

MEALEY'S™ LITIGATION REPORT

Insurance Bad Faith

A Liability Insurer's (Almost Absolute) Right To Settle Claims Without The Insured's Consent

by
R. Steven Rawls
and
Ryan K. Hilton

Butler Pappas Weihmuller Katz Craig LLP

**A commentary article
reprinted from the
March 22, 2012 issue of
Mealey's Litigation Report:
Insurance Bad Faith**



Commentary

A Liability Insurer's (Almost Absolute) Right To Settle Claims Without The Insured's Consent

By
R. Steven Rawls
and
Ryan K. Hilton

[Editor's Note: R. Steven Rawls is a partner and Ryan K. Hilton is a senior associate with the law firm of Butler Pappas Weihmuller Katz Craig LLP, which has offices in Tampa, Chicago, Charlotte, Mobile, Tallahassee, and Miami. Comments in this article are those of the authors, not Butler Pappas or Mealey's. Copyright © 2012 by R. Steven Rawls and Ryan K. Hilton. Responses are welcome.]

Many cases hold that a liability insurer can settle a claim against its insured without the insured's consent because the policy language gives an insurer the right to settle even when an insured may not want to settle.¹ For the most part, courts in California, Florida, and Louisiana allow insurers to settle claims without the insured's consent where the policy gives the insurer the right to settle as it deems expedient. However, courts may nonetheless consider whether a settlement may have adversely impacted the insured to determine whether an insurer acted in good faith. This is especially true in multiple-claimant situations.

I. California

Several California appellate cases have held that the policy language in a CGL policy gives the insurer the right to settle claims without obtaining the insured's consent.

In *Western Polymer Technology, Inc. v. Reliance Insurance Company*,² the insured corporation, Western Polymer Technology, and its president and principal shareholder sued Reliance for bad faith. Western alleged that Reliance acted in bad faith by unreasonably

settling a suit by third parties in a manner contrary to Western's interests. The policy gave Reliance the right to "make such investigation and settlement of any claim or suit as it deems expedient. . . ." Western and its president alleged that the \$425,000 settlement, which was less than Western's policy limits, injured their reputation and damaged Western's ability to recover on its cross-complaint against the third parties.

Third parties sued Western for allegedly delivering defective manufacturing equipment, and Western cross-claimed for amounts due under a note and for misrepresentation. After expending \$500,000 in defense costs, the insurer settled within policy limits under an agreement that left the cross-claims intact. Putting a reverse spin on the numerous cases which have held that an insurer acts in bad faith when it unreasonably refuses to settle a case within policy limits and thus exposes its insured to a judgment far beyond policy limits, the insured argued that an insurer engages in bad faith when it accepts a settlement over the insured's objection where there is no likelihood that the insured would be exposed to a judgment that exceeds the policy limits.

The court found that Reliance did not breach the implied covenant of good faith and fair dealing when it settled the suit against Western despite Western's protests.³ The court explained that, under the circumstances of the case and the terms of the insurance policy, Reliance's actions impaired neither the policy's benefits and purposes nor Western's interests under the policy.⁴

The court described that the scope of the implied covenant of good faith and fair dealing depends on the contractual purposes.⁵ The parties to the insurance contract must refrain from doing anything that will injure the right of another party to receive the benefits of the agreement.⁶ The terms and conditions of the policy define the duties and performance to which the insured is entitled.⁷

The court found that Western's policy gave Reliance the right to "make such investigation and settlement of any claim or suit as it deems expedient. . . ."⁸ The court remarked that this type of clause is not unusual in liability insurance policies.⁹ In general, the insurer is entitled to control settlement negotiations without interference from the insured.¹⁰ As a result, an insurer cannot be liable to the insured if the insurer does no more than settle a claim or suit within the policy's limits.¹¹

