MEALEY'S LITIGATION REPORT
Insurance Bad Faith

The Duty To Initiate Settlement Negotiations: Where Does It Begin And How Far Does It Go?

by
James Michael Shaw Jr.

Butler Pappas Weihmuller Katz Craig LLP
Tampa, Florida

A commentary article reprinted from the February 24, 2011 issue of Mealey's Litigation Report: Insurance Bad Faith

LexisNexis®

Commentary

The Duty To Initiate Settlement Negotiations: Where Does It Begin And How Far Does It Go?

By
James Michael Shaw Jr.

[Editor's Note: James Michael Shaw, Jr., is a senior associate with the law firm of Butler Pappas Weihmuller Katz Craig LLP with offices in Charlotte, Chicago, Miami, Mobile, Tallahassee, and Tampa. Mr. Shaw practices in the firm's Extra-Contractual, Third-Party Coverage, and Liability Departments. Mr. Shaw is also an adjunct professor at St. Petersburg College, teaching legal research and writing. Copyright © 2011 by James Michael Shaw Jr. Responses are welcome.]

I. Introduction

The duty to initiate settlement negotiations remains controversial. In some jurisdictions, a liability carrier has no duty to negotiate a settlement with a third-party claimant unless and until the claimant makes a settlement demand.[1] In others, even without a demand, an insurer can have a duty to initiate settlement negotiations in some circumstances.[2]

This is not an article about that controversy. Instead, this article explores the outer reaches of that duty in the jurisdictions that recognize it. As the duty is somewhat new in the constellation of the common law, these boundaries are not yet fully formed. Different jurisdictions have drawn clear lines in different places, and many jurisdictions have left questions unanswered or given answers from which retreat later became necessary. But, little by little, these boundaries are coming into focus as courts begin to settle on the threshold question of whether to recognize the duty and begin to confront the more mundane questions of when exactly the duty is triggered and what exactly is required to discharge the duty. This article explores some of the early indications of clear answers to these questions while recognizing that consensus among jurisdictions may not be reached for some time.

II. Triggering The Duty To Initiate Settlement Discussions

A. The Basic Trigger

Jurisdictions recognizing the duty to initiate settlement negotiations generally find the duty to be triggered where: (1) the insured's liability is clear; and (2) the claimant's injuries so severe that a judgment exceeding the policy limit is likely.[3] Indeed, the last two years have seen summary judgments entered in circumstances where liability was not "clear"[4] or where an insurer had insufficient information to deem an excess judgment "likely."[5]

Other jurisdictions have announced the less-scientific trigger that "the duty to settle arises if the carrier would initiate settlement negotiations on its own behalf were its potential liability equal to that of its insured."[6] The difference may not be substantive: clear liability and a likely excess judgment are precisely what would cause a carrier to initiate settlement negotiations on its own behalf were its potential liability equal to that of its insured.

B. Necessity Of A Claim

Nobody knows how many people are injured by others' negligent acts but decide, for their own reasons, not to sue over it. But it happens. In the context of the basic trigger for the duty to initiate settlement negotiations, the question is whether insurers, upon learning of a potential claim exceeding policy limits,

have an obligation to initiate settlement negotiations before a claim is made.

Some cases seem to hold that they do. For instance, in *Snowden v. Lumbermens Mutual Caualty Co.*,[7] an insurer was held liable for bad-faith failure to initiate settlement negotiations where a tort victim's brother notified the tortfeasor's liability carrier of the extent of the victim's injuries[8] even though nothing in the opinion indicates that an actual claim was made. The insurer in *Snowden*, however, did not raise the argument that there was no duty to initiate settlement negotiations without a claim.

The early cases recognizing a duty to initiate settlement negotiations explicitly viewed it as stemming from the conflict of interest where a claim exceeds policy limits. For instance, in the 1976 case of *Coleman v. Holecek*,[9] the Tenth Circuit Court of Appeals, applying Kansas law, explained:

> The duty to consider the interests of the insured arises not because there has been a settlement offer from the plaintiff but because there has been a claim for damages in excess of the policy limits. This claim creates a conflict of interest between the insured and the carrier which requires the carrier to give equal consideration to the interests of the insured. This means that the claim should be evaluated by the insurer without looking to the policy limits and as though it alone would be responsible for the payment of any judgment rendered on the claim. When the carrier's duty is measured against this standard, it becomes apparent that the duty to settle does not hinge on the existence of a settlement offer from the plaintiff. Rather, the duty to settle arises if the carrier would initiate settlement negotiations on its own behalf were its potential liability equal to that of its insured.[10]

If the duty to initiate settlement negotiations arises from a claim exceeding policy limits, it would seem logical that the duty cannot exist without a claim. In *Roberts v. Printup*,[11] the Tenth Circuit Court of Appeals was explicitly faced with the question. *Roberts* involved a sixteen-year old's one-car accident in which he injured his named-insured mother as his passenger.[12] Four days after the accident, one or both of them called the insurer's 1-800 number to report that the mother was hurt and that the accident was caused by failed brakes.[13] The insurer coded the accident as a one-car accident with the insured at fault and noted that the mother might have a bodily-injury claim, that PIP benefits would apply, and that medical information should be collected.[14] A supervisor noted that the claims adjuster needed to "look at the total $ for BI exposure."[15] In short, the insurer clearly understood that the mother had a potential claim against the son and that this could implicate the son's $25,000 in bodily-injury coverage under the policy.

Shortly thereafter, the adjuster took the mother's statement and confirmed that the brakes had failed and that she was injured.[16] Notwithstanding, nothing about this conversation gave the adjuster reason to believe a liability claim against the son was imminent or inevitable.[17] The carrier extended PIP to the mother and also paid a third party's property-damage claim arising from the accident, but no bodily-injury claim was opened.[18]

At this point in the narrative, the parties' factual accounts diverged. The mother contended that, shortly before expiration of the limitations period, a friend advised her that she may be entitled to additional money under the policy's bodily-injury coverage, that she called the insurer to inquire, and that the insurer told her she was not entitled to it.[19] The insurer denied that this ever happened.[20] That same day, the mother consulted with an attorney and learned of the imminent expiration of the limitations period, at which time she sent a ten-day time demand for the $25,000 policy limits.[21] The time demand was received within four days of mailing, but due to a mail-room error, it did not arrive at the claims department until after the ten-day period had expired.[22]

The mother filed suit against her son during the ten-day period to accept her offer but waited until after the period had expired without a response before directing the clerk to issue summons and proceed with the suit.[23] The insurer retained counsel to defend the son, and the attorney removed the case to federal court.[24] Meanwhile, within one day of the claims department's receipt of the time demand, the insurer decided to pay the limits of liability coverage upon confirmation of the medical bills.[25] This was later done, but the mother rejected the policy limits when offered.[26]

