



Insurance Coverage Litigation Committee CLE Seminar

March 4–7, 2015
Loews Ventana Canyon
Tucson, AZ



The Right and Duty to Settle Third-Party Liability Claims: A 50-State Survey

Edited and Updated as of January 30, 2015 by:

Scott G. Ball sball@coveragelawdallas.com
Dedman Law, PLLC (214) 361-8885
Dallas, Texas

Additional editing and analysis provided by:

Pamela Dunlop Gates
Colliau, Carluccio, Keener, Morrow, Peterson & Parsons
Dallas, Texas

Linda M. Dedman
Dedman Law, P.L.L.C.
Dallas, Texas

Presenters:

Honorable Paul Stickney
U.S. District Court Magistrate Judge
Northern District of Texas, Dallas Division

Pamela Dunlop Gates pamela.dunlopgates@cna.com
Senior Litigation Counsel for Colliau, Carluccio, Keener, Morrow, Peterson & Parsons
Dallas, Texas (214) 220-5900

D. Christopher Heckman dheckman@exxonmobil.com
General Counsel for ExxonMobil Risk Management, Inc.
Irving, Texas (972) 444-1436

Linda M. Dedman ldedman@coveragelawdallas.com
Dedman Law, PLLC (214) 361-8885
Dallas, Texas

**THE RIGHT AND DUTY TO SETTLE THIRD-PARTY LIABILITY CLAIMS:
A 50-STATE SURVEY**

TABLE OF CONTENTS

Alabama.....	1
Alaska.....	1
Arizona.....	2
Arkansas.....	3
California.....	3
Colorado.....	5
Connecticut.....	5
Delaware.....	6
District of Columbia.....	7
Florida.....	7
Georgia.....	11
Hawaii.....	11
Idaho.....	12
Illinois.....	13
Indiana.....	14
Iowa.....	14
Kansas.....	15
Kentucky.....	16
Louisiana.....	16
Maine.....	19
Maryland.....	19
Massachusetts.....	19
Michigan.....	20
Minnesota.....	21
Mississippi.....	21
Missouri.....	21
Montana.....	23
Nebraska.....	23
Nevada.....	23
New Hampshire.....	24
New Jersey.....	24

New Mexico	25
New York	25
North Carolina	26
North Dakota	27
Ohio	27
Oklahoma	27
Oregon	28
Pennsylvania	28
Rhode Island	29
South Carolina	29
South Dakota	30
Tennessee	30
Texas.....	31
Utah	32
Vermont.....	32
Virginia.....	32
Washington.....	32
West Virginia.....	33
Wisconsin	34
Wyoming	34

THE RIGHT AND DUTY TO SETTLE THIRD-PARTY LIABILITY CLAIMS: A 50-STATE SURVEY

INTRODUCTION

This article is a state-by-state survey of a key issue facing lawyers who specialize in advising insurance companies and plaintiffs. The issues center on the nature and extent of an insurer's duty to participate in settlement negotiations with injured third parties.

ALABAMA

Insurer's Duty to Settle: Alabama recognizes tort actions for bad faith and negligence arising out of an insurer's wrongful failure to settle a claim against its insured. *Waters v. Am. Cas. Co. of Reading, Pa.*, 73 So. 2d 524, 529-30 (Ala. 1954). When an opportunity to settle within policy limits is presented, the law imposes a duty on the insurer to use ordinary care to ascertain the facts on which its performance depends (if it has not already done so). *Id.* A decision not to settle must be thoroughly honest, intelligent and objective, and it must be realistic when tested by the assumed expertise of the insurance company. *State Farm Mut. Auto. Ins. Co. v. Hollis*, 554 So. 2d 387, 390 (Ala. 1989).

Alabama uses the same factors as Pennsylvania in determining whether an insurer negligently failed to settle or acted in bad faith. *Id.* Those factors include: 1) the view of the carrier or its attorney as to liability; 2) consideration of the anticipated range of a verdict, should it be adverse; 3) the strengths and weaknesses of all the evidence to be presented on both sides, so far as known; 4) the history, the particular geographic and cases of similar nature; and 5) the relative appearance, persuasiveness and likely appeal of any claimant, the insured and other witnesses at trial. *Id.*

To succeed on a claim alleging negligent failure to settle, a plaintiff must establish based on all of the circumstances, that the insurer, in deciding not to settle the claim, failed to exercise reasonable or ordinary care, i.e., such care as a reasonably prudent insurer would have exercised under the same or similar circumstances. *Mut. Assurance, Inc. v. Schulte*, 970 So. 2d 292, 296 (Ala. 2007). To succeed on a claim alleging bad-faith failure to settle, a plaintiff must establish that the insurer had no "lawful basis" for failing to do so, i.e., no "legitimate or arguable reason for failing to pay the claim." *Id.*

The fact that a verdict comes back in excess of policy limits is not, standing alone, evidence of negligence. *State Farm Mut. Auto. Ins. Co. v. Hollis*, 554 So. 2d 387, 390 (Ala. 1989).

A suit against a primary insurer for failing to settle within policy limits does not arise until a final judgment has been entered. *State Farm Mutual Automobile Ins. Co. v. Hollis*, 554 So.2d 387 (Ala. 1989). Further, an insured may not pursue such an action if it does not face any risk of personal loss from a final judgment. *Evans v. Mutual Assurance Company, Inc.*, 727 So. 2d 66 (Ala. 1999).

Third Party Actions: Alabama does not recognize a right of an underlying third-party to assert a claim for bad faith in the handling of a third-party insurance claim. *Stewart v. State Farm Ins. Co.*, 454 So. 2d 513, 514 (Ala. 1984). Once a third-party obtains a judgment against the insured, however, the third-party stands in the shoes of the insured and may bring an action against the insurer as a judgment creditor under Alabama's direct action statute. *See Ala. Code § 27-23-2* (1975).

ALASKA

Insurer's Duty to Settle: Under Alaska law, where a plaintiff makes a policy limit demands and "there

exists a substantial likelihood that a verdict will be rendered against the insured in excess of the coverage provided” by the insurance policy, the insurer has a duty to tender the policy. *Schultz v. Travelers Indem. Co.*, 754 P.2d 265, 266-67 (Alaska 1988). An insurer has a duty to determine “the amount of a money judgment which might be rendered against its insured and to tender in settlement that portion of the projected money judgment which [the insurer] contractually agreed to pay.” *Jackson v. American Equity Ins. Co.*, 90 P.3d 136, 142 (Alaska 2004). The covenant of good faith and fair dealing obligates an insurer to: 1) inform the insured of all settlement offers; and 2) to inform the insured of the possibility the injured claimant may recover a judgment in excess of the policy limits. *Id.*; see also *O.K. Lumber Co. v. Providence Washington Ins. Co.*, 759 P.2d 523, 525 (Alaska 1988).

ARIZONA

Insurer’s Duty to Settle: Arizona recognizes the implied duty of insurer to treat settlement proposals with equal consideration to its interests and those of the insured. *Arizona Prop. and Cas. Ins. Guar. Fund v. Helme*, 735 P.2d 451, 459 (Ariz. 1987); *Safeway Ins. Co., Inc. v. Guerrero*, 106 P.3d 1020, 1024 (2005); *McReynolds v. Am. Com. Ins. Co.*, 235 P.3d 278, 282 (Ariz. Ct. App. 2010). In cases where there is a high potential of claimant recovery and a high potential of damages exceeding policy limits, the insurer’s obligation to give equal consideration to the interests of an insured may require that the insurer offer policy limits to settle before receiving a demand within policy limits from the claimant. *Fulton v. Woodford*, 545 P.2d 979, 984 (Ariz. Ct. App. 1976). An insurer’s reservation of rights does not excuse it from its contractual duty to consider settlement offers in good faith. *Parking Concepts, Inc. v. Tenney*, 83 P.3d 19, 26 (Ariz. 2004). If an insurer defends unconditionally but breaches the duty to settle in good faith, the cooperation clause is narrowed and the insured may unilaterally settle the claim the same as if the insurer had issued a reservation of rights. *State Farm Mut. Auto. Ins. Co. v. Peaton*, 812 P.2d 1002, 1010 (Ariz. Ct. App. 1990).

An insured must give its insured’s interests equal consideration as its own in a third-party bad faith analysis. The eight factors to consider are listed by the Supreme Court of Arizona in *Clearwater v. State Farm Mut. Auto. Ins. Co.*, as follows: (1) the strength of the injured claimant’s case on the issues of liability and damages; (2) attempts by the insurer to induce the insured to contribute to a settlement; (3) failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured; (4) the insurer’s rejection of advice of its own attorney or agent; (5) failure of the insurer to inform the insured of a compromise offer; (6) the amount of financial risk to which each party is exposed in the event of a refusal to settle; (7) the fault of the insured in inducing the insurer’s rejection of the compromise offer by misleading it as to the facts; and (8) any other factors tending to establish or negate bad faith on the part of the insurer. *Clearwater v. State Farm Mut. Auto. Ins. Co.*, 792 P.2d 719, 722 (Ariz. 1990).

Under *Clearwater*, an instruction that the coverage issue was “fairly debatable” was held to be improper, based on the reasoning that that defense only applies in first-party claims. *Id.* at 723-24.

Excess v. Primary: The Supreme Court of Arizona has declined to find that the primary insurer owes a direct duty of good faith to an excess carrier, but recognized that an excess carrier may maintain a cause of action against a primary insurer under the equitable subrogation doctrine. *Twin City Fire Ins. Co. v. Superior Court of Ariz. In & For County of Maricopa*, 792 P.2d 758, 759 (Ariz. 1990).

Multiple Claimants: At issue in *State Farm Mut. Auto. Ins. Co. v. Mendoza*, 432 F.Supp. 2d 1017 (D.Ariz. 2006) was whether Arizona’s duty to give equal consideration arises when an insurer in a multiple claimant case has offered to pay its policy limits in a settlement for its insured but the claimants demand an amount in excess of the insurance policy. The duty to give equal consideration arises when a conflict

of interest develops between the insurer and the insured. Having previously declared that no conflict arises when an insurer in a single claimant case offers its policy limits, the question certified to the Arizona Supreme Court was whether a conflict of interest arise (and, in turn, the duty to give equal consideration) where a liability insurer has offered its policy limits to settle all claims in a multiple claimant case when the combined demands of the claimants exceed the policy limits. There is no indication that the Arizona Supreme Court answered the question.

The multiple claims in *McReynolds v. American Commerce Ins. Co.*, 225 Ariz. 125, 235 P.3d 278 (Ct. App. Div. 1 2010), review denied, (Mar. 15, 2011) were McReynolds's injuries sustained in an automobile accident, and the lien of the hospital that treated him. Pre-lawsuit, ACIC responded to McReynolds' policy limits demand by submitting policy limits payable to McReynolds and the hospital, and enclosed a release of all claims, which McReynolds rejected. McReynolds filed suit and made an offer of settlement. ACIC responded by filing an interpleader. The *McReynolds* court "decline[d] to adopt the 'first in time, first in right' rule as applied to multiple claims to a single insurance policy when, as here, no factual basis exists upon which a meaningful temporal priority can be established." "We think the favored approach to managing multiple claims in excess of the policy limits must include some provision for certainty to insureds, insurers, and litigants short of submitting each case to a jury. In that regard, as a matter of Arizona law, we hold that (1) the prompt, good faith filing of an interpleader as to all known claimants with (2) payment of the policy limits into the court and (3) the continued provision of a defense for the insured as to each pending claim, acts as a safe harbor for an insurer against a bad faith claim for failure to properly manage the policy limits (or give equal consideration to settlement offers) when multiple claimants are involved and the expected claims are in excess of the applicable policy limits."

ARKANSAS

Insurer's Duty to Settle: Arkansas law recognizes a tort cause of action for bad faith, however "mere refusal to pay a claim does not constitute the first party tort of bad faith when a valid controversy exists with respect to liability on the policy." *Cato v. Arkansas Mun. League Mun. Health Ben. Fund*, 688 S.W.2d 720, 723 (Ark. 1985). A showing of pressure to settle does not automatically create a jury question in FPBF cases. See *Stevenson v. Union Stand. Ins. Co.*, 746 S.W.2d 39, 42 (Ark. 1988). A failure to investigate or a delay in investigating is not the kind of affirmative conduct required for a successful claim of first party bad faith. *Reynolds v. Shelter Mut. Ins. Co.*, 852 S.W.2d 799, 801 (Ark. 1993).

In *Southern Farm Bureau Cas. Ins. Co. v. Parker*, 341 S.W.2d 36 (Ark. 1960), the Arkansas Supreme Court approved a set of jury instructions that set out the elements of a claim of third party bad faith: (1) that the underlying claim could have been settled within the policy limits; (2) that the insured demanded that the insurance company settle the case and the insurance company refused; (3) that a verdict in the underlying case resulted in the insured being forced to pay the portion of the verdict which exceeded the policy limits; and (4) that the refusal to settle was negligence. *Id.* at 39. The Court also held that there may be liability when an insured proves either negligence or bad faith. *Id.* at 40. Moreover, the court held that, under a standard duty to defend clause, the insurance company becomes "a fiduciary to act, not only for its own interest, but also for the best interest of [the insured]." *Id.* at 41.

CALIFORNIA

Insurer's Duty to Settle: In 2013, California joined the list of states requiring a demand within policy limits to trigger an insurer's duty to settle. In *Reid v. Mercury Insurance Co.*, the California Court of Appeals held that even if the insured's liability in excess of policy limits is reasonably certain, an insurer cannot be held liable for the bad faith failure to settle a claim absent a demand within policy limits or some "other manifestation the injured party is interested in settlement." *Reid v. Mercury Ins. Co.*, 162 Cal.

Rptr. 3d 894, 897 (Cal. Ct. App. 2013), as modified on denial of reh'g (Nov. 6, 2013), review denied (Jan. 21, 2014). A request for information regarding the amount of policy limits was held to not be sufficient an indication of a party's interest in settlement. *Id.* at 906. Affirmative conduct by the insurer discouraging settlement efforts by an injured party can also form the basis for a bad faith claim. *Id.* at 907.

Third Party Actions: As a general rule, absent an assignment of rights or final judgment, a third-party claimant may not bring direct action against an insurance company on contract because the insurer's duties flow to the insured. Cal. Ins. Code § 11580(b)(2); *Harper v. Wausau Ins. Co.*, 66 Cal. Rptr. 2d 64 (Cal. Ct. App. 1997).

Excess v. Primary: In *Highlands Ins. Co. v. Continental Cas. Co.*, the court ruled that the primary insurer was still liable to an excess insurer even though it had offered its full policy limits on the first day of trial. *Highlands Ins. Co. v. Continental Cas. Co.*, 64 F.3d 514, 518 (9th Cir. 1995).