The court discussed other cases where the courts had found that there were limits to the latitude afforded to insurers in effecting settlements pursuant to "deems expedient" clauses and those of similar import.¹² The *Western Polymer* court discussed that, in *Ivy v. Pacific Automobile Insurance Company*, the appellate court found the insurer had violated the duty to act in good faith by stipulating without the insured's knowledge or consent to a judgment that exceeded the policy limits.¹³ Although the insurer obtained a covenant not to execute against the insured, the insured was not fully protected, because the covenant did not bind assignees of the judgment, and the judgment impaired the insured's credit.¹⁴ The *Western Polymer* court observed that the *Ivy* case presented an instance where the insurer protected its own interest first and, as a result, damaged the interests of the insured that the policy was supposed to protect, thus denying the insured the benefits and frustrating the purposes of liability insurance.¹⁵

The *Western Polymer* court also discussed other cases that presented circumstances under which an insurer could be liable for bad faith when settling a claim against the insured within policy limits.¹⁶ In *Rothrock v. Ohio Farmers Insurance Company*, the insurer settled a property damage claim arising out of an automobile collision, but did so by means that barred the insured's claim for personal injuries from that collision.¹⁷ The appellate court found that the insurer could be liable to the insured because the insurer knew about the personal

injury claim and had no legal right to compromise the insured's claim.¹⁸ The court based its decision on the rule that, although an attorney has the power to bind the client, the attorney cannot, without the client's knowledge and consent, compromise the client's claim for reasons foreign to the client's best interests or substantial rights.¹⁹

In *Barney v. Aetna Casualty & Surety Company*, the insurer settled an automobile accident complaint against the insured in a manner that foreclosed the insured's claim for personal injuries.²⁰ The insured alleged that the insurer knew the settlement would bar the insured's personal injury claims, yet effected the settlement without the insured's knowledge or consent.²¹ The *Barney* court noted the rule that a duty of good faith and fair dealing attends contractual provisions that give one party discretionary power that affects the rights of another party.²² Based upon that rule, the insured had a duty not to use its discretionary power to settle claims in a way that it knew would injure the insured's rights.²³ The court rejected the insurer's argument that protecting the insured's claims against others was not a policy right subject to the implied covenant of good faith and fair dealing, noting that "[t]he insured can hardly be said to have received any benefits from the policy of insurance if that benefit is totally voided by a countervailing detriment imposed upon him by the insurer without his consent."²⁴

The *Western Polymer* court also discussed a workers' compensation case wherein that court found that a workers' compensation carrier had a duty to use good faith in investigating, defending, setting claims reserves, and settling claims when those activities directly influenced the insured's premiums and potential dividends under the policy.²⁵ Under the policies in *Security Officers Service v. State Compensation Insurance Fund*, the insured's premiums and potential dividend rights depended, in part, on the insured's loss-experience rating, which could be modified based upon the number of claims outstanding at year-end and the reserve the insurer established for those outstanding claims.²⁶ The insured alleged that the insurer unjustifiably allowed claims to remain unresolved and unreasonably inflated the claims' reserves, which increased the insured's premiums to unwarranted levels.

The insurer in *Security Officers Service* argued that a duty to adjust claims in good faith conflicted with its

policy right to control the defense and settlement of claims without interference, and that the covenant of good faith should not be construed to eliminate the policy's express terms.²⁷ The court noted the limitation on insurers' settlement discretion as follows: "[W]hen resolution of a claim may adversely affect the policyholder in the enjoyment of the policy's benefits and purposes, the insurer becomes obligated, by the implied covenant, to pursue defense and settlement with due, good faith regard to the insured's interests."²⁸

The *Western Polymer* court found that *Rothrock*, *Barney* and *Security Officer Service* demonstrate facets of the same principle.²⁹ An insurer cannot unreasonably refuse to settle within policy limits and thus gamble with its insured's money to further its own interests.³⁰ Similarly, an insurer should not further its own interests by settling a claim within policy limits through the use of the insured's money without some form of consent by the insured.³¹ That happened in *Rothrock* and *Barney*, where the insurers' settlements eliminated the insureds' chances for compensation for their personal injuries, and in *Security Officers Service*, where the insurer's claims adjustment practices allegedly resulted in an increase in premium revenue from the insured.³² In each of those cases, the implied covenant of good faith and fair dealing protected the insured from an impairment of the insured's interests under the policy.³³

