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Commentary

Proximate Causation In Third-Party Bad Faith: Not Every Bad Decision Is A Bad-Faith Suit

By
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Commentators sometimes state that, if a liability insurer wrongfully rejects a third-party claimant's demand to settle for an insured's policy limits, the insurer cannot insulate itself from liability by offering to settle for the policy limits at a later time.[1] That's true. That's the answer to the question of whether an insurer's pre-existing liability for bad faith vanishes after a subsequent[2] offer to settle for the policy limits. But there is still a good reason to make the subsequent offer. Even though it cannot make liability vanish, it can prevent such liability from coming into existence in the first place by cutting off the chain of causation. "An insurer's bad faith conduct does not give rise to liability unless that conduct actually causes harm to the insured."[3]

This is an admittedly difficult concept and might best be explained by using an analogous illustration. Imagine that a huckster cold calls a man and convinces him to pay $1,000 for a two-week stay at a nonexistent resort in Mexico. He tells the man that he requires prepayment in full by the end of the week, and the man agrees to pay him. A fraud has at this point occurred, but the man does not yet hold a perfected cause of action for fraud because he has not yet suffered any damages. The following day, the huckster's conscience gets the better of him, and he calls the man and admits that the whole thing is a sham and that he should, under no circumstances, send any money. If the man, at this point, sends the money anyway, flies to Mexico, and incurs consequential damages upon finding that the resort does not exist, it can no longer fairly be said that his damages were proximately caused by the huckster's false statements; the man's own voluntary actions have broken the chain of causation between the fraud and his damages. The huckster's subsequent correction of his wrong has not *undone* his initial wrongful act, but he has taken an action that, under normal circumstances, would be expected to prevent his wrongful act from causing damages. If the victim of his initial wrongful act nonetheless makes the conscious decision to cause himself consequential damages, these damages can no longer properly be considered the natural result of the huckster's initial wrongful act.

Similarly, if an insurer wrongfully rejects a settlement demand, a subsequent offer to settle for an insured's policy limits can break the chain of causation between the rejection of the settlement demand and an excess judgment later entered against the insured. Not always, but sometimes. The following cases explain.

I. *Adduci* And *Phelan*

Discussion of proximate causation in third-party bad-faith claims begins with *Adduci v. Vigilant Insurance Co.*[4] In *Adduci*, the insured under an automobile-insurance policy carried bodily-injury-liability coverage with a single limit of $25,000.[5] The insured caused an accident that injured passenger Margaret Adduci, and Margaret and Joseph Aducci sued the insured.[6] Roughly six months later, Margaret Adduci's counsel sent the insured's insurer-retained counsel a copy of a

medical report outlining her injuries.[7] During discovery, the insured's counsel was provided with medical records, deposition testimony, and interrogatory answers, all of which indicated that Ms. Adduci's damages exceeded the insured's policy limit.[8] Just before the deposition, counsel for the Adducis demanded that the insurer pay the policy limit into the court in settlement of the Adducis' claims, and the insurer responded by requesting a discount.[9] Later, counsel sent a 28-day time-limited demand for the policy limit, but he received no response within the 28-day time frame.[10] Seventy-two days after the demanded settlement, the insurer offered to settle for the insured's policy limit, but the Adducis rejected the offer.[11] A jury trial resulted in an excess verdict that the insured was unable to pay, and the Adducis took an assignment of the insured's claim against the insurer.[12] In their bad-faith claim against the insurer, the Adducis alleged that trial preparation following expiration of the 28-day settlement demand "foreclosed the opportunity for settlement."[13] The trial court dismissed their claim.[14]

On appeal, the Illinois appellate court first held that the Adducis' complaint had clearly alleged the existence of a duty by the insurer to treat the insureds' interests at least equally with its own, given counsel's awareness that Ms. Adduci's damages exceeded the insured's policy limit.[15] Still, the *Adduci* court affirmed the dismissal, explaining:

> [T]he allegations show that Insurer did respond to the claimants' demand. While this response was forthcoming after the passage of the claimants' self-imposed deadline, it followed only 40 days thereafter, and came only 13 months after the occurrence of the accident giving rise to the claimants' suit. No facts sufficiently indicate why the claimants found it impossible to accept the offer at this time, so as to fairly place the blame for failure of settlement upon Insurer. The allegations of the complaint simply do not show why the offer would have been good on May 7, 1976, but was not acceptable on June 18, 1976. In such circumstances, we cannot say that the recited facts adequately allege a breach of duty on the part of Insurer.[16]