Multiple Claimants: In *Aetna Cas & Sur Co v Superior Court*, 114 Cal App 3d 49, 170 Cal.Rptr 527 (1980), Blas Gomez received severe head injuries in an auto accident that left him unconscious until his death 16 months after the accident. About four months after the accident, Gomez's attorney demanded the applicable policy limits, which Aetna paid incident to court-approval of the settlement. The settlement release did not include a possible unaccrued wrongful death claim, though Aetna was informed that Gomez was not expected to regain consciousness and his condition was expected to continue to deteriorate. After Gomez's death, his heirs, armed with a \$150,000 stipulated judgment (negotiated by the insured's defense counsel who was retained by Aetna), sought payment of that judgment from Aetna claiming that Aetna breached the covenant of good faith and fair dealing in not attempting to obtain a release of the unaccrued wrongful death claim. In holding that Aetna acted reasonably in settling the personal injury claim, notwithstanding the increased probability of Gomez's death at the time of the settlement, the *Aetna* court observed the inadequacy of the insurance coverage in this case was the choice of the insured, and the decision to demand policy limits for the personal injury claim only was Gomez's attorney, not Aetna. To hold that [Aetna] under these circumstances either breached its covenant of good faith and fair dealing with its insured, . . . or was negligent toward him in not attempting to obtain a release of a potential but unaccrued [wrongful death]claim against him when [Aetna] exhausted its insurance coverage available under the policy in settling the only claim then presented (that for damages for personal injuries) would be an unjustified extension of both the law of good faith and fair dealing and of negligence as between an insurer and its insured." *Id.* at 533

Strauss v. Farmers Ins. Exchange, 26 Cal. App. 4th 1017, 31 Cal. Rptr. 2d 811 (1st Dist. 1994) Frank Strauss was injured in an accident involving a truck driven by Kirk Senseney, an employee of New Wave Pool & Spa, Inc. (New Wave). The Farmer's policy was issued to the owner of New Wave, Rodney Fagundes. Senseney was in the course and scope of his employment for New Wave at the time of the accident, thus making them insureds under the policy. Strauss claimed that Farmers' rejection of his policy limits settlement demand, which would have released the employee-driver, but not New Wave or Fagundes constituted bad faith. In rejecting this argument, the *Strauss* court observed that acceptance of Strauss' offer would have left New Wave and Fagundes "bereft of coverage would have breached Farmers' implied covenant of good faith and fair dealing. [] As Farmers would have acted in bad faith by accepting the offer, it could not be held in bad faith for refusing it." *Id.* at 1022-23.

Multiple Insureds: In *Schwartz v. State Farm Fire and Cas. Co.*, 88 Cal. App. 4th 1329 (2001), the question was whether the excess insurer may pay full benefits to the first insured who had exhausted the limits of the primary insurance coverage, or whether the insurer has a duty to protect the interests of the other insured who has not exhausted the primary insurance and is not yet entitled to claim excess insurance benefits. Held: "[A]n excess insurer, with notice of potentially competing claims that exceed policy limits, has an obligation to treat both insureds fairly. That obligation encompasses the duty to

refrain from favoring one insured over the other and from impairing either insured's right to benefits. Evidence that the excess insurer paid full benefits to one insured with knowledge of the other insured's competing claim to the same pool of funds may establish a breach of that duty, precluding summary judgment for the insurer.” *Id.* at 1332.

COLORADO

Insurer’s Duty to Settle: The duty owed to an insured by an insurer to act in good faith when handling third-party liability claims requires the insurer to act reasonably—that is, to act non-negligently. *Farmers Group, Inc. v. Trimble*, 691 P.2d 1138, 1142 (Colo. 1984), *overruled on other grounds*. The standard being “would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances.” *Id.* Breach of that duty will give rise to a tort claim for bad faith breach of insurance contract. In a trial for bad faith, the jury may be instructed that the duty of good faith and fair dealing “is breached if the insurer delays or denies payment without a reasonable basis for its delay or denial.” Colo. Rev. Stat. §10-3-1113(1). The determination of reasonableness in assessing delay or denial of payment is whether the insurer’s behavior was negligent. *Id.* Colo. Rev. Stat. § 10-3-1113(2).

It is the affirmative act of the insurer in unreasonably refusing to pay a claim or act in good faith that forms the basis for liability, and therefore, an actual judgment in excess of policy limits is not a necessary prerequisite to liability. *Trimble*, 691 P.2d at 1142. Moreover, it is not necessary for a jury to find that there had even been a bona fide offer to settle within liability limits as an element of a claim for unreasonable breach of insurance contract. *Miller v. Bryne*, 916 P.2d 566, 575 (Colo. App. 1995). An insured who has suffered a judgment in excess of policy limits has suffered actual damages and will be permitted to maintain an action against its insurer for bad faith breach of the duty to settle—even if the judgment is confessed and the insured is protected by a covenant not to execute. *Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116, 122 (Colo. 2010).

If, however, the insured instructs the insurer not to settle, a claim for bad faith failure to settle may not be brought. *Eklund v. Safeco Ins. Co. of Am.*, 579 P.2d 1185, 1187 (Colo. App. 1978). Additionally, there is no absolute duty to settle claims that fall outside policy coverage, such as claims for punitive damages. *Lira v. Shelter Ins. Co.*, 913 P.2d 514, 518 (Colo. 1996).

“The question of whether an insurer has breached its duties of good faith and fair dealing with its insured is one of reasonableness under the circumstances.” *Trimble*, 691 P.2d at 1142. “The relevant inquiry is whether the facts pleaded show the absence of any reasonable basis for denying the claim, ‘i.e., would a reasonable insurer under the circumstances have denied or delayed payment of the claim under the facts and circumstances.’” *Id.* (quoting *Anderson v. Continental Ins. Co.*, 271 N.W.2d 368, 377 (Wis. 1978)). “In the third-party context, an insurance company stands in a position of trust with regard to its insured; a quasi-fiduciary relationship exists between the insurer and the insured.” *Bankr. Estate of Morris v. COPIC Ins. Co.*, 192 P.3d 519, 523 (Colo. App. 2008). However, this type of claim may only be brought by the insured, and not by the injured third party, who has no contractual relationship with the insurance company. See *Schnacker v. State Farm Mut. Auto. Ins. Co.*, 843 P.2d 102, 104 (Colo. App. 1992).

CONNECTICUT

Insurer’s Duty to Settle: Unfair claims practices by insurers are prohibited under the Connecticut Unfair Insurance Practices Act (CUIPA), General Statutes § 38a-815, 816. Insurers must settle claims “promptly” where liability has become reasonably clear. Conn. Gen. Stat. § 38a-816(6)(m). Insurers must provide a reasonable explanation of the basis in the insurance policy for the denial of a claim or offer of compromise settlement “promptly.” Conn Gen. Stat. § 38a-816(6)(n).

An insurer's duty to accept a good faith settlement offer within policy limits has been the law in Connecticut since 1933. *Bartlett v. Travelers' Ins. Co.*, 167 A. 180, 183 (Conn. 1933). "[W]hen the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." *Grand Sheet Metal Products Co. v. Protec. Mut. Ins. Co.*, 375 A.2d 428, 429 (Conn. Super. 1977). The insurer is required to consider the interests of the policyholder in addition to its own in determining whether to accept a settlement offer. *United Services Auto. Ass'n v. Glen Falls Ins. Co.*, 350 F. Supp. 869, 871 (D. Conn. 1972) (applying Connecticut law).

The insurer has the sole right to settle claims against the insured, within the limits of the policy, and therefore, the insurer is obligated to exercise that right in a reasonable and prudent manner. *General Acc. Group v. Gagliardi*, 593 F. Supp. 1080, 1088 (1984), *aff'd*, 767 F.2d 907 (2d Cir. 1984). The insurer which fails to exercise due care or good faith with regard to settling claims within policy limits is subject to a direct statutory right of action by judgment creditor of insured. *Id.* An insurer may be found to have breached its duty and has acted in bad faith if it fails to settle a claim fairly. Conn. Gen. Stat. §38a-816; *Banatoski v. Sheridan*, 1999 WL 545369 (Conn. Super. Ct. July 12, 1999); *Zamary v. Allstate Ins. Co.*, 1998 WL 323432, 22 Conn. L. Rptr. 317 (Conn. Super. Ct. June 10, 1998).

Third Party Actions: An injured claimant must be a party to an insurance contract or be subrogated to the rights of the insured in order to assert a claim for bad faith before the liability of the insured has been established. *Carford v. Empire Fire and Marine Ins. Co.*, 891 A.2d 55, 58 (Conn. App. 2006) ("no claim of breach of the duty of good faith and fair dealing will lie for conduct that is outside of a contractual relationship.").

Multiple Claimants: *Bartlett v. Travelers' Ins. Co.*, 117 Conn. 147, 157, 167 A. 180 (1933). *Bartlett* court found that Travelers has settled in good faith when it settled two of three claims arising from an automobile accident. The *Bartlett* court held that Travelers' was liable to Bartlett only for the amount by which the total proceeds of the policy exceeded the total of the settlements made, since the settlements were not an inequitable preference nor contrary to public policy. The court found significant that Travelers had promptly notified the third claimant of these settlements and had attempted unsuccessfully to settle with him with the balance of the policy limits. Stating that the avoidance of litigation by compromise was to be favored, the *Bartlett* court said that to adopt a rule that would permit a liability insurer to settle claims only at the risk of being liable above its policy limits would necessarily require the reduction of all claims to judgment, with a consequent congestion in the courts which would be intolerable.

DELAWARE

Insurer's Duty to Settle: The Delaware Insurance Code imposes on insurers a duty to make good faith attempts to effectuate "prompt, fair and equitable settlements of claims in which liability has become reasonably clear." Del. Code Ann. tit. 18 § 2304(16)(f). Insurers must make payment once liability has been resolved and an amount agreed upon, or ordered by the court, or awarded by an arbitration panel within 30 days of the date of agreement, order or award. Del. Code Ann. tit. 18 § 903-4.0, 5.0.

"Where an insurer fails to investigate or process a claim or delays payment in bad faith, it is in breach of the implied duty of good faith and fair dealing underlying all contractual obligations." *Tackett v. State Farm Mutual Ins. Co.*, 653 A.2d 254, 264 (Del. 1995). To establish a bad-faith claim, the insured must show that "the insurer lacked reasonable justification in delaying or refusing payment." *Id.* at 262. This means that, at the time the insurer denied coverage, "there [cannot have] existed a set of facts or circumstances known to the insurer which created a bona fide dispute and therefore a meritorious defense to the insurer's liability." *Watson v. Metro. Prop. & Cas. Ins. Co.*, No. Civ.A.02C05261RRC, 2003 WL

22290906, at *6 (Del. Super. Oct. 2, 2003) (*quoting Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 369 (Del. 1982)). “Mere delay [in processing a claim] is not [necessarily] evidence of bad faith,” but “[d]elays attributed to a ‘get tough’ policy . . . may subject the insurer to [such] a [] claim.” *Tackett*, 653 A.2d at 266. If the delay or denial is willful or malicious, punitive damages may be awarded. *Id.* In such situations, however, there must be “an element of malice with a ‘reckless indifference’” to the plight of the insured. *Id.* (citing *Jardel v. Hughes*, 523 A.2d 518, 529 (Del. 1987)).

Third Party Actions: Since bad faith denial of coverage claims are based in contract rather than tort, and since third parties do not have a contractual relationship with the insurer, the general rule is that a third party cannot maintain an action against an insurer. *Rowlands v. Phico Ins. Co.*, Nos. Civ.A.00–477–GMS, Civ.A.00–485–GMS, 2000 WL 1092134, at *3 (D. Del. 2000); *but see Swain v. State Farm Mut. Auto. Ins. Co.*, No. CIV.A.02C-08-166CLS, 2003 WL 22853415, at *1 (Del. Super. May 29, 2003) (holding that passenger occupant of motor vehicle can assert contractual claims against driver’s uninsured motorist carrier because of his third party beneficiary status), and *Pierce v. Int’l Ins. Co. of Ill.*, 671 A.2d 1361, 1365-66 (Del. 1996)(holding that an insurer’s duty of good faith in a dispute between a workers’ compensation insurer and an employer extended to employees who are third-party beneficiaries to the insurer’s promise to pay).

Multiple Claimants: *Gruwall v. Allstate Insurance Co.*, 988 A.2d 945 (Del.Super. 2009) This is a motion for judgment on the pleadings case. Jeffrey Gruwell, operated a motor vehicle in such a manner as to crash with two other vehicles, one after the other in quick succession, causing injury to three persons in one of the vehicles and one person in the other. The vehicle Gruwell was driving was insured by Allstate Insurance Company. One of the injured parties, Melissa Crawford, filed suit against Gruwell which resulted in entry of a judgment against him which significantly exceeds the limits of the Allstate policy. Gruwall complained that Allstate’s failure to settle Crawford’s claim before the judgment constituted bad faith because Allstate failed to interplead its policy limits. In denying Allstate’s motion for judgment on the pleadings, the *Gruwall* court cautioned that the Gruwall must establish by the preponderance of the evidence, that if interpleader had occurred, the claimant whose settlement demand Allstate had declined would have settled her claim within policy limits and that the remaining claimants would not have litigated their claims to judgment “at least not to any judgment that the insurer would not be obligated to pay.” *Id.* at 949.

DISTRICT OF COLUMBIA

Insurer’s Duty to Settle: The District of Columbia has not yet acknowledged a cause of action for breach of an insurer’s duty to settle within the policy limits. *Choharis v. State Farm Fire and Cas. Co.*, 961 A.2d 1080, 1088 (D.C. 2008). Yet, the District of Columbia Court of Appeals has stated that it does not exclude the possibility of fiduciary principles coming into play in certain third-party situations, such as where the insurance company is involved in a settlement of a third-party claim or directs the actual course of the defense. *Id.*

FLORIDA

Insurer’s Duty to Settle: In interpreting what it means for an insurer to act fairly toward its insured, Florida courts have held that when the insured’s liability is clear and an excess judgment is likely due to the extent of the resulting damage, the insurer has an affirmative duty to initiate settlement negotiations. *Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. Dist. Ct. App. 1991). If a settlement is not reached, the insurer has the burden of showing that there was no realistic possibility of settlement within policy limits. *Id.*

An insurer's failure to settle does not necessarily equate to bad faith since liability may be unclear or damage minimal. Also, mere negligent failure to settle is not sufficient to support a finding of bad faith. The jury may consider a finding of negligence because it is relevant to the question of bad faith, but a cause of action based solely on negligence does not lie. *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601, 603 (Fla. Dist. Ct. App. 1975).

An insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his or her own business, which amounts to a fiduciary duty requiring the exercise of good faith. *Doe v. Allstate Ins. Co.*, 653 So. 2d 371, 374 (Fla. 1995). In executing its good faith duty of diligence, the insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonable prudent person, faced with the prospect of paying the total recovery, would do so. *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 668 (Fla. 2004). Furthermore, the insurer has a continuous duty to negotiate and settle in good faith and to advise the insured of settlement opportunities and possible outcomes of the litigation, including the possibility of an excess judgment, as well as any steps that may be taken to avoid such excess judgment. *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980); *Contreras v. U.S. Sec. Ins. Co.*, 927 So. 2d 16, 21 (Fla. Dist. Ct. App. 2006). Tort liability is imposed on an insurer for not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his interests. See Fla. Stat. §624.155(1)(b)(1); see also *Aboy v. State Farm Mut. Auto. Ins. Co.*, 394 Fed. Appx. 655 (11th Cir. Fla. 2010); *Gutierrez v. Yochim*, 23 So. 3d 1221, 1225 (Fla. Dist. Ct. App. 2009). When the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured. *United Auto. Ins. Co. v. Estate of Levine*, 87 So. 3d 782, 786 n.3 (Fla. Dist. Ct. App. 2011).

Bad faith may be inferred from a delay in settlement negotiations which is willful and without reasonable cause. *Goheagan v. Am. Vehicle Ins. Co.*, 107 So.3d 433, 438 (Fla. Dist. Ct. App. 2012). 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. *Id.*

The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980). A cause of action for an insurer's bad faith failure to settle a third party claim may not be maintained until a judgment in excess of the policy limits has been entered against the insured. *GEICO Gen. Ins. Co. v. Harvey*, 109 So.3d 236, 240 (Fla. Dist. Ct. App. 2013).

Third Party Common Law Action: In *Auto Mutual Indemnity Co. v. Shaw*, 184 So. 852 (Fla. 1938), the Florida Supreme Court for the first time recognized that in a third-party liability setting, an implied covenant of good faith and fair dealing exists between the insured and its liability insurer. A common law third-party bad faith claim may be brought either by the insured or by a third-party judgment creditor standing in the insured's shoes. See *Thompson v. Commercial Union Co. of N.Y.*, 250 So. 2d 259, 261 (Fla. 1971). The third-party judgment creditor's action is derivative of the insured's and is not a separate claim. *Fidelity & Cas. Co. of New York v. Cope*, 462 So. 2d 459, 461 (Fla. 1985).