After mother and son entered into a stipulated judgment and the son assigned his rights against the insurer to his mother, the carrier paid its policy limits to the mother.[27] Thereafter, the mother brought a garnishment action against the insurer to collect the balance of the judgment, alleging that it had acted negligently, among other things, in failing to initiate negotiations for settlement where liability was reasonably clear and damages were in excess of the policy limits.[28] On the insurer's motion for summary judgment, the mother argued that the carrier's duty was triggered through the mere reporting a covered loss.[29]

In reviewing the trial court's entry of summary judgment for the insurer, the Tenth Circuit Court of Appeals approved the trial court's determination that the insurer had no duty to initiate settlement negotiations before a claim was made.[30] Quoting the insurer's brief, the *Roberts* court explained that "it seems odd to think that an insurer [(as part of its duty to the insured)] should beat the bushes to advise potential claimants to sue or make claims against their insured, especially if there is a possibility of an excess claim."[31] Analogizing the situation to Kansas case law relating to first-party coverages, the *Roberts* court agreed with the proposition that there is no duty to initiate settlement negotiations in a third-party claim where the third-party claimant has not notified the insurer that she is presenting a claim.[32] Notwithstanding, the *Roberts* court reversed the summary judgment for the insurer on the ground that there was a factual dispute as to whether the mother had, in fact, given such notice to the insurer in making the pre-demand phone call that the insurer denied receiving.[33] In other words, the *Roberts* court held that the insurer had no duty to initiate settlement negotiations with the mother merely by knowing that she was injured and that it provided liability coverage to the responsible party; she first had to notify the carrier that she was making a claim.

At least one court has taken this principle even further, holding that an insurer has no obligation to initiate settlement negotiations before an actual lawsuit is filed absent language in the insurance policy requiring such a duty.[34] This, however, has been described as a clear minority view.[35]

C. Necessity Of A Realistic Possibility Of A Settlement

As a matter of common sense, a liability carrier's failure to offer an insured's policy limits cannot cause an excess judgment when the third-party claimant would have only rejected the offer.[36] Most jurisdictions recognizing the duty to initiate settlement negotiations have also recognized this seemingly obvious principle that causation must be present and that "[b]ad faith in the air, so to speak, will not do."[37] The principle is straightforward. Proving it is not.

Because causation is an element of a claim for bad faith, the bad-faith plaintiff should bear the burden of proving that a claim could have been settled within policy limits.[38] Of course, at the point in litigation where a third-party claimant is asked to testify that she would have accepted an offer to settle within the policy limits if one had been made, human nature may prevent her from honestly assessing her own retrospective intentions without considering her financial incentive to conclude that she would have. The Georgia courts, cognizant of this reality, have found such testimony to be inherently speculative and require bad-faith plaintiffs to prove that the insurer was given actual notice that it had a definite opportunity to settle.[39]

Confusion is created, however, from language in judicial opinions indicating that an insurer bears the burden of proving, as an affirmative defense, that the claimant would have rejected an offer to settle within the policy limits, and some have made such pronouncements, albeit under circumstances where the question may not have been explicitly before them.[40] Such statements make very little sense when one considers that the very essence of a third-party bad-faith claim is that a carrier *could* have settled a claim against the insured but, due to bad-faith conduct, failed to do so. As such, the possibility of settlement is more properly an element of a claim for bad faith, not an affirmative defense to it. Given this, the burden of proving the possibility of settlement within policy limits more properly belongs to the plaintiff in a bad-faith action.

Further, practically speaking, a claimant's willingness to settle a claim can fluctuate from moment to moment. A claimant may believe herself willing to settle within policy limits without realizing that, if confronted with such an offer, she would most likely have a change of heart. More cynically, especially with claimants represented by counsel, a claimant may reject an offer to settle within policy limits that she might have otherwise accepted precisely because doing so may one day allow for increased recovery in a future bad-faith claim. For

all of these reasons, the Georgia courts were correct to hold that a claimant's testimony regarding her own willingness to settle is inherently speculative. The speculative nature of the testimony is all the more reason to require the bad-faith plaintiff to bear the burden of proving that an offer to settle within policy limits would have been accepted.

Nevertheless, though it is both practical and logical to require the plaintiff to bear the burden of proof as to an essential element of a bad-faith claim, and though this may be what in fact happens even in jurisdictions that believe themselves to be shifting the burden of proof to the insurer, the contrary language is out there. Judicial retreat from this language will become necessary before this boundary line comes into focus in failure-to-initiate-settlement-negotiations claims.

III. Discharging The Duty To Initiate Settlement Discussions

A. The Phantom Duty To "Tender" The Policy Limits

It is sometimes contended, particularly in Florida, that offering to settle for the policy limits is not enough to discharge the duty to initiate settlement negotiations. Instead, it is argued that the insurer has an affirmative duty to tender the policy limits to the claimant.[41] This argument is frequently based on language from *Snowden v. Lumbermens Mutual Casualty Co.*[42]

In *Snowden*, a permissive driver caused an accident that killed herself and caused "grievous" injuries to a man named Eddie Smith.[43] The vehicle owner's insurer was immediately made aware of the accident and told of the extent of Mr. Smith's injuries five days later, but the insurer still had not contacted Mr. Smith's family about paying the policy limits as of three weeks after the accident.[44] At that point, Mr. Smith's wife retained counsel, who sent a letter to the insurer advising that he had filed suit and would not accept any offer of settlement after that point,[45] though Ms. Smith later testified that this was mere posturing and that she still would have entertained a settlement offer.[46] The insurer did not offer to settle the claim for the policy limits until five months after suit was filed against its insureds.[47]

After entering into an excess settlement with the Smiths, the insureds sued their liability carrier for bad faith, alleging that the insurer's "failure to *tender* policy limits to the Smiths immediately following the accident constituted bad faith."[48] The trial court denied a post-verdict motion for a judgment as a matter of law, rejecting the insurer's argument that three weeks was too short a time, as a matter of law, to create a duty to initiate settlement negotiations.[49] In doing so, however, the Court used the language: "As the amount by which an anticipated claim exceeds policy limits increases, the amount of time before a prudent insurer would be expected to *tender* policy limits decreases."[50]

Snowden's interchangeable use of "tender" and "offer" caused little confusion in the *Snowden* opinion itself because, in *Snowden*, the insurer did neither until long after the accident. Nonetheless, the language of *Snowden* allowed future citation for the proposition that, at least in certain circumstances, the insurer's duty to initiate settlement negotiations required an actual tender of the full policy limits. Those who wanted to know the answer would have to wait for a case where the distinction between offering and tendering policy limits would determine the outcome.