Less than two years after *Adduci* was decided, three different justices of the same Illinois appellate court confined *Adduci* to its facts in *Phelan v. State Farm Mutual Automobile Insurance Co.*[17] In *Phelan*, a Mr. Paul Santelli caused an accident in 1971 that rendered an eleven-year-old girl quadriplegic.[18] Mr. Santelli carried liability coverage of $100,000 per person, $200,000 per accident.[19] Counsel for the plaintiff demanded the $100,000 policy limit, first verbally and then in writing, demanding that the offer be accepted by a date roughly eleven months post-accident and specifying that, after that date, he would "proceed to move the matter to trial as rapidly as possible" and would "no longer be in a position to accept the $100,000 in full settlement."[20] Insurer-retained defense counsel failed to accept the offer within the plaintiff's time limit, but he offered the full $100,000 a little over a month later to the plaintiff's new counsel, who rejected the offer.[21]

After a trial, an appeal, and a second trial, the jury returned a verdict of $350,000 against Mr. Santelli.[22] Plaintiff took an assignment from Mr. Santelli and sued his insurer for bad faith, and a jury returned a verdict for the $250,000 excess judgment plus interest.[23] The trial court then granted a *j.n.o.v.*, and the plaintiff appealed, contending that the evidence indicated that the insurer acted in bad faith.[24] On appeal, the insurer relied on *Adduci*, arguing that the plaintiff unreasonably rejected the policy-limit settlement offer less than one month after expiration of the plaintiff's self-imposed time line.[25] In distinguishing *Adduci* and reversing the trial court's *j.n.o.v.*, the *Phelan* court explained:

> *Adduci* involved pleadings which allege insufficient facts to sustain a cause of action and, therefore, even if the allegations in the complaint were proved, plaintiff would not be able to recover. This is clearly different than the instant case in which the issue of defendant's bad faith was submitted to the jury. In this case, the jury concluded defendant was guilty of a breach of duty in its failure to settle with plaintiff. The evidence which plaintiff adduced at trial concerned the necessity of plaintiff's attorney procuring the services of a trial attorney, added expenses incurred in preparation for trial and the welfare of plaintiff's family.[26]

II. Proximate Causation As Explaining The Divergent Results In *Adduci* and *Phelan*

In *Adduci*, a third-party claimant's trial-preparation expenses did not turn the initial rejection of a settlement

offer into a perfected claim for bad faith. In *Phelan*, they did. Harmonizing *Adduci* with *Phelan* is difficult. Attempting to make sense of *Adduci* and *Phelan* (and similar cases involving subsequent offers to settle for policy limits), commentator Stephen S. Ashley writes:

> The problem of belated settlement offers should be analyzed according to principles of proximate causation. Specifically, the issue should be treated as an aspect of that doctrine of proximate cause which addresses whether a defendant should be relieved of liability by some new cause of external origin coming into operation at a time subsequent to the defendant's wrongdoing. In other words, if an insurer commits bad faith by rejecting a settlement that it should have accepted, is the refusal of the third-party claimant, or of his attorney, to accept a subsequent policy limits settlement offer from the guilty insurer a superseding cause that relieves the insurer of legal responsibility for its earlier bad faith?[27]

Another approach is to look to whether the insured is prejudiced by the insurer's conduct,[28] but this is just another way of saying that the insurer's conduct must be the cause in fact of the excess judgment against the insured.[29]

Some more recent cases have adopted the point of view that proximate causation, or the lack of it, determines whether a subsequent settlement offer cuts off bad-faith liability that might have otherwise existed if the subsequent settlement offer were never made.[30] In *Meixell v. Superior Insurance Co.*,[31] an insured hit a utility pole in a one-car accident and rendered his passenger quadriplegic.[32] Just under two months later, he sent his medical bills and records to the driver's liability carrier.[33] Upon reviewing these records, the insurer sent him a draft for the insured's policy limits along with a general release of all claims.[34] The claimant's counsel responded that the claimant would not give a general release of potential third parties but would release the insured in exchange for the policy limits and a covenant not to sue.[35] The insurer rejected the covenant not to sue and asked for the return of the settlement draft without communicating the opportunity to settle to the insured.[36] Three-and-a-half months later, an attorney retained by the insurer agreed to tender the $20,000 policy limits in exchange for a covenant not to sue, withdrawing the demand for a general release, but the claimant rejected this offer and filed suit against the insured, the city, and the county.[37] After the claimant settled with the city and county, a jury returned an excess verdict that resulted in a judgment for $3,137,791.28.[38] The insured assigned his bad-faith cause of action to the claimant, who then brought suit against the insurer.[39] The trial court dismissed his claim with prejudice, finding that the claimant could not show that the insurer's conduct proximately caused the excess verdict.[40] In affirming, the appellate court explained that the claimant "offers no explanation as to why he could not accept the offer of settlement or how he would be prejudiced if he had accepted the offer."[41] In the *Meixell* court's eyes, the claimant's attorney "did not establish a timeline for settlement negotiations" such that the insurer believed that settlement negotiations were still ongoing.[42] In other words, according to the *Meixell* court, the insurer's actions did not harm the insured even though the claimant did not like the insurer's initial offer or the rejection of his counteroffer.[43]

