MEALEY'S™ LITIGATION REPORT
Insurance Bad Faith

An Insurance Carrier's Good Faith Obligations Toward Its Insureds In Liability Settlements Where Not All Of the Insureds Are Released

by
Ryan K. Hilton

Butler Pappas Weihmuller Katz Craig LLP

A commentary article reprinted from the April 25, 2014 issue of Mealey's Litigation Report: Insurance Bad Faith

LexisNexis®

Commentary

An Insurance Carrier's Good Faith Obligations Toward Its Insureds In Liability Settlements Where Not All Of the Insureds Are Released

By
Ryan K. Hilton

[Editor's Note: Ryan K. Hilton, Esq., is a partner with the law firm of Butler Pappas Weihmuller Katz Craig LLP, which has offices in Tampa, Chicago, Philadelphia, Charlotte, Mobile, Tallahassee, and Miami. Comments in this article are those of the author and not his law firm or Mealey's. Responses to this commentary are welcome.

I. Introduction

Generally, liability insurers must secure a release of all of their insureds when settling claims against their insureds. However, some courts have recognized circumstances where an insurer may settle for an insured at the exclusion of another while still maintaining its good faith duties toward all of its insureds. Other courts have seemingly rejected the notion that an insurer can ever settle for one of its insureds at the exclusion of others. These release issues occur most prevalently in automobile accidents involving insured owners and additional insured drivers.

Given the different approaches jurisdictions have adopted with respect to an insurer's good faith duties toward its insureds in their defense and settlement obligations, it is essential for insurers to know which state's law applies and understanding the good faith duties imposed upon insurers. This will enable the insurer to assess whether a claimant's settlement offer that does not contemplate a release of all insureds accords with the insurer's good faith duties toward its insureds.

II. Different States' Perspectives On Settlements That Release An Insured At The Exclusion Of Other Insureds

A. Florida

Courts applying Florida law have found that a liability insurer may settle with a claimant where the claimant is offering to settle with only one insured at the exclusion of another. However, the carrier must, in good faith, attempt to settle (without insisting to settle) for all insureds before settling for only one.

In *Contreras v. U.S. Security Insurance Co.*,[1] the insurance carrier was found in bad faith after it insisted on obtaining a release of all of its insureds, effectively counter-offering the claimant's settlement offer. In the case, the decedent was walking on the side of a road when she was hit and killed by a car owned by Deana Dessanti (the owner) and driven by Arnold Dale (the driver). The driver was using the vehicle with the owner's knowledge and permission. At the time of the accident, the driver was traveling at a high rate of speed and had consumed alcoholic beverages. He was charged with DUI manslaughter and leaving the scene of an accident with injuries.

U.S. Security Insurance Company ("U.S. Security") insured the vehicle. Within a couple of weeks after the accident, the claimant's attorney made a demand to U.S. Security that said, in part:

> Our investigation to date reveals that Deana Dessanti had given permission to Arnold

> Blair Dale to drive her vehicle and that at the time of this accident your insured had coverage up to $10,000 per person and $20,000 per accident. If such is the case, I am hereby demanding as counsel for the estate of Flora Torres your tender of the policy limits within fifteen (15) days from the receipt of this correspondence.

Eight days after the demand, the U.S. Security claims adjuster sent a letter to the claimant's attorney tendering the policy limits along with a general release discharging both the named insured owner and permissive driver and all others who might have claims against them as a result of the accident.

About a week after the insurance carrier tendered the policy limits, the claimant's attorney sent a letter rejecting U.S. Security's offer of the policy limits due to the inclusion of the driver and all others on the release. The claimant offered to accept the policy limits in exchange for a release of the owner and U.S. Security, but not the driver (Dale). The offer was good for a specified time. The claimant's attorney enclosed with the letter a general release releasing both the owner and U.S. Security, but not the driver. The claimant's attorney asserted that, because of the gravity of the driver's misconduct, the personal representative of the decedent's estate was not willing to settle the claim against the driver and was unwilling to give him a release.

U.S. Security hired an attorney who wrote a letter to the claimant's attorney. The letter stated that the settlement offer did not "acknowledge that the driver Arnold Blair Dale is also an insured (covered person) under the policy of insurance issued by U.S. Security Insurance Company to the named insured-owner Deana A. Dessanti." The letter further explained that "pursuant to Florida law U.S. Security Insurance Company is obligated to act in good faith to the named insured/owner Deana Dessanti and to the insured/driver Mr. Arnold Blair Dale." The letter described that U.S. Security "could not enter into a release which operates to fully exonerate one insured while not releasing the second insured."