However, that principle was not at issue in *Western Polymer*. There, the insured contended that the settlement injured its business reputation. The court noted that a liability insurance policy's purpose is to provide the insured with a defense and indemnification for third-party claims within the scope of coverage purchased, and not to insure the entire range of the insured's well-being.³⁴ The court described that at least where the policy does not require the insured's consent to a settlement, there appeared to be no precedent for holding an insurer liable for injury to an insured's reputation as a result of the settlement of a third-party claim.³⁵ The court observed that it was not surprising as the policy language informed the insured that the insurer may settle "as it deems expedient" any claim or suit, even if the suit's allegations are "groundless, false or fraudulent . . ."³⁶

The *Western Polymer* court found that the insured's contention that the settlement injured its ability to

pursue its cross-complaint lacked merit. The record was clear that Western retained its right to proceed with its cross-complaint after the settlement.³⁷ The settlement documents specified that Western denied any liability and that the payment to the injured party was not to be construed as an admission in any context.³⁸ Western offered no evidence in the trial court to show that the settlement had any effect on the prosecution of the cross-complaint.³⁹

The *Western Polymer* court declined to extend the rule in *Rothrock*, *Barney* and *Security Officers Service* to include Western's claims.⁴⁰ The court explained that an insurer already must face bad-faith liability for unreasonably refusing a settlement offer within their policy limits.⁴¹ Under Western's extension of potential bad-faith liability to include Reliance's settlement, liability insurers always would be faced with a dilemma as to settlements.⁴²

In *Novak v. Low, Ball & Lynch*,⁴³ California's First District Court of Appeal found merit in the insured's arguments that the insurer's settlement of the first two cases against the insured adversely impacted the insured so that factual issues of causation and damages should be determined at trial. In the case, the insurer agreed to defend two of the multiple causes of action in a third-party complaint under a reservation of rights. The insurer appointed independent counsel to provide the insured with a defense. In the meantime, unbeknownst to the insured or his independent counsel, counsel for the insurer entered into settlement negotiations with the third party, eventually agreeing to settle the two potentially covered causes of action, allowing the insurer to completely withdraw. The insured sued the attorneys for the insurer, alleging that they should have advised the insured and his counsel of settlement negotiations. The trial court dismissed the suit, but the Court of Appeal found that there was merit to the allegations because the insured and his attorney might have been able "to impact settlement through the exchange of information or otherwise. . . protect [the insured's] interests in light of the proposed dismissal of the first two causes of action."⁴⁴

The *Novak* court cited various examples of ways the insured could have acted to protect himself had his insurer properly informed him, which "[bore] on the factual issues of causation and damages, which remain for determination at trial."⁴⁵ For instance, the insured

could have attempted to finish discovery prior to settlement, effect a global settlement of the entire action, or seek declaratory relief as to whether the insurer could withdraw its defense upon a partial settlement.⁴⁶ The insured also asserted various ways in which the settlement worked more harm than good, including loss of insurance protection and defense to the remaining causes of action.

Following *Novak*, the Fourth District Court of Appeal found that there was no cause against an insurer where the insured claimed a settlement negotiated by its insurer injured its business reputation, nor any when the insured claimed the settlement unfairly depleted its deductibles.⁴⁷ In *New Plumbing Contractors, Inc. v. Edwards, Sooy & Byron*, New Plumbing provided plumbing services to developers and general contractors. Between 1985 and 1991, it carried CGL insurance issued by Nationwide Mutual Insurance Company. The policy contained what the court referred to as a "consent clause" that gave Nationwide the right to settle claims against its insured: "[Nationwide] may at [its] discretion investigate any 'occurrence' and settle any claim or 'suit' that may result."

Nationwide provided the insured contractor with a defense in numerous construction cases. In 1996, Nationwide hired the law firm of Edwards, Sooy & Byron to defend New Plumbing in a case the parties referred to as "Brown/Emery." On November 15, 1996, the insured contractor purchased insurance for the coming year (through November 15, 1997) from a new insurer, Gerling, at a substantially higher premium and deductible than its prior coverage (Fireman's Fund for the years 1994 to 1996). On December 18, 1996, at the recommendation of the Edwards law firm, Nationwide and other insurers involved agreed to settle the Brown/Emery matter for \$130,000, of which Nationwide paid \$48,750.