Contrarily, in *Roberts v. Printup*,[44] the Tenth Circuit Court of Appeals reversed a judgment for an insurer after a bench trial. In *Roberts*, a mother was injured while riding as a passenger with her son at the wheel.[45] Eleven days before expiration of the two-year limitations period, she consulted with counsel and first became aware that she may be able to benefit from her son's liability coverage.[46] Seizing on this, she sent a ten-day time-limited demand for her son's $25,000 policy limits, explaining the nature of her injuries and estimating her medical expenses as exceeding $150,000.[47] This letter was sent to a PIP adjuster rather than the BI adjuster, and the offer had expired by the time it arrived on the proper person's desk three weeks later.[48] The following day, the BI adjuster advised the claimant that the insurer would pay the $25,000 policy limit, but the claimant declined the offer.[49]

Importantly, the trial court made several key factual findings. First, the trial court found that the claimant did not intentionally send her demand to the wrong adjuster.[50] Further, the trial court found that the insured had made an agreement with her attorney to the effect that she would not owe fees if the insurer paid its policy limits of $25,000 before the limitations period

expired,[51] so she became obligated to pay a portion of her recovery to her attorney after the limitations and demand-acceptance periods expired simultaneously.[52] Specifically, the trial court found that the claimant's conduct was not arbitrary and that the ten-day deadline was reasonable in light of the expiring limitations period.[53] The trial court also found that the insurer negligently handled the offer in that it had no written policy, procedure, or mechanism in place to ensure that a claim would be acknowledged with sufficient promptness.[54]

Roberts, then, presented a case where the claimant could demonstrate a change in her circumstances after rejecting the demand that explained why the subsequent offer to settle for policy limits was no longer acceptable to her. Because of these changed circumstances, the claimant's rejection of the insurer's subsequent offer to settle for the policy limits was not arbitrary and, hence, did not constitute a break in the chain of causation.

III. The Elephant In The Room: Arbitrary Rejections Of Policy-Limit Settlement Offers Solely To Manufacture Bad-Faith Claims

Experienced adjusters and litigators, of course, know that time-sensitive demands are often made "in anticipation of the defendant's insurer failing to comply and the underlying plaintiff being assigned the defendant's bad faith claim against its insurer as part of a settlement."[55] In possibly all of the cases discussed in this article, counsel for the respective third-party claimants hoped for their initial settlement demands to be rejected, wanting to treat the insured's cause of action for bad faith as an asset of the insured from which their clients could recover damages exceeding the insureds' policy limits. Indeed, letters rejecting subsequent settlement offers sometimes go so far as to state explicitly that this is the reason that the third-party claimant is no longer willing to settle for the insured's policy limits.

If an arbitrary rejection of an insurer's subsequent settlement offer breaks the chain of causation, the question arises whether it is arbitrary to reject the settlement offer because the third-party claimant believes that the insured's bad-faith claim has suddenly appeared as an asset from which an excess judgment could be satisfied. In *Wade v. EMCASCO Insurance Co.*,[56] the Tenth Circuit Court of Appeals was confronted with this very question under Kansas law. *Wade* involved an insurer's difficulties in obtaining medical records from a quadriplegic third-party claimant whose counsel had promised to provide them.[57] During this period, the third-party claimant made and withdrew two policy-limit settlement demands.[58] When the liability carrier later received medical records and offered to settle for policy limits, the third-party claimant rejected the offer.[59] The insured had no assets to speak of and, on counsel's advice, confessed to an excess judgment and assigned his claim to the third-party claimant.[60]