U.S. Security's insurance policy specified the following with respect to its duty to defend and indemnify:

> We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an automobile accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.

After the deadline in the claimant's settlement offer expired, the claimant filed a wrongful death suit against the insured owner and the insured driver which ultimately was tried by a jury, resulting in a judgment for compensatory damages against both insureds for $1 million, as well as a punitive damage judgment against the driver for $110,000, which was later remitted to $5,000. In addition to the final judgment of $1 million entered against the owner and driver, a cost judgment in the amount of $13,143.05 was entered against the owner.

After entry of the final judgment in the wrongful death case, the insured owner's bankruptcy trustee executed an assignment to the claimant of the insured owner's bad-faith cause of action against U.S. Security. After obtaining the assignment, the claimant filed the bad-faith claim and proceeded to trial.

At the close of the claimant's evidence, U.S. Security moved for and was granted a directed verdict. In granting U.S. Security's motion for directed verdict, the trial court was persuaded by U.S. Security's argument that it was obligated to act in good faith to both the car's owner and the driver as covered insureds and therefore U.S. Security could not enter into a settlement and release which totally exonerated the owner without releasing the driver.

On appeal, the court considered whether, under all the circumstances, the insurer failed to settle the claim against its insured when it had a reasonable opportunity to do so.[2] For guidance, the court looked at Florida Standard Jury Instruction MI 3.1, which provided in relevant part:

> INSURER'S BAD FAITH FAILURE TO SETTLE
>
> a. Issue:
>
> The issue for your determination is whether (defendant) acted in bad faith in failing to settle

> the claim [of] [against] (insured). An insurance company acts in bad faith in failing to settle a claim when, under all circumstances, it could and should have done so, had it acted fairly and honestly toward [its policyholder] [its insured] [an excess carrier] and with due regard for [his][her][its][their] interests.

The court described an insurance carrier's good faith obligations in Florida based upon *Boston Old Colony Insurance Co. v. Gutierrez*.[3] The good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insurer of any steps he might take to avoid same.[4]

The *Contreras* court found that, having attempted to secure a release for the driver without success, U.S. Security fulfilled its obligation of good faith toward him.[5] Once it became clear that the claimant was unwilling to settle with the driver and give him a complete release, U.S. Security had no further opportunity to give fair consideration to a reasonable settlement offer for its additional insured driver.[6] Because U.S. Security could not force the claimant to settle and release the insured driver, it did all it could do to avoid excess exposure to the driver.[7] The court remarked that the focus of a bad faith case is not on the actions of the claimant, but rather on those of the insurer in fulfilling its obligation to the insured.[8]

Contreras was not the first case that found that, under Florida law, an insurer may settle for one insured at the exclusion of another where there was no opportunity to do so.[9] *Contreras* was not the last case, either. Since *Contreras*, Florida federal courts have approvingly cited to or followed it.[10]

B. Illinois

An Illinois appellate court found a driver's insurer acted in good faith when it settled for one insured at the exclusion of another. A more recent Illinois appellate court case from another district reversed partial summary judgment in favor of an insurer that had found it acted in good faith when it settled for one insured at the exclusion of another, and remanded the case to the trial court for further proceedings. However, the facts in each case were vastly different.

1. *Pekin Insurance Co. v. Home Insurance Co.*

In *Pekin Insurance Co. v. Home Insurance Co.*,[11] the insured driver was driving his own car that Pekin Insurance Company ("Pekin") insured when he was involved in an accident with another vehicle. Pekin's policy had a $25,000 per-person liability limit. At the time of the accident, Pekin's insured driver was acting as an agent and an employee of the White Sox Baseball Club, Inc. ("White Sox"). Ultimately, Pekin settled with the claimant for its named insured driver, but did not settle for the White Sox even though Pekin's policy considered the White Sox an omnibus insured. Pekin obtained a Covenant Not to Sue for its named insured ("Covenant"), which did not relieve or limit the liability of the White Sox. The Covenant expressly stated that the claimant reserved "any and all causes of action which he might have against the White Sox." Pekin negotiated this settlement, without any notice to either the White Sox or its liability carrier, Home Insurance Company ("Home").