That case came in 2010. In *Boateng v. GEICO General Insurance Co.*,[51] a third-party claimant pursued a bad-faith lawsuit claiming that an insurer acted in bad faith for offering to settle a claim for the tortfeasor's policy limits without actually tendering a check. In *Boateng*, Ms. Lisa Rose caused a motor-vehicle accident that killed herself and another driver, Lissette Boateng.[52] Ms. Boateng's son was also in her car and suffered significant injuries.[53] Ms. Rose was driving a car owned by Martha Rios George.[54] GEICO insured Ms. George for bodily-injury liability through a policy with limits of $10,000 per person and $20,000 per accident.[55]

Within one week of the accident, GEICO determined that George was liable[56] and sent a letter to Ms. Boateng's widower disclosing the policy limits and indicating that a field representative would be delivering GEICO's offer of the policy limits to him.[57] Six days later, Mr. Boateng called GEICO's adjuster and left a message.[58] The adjuster returned his call and explained that GEICO was offering $10,000 for the wrongful-death claim and $10,000 to settle the claim for her son's injuries.[59] Later that day, a field representative came to his house and presented him with two releases (one for the minor son and one for the Estate of

Lissette Boateng) and a check for $10,000 for the son's claim.[60] GEICO, however, did not tender a second check for the wrongful-death claim, later explaining that it wanted to open an estate on behalf of Lissette Boateng before tendering the check to the estate.[61]

On January 11, 2007 – now thirty-five days post accident – GEICO's claims representative left phone messages for Mr. Boateng on his home phone and cellular phone advising that GEICO had retained counsel to set up the Estate of Lissette Boateng and that additional information would be needed.[62] When these calls went unreturned, GEICO's claim representative called again on January 17 and followed up with a letter explaining that GEICO was offering the $10,000 per-person policy limit for the wrongful death claim and had retained counsel to set up an estate to process the settlement.[63] Mr. Boateng denied receiving these phone messages or the January 17 letter but testified in deposition that he might just not be remembering them.[64]

GEICO next heard from Mr. Boateng on February 7, when it received a letter from his counsel accusing GEICO of having attempted to "trick" Mr. Boateng into releasing all claims for $10,000 instead of offering him $10,000 for the son's claim (and his derivative claim) and an additional $10,000 for the wrongful-death claim.[65] Mr. Boateng later testified that, subjectively, he believed that this is what GEICO was attempting to do, though he conceded that he never attempted to contact GEICO regarding his concerns and never asked GEICO in writing for the full $20,000.[66] The February 7 letter informed GEICO that Mr. Boateng was rejecting the offer of the policy limits "due to GEICO's attempt to take advantage of [Plaintiff's] situation before he was represented by counsel."[67]

In the ensuing bad-faith claim, Mr. Boateng argued that, notwithstanding GEICO's offer to settle for the full policy limits within fifteen days of the accident, "GEICO failed to ever actually tender more than $10,000 until after the present bad faith action was initiated."[68] In support of his argument, Mr. Boateng relied in part on *Snowden* for the proposition that the duty to initiate settlement discussions includes not just a duty to *discuss* settlement but a duty to *tender* the policy limits to the third-party claimant without first establishing that the third-party claimant is willing to settle the claim for that amount.[69] The trial court rejected this argument and entered summary judgment for GEICO, explaining that *Snowden*, unlike *Boateng*, involved a situation where an insurer "failed to engage in settlement negotiations" where, in *Boateng*, GEICO quickly contacted Mr. Boateng to begin the process of settling his claim.[70] As such, the *Boateng* court properly looked to the actual facts and holding of *Snowden* rather than to its language. Accordingly, the trial court entered summary judgment for GEICO, finding that no reasonable fact finder could determine that GEICO had acted in bad faith.[71]

Boateng, then, rejected the proposition that a prompt offer of policy limits is insufficient to discharge the duty to initiate settlement negotiations unless a check is provided along with the offer. Although tendering policy limits is still good practice when liability is clear and damages likely in excess of the policy limits, *Boateng* indicates that the duty to initiate settlement negotiations does not require it.

B. Duration Of The Duty

Most of the time, with the entry of an excess judgment against the insured, any damage from failure to initiate settlement negotiations has been done. In some instances, however, the issue may arise whether a liability carrier's duty to initiate settlement negotiations continues beyond the entry of an excess judgment. For instance, in *Goddard v. Farmers Insurance Company of Oregon*,[72] an insurer disputed coverage under two liability policies and initiated a declaratory-judgment action.[73] A wrongful-death suit against the insured resulted in an excess verdict before the declaratory-judgment action went to trial.[74] Thereafter, in a series of trials and appeals, it was determined that both insurance policies provided coverage.[75] The insured assigned his claim to the plaintiff, who brought a bad-faith claim against the insurer alleging, among other things, that the insurer failed to initiate settlement negotiations after entry of the excess verdict.[76]

The carrier moved to strike this allegation from the complaint as frivolous, arguing that the duty to initiate settlement negotiations is a component of the duty to defend, which terminates upon entry of a judgment,[77] and the trial court granted the motion without opinion.[78] In reversing the ultimate entry of summary judgment on different grounds, the *Goddard* court commented in dicta that this was improper.[79] The *Goddard* court explained:

> Following entry of an excess verdict against the insured, the interests of the insured and the insurer are dramatically different. The insured, now personally liable to plaintiff for the amount of an actual excess judgment, has a heightened interest in settling for an amount within the applicable policy limits. The insurer, with its potential indemnity exposure confined by the limits of the insurance contract, has little to lose by resisting settlement for the policy limits while continuing to defend the case on appeal. If it wins the appeal, the excess verdict will be set aside and a new trial ordered. If it loses the appeal, the policy limits control its financial exposure.[80]

Under these circumstances, the *Goddard* court concluded that the entry of an excess verdict against an insured was a reasonable indication of liability such that failure to attempt settlement after entry may well constitute actionable negligence under Oregon law.[81] The duty to initiate settlement negotiations, thus, begins with the making of a claim and extends beyond entry of an excess judgment against the insured.

C. *Powell* Claims: The Re-Emergence Of Causation In Circular-Logic Claims

In situations where a liability carrier has a duty to initiate settlement negotiations, breach is obvious in cases where carriers never make or invite offers at all. Where an insured suffers an excess verdict, a finding of causation can be justified where the claimant would have settled within policy limits and a carrier had a duty to initiate settlement negotiations but never did so.[82]

Things are less clear when an insurer *does* offer to settle within policy limits; the offer is rejected; and a bad-faith suit is later premised on the argument that the offer would have been accepted if made earlier. Such cases frequently arise under the rationale used in the Florida case of *Powell v. Prudential Property & Casualty Insurance Co.*,[83] and claims premised on an insurer's delay in making a proactive settlement offer are sometimes referred to as "*Powell* claims."