New Plumbing, the insured, sued the Edwards law firm, which Nationwide had retained to represent New Plumbing. New Plumbing alleged that it had to pay higher premiums, accept lower coverage and higher deductibles, and deal with financially weaker carriers to obtain insurance after the settlement of the Brown/Emery matter. The Edwards law firm moved for summary judgment on the ground that the insured could not establish causation or damages because the insurer had the absolute right to settle the case and there was no

evidence that the contractor's increased premiums in 1997 were the result of the Brown/Emery settlement.

The trial court granted the law firm's motion on the theory that causation could not be shown. That court reasoned that the insurer had the right to settle the case regardless of whether it was defensible and without consulting its insured. The trial judge also noted that the insured's president signed the settlement agreement, although the president later claimed to have done so only after a claims adjuster told him that the court would sanction him if he failed to sign.

The appellate court affirmed the trial court's judgment. The appellate court found that under the policy provision giving an insurance company discretion to settle as it sees fit, the insurer "is entitled to control settlement negotiations without interference from the insured," and generally, it has no liability for settling within the policy limits.⁴⁸ Thus, the court found that there was no cause of action where the insured claims the settlement injured its business reputation, nor any where the insured claims the settlement unfairly used up its deductibles.⁴⁹ The *New Plumbing Contractors* court stated that, while an insurer may be liable for bad faith for not diligently paying claims and then setting artificially high reserves to compensate resulting in an increase to the insured's premiums, there was neither a claim of failure to settle promptly, nor one that the reserves were improperly inflated.⁵⁰

In a more recent case, *Hurvitz v. St. Paul Fire and Marine Insurance Company*,⁵¹ the Second District Court of Appeal disagreed with the First District Court of Appeal in *Novak*. The *Hurvitz* court explained that in *Novak*, the harm to the insured arose primarily from the failure to negotiate a global settlement that included dismissal of all causes of action against the insured, which did not occur in *Hurvitz*. However, to the extent that *Novak* was supportive of the view that, prior to acceptance of a reasonable settlement within policy limits, an insurer or its counsel must consider the impact of a settlement on an insured's claim for malicious prosecution or on the third party's ability to finance continuing litigation, the *Hurvitz* court said it "must respectfully disagree" for the reasons set forth in *Western Polymer* and *New Plumbing Contractors*.⁵²

In *Hurvitz*, the insurance policy gave St. Paul "the right and duty to defend any claim or suit for covered injury

or damage made or brought against any protected person. . . even if any of the allegations of any such claim or suit are groundless, false or fraudulent” and “the right to settle any claim or suit within the available limits of coverage.” The insureds argued that, despite the language of the policy, St. Paul did not have an unfettered right to settle claims without their consent. The insureds maintained that by settling, St. Paul violated the covenant of good faith and fair dealing because the claimant’s claims were meritless, and the settlement precluded the possibility of a later claim for malicious prosecution action against the claimant. The insureds further alleged that the settlement impaired their negotiating position, caused injury to their reputation, provided funds to the claimant to finance his defense of the insureds’ lawsuit against him, deprived the insureds of insurance financing for their continued litigation, and impacted their future insurability.

The appellate court affirmed the trial court’s ruling finding that the insurer could settle the claims without the insureds’ consent.⁵³ The *Hurvitz* court found that, based upon the analysis utilized in *Western Polymer*, the purpose of a liability insurance policy is to provide the insured with a defense to and indemnification for third-party claims within the scope of coverage purchased, and not to insure the entire range of the insured’s well-being.⁵⁴

The court explained that the insurer’s decision to settle rather than continue litigation invariably involves a conflict between the desire to vindicate oneself and the desire to minimize the costs of litigation and avoid the risk of loss.⁵⁵ Defendants who settle face an uphill battle in convincing others, including members of the interested public or the media, that they were completely innocent of the charges.⁵⁶ Moreover, when a defendant pays money or gives up something of value to settle a claim, he or she loses the ability to pursue a malicious prosecution claim.⁵⁷ These are the ordinary consequences of settlement.⁵⁸