Third-party bad faith claims often arise from an excess judgment entered against an insured. In such cases, the issue is whether the insurance company should have resolved the case within policy limits if it had acted fairly and honestly towards its insured with due regard for his or her interest. In *North*

American Van Lines, Inc. v. Lexington Ins. Co., the court noted that an insurance carrier must evaluate settlement proposals as though it alone carried the entire risk of loss. *North American Van Lines, Inc. v. Lexington Ins. Co.*, 678 So. 2d 1325, 1331 (Fla. Dist. Ct. App. 1996). Insurance companies have to fulfill their fiduciary obligation to an insured by making decisions that are in the insured's best interest. *Id.* at 1330-31. Insurers should be careful to evaluate settlement offers from the perspective of whether an insured with unlimited assets would have tried to resolve the case for an amount within the applicable policy limits. If so, the insurance company in good faith should resolve the case within policy limits. *See generally Campbell v. Government Employees Ins. Co.*, 306 So. 2d 525 (Fla. 1974).

In *Perera v. United States Fid. & Guar. Co.*, the Florida Supreme Court analyzed four basic scenarios that can result in a common law third-party bad faith claim against an insurer for damages sustained as a result of the insurer's bad faith: (1) the classic bad-faith situation where an excess judgment is entered against the insured; (2) stipulations known as *Cunningham* agreements, which have been held to be the "functional equivalent" of an excess judgment; (3) *Coblentz* agreements, and (4) where the primary insurer refuses to settle and the excess carrier brings a bad-faith claim against a primary insurer by virtue of equitable subrogation. *Perera v. United States Fid. & Guar. Co.*, 35 So. 3d 893, 899 (Fla. 2010); *see also generally Vigilant Ins. Co. v. Cont'l Cas. Co.*, 33 So. 3d 734 (Fla. Dist. Ct. App. 2010).

The nonjoinder statute, Fla. Stat. § 627.4136(1)(2006), prevents a third party from pursuing a direct action against an insurer for a cause of action covered by liability insurance unless the third party has first obtained a settlement or jury verdict against the insured. Once a settlement or verdict has been obtained against an insured, Fla. Stat. § 627.4136(4)(2006) permits joinder of the insurer solely for the purposes of entering final judgment or enforcing the settlement. Fla. Stat. § 627.4136(4)(2006) expressly excludes joinder of an insurer as a party defendant when the insurer has denied coverage.

Statutory Bad Faith (Fla. Stat. § 624.155): In addition to common law bad faith, Fla. Stat. § 624.155 specifically provides that any person damaged by certain enumerated acts of an insurer may bring a civil action against that insurer. As to third-party claims, the statute provides a "cumulative and supplemental remedy." *Hollar v. Int'l Bankers, Ins. Co.*, 572 So. 2d 937, 939 (Fla. Dist. Ct. App. 1990). Actions brought under Fla. Stat. § 624.155 are referred to as "statutory bad faith actions," and the enumerated acts include violations of certain statutes, principally §§ 626.9541, 626.9551; 626.9705; 626.9706; 626.9707 or 627.7283. Moreover, Fla. Stat. § 624.155 allows a civil remedy for bad faith failure to settle, making claim payments without stating the coverage under which payments are made, and failing to promptly settle claims under one portion of an insurance policy to influence settlements under other portions of the insurance policy. These are set forth more specifically in the discussion of the consumer protection statutes below. Fla. Stat. § 624.155 establishes certain procedural conditions precedent to bringing an action for statutory bad faith.

The legal duty created under Fla. Stat. § 624.155 is separate and independent of the contractual obligation. *Opperman v. Nationwide Mutual Fire Ins. Co.*, 515 So. 2d 263, 267 (Fla. Dist. Ct. App. 1987). The statutory civil remedy does not preempt other statutory or common law remedies. Fla. Stat. § 624.155(7). However, it also does not create any new common law remedies. No person may obtain a judgment under both the common law remedy and the statutory remedy. Fla. Stat. § 624.155(7); *Dunn v. National Security Fire & Casualty Co.*, 631 So. 2d 1103, 110 (Fla. Dist. Ct. App. 1993) *receding from by Boozer v. Stalley*, 146 So. 3d 139 (Fla. Dist. Ct. App. 2014) *on other grounds*.

Multiple Claimants: *Liberty Mut. Ins. Co. v. Davis*, 412 F.2d 475 (5th Cir. 1969) (Florida law) Clinton Bess, the insured, an itinerant fruit-picker, was driving in Sarasota, Florida, November 25, 1962, when his automobile struck the rear end of a car occupied by Mr. and Mrs. Lewis Rawls. Bess' car careened head-on into a car occupied by the plaintiffs, Mr. and Mrs. Oliver Davis and their three children. The double

collision resulted in serious injury to the five Davises and the two Rawlses. There has never been any question as to Bess' responsibility for the accident. Liberty Mutual had issued an automobile liability policy to Bess with limits of \$10,000 for personal injury to one person, \$20,000 for personal injuries in one accident, and \$5,000 for property damage. It was soon evident to all concerned that the injury to two Davises alone would exceed \$20,000, and that the Rawls claim also would exceed \$20,000, and that Liberty could expect no contribution from Bess; he was penniless. The Davises offered to compromise for \$20,000. Liberty Mutual never questioned its responsibility to expend its policy limits on behalf of Bess and it recognized that six of the seven claimants had substantial injuries. However, Liberty refused the offer to compromise for fear that it would be liable to the Rawls, if it depleted the entire amount of the insurance proceeds by settling with the Davises. The Fifth Circuit affirmed an excess liability award entered against Liberty. "It follows that, insofar as the insureds' interest governs, the fund should not be exhausted without an attempt to settle as many claims as possible. But where the insurance proceeds are so slight compared with the totality of claims as to preclude any chance of comprehensive settlement, the insurer's insistence upon such a settlement profits the insured nothing. He would do better to have the leverage of his insurance money applied to at least some of the claims, to the end of reducing his ultimate judgment debt." *Id.* at 481.

TIG Insurance Co. v. Smart School, No. 04-22178-CIV, 2005 WL 3199445 (S.D.Fla., Oct. 6, 2005) Under Florida law, the insurer must: (1) fully investigate all claims arising from the multiple claim accident; (2) seek to settle as many claims as possible within the policy limits; (3) minimize the magnitude of possible excess judgments against the insured by reasoned claim settlement; and (4) keep the insured informed of the claim resolution process.

Farinas v. Florida Farm Bureau General Ins. Co., 850 So. 2d 555 (Fla. App. 4 Dist. 2003) In holding that an insurer "may even choose to settle certain claims to the exclusion of others, provided this decision is reasonable and in keeping with its good faith duty," the *Farinas* court ruled that Farm Bureau's good faith duty to the insured requires it to fully investigate all claims arising from a multiple claim accident, keep the insured informed of the claim resolution process, and minimize the magnitude of possible excess judgments against the insured by reasoned claim settlement. The *Farinas* court explained that this does not mean that Farm Bureau has no discretion in how it elects to settle claims, and may even choose to settle certain claims to the exclusion of others, provided this decision is reasonable and in keeping with its good faith duty.

Multiple Insureds: *Contreras v. U.S. Security Ins. Co.*, 927 So. 2d 16, 21-22 (Fla. App. 4 Dist. 2006) This bad faith lawsuit arose out of a tragic automobile accident that occurred on July 17, 1992, when the decedent, Flor Torres Osterman, was walking on the side of a road in a residential area in Broward County when she was hit and killed by a car owned by Deana Dessanti and driven by Arnold Blair Dale. Dale was driving Dessanti's car with her knowledge and permission. At the time of the automobile accident, Dale was driving at a high rate of speed and had consumed alcoholic beverages. He was charged with DUI manslaughter and leaving the scene of an accident with injuries. In response to a policy limits demand on behalf of the Flora Torres' estate, U.S. Security asked for a global settlement in return for policy limits. The *Contreras* court agreed that the issue was not whether an insurer that owes a duty of good faith to two covered insureds can be held in bad faith for offering its policy limits in return for a release of both insureds where the claimant refuses to settle with both, but rather, whether an insurer acts in bad faith in refusing to pay a reasonable settlement demand that would release one of its two insureds, where the claimant refuses to settle with both. Holding as a matter of first impression, the *Contreras* court held that U.S. Security, in attempting to obtain a release for both Dessanti and Dale, had fulfilled its obligation to Dale, but since U.S. Security could not force Contreras to settle and release Dale, it had done all it could do to avoid excess exposure to Dale. "U.S. Security thereafter was obligated to take the necessary steps before Contreras's offer expired to protect Dessanti from what was certain to be a

judgment far in excess of her policy limits. Under the terms of its policy, had U.S. Security paid out its limits, its duty to settle or defend would have ceased.” *Id.* at 21.

GEORGIA

Insurer’s Duty to Settle: An insurance company may be liable for damages to its insured for failing to settle the claim of an injured person in excess of policy limits where the insurer is guilty of negligence, fraud or bad faith in failing to compromise the claim. *McCall v. Allstate Ins. Co.*, 310 S.E.2d 513, 514 (1984). In deciding whether to settle a claim within policy limits, the insurer must give equal consideration to the interests of the insured. *Great Am. Ins. Co. v. Exum*, 181 S.E.2d 704, 708 (Ga. Ct. App. 1971). The question of fact to be determined is whether the insurer, in view of the existing circumstances, has accorded the insured “the same faithful consideration it gives its own interest.” *U.S. Fidelity & Guaranty Co. v. Evans*, 156 S.E. 2d 809, 810 (Ga. Ct. App. 1967), *aff’d* 158 S.E.2d 243 (Ga. 1967). An insurer is negligent in refusing to settle when an ordinarily prudent insurer would consider trying the case as creating an unreasonable risk to the insured. *Cotton States Mut. Ins. Co. v. Brightman*, 580 S.E.2d 519, 522 (Ga. 2003). An insurer has no duty to engage in negotiations concerning a settlement demand that is in excess of policy limits. *Id.*

Excess v. Primary: An excess insurer has the right to bring suit against a primary insurer based on a negligent or bad faith refusal to settle. *Great Am. Ins. Co. v. Int’l Ins. Co.*, 753 F. Supp. 357, 363 (M.D. Ga. 1990).

Third Party Actions: Insureds have the right of assignment a bad faith cause of action for failure to settle. *Canal Indem. Co. v. Greene*, 593 S.E.2d at 46. In 2001, the Georgia legislature passed a law allowing direct actions by claimants for bad faith failure to settle liability claims for property damage to motor vehicles. Ga. Code. Ann. § 33-4-7. Only the insured has the right via the statute to pursue a direct action and it is not assignable. *Canal Indem. Co. v. Greene*, 593 S.E.2d 41, 46 (Ga. Ct. App. 2003).

Multiple Claims: An insurer can create a “safe harbor from liability for an insured's bad faith claim ... by meeting the portion of the demand over which it has control, thus doing what it can to effectuate the settlement of the claims against its insured.” *Brightman*, 580 S.E.2d at 522. In short, *Brightman's* “safe harbor” provision protects an insurer from liability under the reasonableness standard based on an allegation that it failed to satisfy a settlement condition over which it had no control. *Fortner v. Grange Mut. Ins. Co.*, 686 S.E.2d 93, 95 (Ga. 2009).

Multiple Claimants: *Allstate Ins. Co. v. Evans*, 200 Ga. App. 713, 714-15, 409 S.E.2d 273 (1991) (“liability insurer may, in good faith and without notification to others, settle part of multiple claims against its insured even though such settlements deplete or exhaust the policy limit.”)

Walston v. Holloway, 203 Ga. App. 56, 416 S.E.2d 109 (1992) Automobile insurer could settle sum of multiple claims against insured arising out of multi-vehicle collision without notification to other claimants, even though such settlements nearly depleted policy limits, so that remaining claimants who obtained judgments in excess of remaining liability coverage did not have complete recourse, where settlements were made in good faith; thus, insurer could not be held liable to remaining claimants for full amount of damages, including amounts which exceeded remaining liability limits.

HAWAII

Insurer’s Duty to Settle: Hawaii first recognized a tort bad faith cause of action in a first-party insurance context in *Best Place, Inc. v. Penn Am. Ins. Co.*, 920 P.2d 334, 337 (Haw. 1996), as amended (June 21, 1996). The Supreme Court of Hawai’i held that, implied in a first-party insurance contract, the insurer

must act in good faith in dealing with its insured, and a breach of that duty of good faith gives rise to an independent tort cause of action. *Id.* at 346. *See also Miller v. Hartford Life Ins. Co.*, 268 P.3d 418, 427 (Haw. 2011). Bad faith in handling a third-party claim may include “bad faith surrounding an insurer's duty to defend, to settle, or investigate a third-party claim [.]” *Honbo v. Hawaiian Ins. & Guar. Co., Ltd.*, 949 P.2d 213, 218 (Haw. Ct. App. 1997); *Group Builders, Inc. v. Admiral Ins. Co.*, No. 29729, 2013 WL 1579600, at *13 (Haw. Ct. App. Apr. 15, 2013).

The burden of proof for bad faith liability is not insubstantial. As stated in *Best Place*, an insurer's conduct that is based on an interpretation of the insurance contract that is reasonable does not constitute bad faith; moreover, an erroneous decision not to pay a claim for benefits due under a policy does not by itself prove liability. Rather, the decision not to pay a claim must be in “bad faith” in order to prove liability. *Best Place*, 920 P.2d at 347; *Miller v. Hartford Life Ins. Co.*, 268 P.3d 418, 431 (Haw. 2011).

IDAHO

Insurer's Duty to Settle: An insurer is under a duty to exercise good faith in considering offers of compromise an injured party's claim against the insured for an amount within insured's policy limits. *McKinley v. Guaranty National Ins. Co.*, 159 P.3d 884, 888 (Idaho 2007). Accordingly, the Idaho courts adopted an “equality of consideration standard” which requires an insurer to give equal consideration to the interests of its insured in deciding whether to accept an offer of settlement. *Truck Insurance Exchange v. Bishara*, 916 P.2d 1275, 1280 (Idaho 1996).

In determining whether a liability insurer has acted in bad faith in failing to settle or in delaying settlement of a claim against the insured, the trier of fact must consider the following factors, within emphasis on the first two: (1) the insurer's failure to communicate with the insured, including particularly informing the insured of any compromise offer; (2) the amount of financial risk to which each party will be exposed in the event an offer is refused; (3) the strength of the injured claimant's case on the issues of liability and damages; (4) insurer's thorough investigation of the claim; (5) the failure of the insurer to follow the legal advice of its own attorney; (6) any representations by the insured which misled the insurer in its settlement negotiation; and (7) any other factors which may weigh toward establishing or negating the bad faith of the insurer. *McKinley*, 159 P.3d at 888; *Bishara*, 916 P.2d at 1280.

In order to avoid liability for bad faith failure to settle when the insured's potential liability is in excess of the policy limits, the insurer, at a minimum, must make a diligent effort to ascertain the facts, communicate the results of such investigation to the insured and “must inform him of any settlement offers that may affect him, so that the insured may take proper steps to protect his own interests.” *McKinley v. Guaranty National Ins. Co.*, 159 P.3d at 889 (citing *Bishara*, 916 P.2d at 1280).

Third Party Actions: A third-party tort claimant has no right to assert bad faith claims against the tortfeasor's liability insurer. *Hettwer v. Farmer's Ins. Co. of Idaho*, 797 P. 2d 81, 82 (Idaho 1990). In *Weldon Reynolds v. American Hardware Mutual Ins. Co.*, 766 P.2d 1243, 1249 (1988), the court held that an insurer's duty of good faith does not extend to or create rights of action in third parties who have been injured by the negligence of an insured. A third party may not directly sue an insurer in an attempt to obtain the coverage allegedly due the policyholder. *Stonewall Surplus Lines Ins. Co. v. Farmers Ins. Co. of Idaho*, 971 P.2d 1142, 1146 (Idaho 1998).

