintiff now has several options. The obvious and traditional route is to move forward and try the case. With this option, though, the plaintiff, the defendant, and the defendant's insurer are at risk that the decision not to settle will not work out in their favor.

What if the plaintiff and the defendant want to diminish that risk, at the expense of the insurer? Under this scenario, two options exist. First, the plaintiff can settle directly with the defendant for policy limits and seek to collect from the insurer pursuant to the insurer's duty to indemnify the insured. Second, the plaintiff can settle directly with the defendant for more than the policy limits and take an assignment of the insured's rights against the insurer for breach of the duty to settle in good faith.

Settlement for the policy limits. If the plaintiff has followed the strategy outlined above and the insurer has failed to settle, the plaintiff should explore settlement for policy limits directly with the defendant in exchange for giving the defendant a covenant not to execute. The basis for allowing the defendant to settle without the insurer's consent is proof that the insurer's failure to settle constituted a breach of the duty to settle or duty to defend. Similar to enforcing the insurer's obligation to indemnify the insured, the plaintiff must still prove after trial that the settlement is covered. Furthermore, if there is a settlement, the plaintiff has the additional burden to prove the reasonableness of the amount of the settlement and that there was no fraud or collusion between the plaintiff and the defendant.[21] Nonetheless, given the right combination of factors, the plaintiff may be willing to forgo trial, the defendant may be willing to enter into a settlement, and the insurer may be at risk.

> The duty to indemnify can be determined only after the insured becomes legally obligated to pay damages in the underlying suit.

The right of the plaintiff to collect from the insurer is based on the insurer's obligation to indemnify the insured. In this regard, the plaintiff that has settled with the defendant has standing as a judgment creditor seeking to collect the settlement from the insurer that controls the policy as an asset of the defendant. The duty to indemnify can be determined only after the insured becomes legally obligated to pay damages in the underlying suit.[22] An insurer must indemnify the insured for a loss if it actually falls within the insurance policy's coverage.[23] The plaintiff, standing in the insured's shoes, has the burden to prove that the liability incurred in the underlying suit is covered by the policy.[24] Where liability was incurred because of settlement, the insured must establish that it settled "an otherwise covered loss in 'reasonable anticipation of personal liability.'"[25]

The Supreme Court of Connecticut addressed a certified question from the U.S. District Court for the Northern District of Alabama regarding whether, in a presuit situation, an insurer that wrongfully denied coverage must pay where only some of the underlying claims should have been covered. In *Capstone Building Corp. v. American Motorists Insurance Co.*,[26] the court held that the insured had the burden of proving that the settlement was reasonable in proportion to the insurer's liability under its duty to defend. The court reasoned that holding the insurer liable for the portion of a pretrial settlement that may be reasonably allocated to allegations that form the basis of claims for which the insurer had an independent duty to defend was the most appropriate option in global settlements with multiple claims. The court "stress[ed], however, that the insured is not required to prove actual liability, only 'potential liability on the facts known to the [insured].'"[27]

Where the insured elects to settle the third party's claim, the settlement is binding on the insurer not only if the claim was within the policy's coverage but also if the settlement was reasonable and made in good faith.[28] In determining reasonableness, the court should consider whether the settlement was made in reasonable anticipation of liability and "whether, considering the totality of circumstances, the insured's decision conformed to the standard of a prudent uninsured."[29] Some factors to consider include the facts bearing on liability and damages and the costs and risks of going to trial.[30]

In general, there is a direct correlation between proving the reasonableness of the settlement and avoiding the insurer's defense that the settlement was a result of

collusion or fraud. If there is a reasonable basis for the insured to believe that a jury would find the insured liable for more than the policy limits, or for damages that might potentially not be covered (e.g., punitive damages), courts have agreed that the insured has the right to take reasonable steps to protect itself. For example, in *Home Federal Savings Bank v. Ticor Title Insurance Co.*,[31] in which the insurer argued that it had no duty to defend the insured or settle the claims against the defendant because the claims against the defendant were meritless and the defendant had an excellent chance to win, the Seventh Circuit disagreed, noting thus:

> However dim Wilhelm's prospects of success, that was precisely what Home Federal had insured against in the mechanic's lien endorsement. Ticor denied Home Federal's request for a defense, saying, effectively, "Handle this yourself—it's a slam dunk." Home Federal defended its position but eventually chose to settle with Wilhelm rather than risk paying for litigation and possibly losing priority of its security interest. Bearing those costs is a risk against which Home Federal had already insured through its policy with Ticor by paying for the mechanic's lien endorsement. As we see the case, Home Federal was seeking only the peace of mind it had paid for, not a windfall. The district court should have granted Home Federal's motion for summary judgment and denied Ticor's.[32]

Although *Ticor* is a case in which the insurer declined its duty to defend, courts will find a settlement to be reasonable even where the insurer is defending the insured if the insured reasonably believes that it will be liable for more than the policy limits.

The test of reasonableness is a question of fact and one that courts have routinely found must be specifically litigated, giving the insurer an opportunity to introduce evidence. As one court explained, when a settlement "effectively lets the insured off the hook," the insurer has the "right to rebut any showing of reasonableness."[33] Even though the judge in the underlying litigation had already held a "fairness hearing," she instructed the parties to submit additional materials because "the record [wa] s not well-developed."[34] Similarly, in *Guillen ex rel. Guillen v. Potomac Insurance Co. of Illinois*,[35] the Illinois Supreme Court emphasized that "the insurer retains the right to rebut any preliminary showing of reasonableness with its own affirmative evidence bearing on the reasonableness of the settlement agreement."[36] Because the insurer in that case had not had any "opportunity to present evidence" on the issue of the reasonableness of the insureds' decision to settle, the court remanded for further proceedings.[37] In addition, in *Stonecrafters, Inc. v. Wholesale Life Insurance Brokerage, Inc.*,[38] the court held that the trial court had "no basis" to find that the settlement was reasonable without a hearing during which the insurer was able to present its own evidence.[39]

Settlement for more than the policy limits. If the plaintiff has followed the strategy outlined above and the insurer has failed to settle, the plaintiff typically will try the case and get a jury verdict in excess of the policy limits in order to prove up the bad faith failure to settle. Can the plaintiff avoid the necessity of a jury trial, though, and enter into a settlement agreement with the defendant for more than policy limits? The answer is yes.

The benefits of such an agreement are many. In addition to the positive value of forgoing trial, a settlement agreement negates the possibility that the plaintiff may be faced with a judgment-proof defendant, which would make the potential for an excess verdict not worth the effort. Furthermore, a proposed settlement in excess of the policy limits may put more pressure on the insurer to settle because it would be on notice that its failure to settle for policy limits has exposed it to liability in excess of its policy.

If the plaintiff wants to collect an amount in excess of the policy limits from the insurer, the agreement must have the following terms and conditions:

1. The plaintiff and the defendant agree to a judgment by consent (no admission of liability) in an amount in excess of the policy limits, pursuant to a settlement agreement that recites the insurer's refusal to settle within the policy limits and the defendant's exposure to uninsured liability.
2. The plaintiff agrees not to execute on any property or assets of the defendant other than its insurance policies and agrees to satisfy the judgment only from the insurer.
3. The plaintiff agrees not to execute against the defendant's noninsurance assets even if a determination is made that its insurance carrier did not owe coverage, or agrees to a limited amount if there is any unsatisfied amount of the judgment.
4. The defendant assigns to the plaintiff all of its claims and rights to payment from the insurer for bad faith failure to settle.
5. The defendant agrees to cooperate with the plaintiff to consummate the agreement to achieve the settlement provided and to obtain recovery.

6. The plaintiff releases the defendant.
7. The plaintiff dismisses the case against the defendant with prejudice.

As set out above, the plaintiff, as a judgment creditor, will enforce the judgment against the insurer's duty to indemnify the defendant and must prove that the settlement is covered, up to the policy limits, and that the amount is reasonable. In addition, the plaintiff accepts the burden of pursuing the bad faith case as an assignee of the insured's rights against the insurer.