A party purchasing a liability policy containing the duty to defend language at issue in *Hurvitz* agrees to accept the insurer’s view concerning the point at which the benefits of settlement exceed the risk of continuing litigation.⁵⁹ The alternative is to negotiate and pay for a policy with a consent provision.⁶⁰ Liability insurance exists primarily to protect the insured’s finances.⁶¹ The covenant of good faith and fair dealing requires the

insurer to minimize the possibility of an award that exceeds the policy’s limits.⁶² The court stated that liability insurance does not require the insurer to fight a legal action until the bitter end when the costs of defense exceed the benefit to be achieved.⁶³

While the First District Court of Appeal in *Novak* found that there was merit to the insured’s allegations that he and his attorney might have been able to impact settlement through the exchange of information or otherwise protect his interest in light of the proposed dismissal of the first two causes of action, the Second District Court of Appeal in *Hurvitz* disagreed. *Hurvitz* cited to *Western Polymer* and *New Plumbing Contractors* for the proposition that a liability insurer is entitled to control settlement negotiations without interference from the insured, and generally, it has no liability for settling within the policy limits.

II. Florida

Florida courts have not addressed whether a CGL carrier can settle multiple claims to the exclusion of others over the insured’s objections. Florida courts have, however, addressed an insurer’s duty to settle multiple claims. In *Harmon v. State Farm Mutual Automobile Insurance Company*,⁶⁴ Florida’s Second District Court of Appeal suggested that an insurer was free to settle claims in a multiple-claim scenario on a first-come, first-served basis. Where multiple claims arose out of one accident or occurrence, the liability insurer had the right to enter reasonable settlements with some of those claimants, regardless of whether the settlements depleted or even exhausted the policy limits to the extent that one or more claimants were left without recourse against the insurance company.⁶⁵ Under this scenario, when faced with multiple claims, the insurer has the right to enter into reasonable settlements, assuming that the insurer does not overpay the claims.

According to *Farinas v. Florida Farm Bureau General Insurance Company*,⁶⁶ an insurer must fully investigate all claims arising from a multiple-claim accident, keep the insured informed of the claim-resolution process and minimize the magnitude of possible excess judgments against the insured by reasoned claim settlement. An insurer still has discretion in how it elects to settle claims, and may even choose to settle certain claims at the exclusion of others, provided this decision is reasonable and in keeping with its good-faith duty. Unfortunately, the court did not define what is “reasonable”

or establish any standards that might affect that determination.

Florida courts have also held that an insurer can settle liability claims over the insured's objections.⁶⁷ In *Shuster v. South Broward Hospital Physicians' Professional Liability Insurance Trust*,⁶⁸ for instance, Physicians' Trust insured a physician and his professional corporation for medical malpractice. Physicians' Trust settled three cases within the limits of the physician's policy. Shuster thereafter sued Physicians' Trust for bad faith by entering into the settlements without fully investigating the claims. In support of his complaint, Shuster alleged that Physicians' Trust had settled the suits for sums substantially in excess of reasonable settlement values, even after Shuster had requested it deny liability and defend the suits.

In approving the district court's decision that affirmed the trial court's ruling that the insurer did not act in bad faith, the Supreme Court of Florida discussed that, when an insured has surrendered all control over the handling of a claim to the insurer, the insurer assumes a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured.⁶⁹ The court then turned to the language in the policy that insured Shuster.⁷⁰ The policy at issue contained a provision that imposed a duty upon the insurer to defend against any suit.⁷¹ The "deems expedient" language in the policy persuaded the court: "The company may make such investigation and such settlement of any claim or suit as it deems expedient."⁷²

The court explained that the "deems expedient" language put the insured on notice that the insurer had the exclusive authority to control settlement and to be guided by its own self-interest when settling the claims for amounts within the policy limits.⁷³ The court resorted to *Webster's New World Dictionary* to define *expedient*, finding the definition to include: "based on or offering what is of use or advantage rather than what is right or just; guided by self interest."⁷⁴