Multiple Claimants: *McKinley v. Guaranty Nat. Ins. Co.*, 144 Idaho 247, 159 P.3d 884 (2007) The Court found that GNIC failed to keep McKinley, the insured, advised of the settlement overtures that had begun by the claimant a month before making the policy limits settlement demand, or of the fact that one of the claimant's claim substantially exceeded the \$25,000 policy limit, until after the expiration of McBride's

demand deadline, which precluded summary judgment on McKinley's bad faith claim. That said, the court found that summary judgment was appropriate with respect to McKinley's breach of contract claim because GNIC has already paid out the \$50,000 available under the policy and thus no contract remedy is available to McKinley. In a third party action where the insurer unreasonably denies a settlement or payment, the insured would be able to recover contract damages up to the policy limits and then tort damages for any excess. For a cause of action based on delay and not denial, however, the insurer has already paid the policy limits and, therefore, contract damages are unavailable. McKinley's independent contract cause of action cannot survive summary judgment.

ILLINOIS

Insurer's Duty to Settle: An insurer's duty to settle arises when (1) a claim has been made against the insured; (2) there is a reasonable probability of recovery in excess of policy limits; and (3) there is a reasonable probability of a finding of liability against the insured. *Haddick ex rel. Griffith v. Valor Insurance*, 763 N.E. 2d 299, 304-05 (Ill. 2001). Importantly, the duty to settle does not arise until a third party demands settlement within the policy limits. *Id.* at 305. An insurer that refuses to settle may be liable for the full amount of the judgment against the policyholder regardless of policy limits. *Cramer v. Ins. Exch. Agency*, 675 N.E.2d 897, 904 (Ill. 1996).

An insurer has a duty to act in good faith in responding to settlement offers. The basis for the duty to settle is the insurer's exclusive control over settlement negotiations and defense of litigation. *Haddick*, 763 N.E.2d at 303. Although the insurance company, in determining whether to accept or reject a settlement offer, may properly give consideration to its own interests, it must, in good faith, give at least equal consideration to the interests of the insured. A failure to do so constitutes bad faith. *Cernocky v. Indemnity Ins. Co. of North America*, 216 N.E.2d 198, 204-05 (Ill. App. Ct. 1966). Illinois courts look at seven factors in the assessment of third-party bad faith failure to settle within policy limits: 1) the advice of the insurance company's adjusters; 2) a refusal to negotiate; 3) the advice of defense counsel; 4) communication with the insured; keeping them fully aware of settlement offers; 5) an inadequate investigation and defense; 6) substantial prospect of an adverse verdict; and 7) the potential for damages to exceed policy limits. *O'Neill v. Gallant Ins. Co.*, 769 N.E.2d 100, 106-109 (Ill. App. Ct. 2002).

Third Party Actions: In general, a third party claimant has no direct action against the insurer for bad faith. *Scroggins v. Allstate Ins. Co.*, 393 N.E.2d 718, 720 (Ill. App. Ct. 1979). A separate and independent tort action for bad faith exists, however, where the insurer vexatiously and unreasonably refuses to recognize liability (without filing a declaratory judgment action or defending under a reservation of rights) or pay a claim under a policy against a third party for an amount equal to or less than the policy limits. *Cramer*, 675 N.E.2d at 903. Unlike first-party bad faith actions, third-party bad faith cases allow the recovery of punitive damages where the insurance company acts particularly egregiously. *O'Neill v. Gallant Ins. Co.*, 769 N.E.2d 100, 109 (Ill. App. Ct. 2002).

Illinois courts rely upon seven factors in assessing an insurer's bad faith. These include: (1) the advice of the insurance company's own adjusters; (2) a refusal to negotiate; (3) the advice of defense counsel; (4) communication with the insured; *i.e.*, keeping the insured fully aware of the claimant's willingness to settle within the policy limits; (5) an inadequate investigation and defense; (6) a substantial prospect of an adverse verdict; and (7) the potential for damages in excess of the policy limits. *O'Neill*, 769 N.E.2d at 106-08.

Multiple Claimants: *Haas v. Mid America Fire & Marine Ins. Co., Illinois Division*, 35 Ill. App. 3d 993, 343 N.E.2d 36, 38 (3d Dist. 1976). Espousing tenet that liability insurer should deal fairly with all claimants, especially where insurer is aware that the total amount of claims is considerably in excess of

policy limits and the assets of the insured are limited to the policy proceeds. Under the facts as recited in the complaint and based on the precedents to which we have referred, however, the *Haas* court concluded that Mid America was not under a duty to advise plaintiff of the settlement negotiations with other claimants since, absent any offer by plaintiff, it could reasonably conclude that it might have a good defense to plaintiff's claim.

Multiple Insureds: In *Pekin Insurance Co. v. Home Insurance Co.*, 134 Ill. App. 3d 31, 89 Ill. Dec. 72, 479 N.E.2d 1078 (1st Dist. 1985), Pekin had issued an automobile insurance policy that covered the White Sox Baseball Club and one of its employees who was involved in an accident with a third party. Pekin expended the entire \$25,000 policy limits in settling the claim against the employee, leaving the Club exposed to liability for the balance of the third party's claim. The Club's excess carrier claimed that Pekin had acted in bad faith. The court, however, rejected this argument, noting that the settlement in favor of the employee benefitted the Club because it relieved the Club of liability for the first \$25,000 of liability.

INDIANA

Insurer's Duty to Settle: An insurer is liable to its insured for a judgment exceeding policy limits when the insurer, who has exclusive control of defending and settling the suit, refuses, in negligence or bad faith, to settle within policy limits. *Bennett v. Slater*, 289 N.E.2d 144, 146 (Ind. 1972). The duty of due care and good faith requires the insurer "to view the situation as if there were no policy limits applicable to the claim, and to give equal consideration to the financial exposure of the insured." *See Certain Underwriters of Lloyd's v. General Acc. Ins. Co. of America*, 699 F.Supp. 732, 736 (S.D. Ind. 1988); *Erie Ins.Co. v. Hickman by Smith*, 622 N.E.2d 515 (Ind. 1993).

Third Party Actions: The tort action of bad faith in Indiana has not been held to exist with respect to a third party claim. *Menefee v. Schurr*, 751 N.E.2d 757 (Ind. Ct. App. 2001); *Cain v. Griffin*, 849 N.E.2d 507 (Ind. 2006); *Myers v. Deets*, 968 N.E.2d 299 (Ind. Ct. App. 2012). However, the cause of action is assignable so that an insured may assign his cause of action to a third party claimant. In such cases, the injured plaintiff "stands in the legal shoes" of the insured and his claim can be no better than the insured's original claim would have been against his insurer." *Araiza v. Chrysler Insurance Company*, 699 N.E.2d 1162, 1163 (Ind. Ct. App. 1998).

Multiple Claimants: In *Mahan v. American Standard Ins. Co.*, 862 N.E.2d 669 (Ind.App. 2007), the court concluded that, "given the evidence, American acted with a dishonest purpose, moral obliquity, furtive design, or ill will when it filed its interpleader. To the contrary, American had a rational basis for filing the interpleader: after investigating the facts and circumstances surrounding the accident, American determined that Mahan was at fault for the accident, and American most likely would be subject to multiple claims, the total of which would meet, if not exceed, the limits of the policy. Furthermore, American informed Mahan of the results of the investigation, that the claims of the multiple claimants might exceed the limits of his policy and that he had the right to retain personal counsel to advise him regarding any excess liability."

IOWA

Insurer's Duty to Settle: When an insurer acts to defend an insured against a third party, the insurer has control over the defense and possible settlements. *Kooyman v. Farm Bureau Mut. Ins. Co.*, 315 N.W.2d 30, 32 (Iowa 1982). Based on the nature of the relationship, Iowa law imposes an implied covenant of good faith and fair dealing in this situation. *Kelly v. Iowa Mut. Ins. Co.*, 620 N.W.2d 637, 643 (Iowa

2000). “This covenant includes a duty to settle claims without litigation in appropriate cases.” *Kooyman*, 315 N.W.2d at 33.

“It is bad faith for an insurance company to act irresponsibly in settlement negotiations with respect to the insured’s risk in that part of the claim in excess of coverage.” *Wierck v. Grinnell Mut. Reins. Co.*, 456 N.W.2d 191, 195 (Iowa 1990). The insurer also acts in bad faith if it factors the “limited amount between an offer and the policy limits” into its consideration of settlement offers. *Id.* Rather, the insurer should ignore the policy limits and consider only whether it would, but for the policy limits, settle the case for the offered amount. *Id.* If the insurer would settle without regard to its policy limits, it is obliged to do so and pay toward the settlement up to the policy limits. *Id.*

The fact that the plaintiff never offered to settle within policy limits is not dispositive of the issue of whether the insurer breached its duty. *Berglund v. St. Farm Mutual Automobile Ins. Co.*, 121 F.3d 1225 (8th Cir. 1997) (concluding primary insurer liable for excess verdict where it refused to tender its limits despite probability of excess adverse verdict). An insurer’s failure to inform its policyholder of a settlement opportunity was held not to support a claim of bad faith in *Koppi v. Allied Mut. Ins. Co.*, 210 N.W.2d 844, 848 (Iowa 1973).

Third-Party Actions: A third-party tort claimant has no right to assert bad faith claims against the tortfeasor’s liability insurer. *Lang v. McAllister*, 319 N.W.2d 256 (Iowa 1982).

KANSAS

Insurer’s Duty to Settle: “[I]n third-party claims, a private insurance company, in defending and settling claims against its insured, owes a duty to the insured not only to act in good faith but also to act without negligence.” *Miller v. Sloan, Lstrom, Eisenbarth, Sloan, & Glassman*, 978 P.2d 922, 930 (Kan. 1999). As a result, in cases involving an insurer’s failure to settle within policy limits, Kansas courts have imposed an obligation on the part of the insurer to initiate settlement negotiations regardless of the actions of the underlying claimant. *Smith vs. Blackwell*, 791 P.2d 1343, 1346 (Kan. Ct. App. 1989). That duty does not arise in whole until such time as a claim is made against the insured. *Sloane vs. Casualty Ins. Company of Dallas, Texas*, 521 P.2d 249, 251, (Kan. 1974)(stating mere knowledge of accident does not trigger insurer’s duty to initiate an investigation and offer settlement); *see also Roberts vs. Print Up*, 338 F. Supp. 2nd 1216, 1221 (D. Kan. 2004), *affirmed as to this issue*, No. 04-3141 (10th Cir. September 12, 2005)(stating insurer has no duty to initiate settlement negotiations prior to a claim being presented).

Third Party Actions: “An insurer has no duty to reasonably negotiate and settle with a third-party claimant where there is no contract (or assignment of policy rights) between them.” *Benchmark Ins. Co. v. Atchison*, 138 P.3d 1279, 1284 (Kan. Ct. App. 2006).

Multiple Claimants: Generally, where multiple claims arise out of one accident, the liability insurer has the right to enter into reasonable settlements with some of those claimants, regardless of whether the settlements deplete or even exhaust the policy limits to the extent that one or more of the claimants are left without recourse against the insurance company. Stating that settlements of claims were encouraged by courts as being in furtherance of public policy, the court in *Bennett v. Conrady*, 180 Kan. 485, 305 P.2d 823 (1957), held that an automobile liability insurer which had settled, in good faith, with two claimants prior to the obtaining of judgments against the insured by three other claimants, was liable to them only for the amount by which its maximum liability under the policy exceeded the amounts of the settlements made, such amount to be distributed among the three claimants on a prorata basis according to the amount of their judgments, which were obtained in a consolidated action, adding that under the policy the insurer had the right to settle claims and the settlements made were not against public policy. Stating

that if an insurer, through bad faith, failed to settle claims, it was liable for any loss sustained by the insured in excess of the policy limits, the court said that an insurer had the duty to make reasonable settlements, adding that to hold that the insurer could not deduct the amount it had expended in settling the two claims would lead to the improper result that one injured person could enjoin a settlement by an insurer of the claim of another person injured in the same accident.

KENTUCKY

Insurer's Duty to Settle: Kentucky law recognizes an implied covenant of good faith to protect the insured against an unreasonable risk of having a judgment rendered against it greatly in excess of the limits of the policy. *Eskridge v. Educator and Executive Insurers, Inc.*, 677 S.W.2d 887, 889 (Ky. 1984). An insurer who exercises bad faith in refusing to settle a claim against an insured within the policy limits may become liable to the insured for amounts in excess of the policy limits. *Terrell v. W. Cas. & Sur. Co.*, 427 S.W.2d 825, 827 (Ky. 1968).

The factors to consider in determining whether an insurer has exercised bad faith in failing to settle a claim are (1) The probability that the plaintiff will recover; (2) The probability that the recovery will exceed the policy limits; (3) Any negotiations for settlement; (4) Whether the plaintiff offered to settle for less than the policy limits; and (5) Whether the insured made a demand for settlement on the insurer. *Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493, 499-500 (Ky. 1976). A good faith belief that coverage does not exist is no defense in a failure to settle claim. *Eskridge*, 677 S.W.2d at 889-90. If the contract to defend is breached, the party aggrieved by the breach is entitled to recover all damages naturally flowing from the breach. *Id.*

Third Party Actions: The Fourth Circuit ruled in *Brewer v. National Indemnity Co.* that a tort claimant was entitled to pursue an action for relief against a liability insurer based upon an assignment of the insured's claim. *Brewer v. Natl. Indem. Co.*, 413 F.3d 429, 431 (4th Cir. 2005); *see also Coffey v. Jefferson County Board of Education*, 756 S.W.2d 155, 157 (Ky. Ct. App. 1998).

Multiple Claimants: *Safeco Ins. Co., v. Ritz*, 2006 WL 119991 (E.D.Ky Jan. 12, 2006) (applying Kentucky law). Neither the parties nor the Court have been able to locate any Kentucky case involving a bad faith claim where the insurer settles with certain claimants to the exclusion of other claimants. Nevertheless, in deciding a question of state law in a diversity case, the federal court must make an educated guess as to what the state Supreme Court would decide if the question were presented to it. Under Kansas law, there are eight factors to be considered in determining whether an insurer breached its duty of good faith to an insured in settling with certain claimants to the exclusion of others: [1] the strength of the injured claimant's case on the issues of liability and damages; [2] attempts by the insurer to induce the insured to contribute to a settlement; [3] failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured; [4] the insurer's rejection of advice of its own attorney or agent; [5] failure of the insurer to inform the insured of a compromise offer; [6] the amount of financial risk to which each party is exposed in the event of a refusal to settle; [7] the fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and [8] any other factors tending to establish or negate bad faith on the part of the insurer.

LOUISIANA

Insurer's Duty to Settle: Under Louisiana law, insurers owe an obligation of good faith and fair dealing to their policyholders, including a duty to exercise good faith in settlement. La. Rev. Stat. Ann. § 22:1220. In addition, "Louisiana jurisprudence establishes that a duty is placed upon the insurer to consider the interest of the insured as paramount when an offer to settle is made. The insurer has a duty to

act in good faith and to deal fairly when handling and settling claims in order to protect the insured from exposure to excess liability.” *Domangue v. Henry*, 394 So.2d 638, 640 (La. Ct. App. 1980), *writs denied*, 399 So.2d 602 (La. 1981); *Katie Realty v. La. Citizens Prop. Ins. Corp.*, 100 So.3d 324 (La. 2012).