When the claimant sued the White Sox, the White Sox tendered the suit to Pekin. Pekin responded by offering to defend the White Sox under a reservation of right because Pekin had already exhausted the personal injury liability limits of the policy. The White Sox's insurer, Home, wrote Pekin asserting that the Covenant constituted bad faith on Pekin's part. Home, on behalf of the White Sox, also rejected Pekin's reservation of right defense. Home said it would assume the White Sox defense, and it would look to Pekin for total indemnification for any judgment or settlement, together with all costs and attorney fees incurred.

Pekin thereafter filed a complaint for declaratory judgment asking for a declaration that Pekin had fulfilled both its obligation to indemnify and its duty to defend the White Sox. The court granted Pekin's cross-motion for judgment on the pleadings, finding that Pekin's duty to indemnify terminated upon its payment of the $25,000 policy limit, and that Pekin's duty to defend terminated upon the White Sox's rejection of Pekin's offer to defend under a reservation of right.

On appeal, the White Sox asserted that Pekin breached its duty of good faith and fair dealing which it owed to the White Sox as an insured under the policy. The White Sox contended that the execution of the Covenant was bad faith and evidence of Pekin's breach

of its good faith duty. The White Sox also argued that the Covenant protected the insured driver at the White Sox's expense, improperly preferring one insured over another.

The appellate court noted that an insurer has a duty to exercise good faith and to deal fairly with all insured parties.[12] An insurer who breaches this duty will be liable for the tort of bad faith.[13] The court then noted, however, that it would only recognize a bad faith claim when an insurer has acted in a vexatious, unreasonable or outrageous manner toward its insureds.[14]

The court found that Pekin's failure to notify the White Sox of the settlement and of the terms of the Covenant did not rise to the unreasonable or outrageous level of behavior required for a bad-faith claim in Illinois.[15] Furthermore, the examination of the consequences of Pekin's actions made a showing of bad faith even more problematic. The court reasoned that if the plaintiff proved damages of $25,000 or less, he would recover nothing because the trial damages would be reduced by whatever amount Pekin had paid in consideration of the Covenant.[16] If the plaintiff proved damages in excess of $25,000, the White Sox would be liable for any excess amount, which would have occurred without the execution of the Covenant because Pekin's policy limits were only $25,000.[17] The court said that the execution of the Covenant failed to demonstrate any real injury to the White Sox, much less the unreasonable and outrageous behavior required for a bad-faith claim in Illinois.[18]

The court rejected the notion that Pekin's failure to defend was bad faith.[19] The court described that when policy coverage or insurer liability is in question, an insurer may either defend the suit in question under a reservation of right or, in the alternative, seek a declaratory judgment defining the insurer's rights and obligations.[20] Because Pekin initially offered to defend the White Sox under a reservation of right, which the White Sox's insurer rejected, Pekin then sought a declaration of its rights and duties under its policy.[21] "Thus, Pekin has obviously avoided a bad faith action by doubly fulfilling its duty to defend."[22]

More recently, another Illinois appellate court appeared to reach an opposite result than *Pekin Insurance Co. v. Home Insurance Co.* However, the different circumstances in each case make the cases not difficult to reconcile.

2. *Kirk v. Allstate Insurance Co.*

In *Kirk v. Allstate Insurance Co.*,[23] the insured driver was driving a truck owned by someone else. The insured truck driver ran a stop sign, colliding with a motorcyclist whose leg was amputated as result of the injuries he sustained. Allstate Insurance Company ("Allstate") insured the truck, providing liability limits of $100,000 per person. The driver had his own insurance through Mercury Insurance Company ("Mercury"), which provided liability limits of $50,000 per person.

An Allstate claims adjuster took the recorded statement of the driver. During the recorded statement, the Allstate adjuster asked the driver to confirm his home address. The driver told the adjuster that Allstate had the wrong address for him; the driver then gave the adjuster the correct address. Despite learning of the driver's correct address during his recorded statement, Allstate sent all communications regarding the claim to the insured driver at the wrong address.