The court noted that the "deems expedient" language is not absolute.⁷⁵ The court explained that the "deems expedient" language in a multiple-party situation would not protect an insurer who, in bad faith, settles with one or more parties for the full policy limits, exposing the insured to an excess judgment from the remaining parties.⁷⁶ The court explained that the

"deems expedient" language may not be feasible where settling may waive the insured's right to a counterclaim by entering into the agreement.⁷⁷

In conclusion, the Supreme Court of Florida limited its holding to apply only in situations where the insurance contract or policy provides that the insurer may "make such investigation and such settlement of any claim or suit as it deems expedient." Based upon the language, the court held that the insurer could not be liable for breaching a duty of good faith owing to the insured when it paid a claim.⁷⁸ The insurer did not act in bad faith when the insurer settled the claim for an amount within the limits of the insurance policy under the circumstances, absent unusual circumstances, in excess of reasonable settlement values.⁷⁹ Implicit in its holding, a court may find that an insurer acted in bad faith in settling a claim for sums substantially in excess of reasonable settlement values if there is no language in the policy that permits an insurer to settle a claim within policy limits according to its own self-interests. Unfortunately, the court failed to define what constituted "sums substantially in excess of reasonable settlement values."

III. Louisiana

The Fourth Circuit Court of Appeal in Louisiana held that the City of New Orleans' liability policy allowed the insurer to settle a claim, despite the City's objection that it had not approved the settlement. In *Hendrix v. City of New Orleans*,⁸⁰ the plaintiffs, Stephen and Jude Hendrix, sued the City of New Orleans and its insurer after Stephen allegedly sustained injuries during a baseball game at Digby Park in New Orleans. Stephen alleged that he fell into a hole, broke his cheekbone and suffered a "droopy eyelid." He underwent treatment for one and one-half months. The game was played as part of the summer softball league sponsored by the Commercial Athletic Association of New Orleans. Mr. Hendrix, an employee of Tenneco, Inc., played on a team with other Tenneco employees. American Empire Surplus Lines Insurance Company issued the liability policy to the City.

An attorney filed an answer to the lawsuit on behalf of all defendants and, in the answer, filed a third-party claim against Tenneco, alleging that Tenneco was required to indemnify the defendants for any injury plaintiffs may have sustained. The third-party demand was based upon an alleged indemnity provision in an

application form of the Commercial Athletic Association for men's softball teams. In particular, the application form contained the following language which was the exclusive basis of the third-party demand: "All players play at their own risk. The team is responsible for any injury. The C.A.A. nor any City in Louisiana are [sic] responsible for any injury received before, during or after the game."

Mr. Hendrix and the principal defendants (including the City, its departments, and its insurer), represented by their attorney, reached a settlement of the principal demand for \$24,000. The attorney further agreed to dismiss American Empire and its insured's claims against Tenneco in exchange for Tenneco's reciprocal agreement to dismiss its claims against American Empire and the City. The City, however, upon learning of the settlement, objected because it had not approved the settlement and refused to dismiss its third-party claim against Tenneco in accordance with the terms of the settlement agreement.

Following the City's refusal to honor the settlement agreement reached by its insurer, Tenneco filed a motion to enforce the settlement agreement. The trial court ordered the City to join in the settlement and the City instituted the appeal through its separate counsel.

The appellate court found that the attorney's authority to settle the matter, consistent with the provisions of the insurance policy, was absolute.⁸¹ The City's liability policy with American Empire contained the following provision:

I. Coverage A – Bodily Injury Liability

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay because of a) bodily injury or b) property damage to which this insurance applies, caused by an occurrence arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental thereto, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, *and may make such*

investigation and settlement of any claim or suit as it deems expedient, that the company shall not be obligated to pay any claim or judgment or defend any suit after the applicable limit of the company's liability has been settled or exhausted by payment of judgments or settlements. (Court's emphasis).

The court found that this policy language made it clear that the insurer was granted the power and authority to settle claims against the City "as it deems expedient."⁸² There was no requirement that the City be consulted or that it concur in the decision.⁸³

The court then discussed that the policy addressed payment falling within the deductible.⁸⁴ The policy language in the American Empire policy provided:

The company [American Empire] may pay any part or all of the deductible amount to effect settlement of any claim or suit and, upon notification of the action taken, the named insured shall promptly reimburse the company for such part of the deductible amount as had been paid by the company.