The Louisiana Supreme Court examined an insurer’s duty to settle in *Smith v. Audubon Ins. Co.* The Court held that, absent bad faith, a liability insurer is generally free to settle or to litigate at its own discretion, without liability to its insured for a judgment in excess of the policy limits. *Smith v. Audubon Ins. Co.*, 679 So.2d 372, 376 (La. 1996). The Court stated that the insurer must carefully consider the interests of the insured when making such determination. Factors to consider in deciding whether to proceed to trial include, but are not limited to “the probability of the insured’s liability, the extent of the damages incurred by the claimant, the amount of the policy limits, the adequacy of the insurer’s investigation and the openness of communications between the insurer and the insured.” *Id.* at 376-77. “[O]nce the liability insurer exhausted its policy limits through a good faith settlement, it was no longer obligated to defend the insured in the separate action based on the same accident.” *Pareti v. Sentry Indem. Co.*, 536 So.2d 417, 418-419 (La. 1988). “We do not suggest, however, that a liability insurer’s duty to defend its insured will always be discharged by exhaustion of its policy limits.” *Id.*

“When multiple claims are filed against the insured that have the potential for exceeding the insurer’s policy limits, the insurer must act in good faith and with due regard for the insured’s best interest in considering whether to settle one or more of the claims.” *Holtzclaw v. Falco*, 355 So.2d 1279, 1286-87 (La. 1977).

Third Party Actions: “The relationship between the insurer and the third party claimant is neither fiduciary nor contractual; it is fundamentally adversarial. For that reason, a cause of action directly in favor of a third party claimant is generally not recognized absent statutory creation.” *Langsford v. Flattman*, 864 So.2d 149, 151 (La. 2004).

Excess v. Primary: A federal court interpreted Louisiana law to hold that a primary insurer owes a duty to the excess carrier to act reasonably and in good faith. *Nat’l Union Fire Ins. Co. v. Liberty Mut. Ins. Co.*, 696 F. Supp. 1099, 1101 (E.D. La. 1988).

Multiple Claimants: *Richard v. Southern Farm Bureau Cas. Ins. Co.*, 212 So.2d 471 (La. Ct. App. 3d Cir. 1968), writ issued, 252 La. 941, 215 So.2d 122 (1968) and judgment aff’d, 254 La. 429, 223 So.2d 858 (1969) may be cited for the general principle, where multiple claims arise out of one accident, the liability insurer has the right to enter into reasonable settlements with some of those claimants, regardless of whether the settlements deplete or even exhaust the policy limits to the extent that one or more of the claimants are left without recourse against the insurance company. The issue was whether Southern Farm was required to file an interpleader to allow the court to decide the portion of a \$10,000 per accident policy limit each of the four claimants in this case was entitled to receive. Having not done that, the plaintiff/claimant argued that Southern Farm had waived the policy limits as to her. Southern Farm’s settlement with the three other claimants reduced the limits by \$6,227.39. Recognizing that Louisiana’s Direct Action statute - LSA-R.S. 22:1269 - provides that liability policies are executed for the benefit of all injured persons, in holding that Southern Farm’s settlements were reasonable, the *Richard* court also acknowledged that “our law also recognizes that the insurer owes a duty to its insured” and Louisiana’s policy to favor the compromise and settlement of disputes.

The Louisiana Supreme Court in *Holtzclaw v. Falco, Inc.*, 355 So.2d 1279 (La. 1977) confirmed that the Direct Action Statute does not grant to each person injured in accident ownership of or privilege to a pro-rata share in insurance proceeds which become available after liability of insured tortfeasor was established. The *Holtzclaw* court thus held that under insurance policy’s right-to-settle clause, an insurer

could lawfully enter into settlements with multiple property damage claimants to point of exhausting policy limits even though one claimant received nothing in settlement.

Uninsured motorist coverage at issue in *Manieri v. Horace Mann Mut. Ins. Co.*, 350 So. 2d 1247 (La.App. 4 Cir. 1977) where the driver of car was injured, his two passengers killed. In observing that in the uninsured motorist setting there is no risk of an insured of an excess judgment, the court noted that the rule in the liability insurance context, i.e., that a liability insurer faced with multiple claims to inadequate proceeds is generally not required to prorate, but may enter into compromise agreements with one or several claimants to the exclusion of others, even to the extent of exhausting the entire fund, as long as the compromises are reasonable and are made in good faith, does not apply in the uninsured motorist coverage setting. “Liability insurance, however, is not involved in the present case [i.e., there was no question that the other driver was at fault]. Therefore, the reasoning stated above arguably does not apply. Here, with the insurer concerned only with uninsured motorist coverage, there was no excess liability confronting the named insured, and all of the claimants qualified as insureds under the policy. A different obligation of the insurer was involved, and perhaps prorata distribution should have been required, at least after all possible claims had been presented and the suits had been consolidated.” We are not required, however, to squarely decide that question. Assuming for argument that proration should have been required, we note that attached to the motions for summary judgment are copies of pleadings in the wrongful death actions, which indicate that widows and minor children were involved in both suits, and a copy of the judgment in plaintiff’s federal court action against the truck driver, which judgment awards plaintiff \$25,000.00. These facts indicate that plaintiff’s uninsured motorist insurer achieved substantial proration of the uninsured motorist proceeds, and plaintiff has filed no countervailing affidavits which would support a contrary conclusion.” *Id* at 1248-49.

In *Palombo v. Broussard*, 370 So.2d 216 (La. Ct. App. 3d Cir. 1979), The Palombos were passengers of a Buick driven and owned by the Lachaussees that was struck by car driven and owned by Joseph Broussard, who failed to yield the right of way. The Palombos sued Broussard, his auto liability insurer (with \$10,000 per person/\$20,000 per accident coverage), the Palombos’ liability and uninsured motorist carrier (two policies each with \$5,000 per person /\$10,000 per accident coverage), and State Farm, the Lachaussees’ liability and uninsured motorist carrier (the Buick and a Chevrolet) under two separate policies, both with \$25,000 per person/\$50,000 per accident liability and UM coverages. The issue was the amount of coverage State Farm had available for the injured, after State Farm settled with its insureds, the Lachaussees, for \$35,000 from the 25/50 UM policy on the Buick (the car involved in the accident). State Farm contended that \$15,000 remained for the Palombos, which amount it tendered to the Palombos prior to trial, but was refused. The Palombos contend that State Farm acted unreasonably and in bad faith in its settlement negotiations in that it purposely stalled the Palombos so as to settle first with the Lachaussees. The importance of settling first with the Lachaussees was that the total amount of coverage available from State Farm for the Palombos was the 25/50 UM policy on the Buick, while there was up to \$100,000 UM available to the Lachaussees (“stacking” the State Farm policies on their Buick and Chevrolet). The court agreed with the Palombos, finding that State Farm knew the extent of the Palombos’ injuries; had good estimate of amount of compensation required; knew the amount of coverage it had available to each individual yet did not convey to parties involved such information; that State Farm stalled negotiations with the Palombos while requesting they not file suit, with knowledge that the Lachaussees could “stack” coverage of policies while passengers could not, and settled with the Lachaussees for 70% of the only policy limits available to the Palombos.

Merritt v. New Orleans Public Service, 421 So.2d 1000 (La.App. 4 Cir. 1982). An insurer may enter into reasonable, good faith settlements even though such settlements exhaust or diminish the proceeds available to other claimants. In negotiating the settlement of certain claims arising out of an accident between a public service bus and a vehicle owned and operated by insured, insurer acted reasonably and in good faith even though it perfected settlements with 22 of the 29 injured passengers, using

approximately two-thirds of the policy limits available, and no settlement was attempted as to plaintiff passenger's claim.

MAINE

Insurer's Duty to Settle: A liability insurer may be liable to an insured for negligently failing to settle within policy limits. *Wilson v. Aetna Cas. & Sur. Co.*, 76 A.2d 111 (Me. 1950).

Third Party Actions: A third-party tort claimant has no right to assert bad faith claims against the tortfeasor's liability insurer. *Linscott v. State Farm Mutual Automobile Ins. Co.*, 368 A.2d 1161 (Me. 1977). The insurer's duties extend only to its insured.

MARYLAND

Insurer's Duty to Settle: A liability insurer's bad faith failure to settle a claim within policy limits gives rise to a tort action. *Allstate Ins. Co. v. Campbell*, 639 A.2d 652, 659 (Md. 1994). The tort action based upon a liability insurer's wrongful failure to settle a claim against its insured within policy limits was first recognized by this Court in *Sweeten, Adm'r. v. Nat'l. Mutual*, 194 A.2d 817 (Md. 1963). The basis for the tort duty was that "the insurer has the exclusive control, under the standard policy, of investigation, settlement and defense of any claim or suit against the insured, and there is a potential, if not actual, conflict of interest giving rise to a fiduciary duty." *Id.* An action for failing to settle within policy limits may only be filed against an insurer that defended and cannot be pursued against a carrier that refused to defend at all. *Mesmer v. Maryland Auto. Ins. Fund*, 725 A.2d 1053 (Md. 1999).

Third Party Actions: A third-party does not have a tort cause of action against an insurer for bad faith claims. *Bean v. Allstate Instate Company*, 403 A.2d 793 (Md. 1979). Claims for bad faith failure to settle can, however, be assigned. Assignee's right to recovery is not limited by what insured would have been able to pay absent coverage. *See Med. Mut. Liab. Ins. Soc. of Maryland v. Evans*, 622 A.2d 103, 117 (Md. 1993).

Multiple Claimants: *Hartford Cas. Ins. Co. v. Dodd*, 416 F. Supp. 1216 (D. Md. 1976) In Observing the general rule that ordinarily, there is no requirement that insurer wait until all claims have been presented before it deals with any claimant, so that liability insurer may settle claims in good faith with some claimants even if such settlement reduces amount available to others. The court, in this case, however, required Hartford to pay \$2,444 in excess of its ordinary personal injury protection coverage. The court had trouble with Hartford's PIP payments to its insured aware that the accident was caused by the insured's husband who was driving her car, that the accident resulted in the death of the passengers in the insured's car, and caused serious injuries to the other two passengers in the insured's car and that there were relatively low policy limits.

MASSACHUSETTS

Insurer's Duty to Settle: Massachusetts uses a negligence standard in determining an insurer's bad faith failure to settle the claim within policy limits. *Hartford Cas. Ins. Co. v. New Hampshire Ins. Co.*, 628 N.E.2d 14, 17 (Mass. 1994). The test under Massachusetts law is "whether no reasonable insurer would have failed to settle the case within the policy limits." *Id.* at 18. This test requires an insured to prove that 1) the plaintiff in the underlying action would have settled within policy limits; and 2) assuming an insurer's unlimited exposure (viewed from the standpoint of the insured) no reasonable insurer would have refused the settlement offer or refused to respond to that offer. *Id.* Bad faith under Massachusetts law must be supported by competent and credible evidence. *Continental Ins. Co. v. Bahnan*, 216 F.3d 150 (1st Cir. 2000).

Third Party Actions: The Supreme Judicial Court of Massachusetts ruled in *Clegg v. Butler*, that even tort claimants had a right to pursue a Section 9 claim for violations of Mass. Gen. Laws ch. 176D, § 3 (Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance). *Clegg v. Butler*, 676 N.E.2d 1134, 1144 (Mass. 1997). The statute defines unfair claim settlement practices.

To prevail under Mass. Gen. Laws ch. 176D, § 3(9)(f), the plaintiff must show that the insurer failed to make a prompt, fair, and equitable settlement offer when liability had become reasonably clear. *O'Sullivan v. Hingham Mut. Fire Ins. Co.*, 2009 Mass. App. Div. 154 (Mass. Dist. App. Div. 2009).

In determining whether an insurer's liability was "reasonably clear" for ch. 176D purposes, the test is "whether a reasonable person, with knowledge of the relevant facts and law, would probably have concluded, for good reason that the insurer was liable to the plaintiff." *Demeo v. State Farm Mut. Auto. Ins. Co.*, 649 N.E.2d 803, 804 (Mass. App. Ct. 1995).

Primary v. Excess: While recognizing the excess insurer's equitable subrogation rights, the court declined to find that the primary insurer owed any direct duty of care to the excess insurer. *Hartford Cas. Ins. Co. v. New Hampshire Ins. Co.*, 628 N.E.2d 14, 19 (Mass. 1994).

Multiple Claimants: In *Bruyette v Sandini*, 291 Mass 373, 197 NE 29 (1935), an injured claimant brought an action to enjoin settlements of other claims by an automobile liability insurer because the settlements might exhaust the insurance proceeds and any judgment the claimant might obtain against the insured could only be collected out of the insurance proceeds because of the insured's insolvency. The court held that settlement of part of the multiple claims was permissible as it did not constitute an inequitable preference nor contradict public policy and that the plaintiff was not entitled to the equitable relief requested. An injured claimant did not obtain a property right in the proceeds of an insurance policy prior to a judgment in his favor against the insured under the provisions of the compulsory motor vehicle law, and equity would not intervene to aid his inchoate interest against the insurance company, said the court, adding that the insurance law did not create a fund to be distributed pro rata among all injured persons.

MICHIGAN

Insurer's Duty to Settle: Michigan law recognizes the cause of action for bad faith refusal to settle within policy limits and provides that an insurer is liable to the insured for a judgment in excess of the policy limits when an insurer "having exclusive control of settlement, fraudulently or in bad faith refuses to compromise a claim for an amount within the policy limits." *Frankenmuth Mut. Ins. Co. v. Keeley*, 447 N.W.2d 691, 694 (Mich. 1989) *on reh'g*, 462 N.W.2d 750 (Mich. 1990) *and on reh'g*, 461 N.W.2d 666 (Mich. 1990)(quoting *City of Wakefield v Globe Indem Co*, 225 NW 643 (1929)). The measure of damages in a case where the insurer has failed to settle within policy limits does not require evidence that the insured actually paid that judgment but rather is determined based on what is or would actually have been paid by the insurer. *Frankenmuth*, 447 N.W.2d at 707 n. 27.

Third Party Actions: Michigan courts have generally held that any duty of good faith and fair dealing arises from contract, thus, third parties were barred from suing an insurer for bad faith. *In Re Baker*, 709 F. 2d 1063 (6th Cir. 1983). Moreover, to the extent Michigan courts have recognized an implied contractual duty to conduct a good faith investigation on an insurance contract, breaching that duty only enables the recovery of penalty interest under the Michigan Uniform Trade Practices Act, Mich. Comp. Laws § 500.2006(4); *Tyler v. Pacific Indemnity Co.*, No. 10-cv-13782, 2013 WL 183931, at *4 (E.D. Mich. January 17, 2013). Where an insured's claim for bad faith failure to settle within policy limits is

not based on a claim for fraud, the claim is assignable. *Benkert v. Med. Protective Ins. Co.*, 842 F.2d 144 (6th Cir. 1988)(citing *Commercial Union Ins. Co. v. Liberty Mut. Ins. Co.*, 393 N.W.2d 161 (1986)).

Excess v. Primary: The Supreme Court of Michigan found that “the primary carrier does not owe a direct duty to the excess carrier to act in good faith to defend and settle a claim within the former’s policy limits.” *Commercial Union Ins. Co. v. Med. Protective Co.*, 393 N.W.2d 479, 486 (Mich. 1986). The excess carrier does, however, have the right to bring a subrogation action against the primary insurer for bad faith failure to settle. The court found that the excess carrier has “no lesser or greater rights than those held by the insured.” *Id.* Thus, the primary insurer is entitled to the same defenses against the excess insurer as it would have against the insured, such as lack of cooperation or demand.

MINNESOTA

Insurer’s Duty to Settle: An insurer is liable for failure to exercise “good faith” in the conduct of an insured’s defense, including a duty to settle within policy limits where liability is clear. *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387-88 (Minn. 1983). If an insurer fails to take advantage of an opportunity to settle within policy limits where liability is clear and the possibility of an excess judgment is apparent, the insurer will be obliged to pay the full amount of the judgment, including interest. *Id.* However, the insured’s liability must be clear before the insurer itself is liable for negligently failing to settle within policy limits. *Northfield Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 545 N.W.2d 57 (Minn. Ct. App. 1996).