There are a number of reasons that an insurer's policy-limit settlement offer might be rejected. In *Powell*, for instance, the claimant's counsel had advised a tortfeasor's carrier that the claimant was willing to settle within policy limits in order to pay his medical bills and avoid being transferred to a new facility as an indigent.[84] Under those circumstances, one can easily understand how, after being transferred to the new facility, the claimant's fear of being transferred to a new facility ceased to be a settlement motivation and the settlement opportunity was lost.

But what if the plaintiff rejects a policy-limit settlement offer *solely* because the plaintiff is aware of the *Powell* decision and believes that rejecting the offer will give rise to a *Powell* claim? In this scenario, a third-party claimant has never made a settlement demand and receives an unsolicited offer to settle for the policy limits. In a hypothetical universe where bad-faith law does not exist, the claimant would have accepted the offer. However, because bad-faith law *does* exist, the claimant believes that additional compensation would ultimately become available if he rejects the offer and pursues a bad-faith claim. Desiring this, the claimant rejects an offer that otherwise would have been accepted, hoping to use *Powell* to argue that the offer came too late. If the very existence of bad-faith law is the only reason for having rejected the offer, does bad-faith law permit the recovery of damages to the insured that would not have existed but for bad-faith law?

The clearest answer to the question, strangely enough, comes from a case that is arguably not a true *Powell* claim.

1. Wade v. EMCASCO Ins. Co.: Can An Insurer Be Liable For Bad Faith When An Offer Is Rejected Solely Because The Plaintiff's Counsel Believes The Insurer Is Liable For Bad Faith?

Wade v. EMCASCO Insurance Co.,[85] involved a tragic accident that left Mr. Ninh Nguyen paraplegic. The insured, Jerry L. Wade, II, collided with a minivan driven by Mr. Nguyen's wife, Loan Vu.[86] Just after the accident, Mr. Wade made a claim for his own medical treatment and damage to his car.[87] He submitted a claim form stating that he had a green light.[88] Both drivers would later claim to have had a green light.[89] Mr. Wade carried $100,000 in liability coverage.[90]

Mr. Nguyen spent two weeks in a hospital followed by five more weeks in a rehabilitation hospital.[91] While he was still in the hospital, his wife retained an attorney,

who sent a letter to the insurer's adjuster advising that he represented Mr. Nguyen and that Mr. Nguyen had suffered a spinal-cord injury and inquired as to the limits of Mr. Wade's liability coverage.[92] To investigate, the adjuster retained an outside adjuster, who was misinformed by a hospital chaplain that the minivan occupants were okay and would be released.[93] This gave rise to suspicion that the quadriplegia might not have been related to the accident.[94] The outside adjuster also attempted unsuccessfully to locate an eyewitness to determine which driver had the green light.[95]

Meanwhile, roughly nine weeks after the accident, Mr. Nguyen's attorney sent a policy-limit demand to the adjuster, forwarding Mr. Nguyen's medical bills and promising to send the medical records upon receipt.[96] The adjuster, believing that the attorney would do this, did not attempt to obtain the medical records himself.[97]

The attorney received the medical records from the rehabilitation hospital (but not the first hospital) and forwarded them to the adjuster on May 21, 2001, with a cover letter noting that the policy-limit demand would be withdrawn on June 15, 2001.[98] The letter also advised that the attorney had successfully contacted an eyewitness who would verify that Mr. Wade had run a red light an offered to set up a meeting between her and the adjuster.[99] Instead, the adjuster instructed the outside adjuster to contact the eyewitness himself, but the outside adjuster was never able to do so.[100]

June 15, 2001, came and went. On August 2, 2001, the attorney sent the adjuster a copy of a witness statement from the eyewitness dated June 15, 2001, offering no explanation as to why he waited five weeks before sending it.[101] This August 2 letter also offered to settle Mr. Nguyen's claim for the policy limits.[102] On August 7, the adjuster called an attorney who had been retained by the carrier to defend Mr. Wade, but Mr. Nguyen's attorney withdrew the second settlement offer on August 20 – before defense counsel had an opportunity to review Mr. Nguyen's medical records.[103] Along with his letter withdrawing the settlement offer, Mr. Nguyen's counsel enclosed a copy of a lawsuit filed against Mr. Wade but "agreed to delay serving the Petition on Mr. Wade to give EMCASCO time to make a settlement offer on this case should EMCASCO decide to do so."[104] The adjuster promptly forwarded this letter to defense counsel with a note explaining that the threat of an excess judgment and bad-faith liability "may force us to proceed more hastily than we would prefer."[105]

Although doubts were now emerging about whether Mr. Wade, in fact, had a green light, defense counsel became concerned that Mr. Nguyen's quadriplegia might have been caused by something other than the accident.[106] Specifically, he did not have the report from the ambulance service, the emergency-room records, or the records for the initial two-week hospital stay.[107] Defense counsel had nothing to show that the paralysis was causally related to the accident or whether there could have been any claim for malpractice against the paramedics or the emergency-room physicians.[108] For this reason, defense counsel asked Mr. Nguyen's counsel for a medical release to enable him to obtain the missing medical records.[109] The release was provided, but the hospital would not accept it because it was signed by Mr. Nguyen's counsel instead of Mr. Nguyen himself.[110] Stymied, defense counsel asked Mr. Nguyen's counsel whether he had the emergency-room records and, if so, whether he could provide them.[111] Mr. Nguyen's counsel agreed to send them, and defense counsel so advised the carrier, remarking that the claim would be closed by now if Mr. Nguyen's counsel had done this earlier.[112] Upon receiving them, defense counsel sent a summary to the carrier, which immediately authorized a policy-limit settlement offer to which the insured consented.[113] The offer was relayed to Mr. Nguyen's counsel the following day.[114]

Mr. Nguyen's counsel would later testify that, notwithstanding his invitation to make an offer in his August 20 letter, he would not have accepted the policy limits at that point.[115] His reason: he "was fairly certain that they had been acting in bad faith" and that a "policy limit settlement would not have done it, but some amount would have settled it at that point in time."[116] Mr. Nguyen's counsel enlisted co-counsel with experience in bad-faith claims.[117] He later admitted in deposition that he did not recall any additional work being done between August 20 and the settlement offer (November 1) that uncovered additional information regarding Mr. Nguyen's claim against Mr. Wade.[118] Rather, his plan was to negotiate an excess settlement with Mr. Wade, receive an assignment, and pursue a bad-faith claim against the carrier.[119] This being so, Mr. Nguyen's counsel sent

a letter rejecting the policy-limit offer, alleging that the carrier "acted with little, if any, regard for the interest of Mr. Wade, and engaged in a reckless, mindless, refusal to apply reason in its refusal to timely accept Mr. Nguyen's policy limit settlement offers" and was, therefore, in bad faith.[120] Mr. Wade eventually, on his counsel's advice, confessed judgment for $3,150,000 and assigned his bad-faith claim to Mr. Nguyen.[121] The carrier paid its policy limit to Mr. Nguyen and his wife.[122]

