Insurer Duties Regarding Initiation of Settlement Negotiations

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[iii] Division of Jurisdictions on Whether Insurer Has Affirmative Duty To Negotiate

[A] Overview

Some jurisdictions hold that the duty to settle arises only when the claimant makes an offer that should have been accepted and would have shielded the insured.²⁹⁵ As the Third Circuit

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²⁹⁵ E.g.:
Traditionally and logically, the impetus for settlement comes from the plaintiff. He is the one seeking recovery and therefore has the burden of stating just what it is that he wants. A feigned lack of interest in settlement by a defendant is a widely recognized negotiating ploy. We see no reason why use of this technique should excuse the plaintiff from stating his demand. The utter uselessness of ad damnum clauses in personal injury cases requires that at some stage in the litigation the real amount of the claim be disclosed. Only the plaintiff can supply it. 296

But even where a demand is normally required, that requirement may be excused where insurer misconduct at least may have prevented the demand. 297

But other jurisdictions do require insurers to initiate settlement negotiations if that is an appropriate method of resolving the case. 298 The Tenth Circuit best states the reasoning of courts

**Pennsylvania:** Puritan Ins. Co. v. Canadian Univ. Ins. Co., 775 F.2d 76, 82 (3d Cir. 1985) (insurer usually has no obligation to initiate offers);

**Mississippi:** Hemphill v. State Farm Mut. Auto. Ins. Co., 805 F.3d 535, 539–40 (5th Cir. 2015) (predicting no duty absent demand, based on lack of Mississippi authority suggesting otherwise);

**California:** Merritt v. Reserve Ins. Co., 34 Cal. App. 3d 858, 875 (1973) (no conflict triggering duty absent demand within limits or above limits but within insured’s ability to contribute excess);

**Illinois:** Haddick v. Valor Ins. Co., 198 Ill. 2d 409, 417 (2001) (insurer usually has no duty to make offers);

**Iowa:** Wierck v. Grinnell Mut. Reins. Co., 456 N.W.2d 191, 195 (Iowa 1990);

**Texas:** State Farm Lloyds Ins. Co. v. Maldonado, 963 S.W.2d 38, 41 (1998) (duty to settle is triggered by receipt of an offer the insurer should have accepted).

Robert H. Jerry, II, & Douglas R. Richmond, Understanding Insurance Law, § 112[d], at 840 (5th ed. 2012) (“In most jurisdictions, the insurer cannot be liable for breaching the duty to settle unless plaintiff makes a settlement offer within policy limits”).

296 Puritan, 775 F.2d at 82 (citations omitted).

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**California:** Boicourt v. Amex Assur. Co., 78 Cal. App. 4th 1390, 1392 (2000) (refusing, when requested, to disclose policy limits or seek insured’s consent to disclosure);

**Florida:** Davis v. Nationwide Mut. Fire Ins. Co., 370 So. 2d 1162, 1163 (Fla. Dist. Ct. App. 1979) (misinforming claimant that policy limit was less than medical lien).

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**New York:** Hartford Ins. Co. v. Methodist Hosp., 785 F. Supp. 38, 41 (E.D.N.Y. 1992) (collecting authorities supporting this rule and predicting that New York would agree);

**Florida:** Powell v. Prudential Prop. & Cas. Ins. Co., 584 So. 2d 12, 14 (Fla. Dist. Ct. App. 1991) (“Where liability is clear, and injuries so serious that a judgment in excess of policy limits is likely, an insurer has an
imposing this requirement:

The duty to consider the interests of the insured arises not because there has been a settlement offer from the plaintiff but because there has been a claim for damages in excess of the policy limits. This claim creates a conflict of interest between the insured and the carrier which requires the carrier to give equal consideration to the interests of the insured. This means that “the claim should be evaluated by the insurer without looking to the policy limits and as though it alone would be responsible for the payment of any judgment rendered on the claim.” When the carrier’s duty is measured against this standard, it becomes apparent that the duty to settle does not hinge on the existence of a settlement offer from the plaintiff. Rather, the duty to settle arises if the carrier would initiate settlement negotiations on its own behalf were its potential liability equal to that of its insured.299

affirmative duty to initiate settlement negotiations.”); Welford v. Liberty Ins. Corp., 190 F. Supp. 3d 1085, 1095–98 (N.D. Fla. 2016) (duty to initiate settlement negotiations arises only where insured’s liability is clear);


Louisiana: Kelly v. State Farm Fire & Cas. Co., 169 So. 3d 328, 339–41 (La. 2015);


See:


See also


Oregon: Goddard v. Farmers Ins. Co., 173 Or. App. 633, 638 (2001) (“In most circumstances the insurer, having reserved to itself the right to control the defense and the decision whether to agree to a settlement, should be obligated to explore the possibility of a settlement even in the absence of actions by the third-
Even where the jurisdiction at least might find liability in the absence of a demand, the jurisdiction may trigger the requirement to make an offer only when the facts put the insurer on notice that there is an opportunity to settle. Recognizing that Georgia law was uncertain on whether a demand was necessary, Kingsley v. State Farm Mutual Insurance Co., concluded that:

an insurer will be exposed to a judgment in excess of its policy limits only where there is some certainty regarding the settlement posture of the parties in the underlying lawsuit—i.e., where the insured’s liability is clear, the damages are great and the insurer is on notice that it has an opportunity to settle the case, usually because a settlement demand in the amount of the policy limits or greater is received from the plaintiff. There must be a triggering event—something that puts the insurer on notice that it must respond or risk liability for an excess judgment. Put another way, to find liability for tortious refusal to settle there must be something the insurer was required to “refuse.”

Even where an insurer is subject to a duty to initiate settlement negotiations, it has been held that no such duty arises until a claim has been asserted, even though the insurer was aware of the potential for a claim. In Roberts v. Printup, Roberts was injured as a passenger in a family car driven by her son, Printup. She reported the loss to her insurer and gave a recorded statement in which she said that the brakes had failed and she didn’t think that her son was at fault. The insurer paid personal injury protection (“PIP”) benefits for her injuries and $250 on a property damage claim by a third party. It was aware of the potential for a bodily injury liability claim but took no action on account of that potential. Eventually, Roberts submitted a ten-day time limit demand, which was not acted on within the ten-day period. She sued her son, rejected a belated policy-limits offer, recovered a large judgment, and sued on an assigned claim for bad faith. Among her theories was that the insurer should have initiated settlement negotiations even before she made a claim. The Tenth Circuit disagreed:

“it seems odd to think that an insurer [(as part of its duty to the insured)] should beat the bushes to advise potential claimants to sue or make claims against their insured, especially if there is a possibility of an excess claim.” The district court properly determined that an insurance company does not have a duty to the insured to initiate negotiations prior to a claim being made.

party or an express request by the insured,” ” quoting ROBERT KEETON & ALAN I. WIDISS, INSURANCE LAW, §§ 7.8(c), at 889–90 (1988).


302 Roberts v. Printup, 422 F.3d 1211 (10th Cir. 2005) (KS law).

303 Roberts, 422 F.3d at 1212–14.

Where the information available to the insurer did not establish damages exceeding the policy limit, it was reasonable for the insurer to defer initiating settlement negotiations until the claimant provided medical records or an authorization to obtain those records.\(^{304}\)

[B] California Rule Is in Dispute, but Currently Imposes No Duty to Initiate Settlement Negotiations

[I] Ninth Circuit Creates Doubts

A Ninth Circuit decision in 2012 initially appeared to treat California as requiring the insurer to initiate settlement negotiations, though the court retreated from that position by modifying its opinion on petition for rehearing. In \textit{Du v. Allstate Insurance Co.},\(^{305}\) the insured, Kim, was involved in a June 17, 2005 accident in which four occupants of the other vehicle were injured. Policy limits of Deerbrook Insurance, an Allstate subsidiary, were $100,000 per person and $300,000 per accident. In the year after the accident, Du incurred medical expenses of $108,742.92 and the other three claimants incurred medical expenses totalling about $34,000 (none more than $14,000 individually). Allstate accepted liability and sought information on damages. That was first provided on June 9, 2006, along with a global demand for $300,000 to settle with all four claimants. Allstate offered $100,000 to settle Du’s claim, but that was rejected. Du obtained a verdict of $4,126,714.46 against Kim, and took an assignment of Kim’s bad faith claim in return for a covenant not to execute.\(^{306}\)

At trial, Du proposed a jury instruction that one factor to be considered was whether Allstate “did not attempt in good faith to reach a prompt, fair, and equitable settlement” of Du’s claim. The district court instead instructed the jury that there could be no breach of the duty of good faith unless Deerbrook had rejected a reasonable settlement demand. The jury found it had not, and judgment was entered against Du.\(^{307}\)

The Ninth Circuit affirmed. It first purported to “hold that, under California law, an insurer has a duty to effectuate settlement where liability is reasonably clear, \textit{even in the absence of a settlement demand}.”\(^{308}\) Nonetheless, it had not been error to refuse Du’s requested instruction because “there was no evidentiary basis for Du’s proposed jury instruction.”\(^{309}\)

Seemingly, the latter conclusion rendered the prior purported “holding” mere \textit{dictum}, because the “holding” did not support the affirmation of the judgment. In any event, the court amended the

\(^{(N.D. Fla. 2003)}\) (insurer verified liability and severity of injuries and sent insured an excess letter, but made no offer to injured party until after she had retained counsel—thereby incurring liability for fees; bad faith verdict upheld).