The claimant motorcyclist hired a personal injury attorney, who believed that his client's injuries were worth more than the combined limits of $150,000 under the Allstate and Mercury policies. The claimant's medical bills exceeded $100,000. Because of the relatively low policy limits and the claimant's serious injuries, his attorney told another Allstate adjuster that the law firm considered pursuing the personal assets of the truck owner, who possibly owned several restaurants throughout the Midwest. The attorney did not want to pursue the driver given his lack of assets, but he also told the Allstate adjuster the firm would pursue recovery under the driver's Mercury policy. Allstate then sent a letter to its named insured advising that the claimant's injuries exceeded the policy limits and recommended that the truck owner might want to hire her own attorney to protect her personal assets. Allstate sent a similar letter to its additional insured driver, but he never received it because Allstate sent it to the wrong address.

Allstate ultimately offered its $100,000 policy limits to the claimant with a release. During settlement negotiations, the claimant's attorney told Allstate that the driver had his own policy with Mercury and the law firm was working on that. The attorney further advised Allstate: "We need to change the language of the settlement and release to include only your insureds, and

to provide an exception for any other insurance they may have which may provide coverage (doubt there is any), as they are not returning the affidavit." The claimant's attorney asked the adjuster to remove the driver's name from the release so the law firm could pursue accessing the liability coverage provided to the driver by Mercury. The Allstate adjuster readily complied with the request to remove the driver from the release. On the same day, the Allstate adjuster wrote: "No problem. I will send out new release today taking insured driver's name off of it." The following day, the Allstate adjuster sent another release, which did not include the driver. A couple of months later, the claimant signed the release that excluded the driver. Allstate never informed its insured driver of the settlement. The only communication Allstate exchanged with its insured driver was the recorded statement Allstate took of him months earlier.

The claimant ultimately sued the driver for personal injuries he received in the accident. Shortly thereafter, Allstate received notice that the driver was being sued but failed to notify the driver. Allstate did not provide the driver with a defense until over a year after the claimant sued him. The case went to a jury trial after which a judgment was entered on the verdict in the amount of $1.375 million, with a $100,000 set-off for the policy limits paid by Allstate, for a total of $1.275 million, plus costs.

After negotiating a settlement with Mercury, the plaintiff obtained an assignment of rights from the driver to sue Allstate for bad faith. The plaintiff then proceeded to file a bad-faith case alleging, among other things, that Allstate violated its duties to its additional insured and obtained a release that excluded its additional insured, exposing him to personal liability. The bad-faith lawsuit further alleged that Allstate wrongfully refused to defend its additional insured and did not properly defend him at trial.

The trial court granted Allstate's motion for partial summary judgment in favor of Allstate "because [plaintiff] induced the release" that omitted the additional insured. The plaintiff appealed.

The court reversed the trial court's partial summary judgment, finding that, at best, the issue of inducement was a question of fact for the finder of fact.[24] Thus, the court found that the trial court erred in entering partial summary judgment in favor of Allstate on the basis of inducement.[25] The court noted that the fact that the plaintiff's attorney in the underlying action sought that the driver be excluded from the release, "without any type of coercion or trickery" did not relieve Allstate of its duty to its additional insured.[26] The court explained that if Allstate believed that the release should only provide a release for the driver to the extent he had other coverage with Mercury or perhaps some other insurance company, Allstate should have specifically stated that in the release and should not have omitted the driver entirely from the release.[27] The court said that instead it appeared that Allstate tried to clear itself from exposure in an excess case at the expense of its additional insured.[28]

The court next addressed Allstate's claim that partial summary judgment was properly entered in its favor because the driver received a complete setoff of the $100,000 settlement. Allstate argued that bad faith could only arise if it failed to pay its policy limits. In response, the court noted that, under Illinois law, an insurer cannot discharge its duty to defend simply by paying the policy limits.[29]

The *Kirk* court then distinguished its case from *Pekin*[30] in three ways.[31] First, *Kirk* said that *Pekin* "was decided long before our ruling in [*Douglas v. Allied American Ins*urance]."[32] *Douglas* concerned an insurer that tendered its policy limits into a court registry in a multiple-claimant situation and then withdrew its defense of its insured. *Douglas* therefore addressed much different circumstances than the release issue in *Pekin*. Second, *Kirk* distinguished *Pekin* by noting that the driver in *Pekin* worked for the White Sox, "so there was an agency issue involved, which is totally absent in the instant case."[33] Whether this made a critical difference with respect to the insurer's good faith settlement duties is unclear, however, because the *Kirk* court did not explain this in any fashion. Third, *Kirk* said that no excess verdict was issued in *Pekin* whereas, in the case before it, the driver was exposed to personal liability of over $1 million because Allstate failed to communicate with him."[34] In *Pekin*, however, it was actually unclear whether an excess verdict was involved or not. In light of that, the *Pekin* court described that if the plaintiff proved damages in excess of $25,000, the White Sox would be liable for any excess amount, which would have occurred

without the execution of the Covenant because Pekin's policy limits were only $25,000.[35]