In the ensuing bad-faith lawsuit, the trial court entered summary judgment for the carrier, finding that the carrier did not act negligently or in bad faith in waiting to settle Mr. Nguyen's claim until it had obtained all of the medical information.[123] On appeal, the Tenth Circuit Court of Appeals, applying Kansas law, first distinguished between bad-faith claims involving a *refusal* to settle and bad-faith claims involving a *delay* in settlement,[124] agreeing with the trial court that "courts should exercise caution 'when the gravamen of the complaint is not that the insurer has *refused* a settlement offer, but that it has *delayed* in accepting one.' "[125] The court continued: "This caution 'arises from the desire to avoid creating the incentive to manufacture bad faith claims by shortening the length of the settlement offer, while starving the insurer of the information needed to make a fair appraisal of the case.' "[126] Quoting a decision from the First Circuit Court of Appeals, the *Wade* court explained:

> [T]he justification for bad faith jurisprudence is as a shield for insureds – not as a sword for claimants. Courts should not permit bad faith in the insurance milieu to become a game of cat-and-mouse between claimants and insurer, letting claimants induce damages that they then seek to recover, whilst relegating the insured to the sidelines as if only a mildly curious spectator.[127]

Turning to the specifics of the *Wade* case, the *Wade* court analyzed the carrier's claim handling by dividing the claim into two time segments. In considering the time period between the initial policy-limits settlement offer (May 1, 2001) and its withdrawal (August 20, 2001), the *Wade* court had "no hesitation" in affirming the district court's summary judgment in favor of the carrier.[128] During that time period, liability was disputed in good faith, and the carrier reasonably relied on Mr. Nguyen's counsel's offer to send medical records.[129] The court commented that Mr. Nguyen's counsel bore much of the responsibility for the carrier's lack of information because he promised to provide Mr. Nguyen's medical records yet provided only some of them.[130] Though the court noted an apparent failure of the carrier to inform Mr. Wade of the settlement offer, the *Wade* court found that this did not affect the course of the litigation inasmuch as Mr. Wade was insistent that he was not responsible for the accident.[131] Analogizing the case to several others involving promises to send medical records that were not sent until after expiration of an arbitrary deadline, the *Wade* court expressed confidence that the Kansas Supreme Court would conclude that the carrier had not acted in bad faith for failing to accept the settlement offer before receiving the records.[132]

Regarding the carrier's conduct after the settlement offer was withdrawn, the *Wade* court noted that Mr. Nguyen's counsel waited four months – until all settlement offers had expired – to send medical records to counsel representing Mr. Wade.[133] The need for these records was evident in light of defense counsel's concerns about causation.[134] Although acknowledging that the witness statement shifted defense counsel's focus from liability to causation and that the carrier might have acted more expeditiously in securing medical records instead of relying on Mr. Nguyen's counsel to provide them, the *Wade* court seemed troubled by counsel's sending a legally defective medical release, explaining that "[i]t is not clear to us that the Kansas Supreme Court would wish to reward plaintiffs for inducing insurers to rely on promises that plaintiffs never keep; such a holding could create perverse incentives for gamesmanship."[135]

Instead, the *Wade* court resolved the appeal by looking for evidence of causation between the delay in offering the policy limits and the rejection of the offer. First, the court observed that the carrier had no reason to believe that its offer would be rejected on account of the additional delay; it had previously received an identical offer from counsel, and circumstances had not changed in any material respect.[136] Indeed, though he later testified that a policy-limits offer would have been rejected as of August 20, 2001, defense counsel had expressly stated in his August 20 letter that he would delay serving process on the insured "to give EMCASCO time to make a settlement offer on this case should the

company desire to do so."[137] Instead, the *Wade* court viewed the undisputed evidence as showing that counsel's sole reason for rejecting the policy-limits offer was his hope of pursuing a future bad-faith claim.[138] In affirming the summary judgment as to the carrier's conduct after the initial offers had expired, the *Wade* court explained that it would be "turning the cause of action on its head by holding an insurance company liable where it eventually offered to settle the claim for the policy limits, but a claimant rejected the offer precisely in order to manufacture a lawsuit against the insurer for bad-faith refusal to settle."[139]

In so doing, the *Wade* court acknowledged that the possibility that an insurer's delay in attempting to settle a claim could create "a natural and continuous sequence of events that causes a claimant to reject a policy-limits settlement offer that he would have accepted earlier."[140] For instance, a claimant who invests time and resources preparing for trial might want the settlement agreement to reflect those expenses.[141] In contrast, where a claimant arbitrarily withdraws a settlement offer and later rejects an identical proposal from the insurer, the legal cause of the failure to settle is the claimant's arbitrary conduct, not a breach of any duty by the insurer.[142] In other words, bad-faith liability for delay in offering to settle for policy limits is possible where failure to accept the eventual offer is the natural and continuous result of the delay. However, where a rejection of the policy limits would otherwise be arbitrary, it does not become the "natural and continuous" result of the delay simply because the plaintiff believes that rejecting the offer would subject the carrier to liability for bad faith. The opposite result is illogical. It would mean that, where lack of causation foreclosed liability for a bad-faith delay in offering to settle a claim, the causation could be supplied arbitrarily by subjectively believing in the existence of bad-faith liability. Distilling this further, it would mean that liability for bad faith can be willed into existence by the party to whom that liability would inure. Anglo-American law recognizes no other cause of action that can be unilaterally willed into existence like this, and the *Wade* court properly refused to do so on a record where no other causation was present.

2. Applying The *Wade* Rationale To *Powell* Claims: Is There A "Set-Up Defense" To *Powell* Claims?

While some have advocated imposing a duty to act in good faith on third-party claimants as well as liability carriers,[143] few courts have considered the viability of a "set-up defense" as a stand-alone affirmative defense.[144] To the contrary, courts sometimes comment that a claimant's efforts to avoid settlement should be disregarded in assessing whether the carrier acted in bad faith.[145]

Even where the focus of the bad-faith inquiry is on the insurer's conduct rather than the third-party claimant's conduct, it is a long, unjustified leap to conclude that a third-party claimant's efforts to avoid settlement are therefore entirely irrelevant.[146] *Wade* did not involve the "set-up defense" in the sense of a true affirmative defense. Still, in assessing whether there was genuine causation between the alleged bad-faith acts of the insurer and the entry of an excess judgment against the insured, the *Wade* court considered the claimant's reasons for withdrawing his settlement demand and refusing to accept the insurer's offer. The central teaching of *Wade* is that, where a third-party claimant arbitrarily rejects a settlement offer for no reason other than to manufacture a bad-faith claim, the claimant's arbitrary conduct becomes the legal cause of the excess judgment, not the carrier's conduct.