Roberts was permitted to proceed on other theories. 422 F.3d at 1220. She ultimately recovered. \textit{Roberts v. Printup}, 595 F.3d 1181 (10th Cir. 2010), \(^{304}\)


\textit{Du v. Allstate Insurance Co.}, 681 F.3d 1118, \textit{amended}, 697 F.3d 753 (9th Cir. 2012).\(^{305}\)

681 F.3d at 1120–21.\(^{306}\)

681 F.3d at 1121.\(^{307}\)

681 F.3d at 1122 (emphasis added).\(^{308}\)

681 F.3d at 1122.\(^{309}\)
opinion to state that it “need not resolve” the issue of whether a demand was required, because there was no factual foundation for Du’s instruction. Thus, the former “holding” on that point was dropped.

[II] State Cases Require Claimant To Make Demand or, At Least, Indicate Interest in Settling

In fact, there was and is strong basis in California law to support the district court’s conclusion that a demand is necessary. In Merritt v. Reserve Insurance Co., Merritt was injured in a collision with a truck insured by Reserve. Based on its investigation, Reserve determined that there was a clear lack of liability to Merritt, such that it was not worth making a settlement offer. Merritt’s complaint demanded $400,000 in damages, increased just before trial to $650,000, amounts far in excess of the $100,000 bodily injury policy limit. Merritt never made any demand other than the amounts prayed for in the complaint. He obtained a verdict for $434,000, of which Reserve paid its $100,000 limit. Reserve’s insured assigned its bad faith claim to Merritt and paid $20,000 for a covenant not to execute. Merritt recovered a judgment of $499,000 against Reserve, which appealed. The court of appeal reversed and directed judgment for Reserve.

It reasoned that

[w]hile much remains obscure in this field of the law it is apparent from this summary that (1) the legal rules relating to bad faith come into effect only when a conflict of interest develops between the carrier and its insured; (2) a conflict of interest only develops when an offer to settle an excess claim is made within policy limits or when a settlement offer is made in excess of policy limits and the assured is willing and able to pay the excess.

In Merritt,

[s]ince no offer to settle was ever made, either within policy limits (the normal prerequisite for conflict of interest) or above policy limits but within feasibility limits of the assured’s resources, we conclude that no conflict of interest ever developed between assured and carrier, and therefore the issue of the carrier’s bad faith in relation to its assured never arose.

Merritt argued that, had Reserve made settlement overtures, a within-limits settlement

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310 697 F.3d at 758.
312 34 Cal. App. 3d at 861–66.
313 34 Cal. App. 3d at 884.
315 34 Cal. App. 3d at 877.
could have been achieved, though the court described this theory as “supported by no evidence whatsoever.”\(^{316}\) Regardless, none of the factors cited by Merritt would have made any difference:

   No settlement offer was ever made, either within policy limits, or within policy limits supplemented by the assured’s net worth. No demand for settlement was ever presented by the assured to the carrier. No suggestion that settlement was feasible was ever made prior to judgment by anyone connected with the suit. The case, therefore, does not involve a conflict of interest and does not present a situation in which the carrier can be found to have acted in bad faith toward its assured. On the contrary, the interests of carrier and assured remained parallel at all times, and no divergence of interests ever developed. Consequently, no cause of action arose on behalf of Stafford Co. against Reserve for bad faith refusal to settle, and the trial court should have entered judgment for defendant Reserve notwithstanding the verdict on the cause of action for bad faith.\(^{317}\)

The \textit{Merritt} court thus treated the lack of a settlement demand as establishing that Reserve had no duty to settle.

The initial opinion in \textit{Du} sought to distinguish \textit{Merritt} as turning on the lack of any evidence that a settlement could have been achieved, even had Reserve made settlement overtures.\(^{318}\) While that arguably might have been a possible basis for the result, the \textit{Merritt} court clearly treated that as simply a ground for dismissing one of Merritt’s arguments for not requiring a demand. The decision itself clearly rested on the lack of a demand, not on the lack of evidence that an offer by Reserve would have produced a settlement.

The initial opinion in \textit{Du} also relied on \textit{Gibbs v. State Farm Mutual Automobile Insurance Co.}\(^{319}\) But Gibbs (the injured child’s father) had repeatedly told State Farm’s insured and its investigator that he was willing to accept the policy limit; only after State Farm had failed to offer it did he retain counsel and take the case to trial. “Though no formal written offer existed, the jury could find that Gibbs statements gave State Farm a reasonable opportunity to settle the claim within policy limits.”\(^{320}\) They were the functional equivalent of the demand required by \textit{Merritt}.

The initial opinion in \textit{Du} also relied on \textit{California Insurance Code § 790.03(h)}, which defines as an unfair claim settlement practice “[n]ot attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear,”\(^{321}\) and on a decision concluding that “[i]t is reasonably clear that California courts will interpret the California statute as imposing upon an insurance company the duty actively to investigate and attempt to settle a claim by \textit{making}, and by accepting, reasonable settlement offers once liability

\(^{316}\) 34 Cal. App. 3d at 878.
\(^{317}\) 34 Cal. App. 3d at 879.
\(^{320}\) 544 F.2d at 427.
\(^{321}\) \textit{CAL. INS. CODE § 790.03(h)}. 
has become reasonably clear.”\footnote{681 F.3d at 1124, quoting 
Pray ex rel. Pray v. Foremost Ins. Co., 767 F.2d 1329, 1330 (9th Cir. 1985).} The Du court recognized that the latter decision was based on a later-rejected private right of action under the statute.\footnote{681 F.3d at 1124, discussing Moradi-Shalal v. Fireman’s Fund Ins. Cos., 46 Cal. 3d 287 (1988) (which rejected any private right of action under § 790.03).} Still, it argued that “subsequent courts have found that violations of section 790.03(h) can serve as evidence that an insurer had breached the implied covenant of good faith and fair dealing.”\footnote{681 F.3d at 1124–25, citing Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc., 78 Cal. App. 4th 847, 916 (2000); Jordan v. Allstate Ins. Co., 148 Cal. App. 4th 1062, 1078 (2007).} But the cases it relied on involved first-party bad faith on a claim for the insured’s own losses and do not support the existence of a duty to make offers with respect to a third-party claim. Moreover, the California courts have repeatedly warned that the statutory language “provides no toehold for scaling the barrier of Moradi-Shalal.”\footnote{Safeco Ins. Co. v. Super. Ct., 216 Cal. App. 3d 1491, 1494 (1990) (“To permit plaintiff to maintain this action would render Moradi-Shalal meaningless”); Textron Financial Corp. v. National Union Fire Ins. Co., 118 Cal. App. 4th 1061, 1070 (2004) (“parties cannot plead around Moradi-Shalal’s holding merely by relabeling their cause of action as one for unfair competition”); Maler v. Super. Ct., 220 Cal. App. 3d 1592, 1598 (1990) (“[S]ection 1861.03 cannot be construed to supersede Moradi-Shalal’s ban on a private action for damages under section 790.03”).}

This issue was again examined in Reid v. Mercury Insurance Co.\footnote{220 Cal. App. 4th 262 (2013).} On June 24, 2007, Mercury’s insured, Huang, failed to stop at a red light and collided with Reid’s car in a multi-car accident, causing Reid major injuries. Mercury quickly accepted 100% liability. On July 18, 2007, while Reid was still in intensive care, her son had authority to act for her, and asked for disclosure of the policy limits (which were $100,000 per person and $300,000 per accident). Mercury responded that it could not disclose those without Huang’s consent. A few days later, Mercury wrote to Reid saying that its investigation was incomplete, asking for medical records authorizations, and asking for a recorded interview.\footnote{220 Cal. App. 4th at 265–67.}

On July 19, Reid’s son retained counsel for her, because he felt that he was being “jerked around.” Reid also had $250,000 in underinsured motorist coverage which she could not access until the claim against Huang was resolved.\footnote{220 Cal. App. 4th at 267–68.}

Mercury set its reserve for Reid’s claim at $100,000; the other claims were initially reserved at a total of $69,500 and eventually settled for a total of $132,500. Thus, the per-accident limit was never implicated. The limits were disclosed to counsel in August, 2007. Reid testified that counsel told him that Mercury was not prepared to offer limits at that time, though he would definitely have accepted them to access the UIM coverage.\footnote{220 Cal. App. 4th at 267–68.}

By November, 2007, Mercury had given its adjuster authority to settle for $100,000, but Reid never made any demand. In May, 2008, Mercury offered its limits, which Reid rejected. A bench trial resulted in a $5.9 million judgment against Huang, and an assignment of Huang’s rights to Reid by Huang’s bankruptcy trustee.\footnote{220 Cal. App. 4th at 268–70.} The superior court granted Mercury summary
The court of appeal affirmed, though suggesting a less absolute rule. It ruled, consistently with Merritt, that “bad faith liability cannot be founded solely upon an insurer’s failure to initiate settlement discussions or offer its policy limit.” In its view,

For bad faith liability to attach to an insurer’s failure to pursue settlement discussions, in a case where the insured is exposed to a judgment beyond policy limits, there must be, at a minimum, some evidence either that the injured party has communicated to the insurer an interest in settlement, or some other circumstance demonstrating the insurer knew that settlement within policy limits could feasibly be negotiated. In the absence of such evidence, or evidence the insurer by its conduct has actively foreclosed the possibility of settlement, there is no “opportunity to settle” that an insurer may be taxed with ignoring.