As an assignee for bad faith failure to settle, the plaintiff must prove that the failure to settle was unreasonable and that the insured suffered damages as a result of a consent judgment being entered against it in excess of the policy limits. The insurer defends against bad faith on the basis that it appropriately balanced its rights with the rights of the policyholder and had a reasonable basis upon which to refuse to settle.

In the cases in which the defendant insured receives a covenant not to execute against its corporate assets,[40] insurers routinely argue that if the insured is fully insulated from liability by a covenant not to execute, an essential element of the bad faith cause of action is lacking; and, therefore, an assignee of such a bad faith claim cannot prevail.[41] However, courts typically reject this argument, holding that an insured is not required to pay any portion of the judgment or be subjected to collection as a prerequisite to a valid bad faith failure-to-settle claim.[42]

By way of example, an opinion by the Illinois Supreme Court explains why a covenant not to execute does not negate an insured's ability to assign away its policy limits. In *Guillen*, the court held that a settlement agreement that included a stipulated judgment, a covenant not to execute, and an assignment was valid and enforceable against an insurer where the insurer breached its duty to defend. The insurer argued that the settlement was unenforceable because the insured was never "legally obligated to pay damages" as the payment obligation was limited solely to the assignment.[43] The court rejected the insurer's argument that a "covenant not to execute effectively extinguishes the insured's legal obligation to pay," reasoning thus:

> The construction of the "legally obligated to pay" language adopted by the majority of courts is a technical, rather than practical, one. Courts accepting the conclusion that the insured remains "legally obligated to pay" when the settlement consists of a judgment, covenant not to execute, and an assignment hold that a covenant not to execute is a contract and not a release. The insured still remains liable in tort and a breach of contract action lies if the injured party seeks to collect on the judgment. Thus, under this construction, the insured is still "legally obligated" to the injured plaintiff, and the insured retains the right to indemnification from the insurer.[44]

In good news for plaintiffs and defendants considering settlement agreements in excess of policy limits, *Nunn* and *Guillen* represent the modern trend.

The court went on to explain that the rationale supporting this technical construction is premised on the policy considerations underlying the breach of the duty to defend:

> Once the insurer has breached its duty to defend, it is in no position to demand that the insured be held to a strict accounting under the policy language.[45]

The court acknowledged that the insured "never faced any personal financial risk under the settlement agreement"; but it reasoned that because the insurer breached its duty to defend, fairness required that the insured was entitled to a "liberal construction of the 'legally obligated to pay' language."[46] Most other courts and commentators are in agreement with *Guillen*.[47]

Similarly, *Nunn v. Mid-Century Insurance Co.*[48] is a case in which a stipulated judgment was a factor. In *Nunn*, a passenger in an automobile accident suffered injuries after the driver lost control of the vehicle, causing it to crash. The passenger offered to settle with the driver's insurer for the driver's policy limit of $100,000, but the insurer allegedly refused. The passenger and the driver subsequently entered into a settlement agreement whereby the driver agreed to a stipulated judgment for $4 million and assigned his claim for bad faith to the passenger in exchange for a covenant not to execute. The passenger, as assignee, sued the driver's insurer for bad faith.[49]

Both the trial court and court of appeals dismissed the passenger's bad faith claim, reasoning that,

> by virtue of the covenant not to execute, [the driver] would never face personal liability for the excess judgment, and thus there were no damages to assign to [the passenger].[50]

The Colorado Supreme Court reversed, holding that the "entry of judgment in excess alone is sufficient damage to sustain a recovery against an insurer for breach of the duty to act in good faith."[51] Citing to cases from other jurisdictions, the court noted that its holding was consistent with the "majority rule" and concluded that the court of appeals incorrectly affirmed summary judgment on the basis that the driver "had no damages to assign."[52]