Third Party Actions: Generally, Minnesota does not recognize an independent tort for bad faith refusal to pay a claim. *Morris v. Am. Family Mut. Ins. Co.*, 386 N.W.2d 233, 237 (Minn. 1986). An insurer may be liable for failing to exercise “good faith” in handling third party claims against an insured. *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387-88 (Minn. 1983). Typically, the insured assigns his or her bad faith claim against the insurer to an injured claimant in return for relief from the excess judgment. The injured claimant (assignee) may then proceed with the claim for bad faith. *E.g., Strand v. Travelers Ins. Co.*, 219 N.W.2d 622, 622 (Minn. 1974).

MISSISSIPPI

Insurer’s Duty to Settle: Insurers have a fiduciary duty to their insureds to “consider fairly the interests of the insured as well as [their] own” when faced with a settlement demand within the insured’s policy limits. *Hartford Acc. & Indem. Co. v. Foster*, 528 So. 2d 255, 263 (Miss. 1988). An insurer must place the interests of its insured above its own financial interests and can be exposed to tort liability (including bad faith) for refusing to settle within policy limits in the event of an adverse judgment against the insured in excess of policy limits. *Id.*

Third Party Actions: Generally, the implied covenant of good faith and fair dealing runs only between the insurer and the insured, so a third party cannot sue for its breach based upon a refusal to settle claims. However, under certain circumstances, an insured may assign its bad faith rights to the third party, usually in exchange for a covenant not to execute on an excess judgment. *Kaplan v. Harco National Ins. Co.*, 716 So. 2d 673, 677 (Miss. 1998).

MISSOURI

Insurer’s Duty to Settle: An insurer under a liability policy has a fiduciary duty to its insured to evaluate and negotiate third party claims in good faith. *Duncan v. Andrew County Mut. Ins. Co.*, 665 S.W.2d 13,

18 (Mo. Ct. App. 1983). See also *Freeman v. Leader Nat'l. Ins. Co.*, 58 S.W.3d 590, 598 (Mo. Ct. App. 2001).

The elements of a breach of the duty to settle are 1) the insurer's assumption of control over negotiation and settlement and legal proceedings against the insured; 2) demand by the insured that the insurer settle the claim; 3) the insurer's refusal to settle the claim within the policy limits; and 4) proof that the insurer acted in bad faith and not merely negligently. *Dyer v. Gen. Am. Life Ins. Co.*, 541 S.W.2d 702, 704 (Mo. Ct. App. 1976); see also *Rinehart v. Shelter Gen. Ins.*, 261 S.W.3d 583 (Mo. Ct. App. 2008). The insured's demand that the insurer settle the claim is not necessary in the event that the insured was never advised of the offers of settlement. *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554, 564 (Mo. Ct. App. 1990).

Circumstances that courts will consider in determining whether an insurer has acted in bad faith in refusing to settle “include the insurer's not fully investigating and evaluating a third-party claimant's injuries, not recognizing the severity of a third-party claimant's injuries and the probability that a verdict would exceed policy limits, and refusing to consider a settlement offer.” *Johnson v. Allstate Ins. Co.*, 262 S.W.3d 655, 662 (Mo. Ct. App. 2008). Further, when considering a settlement offer, if the interests of the insurer and the insured conflict, the insurer must place the interests of insured ahead of its own. See *id.*

Missouri courts have also held in regards to the duty to settle that once the insurer has, in good faith, exhausted its policy limits on behalf of the insured, its duty to defend is terminated as to additional insureds who may remain in the case and who may incur liability. See *Millers Mut. Ins. Ass'n. of Il. v. Shell Oil Co.*, 959 S.W.2d 864, 872 (Mo. Ct. App. 1997).

Third Party Actions: “Third party bad faith lawsuits” generally arise in one of three situations: (1) when an insurer acts in bad faith by failing to settle a claim against its insured within the policy limits, *Zumwalt v. Util. Ins. Co.*, 228 S.W.2d 750, 756 (Mo. 1950); (2) when an insurer, in bad faith, fails to defend a claim against its insured, see *Columbia Mut. Ins. Co. v. Epstein*, 239 S.W.3d 667, 675 (Mo. Ct. App. 2007) (finding that statutory penalties were appropriate for insurer's refusal to defend); and (3) when an insurer acts in bad faith by failing to settle and defend a claim against the insured. Under Missouri law, the action for bad faith refusal to settle is grounded in tort, not in contract. *Zumwalt*, 228 S.W.2d at 756. This right to sue for bad faith may also be assigned to a third-party claimant. See *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554, 564–65 (Mo. Ct. App. 1990).

Primary v. Excess: On an issue of first impression, the court in *Scottsdale Ins. Co. v. Addison Ins. Co.* 2013 WL 5458918 (Mo.App. W.D. 2013) held that an excess insurer was permitted to recover under theory of equitable subrogation for primary insurer's bad faith failure to settle; excess insurer was not required to make a demand for payment of primary insurer before asserting claim for bad faith failure to settle, abrogating *Dyer v. General American Life Ins. Co.*, 541 S.W.2d 702.

Multiple Claimants: *Purscell v. TICO Insurance Company*, 959 F.Supp.2d 1195 (W.D.Mo. 2013) court declined to find bad faith failure to settle on the insurer's part finding that at the time the insurer received the Carr's settlement demand, “there were a number of unique and complicated issues involving [the insured]'s liability for the accident. Among them, that the accident had resulted in one death, and the concern about Purscell's liability for any wrongful death claim. There were also coverage issues concerning whether Priesendorf's conduct. Did her pushing in the accelerator constitute “use” of the car that might trigger additional insured coverage, and would require any settlement to release her as well? And if she were an omnibus insured and her acts were intentional and caused the Carrs' injuries, coverage might be excluded for the accident. Since only the Purscell survived the accident and Priesendorf could not tell her side of the story, TICO needed to evaluate Plaintiff's statement that Priesendorf “caused” the

accident. In addition, if Priesendorf did have a claim against Purscell, what was its value? Finally, the Carrs' offer did not specify a deadline that would have indicated to Infinity that it needed to act within a matter of days to resolve these issues. Purscell's appeal to the Eighth Circuit is pending; oral arguments were heard in November 2014.

Multiple Insureds: *Millers Mut. Ins. Ass'n of Illinois v. Shell Oil Co.*, 959 S.W.2d 864, 870 (Mo. App. E.D. 1997) Held: "An insurer should not be precluded from accepting a reasonable settlement offer for fewer than all insureds. By accepting the offer the insurer would avoid being subjected to liability exceeding the policy limits due to its rejection of a reasonable offer. . . . Further, any settlement would benefit all insureds by decreasing the total amount of liability in the underlying suit." (citation omitted). Also held: an insurer may terminate its duty to defend one insured by exhausting the policy limits in a good faith settlement on behalf of another insured finding policy provision unambiguous and its enforcement in this context not against public policy.

MONTANA

Duty to Settle: Generally, Montana's claim handling practices are governed by the Montana Unfair Trade Practices Act (UTPA), Mont. Code Ann. § 33-18-101 to -1006 (2003). An insurer has a duty to attempt in good faith to effectuate prompt, fair, and equitable settlements when liability is reasonably clear. Mont. Code Ann. § 33-18-203(6). Insurers are prohibited from failing to settle claims under one portion of the policy in order to influence settlements under other portions of the policy. Mont. Code Ann. § 33-18-203(13). Insurers are obligated to pay, in advance of settlement, reasonable and necessary expenses incurred by a claimant as a result of the accident when liability for those expenses is "reasonably clear." *Ridley v. Guaranty Nat. Ins. Co.* 951 P.2d 987, 989 (1997); *see also DuBray v. Farmers Ins. Exch.*, 36 P.3d 897, 899 (Mont. 2001). Obtaining a general release of the insurer or insured is not required by UTPA as a condition to settlement. *Shilhanek v. D-2 Trucking, Inc.*, 70 P.3d 721, 727 (Mont. 2003).

Third Party Actions: A third party has the same causes of action as stated above, absent the breach of contract claim. Moreover, a third party is not limited to the exclusivity of the above remedies and, in addition to the above causes of action, can bring common law bad faith actions against an insurer over the handling of a claim. *Brewington v. Employers Fire Ins. Co.*, 992 P.2d 237, 240 (Mont. 1999). However, a third party is prohibited from bringing a bad faith action against an insurer until liability of the insured has been established. *Safeco Ins. Co. of Ill. V. Mont. Eighth Jud. Dist. Ct. Cascade County*, 2 P.3d 834, 838 (Mont. 2000).

NEBRASKA

Insurer's Duty to Settle: Under Nebraska law, an insurer's bad faith failure to settle can form the basis for a tort claim. *Home Ins. Co. v. Aetna Ins. Co.*, 236 F.3d 927, 929 n. 5 (8th Cir. 2001); *Hadenfeldt v. State Farm Mutual Auto Ins. Co.*, 239 N.W.2d 499, 502 (Neb. 1976).

Third Party Actions: Nebraska does not have a third-party cause of action for bad faith other than, perhaps, through assignment. *Krohn v. Gardner*, 533 N.W.2d 95 (Neb. 1995).

NEVADA

Insurer's Duty to Settle: Unfair or deceptive consumer practices are proscribed by Nev. Rev. Stat. §§ 598.360, 41.600 (1991) and unfair claims handling by insurers is regulated under Nev. Rev. Stat. § 686A.310 (1978). Nevada Revised Statute §686A.310 subsection 1 provides a laundry list of unfair claims practices including "(5) failing to effectuate prompt, fair and equitable settlements of claims in

which liability of the insurer has become reasonably clear.” Subsection 2 provides that an insurer is liable to its insured for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice.

In addition, the Nevada Supreme Court has held that if an insurer fails to adequately inform an insured of a known reasonable settlement opportunity the insurer may breach its duty of good faith and fair dealing. *Allstate v. Miller*, 212 P. 3d 318, 322 (Nev. 2009). When evaluating whether the failure to settle is bad faith, the following factors are to be considered: 1) The probability of the insured’s liability; 2) The adequacy of the insurers investigation of the claim; 3) The extent of damages recoverable in excess of policy coverage; 4) The rejection of offers in settlement after trial; 5) The extent of the insured’s exposure as compared to that of the insurer; and 6) The nondisclosure of relevant factors by the insured or insurer. *Id.* at 326-27.

If an insurer fails to settle or fails to inform an insured of a reasonable opportunity to settle, it can be considered the proximate cause of all damages arising from a foreseeable settlement or excess judgment. *Id.* at 328.

Likewise, Nev. Rev. Stat. § 686A.310(1) of the Nevada Insurance Unfair Trade Practices Act seems to codify the relevant Nevada case law by making an insurer’s failure to promptly settle a claim actionable.

Third Party Actions: Where third party claimants have no private cause of action against an alleged tortfeasor's insurer under statutory scheme in Nevada, they also have no cause of action under any theory of contract or tort. *Gunny v. Allstate Ins. Co.*, 830 P.2d 1335, 1336 (Nev. 1992).

NEW HAMPSHIRE

Insurer’s Duty to Settle: The New Hampshire Supreme Court has recognized a duty by insurers to use reasonable care (negligence standard) in settlement of third-party liability actions. *Dumas v. State Mut. Auto Ins. Co.*, 274 A.2d 781 (N.H. 1971). The court has, however, refused to extend that duty to first-party claims. *Lawton v. Great Southwest Fire Ins. Co.*, 392 A.2d 576, 580-81 (N.H. 1978) (stating allegations of an insurer's wrongful refusal or delay to settle a first-party claim do not state a cause of action in tort); *see also Bell v. Liberty Mut. Ins. Co.*, 776 A.2d 1260 (N.H. 2001).

NEW JERSEY

Insurer’s Duty to Settle: The interests of both the insured and the insurer must be given the same consideration under New Jersey law. *Bowers v. Camden Fire Ins. Ass'n*, 237 A.2d 857, 862 (N.J. 1968). Furthermore, the insurer must approach a settlement offer without regard to the policy limits and make a determination of whether to accept or reject the offer on that basis. *Id.*

Where an insurer is defending and negligently fails to settle within policy limits, it may be held liable for any excess verdict. *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 323 A.2d 495, 504-07 (N.J. 1974). An insurer can be liable for bad-faith failure to settle in the absence of a settlement demand within limits, but that absence is only one factor to consider in determining whether the insurer acted in bad-faith. *Id.* Factors to consider in a decision not to settle include liability; the anticipated range of verdict; the strengths and weaknesses of all the evidence to be presented by either side; the history of the particular geographic area in cases of similar nature; and the relative appearance, persuasiveness and appeal of the claimant, the insured and witnesses at trial. *Id.* at 489-90.

Insurers are obligated to exercise good faith in evaluating settlement offers. *Courvoisier v. Harley Davidson of Trenton, Inc.*, 742 A.2d 542, 548 (N.J. 1999). The insurer has a fiduciary duty to try to settle claims within the policy limits. *Id.* at 549; *Rova Farms Resort, Inc.*, 323 A.2d at 495. In the event an insurer is found to have acted in bad faith in pursuing settlement negotiations and a judgment in excess of policy limits is rendered, the insurer will have to pay the judgment regardless of its policy limits. *See Courvoisier*, 742 A.2d at 549; *Rova Farms Resort, Inc.*, 323 A.2d at 495.

Alternatively, when an insurer wrongfully denies its defense coverage obligations, the insured may assume control of the defense of the case and settle the case without the input of the insurer. *Griggs v. Bertram*, 443 A.2d 163, 174-75 (N.J. 1982). The insurer is then liable for the settlement amount up to its policy limits as long as the settlement is reasonable in amount and entered into in good faith. *Id.* The insurer possesses the burden of persuasion in proving that the settlement is unreasonable. *Id.* at 174.

Third-Party Actions: A third-party tort claimant has no right to assert bad faith claims against the tortfeasor's liability insurer. *Murray v. Allstate Ins. Co.*, 507 A.2d 247, 250 (N.J. Super. App. Div. 1986).

NEW MEXICO

Insurer's Duty to Settle: Where there is a substantial likelihood of a recovery in excess of policy limits, an insurer breaches its duty of good faith and fair dealing when there is an unwarranted refusal to settle a case within policy limits. *Dairyland Ins. Co. v. Herman*, 954 P.2d 56, 61 (N.M. 1997). If an insurer refuses to settle in bad faith, it is liable for the entire amount of the judgment, including the amount in excess of policy limits. *Id.*; *Lujan v. Gonzales*, 501 P.2d 673, 684 (N.M. 1972). Conversely, in the absence of bad faith, there is no cause of action against an insurer for negligent failure to settle. *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 690 P.2d 1022, 1025 (N.M. 1984).

The Tenth Circuit, in *City of Hobbs v. Hartford Fire Ins. Co.*, 162 F.3d 576, 586 (10th Cir. 1998), held that under New Mexico law "a cause of action for bad-faith failure to settle can exist in the absence of a firm [settlement] offer."

Third Party Actions: In *Hovet v. Allstate Ins. Co.*, the New Mexico Supreme Court held that third-party claimants under an automobile liability policy may sue the insurer for unfair settlement practices under the Insurance Code. *Hovet v. Allstate Ins. Co.*, 89 P.3d 69, 76 (N.M. 2004). The third-party action may only be brought after the underlying negligence action is resolved in favor of the third party. *Id.*

But, in 2010, the New Mexico Supreme Court limited the types of third party claims that it recognized in *Hovet* by holding that a third party does not have a claim against insurers providing nonmandatory excess liability insurance coverage. *Jolley v. Associated Electric & Gas Ins. Services Ltd. (AEGIS)*, 237 P.3d 738, 739 (N.M. 2010).