It stated that “[o]ther Courts of Appeal have disagreed with Merritt’s statement that a conflict of interest develops ‘only’ when a formal settlement offer has been made.” Nonetheless,

none of these cases suggests that an insurer has a duty to initiate settlement discussions—or an “opportunity to settle”—in the absence of any indication from the injured party that he or she is inclined to settle within policy limits (or at some higher figure where the insured is willing to pay the excess over policy limits).

As the Du court noted, § 790.03(h)(5) of the California Insurance Code declares “not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear” an unfair practice; while not itself actionable, a violation of the statute may be evidence of bad faith. But the Reid court observed that the statute did not define circumstances constituting a breach, and “nothing in the statute requires or suggests the conclusion that an insurer’s failure to initiate settlement negotiations, in the absence of any

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331 220 Cal. App. 4th at 271.
332 220 Cal. App. 4th at 272 (capitalization omitted).
335 220 Cal. App. 4th at 273. See Graciano v. Mercury Gen. Corp., 231 Cal. App. 4th 414, 425 (2014) (stating absolute rule: “An insured’s claim for bad faith based on an alleged wrongful refusal to settle first requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. The offer satisfies this first element if (1) its terms are clear enough to have created an enforceable contract resolving all claims had it been accepted by the insurer, (2) all of the third-party claimants have joined in the demand, (3) it provides for a complete release of all insureds, and (4) the time provided for acceptance did not deprive the insurer of an adequate opportunity to investigate and evaluate its insured’s exposure.”); 231 Cal. App. 4th at 427 (citing more qualified Reid rule as authoritative, on facts where difference between rules nonexistent).
335.1 Reid, 220 Cal. App. 4th at 276.
expression of interest in settlement from the claimant, may give rise to a bad faith claim.\textsuperscript{335.2}  

\textit{Reid} thus provides a solid holding that California imposes no duty to initiate settlement discussions absent settlement overtures or other indications of interest from the claimant. It does suggest that there might be a duty to respond to overtures less than a firm demand, though that suggestion is, strictly speaking, dictum, as no such facts were before the court.

The issue was considered again in \textit{Travelers Indemnity v. Arch Specialty Insurance Co.}\textsuperscript{336} The court there recognized that the original \textit{Du} opinion was not controlling, but found it “highly persuasive.”\textsuperscript{337} It found that whether Travelers (the primary insurer) had acted reasonably was a jury question.\textsuperscript{338} Liability had been uncertain but damages clearly large (reflected in an ultimate judgment of $22.5 million, at the high end of a high-low). In the court’s view, “Travelers missed many opportunities to settle.”\textsuperscript{339} It was not liable for failing to accept a demand for its $2 million policy limit, because that demand had been induced by a false interrogatory response that failed to disclose a $25 million Arch excess policy.\textsuperscript{340} But that demand indicated an interest in settlement and Travelers could have made a counteroffer (or tendered its limit to Arch to do so), it could have responded to a letter expressing an interest in mediation, and it could have made an offer (or tendered its limits) when the plaintiff filed a mediation statement valuing the claim at $15 million.\textsuperscript{341} Thus, despite the stated persuasiveness of the original \textit{Du} opinion, the holding of the case appears to go no further than \textit{Reid}.

In sum, the cases collectively hold that California imposes no duty to initiate settlement discussions absent settlement overtures or other indications of interest from the claimant. There are suggestions, but no clear decision, that there might be a duty to respond to “soft” settlement overtures. On balance, California seems properly classified as rejecting any duty to initiate, perhaps with an asterisk noting the possible duty to respond.

[C] Public Policy Analysis

Dean Syverud suggests that some courts may think requiring the insurer to negotiate may be desirable, lest the insurer be able to manipulate the negotiations so the claimant never makes a demand.\textsuperscript{342} But he points that such a requirement places insurers at the mercy of jury interpretations of the settlement strategies in particular cases and concludes that such a standard is likely to change bargaining strategies in all cases, not just those where settlement is appropriate, resulting in overpayment that will be “a cost to all insureds.”\textsuperscript{343} Moreover, if claimants knew that a reasonable offer within limits was necessary to obtain any excess judgment recovery, it would be difficult for insurers to manipulate negotiations in a way that led the plaintiff not to make such a demand.

\textsuperscript{335.2} 220 Cal. App. 4th at 276 (emphasis original).
\textsuperscript{337} 2013 U.S. Dist. LEXIS 169453, at *24.
\textsuperscript{338} 2013 U.S. Dist. LEXIS 169453, at *29.
\textsuperscript{339} 2013 U.S. Dist. LEXIS 169453, at *28.
\textsuperscript{340} 2013 U.S. Dist. LEXIS 169453, at *15–22.
\textsuperscript{343} 76 VA. L. REV. at 1168.
Looked at purely based on the rule that the insurer should act as it would if it alone were liable for the entire judgment, it would seem reasonable to require the insurer to initiate negotiations if that is what any reasonable insurer would do if it alone were liable. But that fails to take account of the distortion of the claimant’s incentives resulting from the very existence of the duty to settle. While the law of bad faith is designed to provide insurers with incentives to address settlement in an appropriate manner, existence of that law alters the incentives of claimants in a way that can be harmful to insureds.

While creation of the settlement duty might not greatly affect the claimant if the policyholder could pay any excess judgment, it has a dramatic effect if the policyholder cannot do so. A greater amount would become recoverable if the insurer breached its duty than if the case were simply taken to a favorable judgment. The claimant thus acquires an incentive to exploit the existence of the duty.

If the expected value of the claim (without regard to collectibility) does not exceed limits by much, the claimant is most likely to use the duty to pressure the insurer to agree to pay the limit (or some smaller amount). If the insurer refuses, any judgment will become fully collectible. Still, the claimant is likely to be chiefly interested in settlement, just as would be the case with a sufficiently solvent tortfeasor.

But if the claim’s expected value is far greater than the policy limit, the injured party may instead seek to provide occasions for the insurer to bypass an arguable settlement opportunity. If the insurer breaches its settlement duty, the entire judgment will become collectible (though at the cost of a second lawsuit), and this may permit settlement for the full value of the case. Even a colorable argument that the duty has been breached will permit bargaining for some payment above the policy limit.

The first of these situations involves a claimant primarily seeking performance of the settlement duty, while the second primarily involves an effort to find a breach. After all, performance of the settlement duty involves no more than payment of policy limits, and those limits are assumed to be far below the value of the second claim.

The opportunity for injured parties to seek increased payment by inducing an insurer misstep (or arguable misstep) has created a new danger for impecunious policyholders. If there were no settlement duty, claimants would recognize that the policy limits would be all that they could hope for. They would have no incentive to pursue litigation against a judgment-proof (or nearly so) tortfeasor, once the policy limits had been offered. This incentive would subject impecunious insureds to large judgments only because the claimants were pursuing a bad faith recovery, instead of simply taking the policy limits.

Pointing this out is not a criticism of injured parties or their counsel. They respond as best they could to a situation involving inadequate resources to fully compensate the injuries at issue. One court has strongly rejected criticism of counsel who allegedly made unreasonable demands in a situation where there were multiple claimants and inadequate limits:

Safeco’s rhetorical complaint that the bad faith litigation was a setup engineered by Brindley was not successful with the jury, and as a legal argument it is equally unsuccessful. Pressing for a policy limits settlement for a badly injured client is a
professional responsibility, not a sinister plot. Keeping bad faith litigation in mind as plan B if the insurer balks is a fair practice. Safeco could have protected itself by putting the limits on the table for all three passengers.\textsuperscript{344}

But the issue for a common-law court is whether it is desirable to hold out the incentives which produce such behavior.

Those incentives harm impecunious policyholders, some of the very policyholders the settlement duty is designed to protect. They also harm the judicial system by generating litigation which would otherwise never be necessary.