If a judgment in excess of policy limits supports an action for bad faith failure to settle, is there any reason that a settlement in excess of the policy limits would not require the same result? This was the question addressed by Judge Shadur in *National Union Fire Insurance Co. v. Continental Illinois Corp.*[53]

In *National Union*, the FDIC, as assignee of a distressed bank, brought a series of derivative securities litigation actions against the bank's officers and directors for breach of fiduciary duty and other related claims. The FDIC proposed to settle the claims for $68 million. When the insurers refused, the FDIC entered into a settlement agreement on its own with the defendants for $88 million. Under the settlement agreement, the defendants assigned to the FDIC their right to seek indemnification for the larger settlement amount in exchange for a covenant not to execute.[54]

The insurers argued that the FDIC could not state a cause of action for bad faith because the insureds' liability resulted from a settlement rather than a judgment.[55] Judge Shadur rejected this argument, reasoning that there was

> no reason to treat a settlement any differently than a judgment in excess of the policy limits, so long as the settlement was reasonable and reached in good faith.[56]

He concluded that

> [s]o long as the insurer's breach of its duty to settle is shown to have deprived the insured of the opportunity for a favorable settlement, no rational distinction separates the insured's striking the next best deal it can make from the insured's going to trial and getting hit with a larger judgment. Either way the insured has been compelled to accept liability because of the insurer's negligence or bad faith in rejecting the more favorable judgment.[57]

However, Judge Shadur ultimately concluded that the FDIC failed to state a cause of action for bad faith because the settlement did not subject the insureds to any personal financial exposure. Describing the situation as "a classic instance of winning the battle but losing the war," Judge Shadur noted that it is essential for the "insured to be at risk for the amount in excess of the policy limits before it can seek to thrust that risk onto its insurer."[58] He continued,

> If the insured is speculating only with the insurer's dollars—a sort of "Heads I win, tails I lose nothing"—there is no rational limit imposed on the putative settlement.[59]

On this basis, Judge Shadur concluded that the FDIC, as assignee, could not enforce the $88 million settlement against the insurers because the insureds were "not in any way personally liable for the $88 million amount of the settlement," and therefore the FDIC could not show "causation."[60]

At a minimum, *National Union* should be inapplicable to cases involving consent judgments or stipulated judgments. While this distinction may seem artificial, courts have repeatedly recognized that, in cases involving claims of bad faith, "[t]he very fact of the entry of a judgment itself constitutes damage and harm sufficient to permit recovery."[61] Thus, if the judgment itself constitutes the harm to the insured, the parties could potentially avoid the fatal impact of *National Union* by structuring the settlement to include a stipulated judgment, as opposed to a mere agreement to pay.

In good news for plaintiffs and defendants considering settlement agreements in excess of policy limits, *Nunn* and *Guillen* represent the modern trend, and *National Union* is both distinguishable and outdated.

Conclusion

An insurer that chooses not to settle within policy limits when it is offered the opportunity to do so risks the consequences of this decision—that is, the plaintiff and the defendant can collaborate between themselves to either settle for the policy limits or settle for more than the policy limits. This realignment of interests gives the plaintiff the right to step into the shoes of the defendant insured and assert its contractual rights against the "misbehaving insurer,"[62] potentially reaping the benefits.

There is no doubt that a plaintiff's strategy to join forces with a defendant at risk can present a win-win solution for both the plaintiff and the defendant. This strategy provides the plaintiff the opportunity to collect policy limits, if there is coverage, and eliminates the risk of a defense verdict at trial. The plaintiff also has the opportunity to collect more than policy limits if it can establish the elements of a bad faith failure to settle case and is spared the cost of trying a case against a potentially judgment-proof defendant, and the defendant

is protected from an unlimited or uninsured judgment. ■

Notes

1. *See, e.g.*, Alliance Syndicate v. Parsec, Inc., 318 Ill. App. 3d 590, 601 (1st Dist. 2000):

> [W]here [the insurer] was otherwise in compliance with the terms of its policy and [the insured], against the wishes of [the insurer], . . . voluntarily settled the underlying suit, [the insured] violated the provision in the . . . policy stating that "no insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, . . . without our consent."