Though the notion of a "set up defense" has taken only shallow root in bad-faith law,[147] the idea has recently begun to take root that a third-party claimant's arbitrary refusal to settle negates any causation between a carrier's conduct and the entry of an excess judgment against an insured. For instance, in the 2010 case of *Valle v. State Farm Mutual Automobile Insurance Co.*,[148] an accident caused fatal injuries to Maria E. Valle and injured seven others.[149] The tortfeasor's policy provided liability coverage in the amount of $10,000 per person and $20,000 per accident.[150] By thirty-four days after the accident, the carrier had identified all involved parties and sent a letter to all claimants communicating its willingness to settle for the full policy limits and requesting that a settlement conference occur to work out a collective settlement.[151] Roughly two-and-a-half months later, the tortfeasor's carrier convened a settlement conference with all of the claimants in effort to resolve their claims.[152]

Counsel for Ms. Valle's personal representative never made a formal demand and never indicated any temporal urgency to resolve the claim, but he participated in the settlement conference.[153] At the conference, the parties agreed that the Valle estate should receive

$10,000 and that the other parties should divide the remainder.[154] During the conference, counsel for the Valle estate learned that the other injured parties had expressed a willingness to settle in this manner before the settlement conference had convened.[155] For this reason, he advised the Valle estate's representative to reject the settlement offer because she "may wish to reserve any bad-faith claim against State Farm because of the delay in paying her claim."[156] After obtaining an excess judgment and an assignment of the tortfeasor's claim, the Valle estate brought a bad-faith claim against the carrier, and the trial court entered summary judgment for the insurer.[157] In affirming, the Eleventh Circuit Court of Appeal distinguished *Powell*, noting that, unlike *Powell*, there was no indication to the carrier that the insured's exposure would be increased absent an extraordinarily prompt resolution of the claim.[158] Instead, the *Valle* court viewed the estate's conduct – agreeing to participate in the settlement negotiations and then participating in them – as indicating the opposite.[159] Similar to *Wade*'s reasoning, the *Valle* court explained:

> Valle's counsel has concisely explained that he advised rejecting State Farm's offer in an effort to create grounds for a bad faith claim. We can find no Florida case law permitting a third-party claimant to participate in settlement negotiations, reject a policy-limits settlement offer, claim post-hoc that the offer was untimely, and prevail in a bad faith action against the insurer.[160]

Similarly, in another 2010 case, a Florida federal district court entered summary judgment for an insurer in a *Powell* claim involving a claimant's transparently willful delays in providing medical records.[161] In so doing, the court explained that "the delay [in offering to settle for the policy limits] was caused not by Defendant's will misconduct, but rather by Plaintiffs' attempt to 'set-up' the Defendant by withholding pertinent information concerning Plaintiffs' claim."[162]

Though the notion of "set up" as an affirmative defense has never caught fire, the notion of "set up" as a break in the chain of causation seems to be doing so. In one sense, the recognition is long overdue that bad-faith law circularly provides remedies for damages that would not have existed if the remedies were unavailable. The absence of a "setup defense" defense inspired a cottage industry of bad-faith litigation against insurers and continuing-legal-education seminars in which lecturers advised colleagues of some of the better methods of maximizing recovery by "setting up" insurers for future bad-faith claims.[163] Attorneys' deposition testimony and oral arguments have, unapologetically, confessed designs to manufacture bad-faith claims by rejecting settlement offers for exactly this reason.[164] In this sense, "setup defense" is a misnomer. It is not so much a "defense" as a break in the chain of causation between an insurer's alleged bad-faith conduct and the excess judgment against the insured.[165] Although not casting it in terms of a defense, the courts are headed toward a rule in which the naked desire to pursue a bad-faith claim cannot supply this causation. To the contrary, the courts seem to be settling on a consensus that rejection of a policy-limits offer for this reason alone actually negates causation.

IV. Conclusion

When compared to the ancient origins of the common law, the judicial creation of the duty to initiate settlement negotiations is still in its infancy. As of present, most commentary tends to focus on whether the duty should exist at all. Attempts to define its boundaries, in the jurisdictions where it *does* exist, are sometimes lost in the conversation.

As those jurisdictions recognizing the duty begin to develop a body of case law, the limits to the duty have been tested, and will continue to be tested, by those seeking to employ it in circumstances different from the factual scenarios that gave rise to its recognition. As this happens, boundaries emerge, which are blurry at first but slowly come into focus.

As of the time of this writing, it seems well settled that the duty exists only in those circumstances where the insured's liability is clear and the claimant's damages likely exceed the policy limits. A third requirement – the claimant's willingness to accept such an offer – is also emerging.

A fourth requirement – that the claimant actually made a claim – is in an even more nascent phase. Still, it is likely to take root in the case law as more claimants attempt "set ups" by foregoing contact with an adverse party's carrier, opting instead to wait silently for a simultaneous invitation to make and settle a claim, later declaring an unwritten deadline to have passed for consideration of offers within policy limits.

In addition to issues relating to when the duty arises, the courts are also confronting issues relating to when the duty disappears. Putting the different jurisdictions' conclusions together, the early indication seems to be that the duty commences as explained above and continues beyond the entry of an excess judgment against the insured. This aspect of the duty is still in its formative phases, however, and future cases would be expected to clarify the beginning and end of the duty even further.

At the same time, the courts are currently being confronted with questions as to what an insurer must do to discharge the duty when it arises. For the past two decades, a number of overly cautious insurers have reacted to this nebulous duty by tendering checks for the policy limits whenever they suspect the duty to have arisen. This, however, may not have ever been necessary as an insurer can easily initiate settlement negotiations by making an offer in good faith,[166] soliciting an offer in good faith,[167] or simply inquiring in good faith whether an offer within the policy limits might be accepted.[168] As of the time of this writing, *Boateng* finds itself on the cutting edge in concluding that a good-faith offer is enough to discharge the duty even if a check is not immediately tendered. What lesser conduct might also discharge the duty remains to be seen.

Meanwhile, a causation element seems to be emerging in claims where settlement negotiations are in fact commenced but a plaintiff claims that these negotiations began too late. In such cases, the courts are beginning to settle on the conclusion that a valid need to resolve the claim quickly must supply the causation, and the simple desire to pursue a bad-faith claim cannot supply that causation.

When these and similar cases make their way through the courts, the courts will define the outer boundaries of this still-developing duty, albeit slowly. At present, different jurisdictions have drawn these borders in different places or in no definite place at all. But, guided by one another and by the polestar of equal consideration of insureds' interests in conflict situations,[169] these boundaries will form and become definite in those jurisdictions recognizing the duty, enabling them to be considered in the middle of the claims process instead of afterward. Meanwhile, insurers should proceed cautiously, ever vigilant about inadvertently crossing a boundary line that will not be drawn until after it has been crossed. Claimants should likewise be cautious about basing settlement decisions on the prospects of convincing a court to draw such a line after the fact in lieu of giving good-faith consideration to within-limits settlement offers. Such caution, practiced on both sides, would of course slow the development of case law defining the outer limits of the duty to initiate settlement negotiations. This would not be an entirely bad thing.