For example, \textit{Gutierrez v. Yochim},\textsuperscript{345} arose from an August 12, 2003 accident in which Gutierrez’s car struck Yochim’s motorcycle. Dairyland Insurance, Gutierrez’s insurer, immediately concluded that she was at fault, and advised her that her policy had a $10,000 bodily injury limit. On August 20, Dairyland obtained the police report, which described Yochim as having suffered “incapacitating” injuries. On August 18, a lawyer for Yochim contacted Dairyland, but ten days later said that Yochim had hired someone else, though asserting a lien for his own services. Having appraised the motorcycle, Dairyland paid its property damage limit in late August and notified Gutierrez that he might have liability for an excess judgment on either the property damage claim or for the potentially serious injuries to Gutierrez. On October 9, the new lawyer’s paralegal told Dairyland that Yochim might have sustained a significant spinal cord injury, and it requested medical records or an authorization to obtain them, stating that it wished to settle the claim as soon as possible.\textsuperscript{346} The lawyer apparently had the medical records, but sent only an authorization.\textsuperscript{347}

On February 1, 2004, shortly after obtaining the hospital records, Dairyland sent a letter offering its policy limits, subject to placing the name of the first lawyer on the check or obtaining an agreement regarding the lien. Having received no response, it sent a similar letter a week later. The new lawyer responded a week later that he would be responsible for any lien and that he would discuss the matter with his client when and if the limits were “tendered.” The adjuster inquired what more he wanted in the form of a “tender” and that a check would be sent only if he indicated that it would be accepted in settlement; the lawyer responded that the adjuster should seek advice from his own counsel if he wanted it. On April 1, 2004, the adjuster hand delivered a check, which the lawyer refused. In his deposition, he claimed that he would have settled in February had the limits been tendered then.\textsuperscript{348}

After a stipulated judgment in the suit against Gutierrez, she sued Dairyland for bad faith, and Dairyland obtained a summary judgment. The court of appeals reversed, saying that Dairyland knew enough about the severity of the injuries that it could not be said, as a matter of law that it did not have a duty to offer the policy limits earlier. Delay by Yochim’s lawyer did not matter, because Dairyland’s “fiduciary duty to timely and properly investigate the claim against

\textsuperscript{345} Gutierrez v. Yochim, 23 So. 3d 1221 (Fla. Dist. Ct. App. 2009).
\textsuperscript{346} 23 So. 3d at 1222–23.
\textsuperscript{347} 23 So. 3d at 1225.
\textsuperscript{348} 23 So. 3d at 1223–24.
the insured was not relieved simply because it was waiting to receive information from the claimant’s attorney.”

In that situation, a policy limits offer would likely have been of little use to Yochim, as it would all have been consumed by a hospital lien. Yochim’s lawyer was obviously doing everything he could to delay any offer from Dairyland, so that he could argue that it came too late and permitted a bad faith claim that would open the policy limit. Had that possibility not been present, he would instead have been encouraged to promptly provide Dairyland the information necessary to obtain payment of the limits, and neither the stipulated judgment nor the bad faith action would have been necessary.

The law should not hold out incentives to create unnecessary litigation and subject insureds to unnecessary risk of excess judgments. The settlement duty can and should be shaped to protect policyholders and the judicial system, while providing more appropriate incentives to claimants.

One who hopes more for a breach of the settlement duty than for performance would prefer not to make demands, for a demand might be accepted and eliminate any possible recovery above limits. Such a party would prefer to wait for an offer, perhaps “signaling” supposed receptiveness. If the offer never comes, it can later be argued that a reasonable insurer would have made one and the injured party can then testify that it would have been accepted. If an offer below limits is rejected, there is still an ability to claim that a higher offer, still within limits, would have been accepted. Yet the claimant (who may not have decided what would be acceptable), retains the ability to reject any offer that is made.

The Texas Supreme Court has noted that there are good reasons why insurers are reluctant to make offers, especially in cases where the value is significantly arguable. Once the insurer makes an offer, it establishes a “floor” for negotiations and must stand by its offer or later risk excess liability for unreasonably withdrawing its offer. “Because the claimant bears little risk of losing the opportunity to settle … [for the amount offered], the claimant has no incentive to settle” when the offer is made; the claimant can look for assets of the tortfeasor or hope that some other development will improve the prospects of an above-limits recovery. And if the insurer’s offer is below limits, the injured party can reasonably expect it to rise.

Precisely to provide proper incentives to both parties, Texas holds that the settlement duty is triggered only by a demand from the claimant that the insurer ought to have accepted. For the reasons just stated, that rule is better than the one requiring the insurer to initiate offers.

If a demand is required, it must be a firm demand: counsel’s opinion about what the claimant would or might accept is not enough. A demand subject to conditions that could not

349 23 So. 3d at 1225.
351 876 S.W.2d at 851 n.18.
352 876 S.W.2d at 851 n.18.
353 876 S.W.2d at 851.
354 Commercial Union Ins. Co. v. Mission Ins. Co., 835 F.2d 587, 588 (5th Cir. 1988) (LA law);
be satisfied cannot be the basis for bad faith liability, because acceptance of that demand could not have created a valid settlement. But a claimant’s informal statements that the claimant was only seeking the policy limits can constitute a demand.

Even if an insurer is not required to initiate settlement negotiations, it may be obliged to respond to a demand with at least a counter offer.

[D] The Restatement of the Law of Liability Insurance

The Restatement of the Law of Liability Insurance allows a jury to find that an insurer’s failure to make a settlement offer or counteroffer was unreasonable. (See § 2.03[2][h], above for a discussion of the general approach taken by the Restatement.) It justifies its treatment of this issue as follows:

This Section adopts a reasonableness standard, not a hard and fast rule regarding an insurer’s obligation to make settlement offers or counteroffers. As with an insurer’s settlement decisions generally, the question is what a reasonable insurer would do under the circumstances. In the absence of a reasonable offer by the plaintiff, there may be circumstances in which it would be unreasonable for the insurer not to make a settlement offer before trial, such as, for example, when the facts known to the insurer make clear that the policy limits are significantly less than the reasonable settlement value of the underlying case, (perhaps because the claimant’s damages are indisputable and very large and the likelihood of the insured’s being found liable is very high). In such circumstances, the insurer’s obligation to attempt to protect its insured from an excess judgment may include making a reasonable settlement offer to the claimant. By making such an offer and by otherwise behaving reasonably in the settlement negotiations, an insurer can eliminate its potential liability for an excess judgment, even if the offer is rejected. It is important to emphasize, however, that there may be good reasons for an insurer not to make an offer. For example, it may be strategically useful, from the perspective of a reasonable insurer that bears the full risk of a judgment, to refrain from making a settlement offer in order to gather more information, to encourage the claimant to reveal more about its case, or to place pressure on the claimant to initiate settlement discussions. Of course, the insurer’s strategic reasons for not making a settlement offer must relate solely to the legal action at issue, not to the insurer’s interest in managing its portfolio of legal

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355 See Ins. Corp. of Am. v. Webster, 906 S.W.2d 77, 80–81 (Tex. Ct. App. 1995) (demands conditioned on lack of other insurance when an excess policy existed).
357.1 RESTATEMENT OF THE LAW OF LIABILITY INSURANCE, § 24, cmt. f (Prop. Final Dr. No. 2 April 13, 2018).
But failure to make an offer is not the same as rejection of a demand:

An insurer’s decision to reject a reasonable settlement offer made by a claimant potentially has different consequences than an insurer’s decision not to make its own reasonable settlement offer, even in those situations in which a reasonable insurer would have made such an offer. The difference comes from the causation requirement in an action for breach of the duty.

When an insurer breaches the duty by failing to accept a settlement offer (in situations where failing to accept the offer constitutes a breach of duty) and the case goes to trial, resulting in an excess judgment against the insured, the causation requirement is satisfied: had the insurer accepted the settlement offer, there would have been no trial and no possibility of an excess judgment. By contrast, when the insurer fails to make its own settlement offer (in situations where failing to make its own offer constitutes a breach of the duty), and the case goes to trial and an excess judgment ensues, causation remains in question. The insurer’s failure to make an offer caused the excess judgment only if the claimant would have accepted a reasonable offer from the insurer. Proving causation is difficult. Before the trial, the claimant would have been in the best position to answer the question whether they would have accepted the settlement offer, but after the trial the claimant’s interests will often be too closely aligned with those of the insured defendant’s to be objective. Other good sources of objective evidence on the matter will be scarce. Nevertheless, a trier of fact may conclude that an insurer’s decision not to make a settlement offer or counteroffer constitutes an unreasonable settlement decision.\footnote{Dennis J. Wall, The American Law Institute and Good Faith Settlement Duties of Liability Insurers: The Scope of the Duty to Initiate Settlement Negotiations, What the ALI Restatement of the Law of Liability Insurance Has to Say About It, and the ALI Reporters Notes, 37 INS. LITIG. RPTR. 597 (2016) (“Affirmative Duty Article” or “ADA”).}

[E] Dennis Wall’s Affirmative Duty Article

One article criticized the then-draft Restatement of the Law of Liability Insurance for not more clearly requiring insurers to initiate settlement negotiations where the liability of the insured is clear and a judgment in excess of policy limits is likely.\footnote{Dennis J. Wall, The American Law Institute and Good Faith Settlement Duties of Liability Insurers: The Scope of the Duty to Initiate Settlement Negotiations, What the ALI Restatement of the Law of Liability Insurance Has to Say About It, and the ALI Reporters Notes, 37 INS. LITIG. RPTR. 597 (2016) (“Affirmative Duty Article” or “ADA”).} Among other things, that article (the “Affirmative Duty Article”) criticizes the Reporters and the authorities they cite for stating that “[t]here is a split of authority on the question whether the duty to settle includes a requirement that the insurer affirmatively explore settlement negotiations should the claimant not

\footnote{Restatement, § 24, cmt. f.}
\footnote{Restatement, § 24, cmt. g.}
come forward with a settlement offer.’” One of the authorities so criticized is this publication. The Affirmative Duty Article counts 16 states as supporting, at least in some circumstances, a duty to initiate negotiations and only three rejecting such a duty. That article then contends that “16 Courts or cases in favor and at most 3 against is not much of a ‘split’ presenting ‘majority’ and ‘minority’ views unless the ‘majority’ in this instance is more accurately described as an overwhelming majority and the ‘minority’ is openly cast as a cluster of outliers on the issue.”