2. Stryker Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 842 F.3d 422, 429–30 (6th Cir. 2016).

3. *See, e.g.*, Ins. Co. of N. Am. v. Spangler, 881 F. Supp. 539, 544 (D. Wyo. 1995); USAA v. Morris, 741 P.2d 246, 249 (Ariz. 1987); Taylor v. Safeco Ins. Co., 361 So. 2d 743, 745–46 (Fla. Dist. Ct. App. 1978).

4. *See, e.g.*, Standard Mut. Ins. Co. v. Lay, 2014 IL App (4th) 110527-B, ¶ 35:

> When an insurer surrenders control of the defense, it also surrenders its right to control the settlement of the action and to rely on a policy provision requiring consent to settle.

Commonwealth Edison Co. v. Nat'l Union Fire Ins. Co., 323 Ill. App. 3d 970, 985 (1st Dist. 2001):

> [The insured] was not required to obtain [the insurer's] consent because [the insurer] was not controlling [the insured's] defense due to a potential conflict of interest, [the insurer] had notice of [the insured's] intention to settle to avoid a potentially large adverse jury verdict, and even [the insurer] believed that the case should be settled.

5. *See, e.g.*, Miller v. Shugart, 316 N.W.2d 729 (Minn. 1982).

6. *See* 1 New Appleman Insurance Bad Faith Litigation § 4.04[3] (2d ed. 2017); J.P. Morgan Sec. Inc. v. Vigilant Ins. Co., No. 26226, slip op. ¶ 2 (Sup. Ct. N.Y. Cnty. 2016):

> [T]he repudiation of liability by an insurer on the ground that the loss is not covered by the policy will excuse an insured from complying with the term of the policy obligating it to obtain the insurers' consent before settlement of any matter, provided that the settlement is reasonable.

7. *See, e.g.*, Camacho v. Nationwide Mut. Ins. Co., 13 F. Supp. 3d 1343, 1363 (N.D. Ga. 2014) (discussing extracontractual duty imposed upon insurers not to "gamble with the funds of its insured by refusing to settle within the policy limits in bad faith under certain circumstances") (citation omitted); Olympia Fields Country Club v. Bankers Indem. Ins. Co., 325 Ill. App. 649 (1st Dist. 1945); Scottsdale Ins. Co. v. Addison Ins. Co., 448 S.W.3d 818, 828 (Mo. 2014); Fireman's Fund Ins. Co. v. Sec. Ins. Co., 72 N.J. 63, 85 (1976):

> [I]t may be tempting for the insurance company to gamble on the outcome of a trial by not settling. If the insurer chooses to gamble, it may do so, but not with the *insured's* money; if it takes an unreasonable gamble and looses [*sic*], the insurer must pay the price.

(emphasis in original) (citation and internal quotation marks omitted).

8. *See* New Appleman Insurance Bad Faith Litigation, *supra* note 6, § 9.03.

9. Twin City Fire Ins. Co. v. Country Mut. Ins. Co., 23 F.3d 1175, 1179 (7th Cir. 1994).

10. SwedishAm. Hosp. Ass'n of Rockford v. Ill. State Med. Interins. Exch. (*ISMIE*), 395 Ill. App. 3d 80, 97–98 (2d Dist. 2009) (quoting Krutsinger v. Ill. Cas. Co., 10 Ill. 2d 518, 527 (Ill. 1957)); *see also* Ill. Tool Works, Inc. v. Home Indem. Co., 24 F. Supp. 2d 851, 854–56 (N.D. Ill. 1998); WestAm. Mortg. Co. v. Tri-County Reports, Inc., 670 F. Supp. 819, 821 (N.D. Ill. 1987); U.S. Gypsum Co. v. Admiral Ins. Co., 268 Ill. App. 3d 598, 625 (1st Dist. 1995).