The *Kirk* court found that there were genuine issues of material fact that precluded entry of partial summary judgment in favor of Allstate.[36] The court therefore reversed the order of the trial court's granting partial summary judgment in favor of Allstate and remanded for further proceedings consistent with its opinion.[37]

The facts in *Pekin* and *Kirk* were vastly different. In *Kirk*, Allstate's conduct probably rose to the level of being unreasonable or outrageous as required for a bad faith claim in Illinois, while *Pekin* said that the insurer's conduct did not rise to that level. Although the *Kirk* court did not assess Allstate's conduct in relation to that standard, it can be inferred that the court would have found that way given that the court described that Allstate never communicated with its additional insured about the settlement and failed to properly defend him following the settlement that excluded him. Instead, the court simply concluded: "We see no need to go into a protracted discussion of bad faith at this juncture."[38]

C. New York

Although it has been cited to in other New York cases for different propositions, there is only one published case directly addressing the exact issue of whether an insurance carrier can settle for one insured at the exclusion of another under New York law.[39]

In *Smoral v. Hanover Insurance Co.*,[40] the plaintiff was driving a vehicle owned by Syracuse Jerome Motors when it was involved in an accident. Whittaker, a passenger in the automobile at the time (the claimant), was injured. The claimant sued Smoral (the driver) and Syracuse Jerome Motors and its president (the owners). Hanover insured the car with $50,000 per-person liability limits, and agreed with the claimant to pay the entire $50,000 in return for a release of the owners. The release specifically reserved all rights against the driver, who was given no notice of the settlement negotiations and did not consent to Hanover's actions. Hanover continued to defend the driver, though.

When the case was ready for trial, the trial judge, learning of the settlement, found that Hanover had an adverse interest to the driver and directed Hanover's attorneys to withdraw, which they did. Hanover insured the owners. The driver's own auto insurer, Glens Falls, then assumed the defense of the claimant's action and settled it for $32,500 on behalf of the driver. The driver and Glens Falls then brought a subrogation action to recover all or part of the $32,500 they paid toward settlement and for the reasonable value of the legal services rendered in that action.

The court found that Hanover owed a duty of good faith to the driver, but not to his insurer, Glens Falls.[41] The duty of good faith means an adequate protection of the interests of the assured.[42] The court commented that it was inappropriate for the insurance company to say it paid the full amount of its policy if, in doing so, it fully protected one of its insureds and left the other completely exposed.[43] The court observed that while it was easy to see why Hanover acted as it did in protecting its policyholder while the one it "ignored" was an insured it was by law required to defend—there was no legal justification for its preferring one insured over the other.[44]

The court noted that, while the breach of Hanover's duty to the driver was clear, the damage caused by the breach presented difficult questions.[45] The court described that at least the driver would have been entitled to legal representation, and Hanover's voluntary conduct in putting itself in an equivocal position amounting to a conflict of interest effectually denied that benefit to the insured driver.[46]

Noticeably absent from *Smoral* is a discussion of what efforts, if any, the insurer undertook in trying to include its insured driver in the settlement paperwork. In any event, it appears that the insurer never told the driver about the settlement, which did not include him, and the personal excess exposure he could face. While *Smoral* appears to stand for the proposition that a carrier cannot settle for an insured at the exclusion of another under New York law, it is not absolutely clear given the limited facts described in *Smoral* and the lack of other reported New York cases concerning this specific release issue.

D. California

California courts hold that an insurer's duty to settle in good faith extends to all of its insureds.[47] Therefore, an insurer may, within the boundaries of good faith, reject a settlement offer that does not include a complete release of all of its insureds.[48]

In *Strauss v. Farmers Insurance Exchange*,[49] the plaintiff was seriously injured in an auto accident. Farmers insured the tortfeasor driver, the company that employed him, and the company's owner. California Casualty insurance company also insured the tortfeasor driver with $50,000 in liability coverage. The plaintiff offered to settle the claim for the $50,000 limits of the California Casualty policy and $100,000 for Farmers' "per person" limit in exchange for a release from liability of the driver only. Farmers rejected the offer because the offer did not release either the company or its owner from liability. Farmers counter-offered to settle for the policy limits in exchange for a release of all three insureds. The plaintiff rejected the offer and a subsequent offer that would also have added a modest contribution from the company's owner.