The Affirmative Duty Article proposed that a new subsection (6) be added to § 24 of the draft Restatement, providing that:

(6) The lack of a formal settlement demand is only one factor to be considered in determining bad faith. Where liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations. Whether and how a liability insurer initiates settlement negotiations, if at all, depends on the facts of each case.

The discussion here makes two points. First, the Affirmative Duty Article has not accurately portrayed the balance of the authorities on this issue. Second, as explained in § 2.03[6][d][iii][C], above, there are good reasons why the law ought not to impose on insurers a duty to initiate settlement negotiations. The cases which support imposition of such a duty do not appear to have been presented with arguments advancing such reasons, so courts in those jurisdictions might reconsider those decisions. In any event, courts in jurisdictions that have not yet addressed the issue ought not to follow the decisions which support imposition of such a duty. (Interestingly enough, the Restatement, which the Affirmative Duty Article criticizes, is closer to that article’s view on that duty than to the view expressed in this publication.)

To be clear, there should not be an absolute rule that an insurer can never be liable for failure to settle if the claimant never made a within-limits offer. Such arguments have sometimes been made by insurers, but have properly been rejected. Insurers have other duties regarding defense or settlement which, if breached, can subject them to liability for failure to settle. (See, e.g., §§ 2.03[4][a], above, 2.03[6][d][x], below.) The argument here is that, in the absence of some other impropriety in the handling of a claim, an insurer ought not to be liable merely for failure to initiate settlement negotiations.

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358.2 Id. at 598–99, quoting RESTATEMENT OF THE LAW OF LIABILITY INSURANCE, § 24, Reporters’ Note e (Council Draft No. 1 Sept. 25, 2015).
358.3 § 2.03[6][d][iii], above (discussing split of authority). The other reference criticized is ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW, 874 (4th ed. 2007) (“In most jurisdictions, the insurer cannot be liable for breaching the duty to settle unless a settlement offer within limits is made by the plaintiff.”).
358.4 ADA, 37 INS. LITIG. RPRTR. at 601–04.
358.5 37 INS. LITIG. RPRTR. at 600.
358.6 37 INS. LITIG. RPRTR. at 607.
358.7 See RESTATEMENT OF THE LAW OF LIABILITY INSURANCE, § 24, cmt. f (Prop. Final Dr. No. 2 April 13, 2018), quoted in § 2.03[6][d][iii][D], above.
Jurisdictions the Affirmative Duty Article Classifies as Having Declared a Duty To Initiate Negotiations

Overview

The Affirmative Duty Article says that “[t]here are ten jurisdictions from which cases have been reported … in which the Courts have declared a legal duty for insurance companies to initiate settlement negotiations even in the absence of a settlement demand from the claimant.”


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358.8 ADA, 37 INS. LITIG. RPRTR. at 601.
358.9 37 INS. LITIG. RPRTR. at 601.
358.10 Fulton v. Woodford, 545 P.2d 979, 984 (Ariz. Ct. App. 1986). While stated as a “holding,” this was actually dictum, because the court went on to hold that there was no such duty on the facts of the case. Id. at 984–85. Nonetheless, the court, after analyzing the issue, purported to lay down a legal rule. Subject to possible alteration by the supreme court, that seems to be the law of Arizona. See Safeway Ins. Co. v. Botma, 2003 U.S. Dist. LEXIS 28663, at *60 (D. Ariz. Mar. 7, 2003) (stating that as a legal rule, but finding no breach, because there were demands and limits were offered).
358.12 Guar. Abstract & Title Co. v. Interstate Fire & Cas. Co., 618 P.2d 1195, 1199 (Kan. 1980); Roberts v. Printup, 422 F.3d 1211, 1215–16 (10th Cir. 2005) (but finding no duty to initiate negotiations before a claim has been asserted).
358.13 Rova Farms Resort, Inc. v. Investors Ins. Co., 323 A.2d 495, 506–07 (N.J. 1974). Rova Farms involved failure to contribute limits to an available settlement where the insured was willing to contribute the balance, Id. at 501. But, like Fulton, the court laid down a fully considered legal rule, which now appears to be the law.
358.14 City of Hobbs v. Hartford Fire Ins. Co., 162 F.3d 576, 583–84 (10th Cir. 1998). This is a prediction by a federal court of what state law will be, but it seems reliable for purposes of this chapter.
358.15 Badillo v. Mid Century Ins. Co., 2005 OK 48, ¶¶ 31–32. Like Powell, Badillo might arguably be read more narrowly in light of its facts, see above, the court, after analyzing the issue, purported to lay down a legal rule. But see SRM, Inc. v. Great Am. Ins. Co., 798 F.3d 1322, 1326–27 (10th Cir. 2015) (excess insurer had no duty to initiate negotiations until primary insurance exhausted, even though primary insurer had tendered its limits).
Wisconsin, seemingly, Tennessee and, possibly, West Virginia—states not mentioned in the Affirmative Duty Article.

Of the jurisdictions identified as declaring a duty to initiate settlement negotiations, Georgia and Michigan are disputed here.

[II] Georgia

Regarding Georgia, the Affirmative Duty Article relies on Delancy v. St. Paul Fire & Marine Insurance Co. The cited passage summarizes authorities relied upon by Delancy in support of imposing a duty to initiate settlement negotiations. As the article notes, the court then states that “as the foregoing discussion shows, Georgia law does not clearly require the insured to show that the insurer refused an offer within the policy limits to establish liability for tortious failure to settle, but it does not foreclose the argument that such an offer is required before the insured may recover.” Nonetheless, the court did not rule on what duty would be imposed by Georgia law, a question not answered by prior cases. Rather, as the court states near the beginning of its opinion:

*We assume for the sake of argument that the plaintiffs correctly state Georgia law.* We nonetheless affirm the district court’s grant of summary judgment to St. Paul, as the plaintiffs have not introduced competent evidence showing a genuine issue of material fact on an element of their case on which they have the burden of proof: they have not shown that St. Paul ever knew or in the exercise of ordinary care should have known that the suit against Dr. Delancy could have been settled within the policy limits.

*Delancy* thus takes no position on the legal issue which the Affirmative Duty Article and

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358.17 Cox v. Cont’l Cas. Co., 2014 U.S. Dist. LEXIS 68081, at *9 (W.D. Wash. May 16, 2014). While only a prediction by a federal district court, it seems reliable for purposes of this discussion.
358.20 State Auto. Ins. Co. v. Rowland, 427 S.W.2d 30, 31–32 (Tenn. 1968). *Rowland* might arguably be read more narrowly in light of its facts, see above. Unlike *Powell*, it is not clear that the court was laying down any broad and considered rule. So, it is unclear whether *Rowland* is actually contrary to the position argued here.
358.21 Daniels v. Horace Mann Mut. Ins. Co., 422 F.2d 87 (4th Cir. 1970) (concluding that district court’s finding of no bad faith was clearly erroneous, in case where there was no demand, but without discussing that point; relying in part on inadequate investigation). Because the issue was never focused and in light of the other misconduct, it is unclear what the court actually held. Moreover, it is a prediction of state law by a federal court. While this gives some support to a duty to initiate negotiations, that support is limited.
358.23 ADA, 37 INS. LITIG. Rptr. at 601 n.17, quoting Delancy, 947 F.2d at 1551.
358.24 Delancy, 947 F.2d at 1537 (emphasis added).
Regarding Michigan, the Affirmative Duty Article relies on *Commercial Union Insurance Co. v. Liberty Mutual Insurance Co.*\(^{358.25}\) Liberty Mutual was the primary insurer and Commercial Union the excess. An excess judgment resulted in favor of Webster, paid by Commercial Union, which brought this suit against Liberty Mutual. It alleged that