11. *See ISMIE*, 395 Ill. App. 3d at 101 ("Breach of the good-faith duty to settle is considered by other jurisdictions, and we agree, to be an extension of the duty to defend."); R.C. Wegman Constr. Co. v. Admiral Ins. Co., 629 F.3d 724 (7th Cir. 2011) (insurer breached duty to notify insured of opportunity to settle); Liberty Mut. Ins. Co. v. Am. Home Assurance Co., 348 F. Supp. 2d 940, 959 (N.D. Ill. 2004) ("The defense and settlement of a case are hopelessly intertwined.").

12. 395 Ill. App. 3d 80.

13. *Id.* at 84–85, 97–102.

14. *Id.* at 99.

15. *See id.* at 101; *see also* Cay Divers, Inc. v. Raven, 812 F.2d 866 (3d Cir. 1987) (finding that if insurer reserves right to contest coverage and provides insured with independent counsel, it has renounced control of the litigation and insured is free to enter into a reasonable settlement and pursue an action for indemnification against insurer); *In re* Halo, 310 B.R. 710, 724 (N.D. Bankr. 2004) (holding that insurer loses its right to consent to a settlement by denying coverage, notwithstanding its compliance with its duty to defend); United Servs. Auto. Ass'n v. Morris, 154 Ariz. 113 (1987) (finding that insured only forbidden from settling without insurer's consent when insurer has unconditionally assumed liability under the policy); Miller v. Shugart, 316 N.W.2d 729 (Minn. 1982) (holding that insurer disputing coverage cannot compel insured to forgo settlement in insured's best interest); Whitehead v. Lakeside Hosp. Ass'n, 844 S.W.2d 475, 480 (Mo. Ct. App. W.D. 1992) (ruling that insured properly refused to accept defense pursuant to a reservation of rights and was entitled to make a reasonable settlement or compromise); Butters v. City of Independence, 513 S.W.2d 418 (Mo. 1974) (same); G. A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929) (same as *Shugart*, 316 N.W.2d 729).

16. *See* Teleflex Med. Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 851 F.3d 976, 979 (9th Cir. 2017)

(discussing Diamond Heights Homeowners Ass'n v. Nat'l Am. Ins. Co., 277 Cal. Rptr. 906 (1991)).

17. *Id.*

18. *See* Scottsdale Ins. Co. v. Addison Ins. Co., 448 S.W.3d 818, 821 (Mo. 2014) (finding that both excess insurer and insured had potential bad faith failure-to-settle claims against primary insurer that improperly rejected policy limits demand, even though the case eventually settled and no judgment was entered against the insured); W. Am. Ins. Co. v. RLI Ins. Co., 698 F.3d 1069, 1071 (8th Cir. 2012) (same).

19. *W. Am. Ins. Co.*, 698 F.3d at 1077 (quoting Farmers Ins. Exch. v. Schropp, 567 P.2d 1359, 1369 (1977)).

20. *See, e.g.*, Am. Guar. & Liab. Ins. Co. v. USF&G, 668 F.3d 991 (8th Cir. 2012) (primary insurer's bad faith refusal to settle for $5 million limit resulted in jury verdict of $46 million); Sequoia v. Royal Ins. Co., 971 F.2d 1385 (9th Cir. 1992) (plaintiff repeatedly offered to settle for the $500,000 policy limit; jury ultimately awarded plaintiff $700,000).

21. *See* New Appleman Insurance Bad Faith Litigation, *supra* note 6, § 4.04[5][a].

22. *See* Outboard Marine Corp. v. Liberty Mut. Ins. Co., 154 Ill. 2d 90 (1992).

23. *See id.* at 126.

24. *See* St. Michael's Orthodox Catholic Church v. Preferred Risk Mut. Ins. Co., 146 Ill. App. 3d 107, 110 (1st Dist. 1986).

25. Fed. Ins. Co. v. Binney & Smith, Inc., 913 N.E.2d 43, 48 (Ill. App. Ct. 1st Dist. 2009) (quoting U.S. Gypsum Co. v. Admiral Ins. Co., 643 N.E.2d 1226 (Ill. 1995) (internal citations omitted)).