The plaintiff offered to release all three insureds for $950,000. Farmers rejected that offer. The plaintiff ultimately settled with the driver for California Casualty's $50,000 limits and an assignment of any bad-faith claim the driver may have had against Farmers, in exchange for a covenant not to execute on any judgment that the plaintiff might obtain against the driver. The plaintiff then sued the driver, the company he worked for and its owner, eventually securing a $563,476 judgment against the driver and the company. Farmers paid its $100,000 policy limit to the plaintiff.

The plaintiff asserted that Farmers' rejection of his settlement offer constituted bad faith. He argued that because Farmers acted in bad faith, the trial court erred in granting Farmers' motion for summary adjudication on the plaintiff's bad-faith claim.

The court explained that the plaintiff offered to settle for the limits of the policy proceeds but would release only the driver from liability.[50] Farmers' acceptance of the offer would have exhausted the policy, thereby releasing it from any further explicit contractual obligation to pay any award against the company or its owner. However, acceptance of any offer that left two of its insureds bereft of coverage would have breached Farmers' implied covenant of good faith and fair dealing.[51]

The plaintiff argued that, even if Farmers had accepted the offer, it would still have been obliged to provide a defense in any action brought by the plaintiff's children. The court observed that, even assuming that was true, it had no bearing on Farmers' obligation to provide a continuing defense in the plaintiff's action. The plaintiff also argued that Farmers' actual motive for rejecting the settlement offer was to delay in order to determine its coverage position—whether the permissive user clause actually applied to the driver. The court rejected this, noting that was irrelevant because Farmers could not have accepted the settlement without breaching its duty to the insured company and its owner.[52]

The court noted that Farmers was placed in a "Catch-22" situation because if it agreed with the plaintiff's reasoning, an insurer would be liable for either agreeing to or refusing to settle.[53] The court said: "This dilemma would discourage settlements and defy the reasonable expectations of the insureds." Thus, the court found that the trial court properly granted summary adjudication for Farmers on the plaintiff's bad-faith cause of action.[54]

III. Choice-Of-Law Implications

The differences among jurisdictions' laws with respect to an insurer's good-faith duties toward its insureds in their defense and settlement obligations illustrate the necessity for insurers, particularly auto insurers, to appreciate the forum's choice-of-law rules. For example, if a claim arises out of a Florida accident involving a New York resident and a Florida resident, Florida courts apply the *lex loci contractus* choice-of-law rule on issues relating to a contract's interpretation, validity, and obligations.[55] Thus, if there is a coverage question, a Florida court would likely apply New York law to a policy's interpretation where the policy was executed in New York.[56]

Questions concerning the manner or method of performance under a contract are determined by the law of the place of performance.[57] *Government Employees Insurance Co. v. Grounds*[58] is the "seminal and only Florida case that discusses the applicable choice of law principle in bad faith actions."[59] In *Grounds*, the Florida Supreme Court determined that the breached contractual obligation—to provide the insured a good faith defense to the action—went to the insurer's performance under the contract.[60] Because the insurer was defending the insured in Florida, Florida law applied.[61] *Grounds*, however, has been criticized.[62] Nonetheless, *Grounds'* "place of performance" rule remains the law in Florida.[63]

"Snowbirds" flocking to Florida during the winter months to stay warm further illustrates this example.[64]

During these months, the upsurge of snowbirds increases their chances of becoming involved in an auto accident while in Florida. New York insurance carriers as well as other out-of-state carriers should therefore know whose state's laws would apply if the insurers have to defend their insureds and attempt settlement on behalf of their insureds with respect to a Florida accident. If the New York insurer receives a claimant's settlement offer that contemplates releasing one insured at the exclusion of another, the New York carrier may want to consider retaining an attorney who can determine the applicable choice-of-law rules and governing good-faith laws.