> Liberty Mutual (1) failed to make settlement offers and ignored numerous settlement demands between May, 1971, and the commencement of the first Webster trial in October, 1973, (2) failed to communicate each and every settlement demand made throughout the pendency of the Websters’ claim, (3) failed to respond properly to settlement offers at figures below the first jury award while the first Webster case was pending on appeal, (4) chose to ignore the advice of its attorney to make efforts to settle the case following the Court of Appeals reversal of the first Webster case, but before the second trial, and (5) failed to communicate all material developments as they occurred throughout the pendency of the Websters’ claim.\(^{358.26}\)

The jury gave a verdict for Liberty Mutual, but the Michigan Supreme Court determined that the jury had been improperly instructed on what constitutes “bad faith” in this context.\(^{358.27}\) The proper definition was held to be “arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty [of good faith].”\(^{358.28}\) The court went on to identify supplemental factors which may be considered in determining whether liability exists for bad faith. These factors clarify the “indicators” pronounced in the trial court’s bad-faith instruction in the instant case . . . . Because the facts of each individual case will vary in any given situation, the trial court, in its discretion, will have the option of determining which factors, if any, are to be included in instructions to the jury. The recommended factors are not exclusive. No single factor shall be decisive. Among the factors which the factfinder may take into account, together with all other evidence in deciding whether or not the defendant acted in bad faith are:

...  
3) failure to solicit a settlement offer or initiate settlement
negotiations when warranted under the circumstances …

The description of Commercial Union’s allegations does not indicate that failure to initiate settlement negotiations was actually involved in the case, nor is there any indication that the court gave focused attention to the issue of whether an insurer should be obliged to initiate settlement negotiations. Moreover, those allegations suggest that one of the problems in the case was failure to keep the insured (and Commercial Union) informed regarding settlement developments, which might have led Commercial Union to offer a contribution. Failure to communicate might support liability without a demand. Whether or not that could be so does not appear relevant to the case, because there actually were demands. Not even in dictum does the court say that an insurer ever has a duty to initiate settlement negotiations; it necessarily leaves open whether there ever will be circumstances which warrant imposing such a duty.

In short, neither Georgia nor Michigan belongs on either side of the scales in determining the balance of authority.

[G] Jurisdictions the Affirmative Duty Article Classifies as Having Recognized a Possible Duty To Initiate Negotiations

[I] Overview

The Affirmative Duty Article identifies six states in which cases “have recognized that at least there might be a duty on the liability carrier to initiate settlement negotiations without a settlement demand”: 1. California, (2) Idaho, (3) Illinois, (4) Ohio, (5) Pennsylvania, and (6) Texas. To these might be added Massachusetts. As explained in §§ 2.03[6][d][iii][B], above, & 2.03[6][d][iii][H], below, California and Illinois should be classified as holding that there is no duty to initiate settlement negotiations, with minor qualifications that circumstances not yet found might create such a duty. As to Texas, the very case the Affirmative Duty Article cites holds the opposite, and the article recognizes Texas as having more recent authority holding that an insurer ordinarily has no duty to initiate settlement negotiations. Idaho also belongs on the other side of the scales, and Pennsylvania probably does; certainly Pennsylvania authority does not support imposing a duty to initiate

358.29 393 N.W.2d at 165.
358.30 ADA, 37 INS. LITIG. RPRTR. at 602.
358.31 37 INS. LITIG. RPRTR. at 602–03.
358.32

Massachusetts: Hartford Cas. Ins. Co. v. New Hampshire Ins. Co., 417 Mass. 115, 123 (1994) (rejecting claim that trial court made existence of a firm offer a condition of settlement, thereby mooting claim that doing so was error; trial court properly refused to instruct jury that insurer had affirmative duty to explore settlement possibilities because “[i]n the negligence test we now adopt, the question would be whether it was unreasonable at one or more points for New Hampshire not to explore settlement (i.e. no reasonable insurer would have failed in the circumstances to pursue settlement possibilities”).
358.33 See discussion at § 2.03[6][d][iii][G][III], below.
358.34 ADA, 37 INS. LITIG. RPRTR. at 603 & n. 34, citing Rocor Int’l v. Nat’l Union Fire Ins. Co., 77 S.W.3d 253, 261–61 (Tex. 2002), as a decision that “addressed this issue seemingly head on.”
negotiations. Ohio, like Georgia and Michigan, belongs on neither side of the scales. The discussion here will address Ohio, Texas, Pennsylvania, and Idaho, in that order.

[II] Ohio

Regarding Ohio, the Affirmative Duty Article relies on Miller v. Kronk.\(^{358.35}\) The facts and the alleged misconduct are not clearly stated. But the court does say that the insured “has not cited any case law in support of its position that the failure of an insurer to initiate settlement negotiations, where none had previously been instituted by the party bringing the action, amounts to bad faith.”\(^{358.36}\) The court found it unnecessary to address that issue, because the insured did not allege any conduct meeting Ohio’s definition of bad faith.\(^{358.37}\) Nothing in the case suggests any conclusion on whether Ohio would impose a duty to initiate settlement negotiations under any circumstances. Ohio belongs on neither side of the scales.

[III] Texas

Regarding Texas, the Affirmative Duty Article relies for support of a duty to initiate settlement negotiations on American Physicians Insurance Exchange v. Garcia.\(^{358.38}\) This case arose from a medical malpractice suit by the Cardenases against Dr. Garcia, APIE’s insured. Dr. Garcia had various policies in successive years, including an APIE occurrence-based policy for 1983, with a $500,000 limit.\(^{358.39}\)

Dr. Garcia received notice of the Cardenas claim in 1983, and promptly reported it to APIE. But APIE determined that only one of Cardenas’s visits was within its policy period, and concluded in an internal memo that the “lion’s share” of the claim arose out of treatment performed while another insurer, ICA, had provided coverage. ICA retained defense counsel, with APIE agreeing to share payment and to share any settlement or judgment “‘on a pro rata coverage basis.’” The Cardenases filed five amended petitions, none alleging malpractice in APIE’s policy period. APIE eventually notified Dr. Garcia that it provided no coverage because the alleged conduct occurred prior to its policy period, though it continued to pay defense costs for several weeks, through judgment.\(^{358.40}\)

Defense counsel told the Cardenases that $600,000 in coverage was available. They demanded that amount, then substituted a demand for $1.1 million on the discovery that there was a second ICA policy. Defense counsel then asserted that coverage was limited to $500,000. On

\(^{358.35}\) Miller v. Kronk, 519 N.E.2d 856 (Ohio Ct. App. 1987), relied upon, 37 INS. LITIG. RPTR. at 602 & n.29.

\(^{358.36}\) Miller, 519 N.E.2d at 858.

\(^{358.37}\) 519 N.E.2d at 859.


\(^{358.39}\) APIE, 876 S.W.2d at 843–44 (“In 1980, Garcia was covered by an ICA ‘claims-made’ 3 medical malpractice insurance policy with limits of $100,000. In 1981 and 1982, Garcia was covered under two consecutive one-year ICA ‘occurrence’ policies, each providing him with $500,000 in coverage. In 1983, Garcia purchased an APIE occurrence policy with a $500,000 limit per occurrence, the policy involved in this appeal.” Because the claim was made in 1983, the 1980 policy could never provide coverage. 876 S.W.2d at 843 n.3.).

\(^{358.40}\) 876 S.W.2d at 843–44.
discovery of the third ICA policy, the demand was raised to $1.6 million. No offers were made. After APIE asserted that there was no coverage under its policy, Dr. Garcia entered into an agreement with the Cardenases assigning to them all of his rights against APIE and ICA in return for an agreement not to execute on noninsurance assets. On the day of trial, the Cardenases again amended their petition, this time to allege malpractice in 1983, during APIE’s policy period. The case was tried to the court, which found continuing negligence from September, 1980 through February, 1983 and rendered judgment for $2,235,483.30.358.41

ICA settled out and a jury rendered a verdict against APIE. The Texas Supreme Court quickly disposed of all claims other than breach of the duty to settle (known in Texas as a “Stowers” claim).358.42 It held that “because APIE never received a settlement demand within its policy limits, it did not breach its Stowers duty to settle.”358.43 Accordingly, it rendered judgment for APIE.358.44

The court described that duty as one of care “in responding to settlement demands within the policy limits.”358.45 “A demand above policy limits, even though reasonable, does not trigger the Stowers duty to settle.”358.46 Here, there was never a demand within limits unless APIE was mistaken in believing that the coverages could not be stacked.358.47

A dissent urged that that the Stowers duty included an affirmative duty to explore settlement possibilities.358.48 The court viewed the dissent’s proposed rule as shifting “the burden of making settlement offers” to the insurer.358.49 It concluded that cases imposing such an affirmative duty “generally involve affirmative misconduct by the insurer to subvert or terminate settlement negotiations.”358.50 It “disagree[d] with any reading of the no-demand cases that would require insurers rather than claimants to make settlement offers.”358.51 It rejected a requirement to do so “when ‘there is a high potential of claimant recovery and a high potential of [excess] damages,’”358.52 “because settlement is particularly unlikely when substantial excess damages are virtually certain. By requiring insurers to observe an ineffective ritual on pain of waiving all policy limits, [that requirement] represents a trap for the unwary.”358.53