The court found that the policy clearly contemplated that payment and settlement by the insurer "may certainly precede notification to the insured and a request for reimbursement."⁸⁵

In another case, the Fourth Circuit reiterated that where there are multiple claims arising out of an accident, the liability insurer, in entering compromise settlements under the policy, may exhaust its policy limits, thus leaving one or more injured parties with little or no recourse against the insurer.⁸⁶ The court in *Oliver v. Imperial Fire and Casualty Insurance Company* discussed that in the absence of bad faith, a liability insurer generally is free to settle or litigate at its own discretion, without liability to its insured for a judgment in excess of the policy limits.⁸⁷

In addition to *Oliver*, in Louisiana, a liability insurer may settle multiple claims in good faith as they come along, exhausting the policy limits to the exclusion of other remaining claims. In *Richard v. Southern Farm Bureau Casualty Insurance Company*,⁸⁸ the Supreme Court of Louisiana held that where there are multiple claims arising out of an accident, the liability insurer, in

entering compromise settlements may exhaust the entire fund. Thus one or more of the injured parties may find that they have little or no recourse against the insurer.⁸⁹ Such settlements must be made in good faith and be reasonable.⁹⁰

The Louisiana courts have not defined what “reasonable” means in the context of an insurer’s settlement. The courts also have not addressed whether “reasonable” goes to the amount of the insurer’s settlement. At least a couple of courts, however, have held that if the settlement was not the result of the insurer acting arbitrarily or capriciously toward its insured, there is no bad faith.⁹¹ The determination of whether an insurer acted arbitrarily or capriciously is one of fact, which should not be disturbed on appeal unless it is manifestly erroneous.⁹² Presumably, a reasonable settlement must be reasonable in amount and not an overpayment.

IV. Conclusion

In general, a liability insurer is entitled to settle without consent of the insured where the insurance policy permits the insurer to do so. As a result, an insurer typically will not face liability to its insured if the insurer does no more than settle a claim or suit for reasonable value within the policy limits. However, where an insurer settles some claims at the exclusion of others, a court may consider how much a settlement impacts the insured when considering whether an insurer acted in good faith.

There is a difference of opinion between the First District Court of Appeal and the Second District Court of Appeal in California regarding whether a liability insurer can settle some litigated claims within the policy limits to the exclusion of others without taking into consideration the insured’s objections. In *Novak*, First District found that there may have been some merit to the insured’s objections and concerns after his insurer settled two cases without informing him and leaving him exposed to other claims in litigation. In *Hurvitz*, the Second District found that the policy language gave the insurer the unfettered right to control settlement negotiations without interference from the insured.

Based upon these cases, it appears unlikely that a court would require an insurer to consider the insured’s solvency and the insured’s strategy when the insurer is determining whether to settle some claims at the

exclusion of others. That is, whether the insured has the financial ability to defend itself against the non-settled claims and subsequently indemnify those claims is typically not a factor an insurer must weigh in its settlement considerations. Instead, the policy language and prevailing law in the jurisdiction guide the insurer’s ability to settle claims. The insurer must act in good faith in settling the claims within policy limits, and must usually seek to limit the insured’s overall exposure and ensure that it does not overpay the settled claims. Where claimants reject an offer to settle all or some of the claims within policy limits, the insurer can usually reasonably settle certain claims to the exclusion of others even through settlements may leave the insured without a defense against the non-settled claims where the policy gives an insurer the right to settle claims as it deems expedient.

Endnotes

1. *See, e.g.*, *Shuster v. South Broward Hospital District Physicians’ Professional Liability Insurance Trust*, 591 So. 2d 174 (Fla. 1992); *Teague v. St. Paul Fire and Marine Ins. Co.*, 10 So. 3d 806 (La. Ct. App. 2009); *Papudesu v. Medical Malpractice Joint Underwriting Ass’n of Rhode Island*, 18 A.3d 495 (R.I. 2011).
2. 38 Cal. Rptr. 2d 78 (Cal. Ct. App. 1995).
3. *Id.* at 80.
4. *Id.*
5. *Id.* at 82 (internal citations omitted).
6. *Id.*
7. *Id.* at 83.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* (citing *Ivy v. Pacific Automobile Ins. Co.*, 320 P.2d 140 [Cal. Ct. App. 1958]).