Endnotes

1. *E.g.*, Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 848-49 (Tex. 1994).

2. *E.g.*, Powell v. Prudential Prop. & Cas. Ins. Co., 584 So. 2d 12, 14 (Fla. 3d DCA 1991).

3. *See id.* at 14 (Fla. 3d DCA 1991); Swed. Am. Hosp. Ass'n of Rockford v. Ill. State Med. Inter-Ins. Exch., 916 N.E.2d 80, 100 (Ill. App. Ct. 2009); Badillo v. Mid Century Ins. Co., 2005 OK 48, ¶ 33, 121 P.3d 1080, 1095.

4. *See* Shin Crest PTE, Ltd. v. AIU Ins. Co., 605 F. Supp. 2d 1234 (M.D. Fla. 2009).

5. *See* Aboy v. State Farm Mut. Auto. Ins. Co., 22 Fla. L. Weekly Fed. D163 (S.D. Fla. 2010), *aff'd*, 394 Fed. App'x 655 (11th Cir. 2010).

6. Farmers Ins. Exch. v. Schropp, 567 P.2d 1359, 1366 (Kan. 1977) (quoting Coleman v. Holecek, 542 F.2d 532, 537 (10th Cir. 1976)).

7. 358 F. Supp. 2d 1125 (N.D. Fla. 2003).

8. *Id.* at 1126.

9. 542 F.2d 532 (10th Cir. 1976).

10. *Id.* at 537 (citations omitted) (internal quotation marks omitted).

11. 422 F.3d 1211 (10th Cir. 2005).

12. *Id.* at 1213. To clarify, the vehicle was titled in both of their names. The mother was listed as the insured, and the son was listed as an insured driver. *Id.*

Nothing in the opinion indicated that the policy excluded coverage for bodily injury to an insured.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 1215.

23. *Id.* at 1213.

24. *Id.* at 1213-14.

25. *Id* at 1214.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 1215.

30. *Id.* at 1216.

31. *Id.* (bracketing and parenthesis in original).

32. *Id.*

33. *Id.* 1216-17.

34. Morrell Constr., Inc. v. Home Ins. Co., 920 F.2d 576, 580 (9th Cir. 1990) (applying Idaho law).

35. Dennis Wall, Litigation and Prevention of Insurer Bad Faith § 3:13 (2d ed. 1994).

36. *See* Stephen S. Ashley, Bad Faith Actions: Liability and Damages § 3:38 (2d ed. 2009).

37. *Id.*

38. *See* Carrier Exp., Inc. v. Home Indem. Co., 860 F. Supp. 1465, 1477 (N.D. Ala. 1994) ("The burden of proof to be carried by the plaintiff is to show what would have more likely than not occurred had [the carrier] offered its limits.").

39. *See* Kingsley v. State Farm Mut. Auto. Ins. Co., 353 F. Supp. 2d 1242, 1252 (N.D. Ga. 2005); Cotton States Mut. Ins. Co. v. Fields, 128 S.E.2d 358, 359-60 (Ga. Ct. App. 1962).

40. *E.g.*, Powell v. Prudential Prop. & Cas. Ins. Co., 584 So. 2d 12, 13 (Fla. 3d DCA 1991); Yeomans v. Allstate Ins. Co., 324 A.2d 906, 908 (N.J. Super. Ct. 1974).

41. *See, e.g.*, Royal Indemnity Co.'s Reply to Liberty Mutual's Response in Opposition to Royal's Motion for Summary Judgment ¶ 1, Royal Indem. Co. v. Liberty Mut. Fire Ins. Co., No. 07-80172, 2008 WL 2305640 (S.D. Fla. Apr. 8, 2008) (arguing that a carrier "acted in bad faith by failing to unconditionally tender its $1 million policy limits in order to settle" a cliam); Trial Brief for Plaintiff at 3, Mendez v. Unitrin Direct Prop. & Cas. Co., No. 06-563, 2007 WL 5125112 (M.D. Fla. Sept. 11, 2007) ("Where liability is clear, and injuries are sufficiently severe that a judgment in excess of policy limits is likely, an insurance company can be in bad faith for failing to tender its policy limits even before a settlement demand from the plaintiff, since the insurance company has an affirmative duty to initiate settlement negotiations in such a situation."), ECF No. 98.

42. 358 F. Supp. 2d 1125 (N.D. Fla. 2003).

43. *Id.* at 1126.

44. *Id.*

45. *Id.*

46. *Id.*

47. *See id.*

48. *Id.* at 1127 (emphasis added).

49. *Id.* at 1129.

50. *Id.* (emphasis added).

51. No. 10-60147, 2010 WL 4822601 (S.D. Fla. Nov. 22, 2010).

52. *Id.* at *1.

53. *Id.*

54. *Id.*

55. *Id.*

56. This may be confusing to a reader unfamiliar with Florida law. *Boateng* was a Florida case. Florida is the only state with a judicially created "dangerous instrumentality" doctrine applicable to automobile accidents. Salsbury v. Kapka, 41 So. 3d 1103, 1104-05 (Fla. 4th DCA 2010). The doctrine imposes strict vicarious liability on a vehicle owner for a permissive driver's negligence. *Id.* at 1104. The doctrine has its roots in common-law vicarious liability whereby, if a master entrusted a servant with an instrument that was inherently dangerous or created a high risk of harm to others, the master would become liable if the servant injured another with it. Sarah E. Williams, Comment, *Florida's Dangerous Instrumentality Doctrine*, 25 STETSON L. REV. 177, 179 (1995) (citations omitted). Other jurisdictions do not hold an automobile to be a "dangerous instrumentality" under this common-law doctrine, but Florida does. *Id.* at 180 (citations omitted). Accordingly, in *Boateng*, the claim against the vehicle owner was a valid claim triggering GEICO's liability coverage under its policy.

57. *Boateng*, 2010 WL 4822601 at *3.

58. *Id.*

59. *Id.*

60. *Id.* at *4.

61. *Id.* at *2.

62. *Id.* at *3.

63. *Id.* at *3-*4.

64. *Id.* at *4.

65. *Id.*

66. *Id.*

67. *Id.* at *6.

68. *Id.* at *1.

69. *Id.* at *5 n.3.

70. *Id.*

71. *Id.* at *5.

72. 22 P.3d 1224 (Or. Ct. App. 2001).

73. *Id.* at 1226.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1229.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* (citations omitted).

82. *See* ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES & INSUREDS § 5:2 (5th ed. 2007).

83. 584 So. 2d 12, 13 (Fla. 3d DCA 1991).

84. *Id.* at 13.