In the third-party claimant's bad-faith suit against the insurer in his capacity as the insured's assignee[61] – in which the insured later joined – the third-party claimant's counsel candidly testified that he rejected the settlement offer because he wanted to pursue a claim for bad faith.[62] Indeed, the *Wade* court found that this was the *sole* reason.[63] Citing *Aducci*, the *Wade* court found that, where counsel had arbitrarily withdrawn previous settlement offers and then rejected an identical offer by the insurer, the third-party claimant's arbitrary conduct, not the insurer's conduct, was the legal cause of the failure to settle.[64]

The Eleventh Circuit Court of Appeals recently reached a similar conclusion in a case involving Florida law, which permits a finding of bad faith even in the absence of a settlement demand from a third-party claimant under certain circumstances.[65] In *Valle v. State Farm Mutual Automobile Ins. Co.*,[66] the insured caused an automobile accident that killed Maria E. Valle and injured seven others.[67] The personal representative for Ms. Valle's estate (hereinafter "Valle") never made a formal settlement offer and never informed the insurer of any temporal urgency to resolve the claim.[68] The insurer convened a global settlement conference, which was attended by Valle's counsel, during which the insurer offered to settle with Valle for the insured's policy limits, but counsel contended that the offer was untimely and rejected it.[69] In advising his client to reject the offer, Valle's counsel candidly explained that his advice was guided by his effort to create grounds for a bad-faith claim.[70] In affirming summary judgment entered for the insurer in the district court, the Eleventh Circuit Court of Appeals explained: "We can find no 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."[71] Stated

differently, even if there was a misstep in the insurer's handling of the claim, Valle's arbitrary rejection of the settlement offer (not the misstep) became the proximate cause of the excess judgment entered against the insured. The attorney attempted to supply the causation by rejecting the settlement offer arbitrarily and announcing that he was doing so because he perceived a misstep, but the district court and appellate court both properly found that legal causation must be objectively real and not arbitrarily concocted.

Both *Wade* and *Valle* stand for the proposition that rejecting a policy-limit settlement offer *solely* for the purpose of supplying causation between an insurer's error and an insured's damages is an arbitrary act that becomes the superseding cause of an excess judgment later entered against an insured. This is not to say that the third-party claimants in *Roberts* and *Phelan* did not have the same thing in mind, but the difference between *Wade*, *Adduci*, and *Valle*, on the one hand, and *Phelan* and *Roberts*, on the other, was that the third-party claimants in *Phelan* and *Roberts* were able to show that their settlement positions had changed before the respective insurers' subsequent settlement offers so that their actions were not arbitrary. In *Wade*, *Adduci*, and *Valle*, the plaintiffs were unable to demonstrate to the respective courts' satisfaction that there was any change in their respective settlement positions such that the *sole* reason for rejecting the subsequent settlement offer was to create causation that didn't otherwise exist.

IV. The Role Of *Foreseeability* In Arbitrary Rejections of Subsequent Settlement Offers

Exactly why a third-party claimant's arbitrary rejection of a settlement offer should be treated as the superseding cause of the excess judgment is difficult to articulate. At least one commentator has suggested that the rejection of such offers should rarely be treated as a superseding cause both because the third-party claimant owes no duty to the tortfeasor or his insurer and because the risk that a claimant will take his case to trial and seek an excess judgment is clearly foreseeable.[72] In espousing this view, commentator Steven S. Ashley analogizes an insurer's duty to settle a claim against its insured within policy limits to a Restatement illustration of the tort duty to protect another from the foreseeable criminal acts of a third party:

> A is traveling on the train of the B Railway Company. Her ticket entitles her to ride only to Station X, but she intentionally stays on the train after it has passed that station. When she arrives at Station Y the conductor puts her off the train. This occurs late at night after the station has been closed and the attendants have departed. The station is situated in a lonely district, and the only way in which she can reach the neighboring town is by passing a place where to the knowledge of the conductor there is a construction camp. The construction crew is known to contain many persons of vicious character. While attempting to pass by this camp, A is attacked and ravished by some of the construction crew. The B Railway Company is subject to liability to A.[73]