As to public policy analysis, see § 2.03[6][d][iii][C], above. But there can be no doubt

358.41 876 S.W.2d at 844–45.
358.42 876 S.W.2d at 846–48.
358.43 876 S.W.2d at 843.
358.44 876 S.W.2d at 843.
358.45 876 S.W.2d at 848.
358.46 876 S.W.2d at 848.
358.47 876 S.W.2d at 848.
358.48 876 S.W.2d at 862–65 (dissenting op.).
358.49 876 S.W.2d at 850.
358.50 876 S.W.2d at 850 n.17.
358.51 876 S.W.2d at 850 n.17.
358.52 876 S.W.2d at 850 n.17, quoting Fulton v. Woodford, 545 P.2d 979, 984 (Ariz. Ct. App. 1986). This is also the formulation used by Mr. Wall’s proposed addition to Restatement § 24. 37 INS. LITIG. RPRTR. at 607.
358.53 876 S.W.2d at 850.
that, contrary to the Affirmative Duty Article’s reading, the court squarely rejected any affirmative duty to initiate settlement negotiations, absent some other misconduct by the insurer. This point is confirmed by *Rocor International, Inc. v. National Union Fire Insurance Co.*, a case even the article admits to reject any such duty. Relying on *Garcia*, the *Rocor* court stated that “in Texas, the common law imposes no duty on an insurer to … make or solicit settlement proposals.” Moreover, the statutory duty to reasonably attempt settlement when the insured’s liability has become reasonably clear “is not triggered until the claimant has presented a proper settlement demand within limits that an ordinarily prudent insurer would have accepted.”

The Affirmative Duty Article’s classification of *Garcia* as supporting imposition of such a duty is simply wrong. At most, *Garcia* acknowledged the possibility that such a duty might arise from other misconduct by the insurer. To be sure, the Affirmative Duty Article properly concludes that *Garcia* rejects an absolute requirement that the claimant make a demand. But, as already explained, rejection of that requirement is not very significant. (See § 2.03[6][d][iii][E], above.)

**[IV] Pennsylvania**

Regarding Pennsylvania, the Affirmative Duty Article relies on *Puritan Insurance Co. v. Canadian Universal Insurance Co.* This was a suit by an excess insurer, Canadian, against a primary, Puritan, for alleged bad faith failure to settle. The district court rendered judgment for Canadian, because it found bad faith in Puritan’s rigid “no liability, no offer” stance. The Third Circuit reversed because the insured (which had a $100,000 deductible) had consented to try the case, rather than settle, and this consent was an insurmountable barrier to Canadian’s equitable subrogation claim. The court went on to also address the duty to initiate issue:

Nor do we agree that on this record Canadian had an affirmative duty to initiate settlement negotiations with Donahue. The same factors that militate against a finding of bad faith in refusing to settle are relevant in this instance as well. An insurance carrier may be required to broach settlement negotiations under some circumstances but this case does not present them.

Traditionally and logically, the impetus for settlement comes from the plaintiff. He is the one seeking recovery and therefore has the burden of stating just what it is that he wants. A feigned lack of interest in settlement by a defendant is a widely recognized negotiating ploy. We see no reason why use of this

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358.55 ADA, 37 INS. LITIG. RPR. at 602 & n.29.
358.56 *Rocor*, 77 S.W.3d at 261.
358.57 77 S.W.3d at 262.
358.59 *Puritan*, 775 F.2d at 80.
358.60 775 F.2d at 80.
technique should excuse the plaintiff from stating his demand. The utter uselessness of *ad damnum* clauses in personal injury cases requires that at some stage in the litigation the real amount of the claim be disclosed. Only the plaintiff can supply it.\(^{358.61}\)

While the court declined to rule out the possibility that there might be circumstances supporting imposition of a duty to initiate settlement negotiations, it certainly offered no support for the proposition that there might be such circumstances. The second paragraph indicates a strong leaning against that possibility. Pennsylvania probably should be classified as rejecting imposition of a duty to initiate settlement negotiations.\(^{358.62}\)

[V] Idaho

As to Idaho, the Affirmative Duty Article relies on *Morrell Construction, Inc. v. Home Insurance Co.*\(^{358.63}\) Morrell claimed that Home had acted in bad faith by refusing to investigate or initiate settlement negotiations before suit was filed. After suit was filed, Morrell settled with the plaintiff for $125,000, which exceeded its $100,000 policy limit. The $25,000 excess was contingent on success in the bad faith action. The district court rendered summary judgment for Home. Initially, the Ninth Circuit certified to the Idaho Supreme Court questions whether there were duties to investigate or initiate settlement negotiations before suit was filed.\(^{358.64}\) After the Idaho Supreme Court declined to answer those questions, the Ninth Circuit concluded that Idaho would not impose a duty to do either, and affirmed the summary judgment.\(^{358.65}\) The court noted the division of authority on whether insurers have a duty to initiate settlement negotiations,\(^{358.66}\) then concluded that “[w]hile it may make some sense to impose an obligation on insurers to initiate settlement negotiations in certain third party situations, we decline to hold that the Idaho Supreme Court would impose such a tort duty on all insurers.”\(^{358.67}\)

While the facts of the case relate only to pre-suit duties, the court chose to address the question regarding initiation of settlement negotiations more broadly. (That is not surprising, as there appears to be no authority distinguishing between the pre-suit context and the post-suit context regarding this duty.) By declining to hold that the Idaho Supreme Court would impose such a duty, and by affirming the summary judgment, the Ninth Circuit effectively predicted that Idaho would not impose such a duty.

[H] While Some Illinois Cases Appear To Suggest a Possible Duty To Initiate Settlement Negotiations, That Possibility Is an Illusion

\(^{358.61}\) 775 F.2d at 82.
\(^{358.62}\) *But see* Dewalt v. Ohio Cas. Ins. Co., 513 F. Supp. 2d 287, 297–98 (E.D. Pa. 2007) (concluding that Pennsylvania does not require that the insurer reject a demand, but granting summary judgment on other grounds, rendering that conclusion dictum).
\(^{358.63}\) *Morrell Construction, Inc. v. Home Insurance Co.*, 920 F.2d 576 (9th Cir. 1990) (“*Morell II*”), relied upon, 37 INS. LITIG. RPTR. at 602 & n.27.
\(^{358.64}\) *Morrell Construction, Inc. v. Home Insurance Co.*, 899 F.2d 875 (9th Cir. 1990) (“*Morell I*”).
\(^{358.65}\) *Morell II*, 920 F.2d at 577–78.
\(^{358.66}\) 920 F.2d at 580–81.
\(^{358.67}\) 920 F.2d at 581.
Cases that seem to suggest a possible duty to initiate settlement negotiations are *Adduci v. Vigilant Insurance Co.* \(^{358.68}\) and *Haddick v. Valor Insurance Co.* \(^{358.69}\)

*Adduci* arose from a one-car accident, resulting in an excess judgment in favor of one of the two passengers. A collective time-limit demand for limits was made and allowed to expire. The limit, $25,000 for all injuries, was later offered to the two collectively and refused. One claim was settled before trial for $7,500. The verdict for the remaining claim was $70,000, leaving an excess judgment of $52,500 after the remaining policy limit was paid. Adduci sued for bad faith and the trial court dismissed the complaint. The appellate court agreed that no cause of action was alleged. \(^{358.70}\)

That court did not find a breach of the duty of good faith, where Vigilant had offered the limits only 72 days after the demand and 40 days after it “expired.” The only reason alleged for refusal to accept this offer was that further preparation of the claims for trial was conducted, thereby necessitating a different attorney fee arrangement between plaintiffs’ counsel and all three plaintiffs, which foreclosed the opportunity for settlement. \(^{358.71}\) No details were offered to flesh out this “bald allegation,” and the court was of the opinion that “[n]o facts sufficiently indicate why the claimants found it impossible to accept the offer at this time, so as to fairly place the blame for failure of settlement upon Insurer.” \(^{358.72}\)

The Adducis also argued that Vigilant had breached the duty by failing to initiate settlement negotiations. The court rejected this argument:

> It is settled in Illinois that insurance companies are not required to initiate negotiations to settle a case. The basis for this rule is that the imposition of such a requirement would put the insurer into a negotiating disadvantage which is imposed on no other litigant. While an exception is recognized where the probability of an adverse finding on liability is considerable and the amount of probable damages would greatly exceed the insured’s coverage, we believe that this exception should be sparingly used, and then only in the most glaring cases of an insured’s liability, since “[t]rial attorneys are not endowed with the gift of prophecy so as to be able to predict the precise outcome of personal injury litigation.” No facts are alleged here to demonstrate the probable liability of Insured for high-figure damages to each of the passengers in her auto. Thus, as a matter of law, Insurer cannot be said to have breached its duty by failing to initiate settlement negotiations in this case. \(^{358.73}\)

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\(^{358.70}\) *Adduci*, 424 N.E.2d at 646–50.

\(^{358.71}\) 424 N.E.2d at 477.