IV. Conclusion

In jurisdictions like Florida where the courts have found that insurers acted in good faith in settling for some insureds at the exclusion of others, those courts have examined whether the insurers attempted to settle with the claimant to include all of the insureds on the release. It was only after it became clear that the claimant would not release all of the insureds, among other things, that the insurer acted in good faith in settling for only one insured. California appears to be on the opposite side of the spectrum where the *Strauss* court held that an insurer can reject a claimant's settlement offer that does not contemplate releasing all insureds.

No matter the jurisdiction, insurers must act in good faith toward their insureds. Sometimes, however, it is not readily apparent whose state's laws will guide the insurer's conduct. Simply because a policy was issued in a certain state does not mean that state's laws will guide the insurer's good faith obligations toward its insureds where the accident occurred in another state. Accordingly, if an insurer receives a settlement offer regarding an accident that occurred out of the insured's home state, the insurer may want to consider retaining counsel who can assist in determining what state's good faith laws apply and understanding the parameters and nuances of those laws in settling where the claimant may be unwilling to settle for all insureds.

Endnotes

1. 927 So. 2d 16 (Fla. 4th DCA 2006).
2. *Id.*
3. 386 So. 2d 783 (Fla. 1980).
4. *Id.* at 785.
5. 927 So. 2d at 21.
6. *Id.*
7. *Id.*
8. *Id.* (*citing* Berges v. Infinity Ins. Co., 896 So. 2d 665, 677 [Fla. 2004]).
9. *See* Springer v. Citizens Cas. Co. of New York, 246 F.2d 123 (5th Cir. 1957).
10. *See* Adega v. State Farm Fire and Cas. Ins. Co., 2009 WL 3387689 (S.D. Fla. Oct. 16, 2009); *see also* Shin Crest PTE, Ltd. v. AIU Ins. Co., 605 F. Supp. 2d 1234 (M.D. Fla. 2009).
11. 479 N.E.2d 1078 (III. Ct. App. 1985).
12. *Id.* at 1080.
13. *Id.*
14. *Id.* at 1080-1.
15. *Id.* at 1081.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 1081.
20. *Id.*
21. *Id.*
22. *Id.*
23. 969 N.E.2d 980 (Ill. Ct. App. 2012).
24. *Id.* at 985.
25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. 479 N.E.2d at 1078 (Ill. Ct. App. 2012).

31. 969 N.E.2d at 986.

32. *Id.* (*citing* Douglas v. Allied American Ins., 727 N.E.2d 376 [Ill. Ct. App. 2000]). *Kirk* and *Douglas* are Fifth District cases while *Pekin* is a First District case.

33. *Id.*

34. *Id.*

35. 479 N.E.2d at 1081.

36. *Id.* at 987.

37. *Id.*

38. *Id.*

39. *See* Smoral v. Hanover Insurance Co., 37 A.D.2d 23 (N.Y. App. Div. 1971).

40. *Id.*

41. *Id.* at 25.

42. *Id.* (internal citation omitted).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *See* Strauss v. Farmers Ins. Exchange, 26 Cal. App. 4th 1017 (Cal. Ct. App. 1994); Palmer v. Financial Indem. Co., 215 Cal. App. 2d 419 (Cal. Ct. App. 1963).

48. Strauss, 26 Cal. App. 4th at 1017.

49. *Id.*

50. *Id.* at 1022.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Higgins v. West Bend Mut. Ins. Co., 85 So. 3d 1156, 1158 (Fla. 2012) (*citing* Goodman v. Olsen, 305 So. 2d 753, 755 [Fla. 1974]; Sturiano v. Brooks, 523 So. 2d 1126, 1129-30 [Fla. 1988]; Lumbermens Mut. Cas. Co. v. August, 530 So. 2d 293, 295 [Fla. 1988]).

56. Sturiano, 523 So. 2d at 1129.

57. *Id.* at 1158 (*citing* Gov't Employees Ins. Co. v. Grounds, 332 So. 2d 13, 14 [Fla. 1976]).

58. 332 So. 2d 13 (Fla. 1976).

59. Higgins, 85 So. 3d at 1158.

60. Grounds, 332 So. 2d at 14-15.

61. *Id.* at 15.

62. Higgins, 85 So. 3d at 1158, n.2 (internal citations omitted).

63. *Id.*

64. "Snowbird" is "one who travels to warm climes for the winter." <http://www.miriam-webster.com/dictionary/snowbird. ■

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