26. 67 A.3d 961 (Conn. 2013).

27. *Id.* at 1000 (quoting Black v. Goodwin, Loomis & Britton, Inc., 681 A.2d 293 (1996)).

28. *See* Midw. Indem. Co. v. Laikin, 119 F. Supp. 2d 831, 842 (S.D. Ind. 2000). This case interprets Indiana law as supporting the rule that a

> consent judgment . . . bind[s] the insurer on issues of its insured's liability and the extent of the injured parties' damages, so long as (1) the coverage is eventually shown, and so long as the consent judgment (2) is not the product of bad faith or collusion and (3) falls somewhere within a broad range of reasonable resolutions of the underlying dispute.

Cincinnati Ins. Co. v. Young, 852 N.E.2d 8, 14 (Ind. Ct. App. 2006) (endorsing *Laikin's* approach); *see also* 7cf-197 Appleman on Insurance Law and Practice § 4714 (2d ed. 2011) ("A settlement made by the insured of a pending action must be reasonable; and the court will examine the merits of the claim to determine that question.").

29. Guillen *ex rel.* Guillen v. Potomac Ins. Co. of Ill., 785 N.E.2d 1, 14 (Ill. 2003).

30. *See id.*

31. 695 F.3d 725 (7th Cir. 2012).

32. *Id.* at 729.

33. Maxum Indem. Co. v. Eclipse Mfg. Co., 848 F. Supp. 2d 871, 885 (N.D. Ill. 2012); *see also Guillen*, 785 N.E.2d 1.

34. *Maxum Indem. Co.*, 848 F. Supp. 2d at 886.

35. 785 N.E.2d 1.

36. *Id.* at 14.

37. *Id.* at 15.

38. 915 N.E.2d 51 (Ill. App. Ct. 2d Dist. 2009).

39. *Id.* at 62.

40. *See* Standard Mut. Ins. Co. v. Lay, 2012 IL App (4th) 110527 (settlement with a covenant not to execute).

41. *See, e.g.*, W. Am. Ins. Co. v. RLI Ins. Co., 698 F.3d 1069, 1075 (8th Cir. 2012).

42. *See* 2 Law of Liability Insurance § 7.05 (2017) (noting that the rule that insured is not obligated to pay a portion of an excess judgment to establish bad faith claim is supported by the "overwhelming weight of authority, and all modern authority").

43. Guillen *ex rel.* Guillen v. Potomac Ins. Co. of Ill., 785 N.E.2d 1, 12 (Ill. 2003).

44. *Id.*

45. *Id.* at 13.

46. *Id.*

47. *See, e.g.*, Salvati v. Am. Ins. Co., 855 F.3d 40, 49 (1st Cir. 2017) (citing Douglas R. Richmond, *The Consent Judgment Quandary of Insurance Law*, 48 Tort Trial & Ins. Prac. L.J. 537, 556 (2013)).

48. 244 P.3d 116 (Colo. 2010).

49. *Id.* at 118.

50. *Id.*

51. *Id.* at 121.

52. *Id.* at 121–24.

53. 673 F. Supp. 267, 272–75 (N.D. Ill. 1986).

54. *Id.* at 269–70.

55. *Id.* at 272.

56. *Id.* at 274.

57. *Id.*

58. *Id.* at 274–75.

59. *Id.* at 275.

60. *Id.* at 274.

61. Wolfberg v. Prudence Mut. Cas. Co. of Chi., 98 Ill. App. 2d 190, 197 (1st Dist. 1968); *see also* Law of Liability Insurance, *supra* note 42, § 7.05 (noting that the rule that insured is not obligated to pay a portion of an excess judgment to establish bad faith claim is supported by the "overwhelming weight of authority, and all modern authority").

62. Twin City Fire Ins. Co. v. Country Mut. Ins. Co., 23 F.3d 1175, 1179 (7th Cir. 1994).