Analogizing the third-party claimant to the vicious member of the construction crew, Ashley explains that the risk that the third-party claimant will proceed to trial and obtain an excess judgment is the very reason that gives rise to the insurer's duty to exercise good faith in responding to the initial offer.[74] Accordingly, Ashley suggests that the rejection of the subsequent settlement offer should normally have no bearing on the insurer's legal responsibility for its earlier bad-faith rejection of the third-party claimant's settlement offer, the only exception being when the rejection of the insurer's offer can fairly be regarded as unforeseeable and abnormal.[75]

On analysis, this analogy does not hold up. First, the third-party claimant is *not* like the vicious member of the construction crew. The construction-crew member has his own reasons for attacking "A" and is wholly unconcerned with what causes of action she might acquire as a result. Inversely, the third-party claimant is *solely* concerned with creating an injury to the insured for which the insured has a remedy against a third party and, in the vast majority of cases, has no independent reason for wasting his money on an expensive trial solely for the sake of obtaining an excess judgment that the insured will inevitably be unable to pay. Further, the vicious construction worker owes "A" a duty to refrain from attacking her, but the third-party claimant owes the insured no duty to refrain from obtaining a judgment. The railroad, also, is theoretically able to protect every passenger from the construction

crew, but not every claim against an insured can be settled within policy limits. The two situations are simply too different to analogize an insurer's duty of good faith to the tort duty to protect another from a third party's foreseeable criminal acts.

The better analogy is to a defense attorney retained to defend a civil suit against a defendant whose liability is clear. The attorney owes his client a duty of professional care in defending a civil suit against his client and settling it if it can be settled. The law recognizes that not every case can be settled beforehand; some plaintiffs overvalue their claims or would prefer the emotional catharsis of a day in court to a favorable settlement. Imagine that he retains an attorney to defend a civil suit involving likely liability. Suppose that the plaintiff serves a proposal for settlement for an amount just under the defendant's net worth, but the attorney's staff mishandles the proposal for settlement such that it expires before it can be accepted. Normally, one would expect that the plaintiff would still agree to settle for this amount, for there would be no reason to invest in further litigation simply to obtain an uncollectible judgment exceeding the defendant's net worth. If the plaintiff incurred additional litigation expenses, it would be understandable for the plaintiff to insist on a higher amount to cover these expenses, and it could fairly be said that the difference was proximately caused by the attorney's negligence and should be recoverable in a malpractice action.

But what if the plaintiff thereafter refuses to engage in further discussions about settlement, explaining that he is no longer willing to settle with the kind of fellow who would retain such an inattentive attorney? If the plaintiff thereafter litigates through to a jury verdict and obtains an uncollectible judgment far in excess of the defendant's net worth, the attorney's failure to accept the original proposal for settlement is certainly a "but for" cause of the judgment in the sense that it wouldn't have happened if the attorney had accepted the proposal for settlement. But is the attorney's negligence the *proximate* cause of the plaintiff's decision to do something so irrational? In the few rare instances that plaintiffs have actually invested in obtaining an excess judgment against a defendant whose attorney has wrongfully failed to accept a settlement offer, courts have limited the defendant's recovery to the actual economic harm that the judgment has caused the defendant, not the face value of the judgment itself.[76] Indeed, creating a means to collect the face value of such judgments from defense attorneys would only encourage plaintiffs to pursue uncollectible judgments in hopes of making them collectible by subsequent litigation. In other words, creating a remedy for the harm would create the incentive to cause the harm in the first place when the incentive did not previously exist. It would create new disease by creating a cure for it.

To give a concrete illustration, a defendant with a net worth of $200 may sue his attorney for $50 if the attorney fails to accept a $100 settlement offer and the defendant is thereafter unable to settle with the plaintiff for less than $150. In such an instance, the necessity of paying the extra $50 is certainly the foreseeable result of the attorney's failure to accept the earlier offer. More importantly, it was proximately caused by the failure to accept the initial offer. However, if the plaintiff, knowing of the defendant's $200 net worth, nonetheless decides to litigate ferociously for years to obtain a hopelessly uncollectible judgment for $10,000,000, the attorney's failure to accept the $100 offer has not truly caused the defendant to suffer $9,999,900 in damages, much less *proximately*. In such an instance, the defendant certainly *would* have damages that were proximately caused by the judgment (e.g., damage to credit, damage to reputation, costs incurred in dealing with the existence of the judgment), and he would be able to recover these.[77] But such a defendant has not truly suffered actual damages in the amount of the judgment's face value and would not be able to collect that amount.[78]

It therefore misses the point to ask whether the plaintiff's irrational and arbitrary conduct is foreseeable. Yes, the $50 is foreseeable and the $9,999,900 is not, but foreseeability isn't the reason that the $50 would be recoverable in a malpractice claim while the $9,999,900 would not. The reason is that the $50 increased settlement cost was proximately caused by his mistake; the $9,999,900 judgment was not.