NEW YORK

Insurer's Duty to Settle: Under New York law, the insurer's conduct must constitute a "gross disregard" of the insured's interest - a deliberate or reckless failure to place on equal footing the interest of its insured with its own interest when considering a settlement offer. *Pavia v. State Farm Mut. Auto. Ins. Co.*, 626 N.E.2d 24 (N.Y. 1993)(no pinpoint site available); *Allstate Ins. Co. v. Jacobs*, 617 N.Y.S.2d 360 (N.Y. App. Div. 1994); *New England Ins. Co. v. Healthcare Underwriters Mut. Ins. Co.*, 295 F. 3d 232 (2d Cir. 2002); *Pinto v. Allstate Ins. Co.*, 221 F. 3d 394 (2d Cir. 2000). A primary insurer discharges its duty by giving as much consideration to its insured's interests as it does its own. *Fed. Ins. Co. v. N. Am. Specialty Ins. Co.*, 921 N.Y.S.2d 28 (N.Y. App. Div. 2011).

Courts use the following nonexclusive factors in determining whether an insurer committed bad faith in failing to settle: 1) failure to communicate the status of settlement offers and negotiations; 2) plaintiff's likelihood of success on the liability issue in the underlying action; 3) the potential magnitude of damages and the financial burden each party may be exposed to as a result of a refusal to settle; 4) the insurer's failure to properly investigate the claim and any potential defenses, and the information available to the insurer at the time the demand for settlement is made; and 5) any other evidence which tends to establish or negate the insurer's bad faith in refusing to settle. *Smith v. General Accident Ins. Co.*, 697 N.E.2d 168, 171 (N.Y. 1998).

The United States Court of Appeals for the Second Circuit has ruled that bad faith can be established, even if the settlement demand exceeds the primary limits - "plaintiffs' willingness to settle for the policy limits is one way, but not the only way to show that an actual opportunity to settle existed." *New England Ins. Co. v. Healthcare Underwriters Mut. Ins. Co.*, 295 F. 3d 232, 247 (2d Cir. 2002); *see also Borchstein v. Nationwide Mut. Ins. Co.*, 448 F. 2d 987, 989 (2d Cir. 1971).

An insurer should, in good faith, communicate all settlement demands and offers to the insured, since the insured (or excess carrier) may be willing to make up the difference. *See Smith v. General Acc. Ins. Co.*, 697 N.E.2d 168, 171 (N.Y. 1998).

Multiple claims: New York follows a "first in time, first in right" approach to settlements with multiple claimants. *See, e.g., David v. Bauman*, 196 N.Y.S.2d 746 (N.Y. Sup. Ct. 1960).

Multiple Insureds: An insurer "cannot prefer one its insureds over another" with respect to settlement. *Smoral v. Hanover Ins. Co.*, 37 A.D.2d 23, 322 N.Y.S.2d 12 (1971).

Third Party Actions: The victim of an automobile accident who received an assignment of the insured's rights to pursue coverage is subject to all the same defenses to coverage as would have applied against the policyholder. *Zeldin v. Interboro Mut. Indem. Ins. Co.*, 843 N.Y.S.2d 366 (N.Y. App. Div. 2007).

Excess v. Primary: A primary insurer's duty to act in good faith also extends to excess insurers. *Pavia v. State Farm Mut. Auto. Ins. Co.*, 626 N.E.2d 24 (N.Y. 1993). This duty reflects the inherent conflict between the primary insurer's desire to settle the claim for as little as possible and the excess insurer's desire to avoid a judgment exceeding the primary limits. *Smith v. General Accident Ins. Co.*, 697 N.E.2d 168 (N.Y. 1998); *see also New Eng. Ins. Co. v. Healthcare Underwriters Mut. Ins. Co.*, 295 F.3d 232, 241 (2d Cir. 2002). The primary carrier is required to give as much consideration to the excess carrier's interests as it does its own. *Fed. Ins. Co. v. N. Am. Specialty Ins. Co.*, 921 N.Y.S.2d 28 (N.Y. App. Div. 2011).

NORTH CAROLINA

Insurer's Duty to Settle: The law imposes on an insurer the duty of carrying out in good faith its contract of insurance which includes a duty to its insured to act diligently and in good faith in effecting settlements within policy limits, and if necessary to accomplish that purpose, to pay the full amount of the policy. *Alford v. Textile Ins. Co.*, 103 S.E.2d 8, 12 (N.C. 1958). Liability has been repeatedly imposed upon insurance companies because of their failure to act diligently and in good faith in effectuating settlements with claimants. *Id.*

An insurer is required to act in good faith in exercising its right to settle a claim against the insured and must consider the interests of the insured, but the insurer is not required to give more consideration or weight to the interests of the insured than its own interests. *Nationwide Mut. Ins. Co. v. Public Service*

Co. of North Carolina, Inc., 435 S.E.2d 561, 564 (N.C. Ct. App. 1993); *Cash v. State Farm Mut. Auto. Ins. Co.*, 528 S.E.2d 372, 380 (N.C. Ct. App. 2000). However, if an insurance company "admits that its insured is liable, without its insured's knowledge or consent, [it] is acting in its own interest, and not as the agent of the insured." *Anderson v. Gooding*, 259 S.E.2d 398, 400, *appeal dismissed*, 261 S.E.2d 921 (1979), *rev'd on other grounds*, 265 S.E.2d 201 (1980).

Third Party Actions: North Carolina does not recognize any cause of action for bad faith or unfair or deceptive trade practices by third-party claimants against the insurance company of an adverse party. *Lee v. Mut. Community Sav. Bank, SSB*, 525 S.E.2d 854, 857 (N.C. Ct. App. 2000). Courts have also held that a judgment creditor is limited to the policy limits in the event of an unsatisfied judgment following an excess verdict. *Wilson v. State Farm Auto Ins. Co.*, 394 S.E.2d 807, 811 (N.C. 1990); *Wilson v. Wilson*, 468 S.E.2d 495, 498 (N.C. Ct. App. 1996).

NORTH DAKOTA

Insurer's Duty to Settle: Insurers have an implied duty to negotiate a good faith settlement. *Dvorak v. American Family Mut. Ins. Co.*, 508 N.W.2d 329, 331-32 (N.D. 1993). However, an insurer does not breach its implied duty to settle a case where the insurer has a right of reimbursement from the insured. *Continental Cas. Co. v. Kinsey*, 513 N.W.2d 66, 69 (N.D. 1994). The test is whether an insurer acts reasonably in settling the claim; the North Dakota Supreme Court has held an insurer does not act in bad faith by reasonably refusing to settle a claim where liability is fairly debatable. *See Hanson v. Cincinnati Life Ins. Co.*, 571 N.W.2d 363, 370 (N.D. 1997).

Third Party Actions: The insurer generally does not owe a third party claimant a duty of good faith and fair dealing where no contract or other rights confer such a right upon the third party. *Dvorak v. American Family Mut. Ins. Co.*, 508 N.W.2d 329, 331 (N.D. 1993). However, where the insurance contract designates the third party as an intended claimant or third party beneficiary, the insurer may owe the third party a duty of good faith and fair dealing in handling the claim. *Szarkowski v. Reliance Ins. Co.*, 404 N.W.2d 502, 505 (N.D. 1987).

OHIO

Insurer's Duty to Settle: Ohio courts have consistently applied the "reasonable justification" standard to bad faith cases. Under this standard, "an insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor...intent is not and has never been an element of the reasonable justification standard." *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 400 (Ohio 1994). An insurer's refusal to pay a valid claim is not conclusive of bad faith, "but if the insurer bases its refusal on a belief that there is no coverage for a particular claim, such belief may not be arbitrary or capricious." *Beever v. Cincinnati Life Ins. Co.*, Nos. 02AP-543, 02AP-544, 2003 WL 21321428, at *3 (Ohio Ct. App. June 10, 2003). Additionally, an insurer may be liable for excess judgment where it fails to settle claim within policy limits if its decision not to settle was arbitrary or capricious and there was no reasonable justification for the decision. *Hart v. Republic Mut. Ins. Co.*, 87 N.E.2d 347, 349 (Ohio 1949).

Third Party Actions: A third-party tort claimant has no right to assert bad faith claims against the tortfeasor's liability insurer. *Murrell v. Williamsburg School District*, 634 N.E.2d 263, 265 (Ohio. Ct. App. 1993).

OKLAHOMA

Insurer's Duty to Settle: An insurer has a duty to tender the policy limits when damages would clearly exceed available insurance coverage. *Barnes v. Okla. Farm Bureau Mut. Ins. Co.*, 11 P.3d 162, 175-76 (Okla. 2000). “[A] legally binding, unconditional offer of settlement from the claimant is not a prerequisite to maintaining an action of this type where the insured has been exposed to an excess verdict.” *Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080, 1095 (Okla. 2005).

Third Party Actions: “The so-called bad-faith tort action is confined to tortfeasor-insurers and inures solely to insured persons (and a policy's third-party beneficiaries). It lies only for bad-faith refusal to settle a covered claim.” *DeAnda v. AIU Ins.*, 98 P.3d 1080, 1090 (Okla. 2004). An exception to the foregoing was later made with regard to an insurer's bad faith in refusing to pay a worker's compensation claim. *See Sizemore v. Continental Cas. Co.*, 142 P.3d 47 (Okla. 2006).

OREGON

Insurer's Duty to Settle: An insurer's duty to exercise reasonable care includes the duty to settle when a reasonable opportunity exists to do so. *Georgetown Realty, Inc. v. Home Ins. Co.*, 831 P.2d 7, 13 (Or. 1992); *Maine Bonding & Cas. Co. v. Centennial Ins. Co.*, 693 P.2d 1296, 1299 (Or. 1985); *see also Goddard v. Farmers Ins. Co.*, 22 P.3d 1224, 1227 (Or. 2001)(stating duty to settle may include duty to initiate settlement discussions). An insurer may be liable for failing to solicit an offer within limits, where warranted, even if the plaintiff never actually made such an offer. *Maine Bonding*, 693 P.2d at 1299.

Oregon uses a hybrid between the negligence standard and what it refers to as the “no limits” rule (the disregard the limits rule). Specifically, the insurer must use such care “as would have been used by an ordinarily prudent insurer with no policy limit applicable to the claim.” *Id.* at 1299. An insurer commits negligence in failing to settle where an opportunity to settle exists and choosing not to settle would be taking an unreasonable risk, namely a risk that would involve chances of unfavorable results out of a reasonable proportion to the chances of favorable results. *Id.*

The Oregon Court of Appeals ruled that a liability insurer has a continuing obligation to attempt to resolve the claims against its policyholder even after the underlying case has resulted in an excess verdict in *Goddard v. Farmers Ins. Co. of Oregon*, 22 P.3d 1224, 1229 (Or. Ct. App. 2001), *rev. denied*. There, the court ruled that if anything, a liability insurer owes an even greater duty following entry of judgment. *Id.*

Oregon appellate courts, however, have not clearly resolved the issue of whether an insurer may consider coverage in dealing with settlement opportunities, or what happens if it considers coverage but guesses wrong. *Kuzmanich v. United Fire and Casualty*, 410 P.2d 812, 814 (Or. 1966)(holding insurer not liable for failing to settle case defended under reservation of rights where insurer had coverage and related liability concerns); *Safeco Ins. Co. v. Barnes*, 891 P.2d 682, 685-86 (Or. Ct. App. 1995) (indicating insurer may have tort liability for failing to settle case defended under reservation of rights even where insurer later showed that claim was not covered).

PENNSYLVANIA

Insurer's Duty to Settle: An insurer may be liable for failing to settle within policy limits if it fails to evaluate a claim in an “intelligent and objective” manner. *Shearer v. Reed*, 428 A.2d 635, 638-39 (Pa. Super. Ct. 1981). The following factors are used by Pennsylvania courts to determine an insurer's bad faith in its refusal to settle a liability claim within the policy includes a good faith evaluation and consideration of: 1) the view of the carrier or its attorney as to liability; 2) the anticipated range of the verdict, should it be adverse; 3) the strengths and weaknesses of all the evidence to be presented by both

sides so far as known; 4) the history of the particular geographic area in cases of similar nature; and 4) the relative appearance, persuasiveness and likely appeal of the claimant, the insured, and other witnesses at trial. *Id.* at 638. The insurer is liable for the known and/or foreseeable consequential damages of its insured that reasonably flow from the insurer's bad faith conduct. *The Birth Center v. The St. Paul Companies*, 787 A.2d 376, 389 (Pa. 2001).

Pennsylvania legislative policy also provides that insurers may not delay settling third-party claims just because the insured objects. *See* 40 Pa. Cons. Stat. § 1171.5(a)(10)(xv). *See Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828 (3d Cir. 1995). Section 1171.5 of the Unfair Insurance Practices Act specifically provides that an insured's objection cannot be the sole basis for refusing to pay a claim unless: (a) the insured claims sovereign, eleemosynary, diplomatic, military service, or other immunity from suit or liability with respect to such claim; (b) the insured is granted the right under the policy of insurance to consent to settlement of claims; or (c) the refusal of payment is based upon the insurer's independent evaluation of the insured's liability based upon all available information. *See* 40 Pa. Cons. Stat. § 1171.5(a)(10)(xv)(a)-(c); *see also Step-Plan Servs. v. Koresko*, 12 A.3d 401 (Pa. Super. Ct. 2010).

Third Party Actions: There is no direct right of action by a third-party claimant against the defendant's insurer. *Klinger v. State Farm Mut. Auto Ins. Co.*, 895 F.Supp. 709, 716 (E.D. Pa. 1995). However, the third party claimant can proceed against the insurer by assignment from the defendant-insured of the defendant's rights against the insurer. *Gray v. Nationwide Mut. Ins. Co.*, 223 A.2d 8, 11 (Pa. 1966). *See also Johnson v. Beane*, 664 A. 2d 96, 98-99 n. 2-3 (Pa. 1995); *Brown v. Candelora*, 708 A.2d 104, 113 (Pa. Super. Ct. 1998).

RHODE ISLAND

Insurer's Duty to Settle: An insurer's bad faith refusal to settle an insurance claim can give rise to an independent tort action that can result in an award of both compensatory and punitive damages. *Bibeault v. Hanover Ins. Co.*, 417 A.2d 313, 319 (R.I. 1980). An insurance company's fiduciary obligations include a duty to consider seriously a plaintiff's reasonable offer to settle within the policy limits. *Asermely v. Allstate Insurance Co.*, 728 A.2d 461, 464 (R.I. 1999). It includes an obligation of good faith and fair dealing. *Id.* If an insurer declines to settle a case within policy limits, it does so at its peril in the event that a trial results in a judgment that exceeds the policy limits, including interest; if such a judgment stands, the insurer is liable for the amount that exceeds the policy limits, unless it can show that the insured was unwilling to accept the offer of settlement. *Id.* "Even if the insurer believes in good faith that it has a legitimate defense against the third party, it must assume the risk of miscalculation if the ultimate judgment should exceed the policy limits." *Id.* at 464.

SOUTH CAROLINA

Insurer's Duty to Settle: An unreasonable refusal on the insurer's part to accept a settlement offer renders it liable in tort to the insured for the amount of the judgment against the insured in excess of policy limits. *Trimper v. Nationwide Ins. Co.*, 540 F. Supp. 1188, 1193 (D.S.C. 1982). "It has long been the law in South Carolina that a liability insurer owes its insured a duty to defend and settle actions brought against its insured in good faith and with reasonable care for the rights of the insured." *Id.*; *see also Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.E. 346 (1933).

Third Party Actions: Generally, South Carolina law does not recognize a third-party tort action for bad faith refusal to pay benefits. *Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.*, 586 S.E.2d 586, 588 (S.C. 2003); *Kleckley v. Northwestern Nat'l Cas. Co.*, 498 S.E.2d 669, 674 (S.C. Ct. App. 1998). A very narrow exception has been created for a spouse who sues based on the insurer's bad faith refusal

to pay the benefits of the insured spouse. *Ateyeh v. Volkswagen of Florence, Inc.*, 341 S.E.2d 378, 380 (S.C. 1986)(finding wife had standing based on her derivative relationship to the policyholder husband created by unique doctrine in South Carolina, the necessities doctrine, which makes wife personally liable for the bills of the insured).