85. 483 F.3d 657 (10th Cir. 2007).

86. *Id.* at 660.

87. *Id.* at 661.

88. *Id.*

89. *Id.* at 660-61.

90. *Id.* at 661.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 662.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* (internal brackets omitted). The opinion is unclear, but references to the "plaintiffs" in some parts of the opinion indicate that this lawsuit was filed on behalf of both Mr. Nguyen and Ms. Vu. By the time the ensuing bad-faith case reached the appellate court, only Mr. Nguyen remained as a party, his wife's claim having been settled. This article focuses only on Mr. Nguyen's claim, but the reader should be aware that Ms. Vu also seems to have presented a claim.

105. *Id.*

106. *Id.*

107. *Id.* at 662-63.

108. *Id.* at 663.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* (internal brackets omitted).

117. *Id.*

118. *Id.* at 664.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* To be precise, $75,000 was paid to Mr Nguyen, and $25,000 was paid to his wife for her claim. *Id.*

123. *Id.* at 665.

124. *Id.* at 666-69.

125. *Id.* at 669 (quoting the unpublished memorandum opinion of the trial court) (emphasis in original).

126. *Id.* (quoting the unpublished memorandum opinion of the trial court).

127. *Id.* (quoting Peckham v. Continental Cas. Ins. Co. 895 F.2d 830, 835 (1st Cir. 1990)).

128. *Id.* at 670.

129. *Id.*

130. *Id.* at 671.

131. *Id.*

132. *Id.*

133. *Id.*

134. *See id.*

135. *Id.* at 672.

136. *Id.* at 672-73.

137. *Id.* at 673 (internal brackets omitted).

138. *Id.*

139. *Id.* at 674.

140. *Id.*

141. *Id.* (citing Haugh v. Allstate Ins. Co., 322 F.3d 227, 232-33 (3d Cir. 2003)).

142. *Id.* (citing Adduci v. Vigilant Ins. Co., 424 N.E.2d 645, 649 (Ill. Ct. App. 1981) (holding that the court could not "fairly place the blame for failure of settlement upon the insurer" when the plaintiff did "not show why the offer would have been good on May 7, 1976, but was not acceptable on June 18, 1976")).

143. *E.g.* Gwynne A. Young & Joshua W. Clark, *The Good Faith, Bad Faith, and Ugly Set-Up of Insurance Claims Settlement*, 85 Fla. B.J., Feb. 2011, at 9, 9-10.

144. Ronald S. Range, *The 'Setup' Defense and the Comparative Fault Defense: New Wrinkles in Bad Faith Claims Against Insurers*, 45 Wash. & Lee L. Rev. 321, 337-38 (1988).

145. *See* Gwynne, *supra* note 143, at 13 (citations omitted).

146. *Barry v. GEICO Gen. Ins. Co.*, 938 So. 2d 613, 618 (Fla. 4th DCA 2006) ("Although . . . the focus of an insurance bad faith case is not on the motive of the claimant but of the insurer in fulfilling its duty to its insured, that does not mean that all inquiries into prior conduct and motives are irrelevant and prejudicial.") (citation omitted).

147. *See generally* Range, *supra* note 144, at 336-47.

148. No. 10-10769, 2010 WL 3310616 (11th Cir. Aug. 24, 2010).

149. *Id.* at *1.

150. 2010 WL 3310616, at *1.

151. Valle v. State Farm Mut. Auto. Ins. Co., No. 08-22117, 2010 WL 5475608, at *1 (S.D. Fla. 2010).

152. 2010 WL 3310616, at *1.

153. *See id.*

154. *Id.*

155. *Id.*

156. *Id.* (internal brackets omitted).

157. *Id.*

158. *Id.* at *2.

159. *Id.*

160. *Id.*

161. Noonan v. Vt. Mut. Ins. Co., __ F. Supp. 2d __, 2010 WL 5621359 (M.D. Fla. 2010).

162. 2010 WL 5621359, at *5 (footnote omitted).

163. Douglas R. Richmond, *The Two-Way Street of Insurance Good Faith: Under Construction But Not Yet Open*, Loy. U. Chi. L.J. 95, 97 (1996).

164. *See* Wade v. EMCASCO Ins. Co., 483 F.3d 657, 664 (10th Cir. 2007); Peraza v. Robles, 983 So. 2d 1189, 1192 (Fla. 3d DCA 2008) (Cope, J., dissenting) ("[A]t the original Oral argument, plaintiff's counsel was fairly direct in saying that this entire controversy stems from a desire to set the stage for a 'bad faith' action against the insurer. Except for that fact, it seems clear this matter would have

been resolved long ago. We should adopt rules which encourage, and do not thwart, settlements.").

165. *Cf.* Steven Plitt & John K. Wittwer, *A Critical Review of the Practice of Setting Up Insurance Companies for Bad Faith*, 32 INS. LITIG. REP. 299 (2010) ("Where the court recognizes that [a plaintiff made a settlement demand with unrealistic time limitations or without full access to information bearing on liability and damages], the insurance company may not be liable for failure to accept the settlement as the excess judgment or settlement was not due to the insurance company's 'unreasonable' conduct but was driven by the motives of the plaintiff.") (accessed through Westlaw, pagination not available); Stephen R. Schmidt, *The Bad Faith Setup*, 29 TORT & INS. L.J. 705, 712 (1994) (suggesting that the "set-up defense" is not a true affirmative defense but, instead, a denial of the allegation that the insurer has breached its duty to act in good faith).

166. Boateng v. GEICO General Insurance Co., No. 10-60147, 2010 WL 4822601, at *5 (S.D. Fla. Nov. 22, 2010).

167. U.S. Fire Ins. Co. v. Royal Ins. Co., 759 F.2d 306, 310 (3d Cir. 1985) (applying Pennsylvania law and referring to the duty as one to "solicit or make an offer of settlement" and "to explore settlement responsibilities").

168. *See* Me. Bonding & Cas. Co. v. Centennial Ins. Co., 693 P.2d 1296, 1299 (Or. 1985).

169. Darrell Wass, Comment and Casenote, *Expanding the Insurer's Duty to Attempt Settlement*, 49 U. COLO. L. REV. 251, 260 (1978) (explaining that the duty arose from the duty to give the insured's interests equal consideration to the insurer's interests when a claim exceeding policy limits creates a conflict of interest between insurer and insured). ■

MEALEY'S LITIGATION REPORT: INSURANCE BAD FAITH
edited by Mark Rogers
The Report is produced twice monthly by

1018 West Ninth Avenue, 3rd Floor, King of Prussia Pa 19406, USA
Telephone: (610) 768-7800 1-800-MEALEYS (1-800-632-5397)
Fax: (610) 962-4991
Email: mealeyinfo@lexisnexis.com Web site: http://www.lexisnexis.com/mealeys
ISSN 1526-0267