Similarly, in the third-party bad-faith context, damages that are proximately caused by an insurer's bad-faith failure to accept a settlement demand will usually be foreseeable, but it is because of proximate causation, not foreseeability, that the damages are recoverable. Foreseeability, then, is a red herring that should not be permitted to substitute itself for proximate causation as an element of the cause of action for third-party bad

faith. Indeed, in *Adduci*, *Wade*, and *Valle*, it was foreseeable that the respective plaintiff's attorneys would pursue excess judgments in hopes of pursuing a bad-faith claim, but the respective plaintiffs did not prevail because their actions, though foreseeable, were not proximately caused by the errors that they alleged the respective insurers to have made.

V. Conclusion

Again, it is true that an insurer cannot absolve itself from liability for its bad-faith rejection of a time-limited settlement demand simply by offering to settle for the policy limits at a later time. Yet, as seen in *Adduci* and *Wade*, there is still a good reason to make the subsequent offer. For one, if the third-party claimant's circumstances have not changed, the third-party claimant might still accept it. Further, if the third-party claimant rejects it arbitrarily, or just to tee up a bad-faith claim, the third-party claimant's rejection of the offer may be later deemed the superseding cause of any excess judgment entered against the insured, precluding the recovery of an excess judgment from the insurer.

Even outside the context of insurers' settlement offers made after rejecting third-party claimant's offers, both insurers and insureds would benefit from a further development of case law concerning what damages are proximately caused by *any* wrongful act by an insurer. Certainty in this area of the law would prevent situations like *Wade*, *Valle*, and *Adduci* where insureds were needlessly subjected to excess judgments simply to enable the later prosecution of unsuccessful bad-faith claims.

While bad-faith law was itself created as a response to insurers' perverse incentives against settlement, the creation of the duty to act in good faith has slowly created perverse incentives for third-party claimants to exploit the existence of the duty,[79] causing damages to third parties that they later seek to collect as those third parties' assignees.[80] When an insurer truly acts in bad faith, few quarrel with the notion that an insured should be able to recover damages actually caused by the insurer's bad faith. Conversely, few openly advocate that, when an insurer acts in bad faith, a third-party claimant ought to be able to take arbitrary, irrational actions to ensure that the bad-faith act causes the most damage possible and thereby maximize the amount of damages that can be recovered. Both concerns are addressed by allowing recovery of damages *proximately* caused by the insurer's wrongful conduct while treating a third-party claimant's arbitrary actions as a superseding cause of any damages caused by those actions.

Endnotes

1. *See, e.g.*, Stephen S. Ashley, Bad Faith Actions: Liability and Damages § 7:14 (2d ed. 2009) ("If a liability insurer wrongfully rejects a policy limits settlement offer, the insurer may not later tender the policy limits to settle the third party's case and thereby absolve itself of responsibility for the damages caused by its initial wrongdoing.") (footnote omitted); Irvin E. Schermer & William Schermer, 1 Automobile Liability Insurance 4th § 15:1 (2008) ("After refusing to pay policy limits, an offer to pay policy limits before trial does not relieve the insurer of liability for a bad faith refusal to pay limits in the event of an excess award.") (footnote omitted).

2. Articles on this subject often utilize the shorthand term "belated" to describe an insurer's policy-limit settlement offer made after rejecting a within-limits offer by a third-party claimant. "Belated," however, is an imprecise term that incorrectly implies that the earlier offer was not premature. This article uses the term "subsequent" except where quoting or paraphrasing material that utilizes the less-precise term "belated."

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

4. 424 N.E.2d 645 (Ill. App. Ct. 1981).

5. *Id.* at 647.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 646.

15. *Id.* at 648.

16. *Id.* at 649.

17. 448 N.E.2d 579 (Ill. App. Ct. 1983).

18. *Id.* at 580.

19. *Id.*

20. *Id.*

21. *Id.* at 581.

22. *Id.* at 582.

23. *Id.*

24. *Id.* at 582-83.

25. *Id.* at 583.

26. *Id.* at 584.