In addition, while not specifically addressing the question, case law suggests that an insured may assign its bad faith rights to a third-party claimant. *Peterson v. West Am. Ins. Co.*, 518 S.E.2d 608, 610 (S.C. Ct. App. 1999) (noting that insurer assigned rights to third party who brought bad faith action against insurer); *Whittington v. Nationwide Mut. Ins. Co.*, 208 S.E.2d 529, 529-30 (S.C. 1974)(same); *Hodges v. State Farm Mut. Auto. Ins. Co.*, 488 F. Supp. 1057, 1059 (D.S.C. 1980)(same).

SOUTH DAKOTA

Insurer's Duty to Settle: Implied in every insurance contract is a covenant that neither party will do anything to injure the rights of the other in receiving the benefits of the agreement. *Harter v. Plains Ins. Co.*, 579 N.W.2d 625, 631 (S.D. 1998)(quoting *Helmbolt v. LeMars Mut. Ins. Co. Inc.*, 404 N.W.2d 55, 57 (S.D. 1987)). The covenant includes a duty to settle claims without litigation in appropriate cases. *Id.*

A failure to make a good faith settlement may provide a basis for a bad faith claim if the judgment against the insured exceeds the policy limits. *See, e.g., Crabb v. Nat'l Indem. Co.*, 205 N.W.2d 633, 639 (S.D. 1973). In considering what constitutes good or bad faith, the interests of the insured must be given equal consideration with those of the insurer; in making a decision to try a case or settle, the insurer must in good faith view the circumstances as it would if there were no policy limits applicable to the claim. *Id.* at 636.

Third Party Actions: A third party who is injured by the insured cannot sue the insured's insurance company for bad faith, but, following an excess judgment, the defendant-insured may assign his bad faith claim to the prevailing plaintiff. *Crabb v. Nat'l Indem. Co.*, 205 N.W.2d 633, 638 (S.D. 1973)(holding that excess judgment need not be paid by insured prior to assigning bad faith claim).

TENNESSEE

Insurer's Duty to Settle: Where the insurer is given the opportunity to settle and compromise the claim against its insured within the policy limits and refuses to do so in bad faith, the insurer is liable to pay a subsequent judgment which exceeds the policy limits. *Aycock Hosiery Mills v. Maryland Casualty Co.*, 157 Tenn. 559, 11 S.W.2d 889 (1928); *Southern Fire and Casualty Company v. Norris*, 35 Tenn.App. 657, 250 S.W.2d 785 (1952); *Tennessee Farmers Mutual Ins. Co. v. Hammond*, 43 Tenn.App. 62, 306 S.W.2d 13 (1957); *National Service Fire Ins. Co. v. Williams*, 61 Tenn.App. 362, 370, 454 S.W.2d 362, 365 (Tenn.App. 1969). The fact the insurer did not receive an offer of settlement from an injured party within policy limits did not preclude a finding that the insurer failed to act in good faith in making no attempt to effectuate settlement. *State Auto Ins. Co. of Columbus, Ohio v. Rowland*, 427 S.W.2d 30, 35 (Tenn. 1968).

An insurer having exclusive control over the investigation and settlement of a claim may be held liable by the insured for an amount in excess of the policy limits if, as a result of bad faith, it fails to effect settlement within the policy limits; and this may be true even though the injured party did not make an offer of settlement within the policy limits. An insurer must investigate and evaluate the facts in the underlying action "to such an extent that it can exercise an honest judgment regarding whether the claim should be settled." *Johnson v. Tennessee Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 370-371 (Tenn. 2006).

In order to prevail in such a case, the insured must prove that the failure to settle within policy limits is "fraudulent or in bad faith." *Id.*

Third Party Actions: The implied covenant of good faith and fair dealing runs only between the insurer and the insured, so a third party cannot sue for its breach based upon a refusal to settle claims. *Clark v. Hartford Accident and Indent. Co.*, 457 S.W.2d 35, 38 (Tenn. Ct. App. 1970)(holding judgment creditor of insured, alleging bad faith and negligence on the part of insurer in refusing to settle within the insured's policy limits, cannot sue the insurer for excess judgment over the policy limits). However, a plaintiff's cause of action for bad faith may be assigned so long as it survives the test of "assignability." *See Came v. Md. Cas. Co.*, 346 S.W.2d 259 (Tenn. 1961). In addition, an insured's cause of action based on an automobile carrier's bad faith in failing to settle a claim within the policy limits survives the death of the insured and passes to the insured's personal representative. Tenn. Code Ann. § 20-5-120(a).

TEXAS

Insurer's Duty to Settle: In Texas, the duty of an insurer to accept reasonable settlement demands is known as the *Stowers* duty. The *Stowers* duty is the only common law tort duty that an insurer owes its insured when handling a third-party claim. The elements of a cause of action against an insurer for breaching its *Stowers* duty are the following:

1. A claim against the insured is within the scope of coverage;
2. The demand is within policy limits;
3. The terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment.

See Texas Farmers Ins. Co. v. Soriano, 881 S.W.2d 312, 314 (Tex. 1994); *G.A. Stowers Furniture Co. v. American Indemn. Co.* 15 S.W. 2d 544, 547 (Tex. Comm'n App. 1929, holding approved). The *Stowers* duty applies only to third-party claims, it does not apply to first-party claims. *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 847 n.10 (Tex. 1994).

Under Texas' unfair settlement practices act (Tex. Ins. Code Chpt. 542), the failure of an insurer to attempt in good faith to effectuate a prompt fair and equitable settlement of a claim "with respect to which the insurer's liability has become increasingly clear, the insurer's statutory duty is triggered to reasonably attempt settlement where 1) the policy covers the claim; and 2) the insurer's liability to the third party is reasonably clear." *Rocor Int'l, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 77 S.W. 3d 253, 261 (Tex. 2002).

Third Party Actions: In *Maryland Ins. Co. v. Head Indus. Coatings & Servs.*, 938 S.W.2d 27, 28-29 (Tex. 1996)(per curiam), the Texas Supreme Court held that "Texas law recognizes only one tort duty in [third-party insurance cases], that being the duty stated in [*G.A.*] *Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved)."

A third party can gain standing to bring an extra-contractual claim against an insurer through an assignment of rights from the policyholder. The assignment must be made after an adjudication of plaintiff's claim against the defendant in a fully adversarial trial. *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996).

Multiple Claims: In *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 315 (Tex. 1994), the Texas Supreme Court held that when faced with a settlement demand arising out of multiple claims and

inadequate proceeds, an insurer may enter into a reasonable settlement with one of the several claimants even though such settlement exhausts or diminishes the proceeds available to satisfy other claims. *See also Pride Transportation v. Continental Casualty Co.*, 511 Fed.Appx. 347, 2013 WL 586791 (5th Cir. (Tex.) 2013).

Excess v. Primary: An excess carrier may bring an equitable subrogation claim against the primary carrier. *Am. Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 483 (Tex. 1992).

UTAH

Insurer's Duty to Settle: A liability insurer owes its insured a duty to settle a third-party's claim within policy limits when there is a "substantial likelihood" of an excess judgment against the insured and potential for punitive damages liability for the insured. *Rupp v. Transcontinental Ins. Co.*, 627 F.Supp.2d 1304, 1324 (D. Utah 2008); *see also Campbell v. State Farm Mutual Automobile Ins. Co.*, 840 P.2d 130, 138 (Utah Ct. App. 1992), *cert. denied*. The duty to accept a reasonable settlement offer within policy limits is an extension of the duty to defend. *Rupp*, 627 F.Supp.2d at 1324. The insurer's conduct is judged by a "reasonableness" standard. *Campbell v. State Farm Mutual Automobile Ins. Co.*, 840 P.2d 130, 141 (Utah Ct. App. 1992), *cert. denied*.

An insurer who refuses to participate in settlement discussions on the wrongful belief that it does not owe defense and indemnification coverage is estopped from challenging a settlement reached by its insured. *Benjamin v. Amica Mut. Ins. Co.*, 140 P.3d 1210, 1216 (Utah 2006); *see also generally Gibbs M. Smith Inc. v. USF&G*, 949 P.2d 337 (Utah 1997).

Third-Party Actions: Plaintiffs and other third parties do not have standing to sue an insurer for breach of the implied covenant of good faith and fair dealing. *Savage v. Educators Ins. Co.*, 908 P.2d 862, 866 (Utah 1995).

VERMONT

Insurer's Duty to Settle: Vermont has long recognized a cause of action against an insurance company for bad faith in handling third-party claims brought against its insured, *see Myers v. Ambassador Ins. Co.*, 508 A.2d 689, 690 (Vt. 1986); *Johnson v. Hardware Mutual Casualty Co.*, 1 A.2d 817, 820 (Vt. 1938).

VIRGINIA

Insurer's Duty to Settle: Virginia utilizes the "bad faith" standard in determining an insurer's liability for failure to settle within policy limits. Specifically, an insured must prove by clear and convincing evidence that the insurer acted in furtherance of its own interest with intentional disregard of the financial interest of the insured. *State Farm Mut. Auto. Ins. Co. v. Floyd*, 366 S.E.2d 93, 97-98 (Va. 1988).

Third Party Standing: A bad faith claim may be pursued by a third party beneficiary to an insurance contract, particularly where the insurer knew that the policy was intended to benefit the claimant. *Levine v. Selective Ins. Co. of America*, 462 S.E.2d 81, 83 (Va. 1995).

WASHINGTON

Insurer's Duty to Settle: Washington uses the "no limit" test as the best means to determine whether the insurer has given equal consideration to its interest and the insured's interest. *Tyler v. Grange Ins. Ass'n.*, 473 P.2d 193, 200 (Wash. Ct. App.1970). This rule is applied whether the insurer is being evaluated

under a negligence or good faith standard. *Id.* The factors under Washington law to determine whether an insurer breached its affirmative duty to make a good faith effort to settle whether negligently or in bad faith include, but are not limited to: 1) strength of the injured claimant's case on the issue of liability and damages; 2) the adequacy of the insurer's investigation and evaluation; 3) the adequacy of the insured's policy limits and the consequent risk to which each party is exposed in the event of a refusal to settle; 4) willingness or refusal to negotiate and the resulting "climate for settlement;" 5) any other action by the insurer demonstrating a greater concern for the insurer's monetary interest than for the financial risk attendant to the insured's situation. *Smith v. Safeco Ins. Co.*, 50 P.3d 277, 281 (Wash. Ct. App. 2002), *rev'd on other grounds*, 78 P.3d 1274 (Wash. 2003).

The liability of an insurer for bad faith refusal to settlement on behalf of its insured is not limited to the policy limits regardless of whether it is due to an excess verdict, a consent judgment or a reasonable settlement effected by the insured. *Besel v. Viking Ins. of Wisconsin*, 49 P.3d 887, 890 (2002).

Third Party Actions: The Washington Court of Appeals ruled in *Heigis v. Cepeda*, that an insurer has "no enhanced duty of good faith. . . when dealing with its own insured as a third party claimant." *Heigis v. Cepeda*, 862 P.2d 129, 132 (Wash Ct. App. 1993). The Supreme Court declared in *Van Noy v. State Farm Mutual Automobile Ins. Co.*, 16 P.3d 574, 579 (2001) that a first party carrier must deal fairly with its policyholder and give "equal consideration" to the insured's interests. Although a concurring justice proposed a distinction between first and third party claims, declaring that first party carriers only owe a duty of good faith, the majority noted in a footnote that it did not see any real difference between a "fiduciary" duty and a "duty of good faith" in the insurance context.

WEST VIRGINIA

Insurer's Duty to Settle: West Virginia's uses a unique standard for determining third-party bad faith failure to settle. *Shamblin v. Nationwide Mut. Ins. Co.*, 396 S.E.2d 766, 775 (W. Va. 1990). "Wherever there is a failure on the part of an insurer to settle within policy limits where there exists an opportunity to so settle and where such settlement within policy limits would release the insured from any and all personal liability, that insurer has *prima facie* failed to act in its insured's best interest" and that such failure constitutes *prima facie* bad faith towards the insured. *Id.* Thereafter an insurer has the burden of proving by clear and convincing evidence that 1) it attempted in good faith to negotiate a settlement; 2) that any failure to enter into a settlement where the opportunity to do so existed was based on reasonable and substantial grounds; and 3) that it accorded the interest and rights of the insured as least a great a respect as its own. *Id.* To determine whether the attempts at settlement were reasonable, the trial court should consider: 1) whether there was an appropriate investigation and evaluation of the claim based upon objective and cogent information; 2) whether the insurer had a reasonable basis to conclude that there was a genuine and substantial issue as to liability of its insured; and 3) whether there was potential for substantial recovery of an excess verdict against its insured. *Id.*

The Unfair Trade Practices Act ("UTPA") prohibits insurers from engaging in certain unfair acts and practices, including a host of unfair claim settlement practices that are set forth in W.Va. Code, 33-11-4(9) (2002) such as:

- (d) Refusing to pay claims without conducting a reasonable investigation based upon all available information;
- (f) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;
- (n) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

Unfair or deceptive consumer practices are proscribed by W. Va. Code § 46A-6-101 (1992 & Supp. 1992).

Third Party Actions: Generally, a third-party claimant may not bring a private cause of action or any other action against any person for breach of a common law duty or a violation of the Unfair Claims Settlement Practices Act, however, a “third party” bad faith action may be assigned. *Strahin v. Sullivan*, 647 S.E.2d 765, 774 (W. Va. 2007); *see also Johnson ex rel. Estate of Johnson v. Acceptance Insurance Co.*, 292 F. Supp. 2d 857, 864 (N.D.W. Va. 2003).

WISCONSIN

Insurer’s Duty to Settle: “An insurer owes a general duty to its insured to settle or compromise a claim made against the insured.” *Mowry v. Badger State Mut. Cas. Co.*, 385 N.W.2d 171, 183 (Wis. 1986). The insurer has been said to be in the position of a fiduciary with respect to an insured’s interest in settlement of a claim. *Prosser v. Leuck*, 592 N.W.2d 178, 180 (Wis. 1999). “[A]n insurance company...breaches its duty when it has the opportunity to settle an excess liability case within policy limits and it fails to do so.” *Alt v. Am. Family Mut. Ins. Co.*, 237 N.W.2d 706, 712 (Wis. 1976). Thus, the insurer may have to exercise reasonable diligence in initiating settlement negotiations and keeping the insured informed of settlement offers in order to discharge its good-faith obligations. *Id.* at 710.

Third Party Actions: Wisconsin does not recognize a right of action for tort claimants to sue a tortfeasor’s liability insurer for failing to settle within policy limits. *Jadair, Inc. v. U.S. Fire Ins. Co.*, 586 N.W.2d 698 (Wis. Ct. App. 1998)(“A third-party claimant cannot assert a claim for failure to settle a claim.”).

WYOMING

Insurer’s Duty to Settle: Under Wyoming law, the failure to settle a third-party claim within policy limits will potentially subject the insurer to tort liability for bad faith if the insured is exposed to a judgment in excess of policy limits. *Jarvis v. Farmers Insurance Exchange*, 948 P.2d 898, 901 (Wyo. 1997). A claim of third-party bad faith may lie where the insured voluntarily stipulates to a judgment in excess of policy limits without the insurer’s consent. *Gainsco Insurance Company v. Amoco Production Company*, 53 P.3d 1051, 1070-71 (Wyo. 2002).

Third Party Actions: Third-party claimants have no direct cause of action against an insurer for bad faith, either in contract or tort. *Herrig v. Herrig*, 844 P.2d 487, 491-92 (Wyo. 1992)(“no basis is present for extending an insurers’ duty of good faith and fair dealing to third-party claimants, even in the context of intra-family suits”).