\(^{358.72}\) 424 N.E.2d at 477. Questions could be raised about the soundness of that reasoning, but it is beside the point here.

\(^{358.73}\) 424 N.E.2d at 649–50 (citations omitted).
The limitation of the “exception” to “the most glaring cases of an insured’s liability,” is supported by the fact that Illinois treats the duty to consider settlement as arising only where there is a “reasonable probability” of liability, itself interpreted to require that liability be more likely than not.\(^{358.74}\) The “exception” is only said to apply “where the probability of an adverse finding on liability is considerable,” something significantly greater than 50%. Moreover, in Adduci, the very existence of the exception was dictum, as it was not found to apply.

The authority Adduci relied upon to support existence of this exception was Kavanaugh v. Interstate Fire & Casualty Co.\(^{358.75}\) Sheehan, Kavanaugh’s passenger, had obtained an excess judgment for her injuries when his car rear-ended a truck being towed by a co-defendant’s tractor. Kavanaugh had a Royal policy with a $10,000 limit and an Interstate excess policy with a $15,000 limit. Trial was bifurcated, with liability found on September 30 and $45,000 in damages assessed on October 4. The bad faith case went to the jury on the theory that the insurers failed to offer their limits; there was never a demand less than $60,000. The bad faith jury returned a $20,000 verdict in favor of Sheehan and judgment was entered accordingly.\(^{358.76}\)

As in Adduci, the appellate court found, as a matter of law, no breach of the duty of good faith. In general, Illinois law does not “impose[] a duty on an insurance company to initiate negotiations to settle a case.”\(^{358.77}\) The court stated that “[t]here is a well-recognized exception to the general principle when the probability of an adverse finding on liability is great and the amount of probable damages would greatly exceed the coverage.”\(^{358.78}\) But that exception did not apply in Kavanaugh, where:

liability was not clear cut. Kavanaugh was subject to a low degree of care under the Illinois guest statute whereas his co-defendants were charged with simple negligence, thus favoring his probability of success. Moreover, Johnson possessed a statement from the claimant Sheehan exonerating Kavanaugh from any charge of speeding and admitting that she had never questioned his ability to control the automobile on the night of the accident. Trial attorneys are not endowed with the gift of prophecy so as to be able to predict the precise outcome of personal injury litigation. Nor does the mere fact that the insurance company was unsuccessful in the trial of a case show that their defense was made in bad faith.\(^{358.79}\)

Again, the very existence of the exception is dictum, as it was not found to apply. Moreover, of the three cases cited to support existence of the exception, two are cases where demands were made and refused;\(^{358.80}\) neither mentioned any duty to initiate. The third case was

\(^{358.76}\) 342 N.E.2d at 117–20.
\(^{358.77}\) 342 N.E.2d at 121.
\(^{358.78}\) 342 N.E.2d at 121.
\(^{358.79}\) 342 N.E.2d at 121.
one where, despite repeated importunities, the insurer refused to disclose the policy limits;\textsuperscript{358.81} while absence of a demand was not fatal in that context, there was no mention of any duty to initiate. On this point, the Kavanaugh dictum was completely unsupported. Moreover, neither Kavanaugh nor Adduci appears to have given this dictum much consideration.

Nonetheless, the Adduci dictum on this point was approvingly cited in Haddick.\textsuperscript{358.82}

To survive a motion to dismiss a bad-faith claim, the plaintiff must allege facts sufficient to establish the existence of the duty to settle in good faith … . The duty of an insurance provider to settle arises when a claim has been made against the insured and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured. Since Illinois law generally does not require an insurance provider to initiate settlement negotiations this duty also does not arise until a third party demands settlement within policy limits.

There is an exception to this general rule where the probability of an adverse finding on liability is great and the amount of probable damages would greatly exceed policy limits.\textsuperscript{358.83}

On the facts of Haddick, there had been a demand,\textsuperscript{358.84} and the court held that there was a jury question on whether the insurer had acted in bad faith in refusing that demand. There was no issue regarding initiation of settlement negotiations, so the approving restatement of the Adduci dictum was itself dictum, and, again, seemingly off hand dictum, not carefully considered analysis.

In the wake of Haddick, courts have frequently stated that Illinois does not require insurers to initiate settlement negotiations without noting any exception.\textsuperscript{358.85} One case mentioned the exception but found it inapplicable.\textsuperscript{358.86}

Only one reported case has considered actually applying the exception, Ranger Insurance


\textsuperscript{358.82} Haddick v. Valor Ins. Co., 763 N.E.2d 299 (Ill. 2001).

\textsuperscript{358.83} 763 N.E.2d at 304 & n.1 (citations omitted, emphasis added to language relying on Adduci).

\textsuperscript{358.84} 763 N.E.2d at 301.


Co. v. Home Indemnity Co. Home was the primary insurer of Mid-States General & Mechanical Contracting Corp. (“Mid-States”), with a limit of $500,000, Ranger the excess insurer. Paul Hall sued Mid-States and Archer-Daniels-Midland (“ADM”) for injuries suffered at an ADM plant while employed by Corrigan Co. ADM settled the case for $1.5 million plus indemnity for the workers’ compensation lien, then pursued Mid-States and Corrigan for indemnity. A jury found Mid-States 48% liable, and a judgment for $788,989 was entered against it. Ranger paid $288,989 to ADM, then sued Home for failure to settle.

The court began its legal analysis by citing Kavanaugh for the general rule that a primary insurer is not obliged to initiate settlement negotiations, so that an excess insurer must show that the primary insurer rejected an offered settlement. That also would normally be necessary to show proximate cause of the excess judgment.

There had been negotiations after ADM had settled the Hall claim, in which ADM’s counsel suggested the possibility of an even three-way split. Because the settlement lien was about $150,000, that would have required a payment on behalf of Mid-States of $550,000. At a later point, Ranger offered to contribute $50,000 if Home would contribute its limit. Thus, had there been a firm demand, there could have been a settlement. But defense counsel’s suggestion was unauthorized, so there was no firm demand.

But Ranger also sought application of the “exception” to the demand requirement. But, at least in Ranger, the exception could not be applied because proximate cause could not be established:

Under the exception, … the plaintiff must affirmatively show that had the primary insurer offered terms of settlement within its limits, the judgment creditor, who had not otherwise so indicated, would ultimately have accepted the offer. Yet, paradoxically, although the exception may benefit an excess carrier’s bad faith action by expanding the scope of the primary carrier’s obligations to pursue settlement, it works to the detriment of the excess carrier on the issue of proximate cause. Since the exception applies only where the probability of an adverse finding of liability is considerable and the amount of probable damages greatly exceeds primary coverage, the likelihood that a settlement offer within primary limits would be acceptable to a judgment creditor would necessarily be drastically reduced. That fact leads us to question the efficacy of the exception in providing relief in the extreme case.

That is, if liability were almost certain and damages were far in excess of limits, the
claimant would have little reason to accept a limits settlement if an excess insurer (or a solvent defendant) was available to pay the excess judgment. In the *Ranger* context, there would be no reason to accept a $550,000 settlement if liability of Mid-States were clear: ADM could expect to collect more from a judgment.

Regardless, *Ranger* simply had not proven that ADM would have accepted a $550,000 offer, had such an offer been made.358.93

All of the Illinois authority for recognizing a duty to initiate settlement is dictum, and not very carefully considered. Even that dictum says that the exception is to be “sparingly used, and then only “in the most glaring cases of an insured’s liability.”358.94 In nearly 50 years since the “exception” was first described, no reported case has found it applicable. If it were applicable, damages could not be found in the absence of proximate cause, and there would be obstacles to such a finding. The “exception” appears to have little practical effect. As a practical matter, Illinois should be classified as rejecting any duty to initiate settlement negotiations, with a footnote reflecting the theoretical possibility that circumstances might someday be found to require an insurer to do so.

[I] Jurisdictions the Affirmative Duty Article Classifies as Rejecting a Duty To Initiate Negotiations

The Affirmative Duty Article recognizes three states as having authority rejecting any duty to initiate negotiations Alaska, Mississippi, and Texas. That is certainly correct as to Texas. (See § 2.03[6][d][iii][G][III], above.) The Eleventh Circuit has predicted that Mississippi will not require an insurer to initiate settlement negotiations,358.95 which is at least as solid as basis as that for the contrary conclusions about New Mexico and Washington.358.96

As to Alaska, the Affirmative Duty Article relies on *Jackson v. American Equity Insurance Co.*358.97 In that case there was a demand and no issue about the duty to initiate. But the court did say that “[w]hen a plaintiff makes a policy limits demand, the covenant of good faith and fair dealing places a duty on an insurer to tender maximum policy limits to settle a plaintiff’s demand when there is a substantial likelihood of an excess verdict against the insured.”358.98 That says that the demand triggers the duty, but does not clearly say that there would be no duty without the demand. And, it appears to be an offhand statement, not a considered ruling. So, *Jackson* supports rejection of a duty to initiate, but only weakly.

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358.96 See § 2.03[6][d][iii][F][I], above.
358.98 *Jackson*, 90 P.3d at 142.