13. *Id.* (citing Ivy, 320 P.2d at 140).
14. *Id.*
15. *Id.*
16. *Id.* (citing Rothrock v. Ohio Farmers Ins. Co., 43 Cal. Rptr. 716 [Cal. Ct. App. 1965] and Barney v. Aetna Cas. & Surety Co., 230 Cal. Rptr. 215 [Cal. Ct. App. 1986]).
17. *Id.* (citing Rothrock at 716).
18. *Id.*
19. *Id.*
20. *Id.* (citing Barney at 215).
21. *Id.*
22. *Id.*
23. *Id.* at 83-84.
24. *Id.* at 84.
25. *Id.* (citing Security Officers Service v. State Compensation Ins. Fund, 21 Cal. Rptr. 2d 653 [Cal. Ct. App. 1993]).
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 84-85.
35. *Id.* at 85.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. 91 Cal. Rptr. 2d 453 (Cal. Ct. App. 1999).
44. *Id.* at 458.
45. *Id.*
46. *Id.*
47. New Plumbing Contractors, Inc. v. Edwards, Sooy & Byron, 121 Cal. Rptr. 2d 472 (Cal. Ct. App. 2002).
48. *Id.* at 474 (citing Western Polymer, 38 Cal. Rptr. 2d 78).
49. *Id.* (citing Western Polymer at 78 and New Hampshire Ins. Co. v. Rideout Roofing Co., 80 Cal. Rptr. 2d 286 [Cal. Ct. App. 1998]).
50. *Id.*
51. 135 Cal. Rptr. 2d 703 (Cal. Ct. App. 2003).
52. *Id.* at 714.
53. *Id.* at 718.
54. *Id.* at 711.
55. *Id.* at 712.
56. *Id.*
57. *Id.*
58. *Id.* at 713.

59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. 232 So. 2d 206 (Fla. 2d DCA 1970).
65. *Id.* at 207-08.
66. 850 So. 2d 555 (Fla. 4th DCA 2003).
67. *See, e.g.,* Sharpe v. Physicians Protective Trust Fund, 578 So. 2d 806 (Fla. 1st DCA 1991); Rogers v. Chicago Ins. Co., 964 So. 2d 280 (Fla. 4th DCA 2007).
68. 591 So. 2d 174 (Fla. 1992).
69. *Id.* at 176.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 176-77.
74. *Id.* at 176.
75. *Id.* at 177.
76. *Id.*
77. *Id.*
78. *Id.* at 177.
79. *Id.*
80. 562 So. 2d 1164 (La. Ct. App. 1990).
81. *Id.* at 1166 (*citing* Employer's Surplus Lines Ins. v. City of Baton Rouge, 362 So. 2d 561 [La. 1978]).
82. *Id.* (Court's emphasis).
83. *Id.*
84. *Id.* at 1166-67.
85. *Id.* at 1167 (court's emphasis).
86. Oliver v. Imperial Fire and Cas. Ins. Co., 983 So. 2d 172, 175 (La. Ct. App. 2008).
87. *Id.* (*citing* Smith v. Audubon Ins. Co., 679 So. 2d 372, 376 (La. 1996)).
88. 223 So. 2d 858, 861 (La. 1969).
89. *Id.*
90. *Id.*
91. *See* Lantier v. Aetna Cas. & Surety Co., 614 So. 2d 1346, 1359 (La. Ct. App. 1993); *see also* Robin v. Allstate Ins. Co., 870 So. 2d 402, 409 (La. Ct. App. 2004).
92. Robin, 870 So. 2d at 410. ■

MEALEY'S LITIGATION REPORT: INSURANCE BAD FAITH

edited by Mark Rogers

The Report is produced twice monthly by



1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA

Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)

Email: mealeyinfo@lexisnexis.com

Web site: <http://www.lexisnexis.com/mealeys>

ISSN 1526-0267