27. Stephen S. Ashley, Bad Faith Actions: Liability and Damages § 7:14 (2d ed. 2009).

28. James Hofert & Ali Ryan Amin, *Time-Sensitive Settlement Demands*, Brief, Spring 2001, at 24, 25-26.

29. Of course, it is also perfectly legitimate to focus the inquiry on the existence of a duty to accept the initial settlement offer within the claimant's unilateral time frame. Failing to respond to an initial settlement demand does not subject an insurer to liability if, under the circumstances, the insurer did not act wrongfully in rejecting an early settlement demand and then later made a policy-limits settlement offer upon reaching a point in its investigation where that first became appropriate. *See* Humphrey v. Founders Ins. Co., No. 2:05-CV-46, 2006 WL 978881 (N.D. Ind. Apr. 7, 2006); Pavia v. State Farm Mut. Auto. Ins. Co., 626 N.E.2d 24 (N.Y. 1993). This analysis, however, exists in addition to the proximate-causation analysis, not in the alternative to it. A court simply never reaches the proximate causation issue if it concludes that the insurer did not act wrongfully in the first place.

30. *Compare* Meixell v. Superior Ins. Co., 230 F.3d 335 (7th Cir. 2000) (affirming dismissal with prejudice of a bad-faith claim premised upon an insurer's rejection of a settlement offer that the insurer later attempted to reanimate because the claimant could not demonstrate any reason for rejecting the insurer's subsequent offer), *with* Roberts v. Printup, 595 F.3d 1181 (10th Cir. 2010) (reversing a judgment for an insurer where, in between the insurer's wrongful failure to accept a time-limited demand and its subsequent offer to settle for policy limits, the claimant was forced by an expiring statute of limitations to file suit and became obligated to pay a portion of her recovery to her attorney); Knobloch v. Royal Globe Ins. Co., 344 N.E.2d 364 (N.Y. 1976) (acknowledging that a post-rejection offer to settle for policy limits is material to the issue of whether the earlier rejection was the proximate cause of an excess judgment but finding that the evidence was sufficient to sustain a jury verdict against the insurer where the insureds retained independent counsel, thereby indicating to the claimant that the insureds had more assets than previously thought).

31. 230 F.3d 335 (7th Cir. 2000).

32. *Id.* at 336.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 336-37.

38. *Id.* at 337.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 337-38.

44. 595 F.3d 1181 (10th Cir. 2010).

45. *Id.* at 1183.

46. *Id.* at 1184.

47. *Id.*

48. *Id.* at 1184-85.

49. *Id.* at 1185.

50. *Id.* at 1186.

51. *Id.* at 1184.

52. *Id.* at 1185.

53. *Id.* at 1186.

54. *Id.*

55. James Hofert & Ali Ryan Amin, *Time-Sensitive Settlement Demands*, BRIEF, Spring 2001, at 24, 24.

56. 483 F.3d 657 (10th Cir. 2007).

57. *See id.* at 661-63.

58. *Id.*

59. *Id.* at 663-64.

60. *Id.* at 664.

61. *Id.* at 665.

62. *Id.* at 673.

63. *Id.*

64. *Id.* at 674.

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

66. 394 Fed. App'x 555 (11th Cir. 2010).

67. *Id.* at 556.

68. *Id.*

69. *Id.*

70. *Id.*at 557.

71. *Id.*

72. STEPHEN S. ASHLEY, BAD FAITH ACTIONS: LIABILITY AND DAMAGES § 7:14 (2d ed. 2009).

73. *Id.* (quoting Restatement (Second) of Torts § 449, cmt. b, illus. 1 (1965)).

74. *Id.*

75. *Id.*

76. *See* Thurston v. Continental Cas. Co., 567 A.2d 922, 924 (Me. 1989); *cf.* Miller v. Byrne, 916 P.2d 566, 581 (Colo. App. 1995) (rejecting the argument that a underlying defendant's damages were fixed at the amount of a stipulated judgment, entered after counsel wrongfully rejected a settlement offer, where the judgment was accompanied by a covenant not to execute and was therefore not a trustworthy indication of damages that would be proximately caused by the rejection of the settlement offer).

77. *See Thurston*, 567 A.2d at 924.

78. *See id.*

79. William T. Barker & Ronald D. Kent, *Responding to Bad Faith Set-Ups: Argumentative Strategies for Advocates*, 32 INS. LITG. REP. 567 (2010).

80. *See* Peckham v. Continental Cas. Ins. Co., 895 F.2d 830, 835 (1st Cir. 1990) ("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."). ■

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