February 2007 Vol. 75 No. 2

The Briefs

A Publication of the Orange County Bar Association

Table of Contents


Page 5


Page 7


Page 8


Page 11


Page 13

The Briefs

© 2007

Co-Editors
Jessica K. Hew & Tad A. Yates

Communications Manager
Peggy Storch

Hearsay Columnist
Kristyne E. Kennedy

YLS Columnist
Judith A. Garabo

880 North Orange Avenue
Orlando, FL 32801
(407) 422-4551 • Fax (407) 843-3470

Legal Aid Society	407-841-8310
Citizen Dispute	407-423-5732
Family Law Mediation	407-841-8310
Lawyer Referral Service	407-422-4537
Legal Placement Service	407-841-8310
Young Lawyers Section	407-422-4551

DEADLINE INFORMATION
Deadline for March Edition: 2/1/2007
The deadline for each edition will be the first day of each month. If that day falls on a weekend or holiday, the deadline will be the last working day prior.

Visit the OCBA's Website:
www.orangecountybar.org

Insurance Law Committee

Litigation and Prevention of Insurer Bad Faith, Second Edition *

Database updated July 2006

Dennis J. Wall, Esquire

Part II. Third-Party Claims
Chapter 3. Standards of Conduct Toward the Insured

I. Settlement

§ 3:1. Requirements for fulfillment or enforcement of good faith in settlement: A working definition of third-party insurance and a standard for measuring insurer conduct

Third-party insurance is liability insurance. It always involves a claim of loss and three distinct parties: an injured claimant, an insured, and the insured's insurance company.[FN1] In contrast to first-party insurance, [FN2] which applies to the insured's own claimed losses, third-party insurance is intended to protect the insured from the expense of defending and paying the claim of a third party within the policy's limits.[FN3]

Liability policies provide for absolute control by the insurer over the defense and settlement of all covered claims.[FN4] By virtue of the insurer's absolute control of defense and settlement, the insurer owes the insured a duty of good faith and fair dealing in the exercise of that control.[FN5] Breach of that duty may result in liability to the insurer for extracontractual damages, which are sums beyond the costs, fees, and limits for which the insured contracted.[FN6]

The insurer's duty of good faith and fair dealing in settlement is activated by a conflict between the insurer and the insured concerning a particular claim. The courts appear to differ in their views over the nature of this activating conflict. It has been described as occurring "[w]hen there is a likelihood liability may exceed policy limits and there is an opportunity for settlement within policy limits ...."[FN7] It has also been characterized as occurring by virtue of the fact that the claim is for damages in excess of policy limits as distinct from being dependent on a settlement demand from the injured party. [FN8]

As will be seen, the results of decided cases indicate that most courts are willing to accept twin propositions. First, that the insurer's duty of good faith and fair dealing in *settlement* is activated by a comparison of:

1. The insurer's policy limits
2. The insured's liability
3. The reasonably foreseeable amount of damages if the claim were tried[FN9]

Second, that the duty of good faith and fair dealing in *defense* of the claim is activated simply by virtue of the fact that a claim has been made which is covered by the policy.[FN10]

With regard to fulfillment of the duty of good faith and fair dealing in settlement when the respective interests of the insured and of the insurer are in conflict, a variety of standards have been judicially stated. These are all measures of insurer liability for extracontractual damages in such situations. What "Good Faith" or "Bad Faith" means is particularized in the case law; the terms are not meant in other words to convey that a claim or a cause of action can somehow be based on general allegations or theories that the insurance company defendant is "bad". *See Mattadeen v. State Farm Mutual Automobile Insurance Co.*, No. 04-80034-Civ-Hurley/Hopkins (S.D. Fla. filed 2004), December 17, 2004 "Order Granting Defendants' Motion For Final Summary Judgment", at 13. The author filed a Report as an Expert Witness for the defendant in that particular case.

One such standard is that liability insurance companies "should be held to that degree of care and diligence which a man of ordinary care and prudence should exercise in the management of his own business."[FN11] Another standard is that the insurer must give at least equal consideration to the insured's interests as to its own in determining whether and how to settle the claim that has called forth the insurer's duty of good faith and fair dealing in settlement.[FN12] Still another standard would have the insurer evaluate such a claim as though only the insurer would be responsible to satisfy it, i.e., as though the insurer had issued its policy without limits.[FN13]

Another standard holds that a decision not to settle such a claim "must be a realistic one when tested by the necessarily assumed expertise of the company." [FN14] The standard of liability will be more exacting after a verdict or judgment in excess of the policy limits has been returned against the insured and the insurer is considering an appeal instead of settlement for the policy limit.[FN15]

It is generally agreed that the insurer's liability for extracontractual damages on account of alleged bad faith and unfair dealing in settlement is tested in light of facts known or reasonably knowable at the time the decision not to settle was made.[FN16] Ordinarily, application of this standard to the insurer conduct in question in a particular case is left to the trier of fact.[FN17]

In succeeding sections, the kinds of insurer conduct which have been or might soon be litigated in bad faith cases are examined.

[FN1] *E.g.*, Zephyr Park, Ltd v Superior Court, 213 Cal App 3d 833, 262 Cal Rptr 106, 107 n2 (1989); *see, e.g.*, Lamar Truck Plaza, Inc v Sentry Ins, 757 P2d 1143, 1143-44 (Colo Ct App 1988); Mason v Home Ins Co, 177 Ill App 3d 454, 532 NE2d 526, 527-29 (1988) *cert. denied*, 125 Ill 2d 567, 537 NE2d 811 (1989); Falkenstein's Meat Co v Maryland Casualty Co, 91 Or App 276, 278-79, 754 P2d 621, 622-23 (1988); Campbell v State Farm Mut Auto Ins Co, 840 P2d 130, 137 n12 (Utah Ct App), cert

Continued on page 22

denied, 853 P2d 897 (Utah 1992); Transcontinental Ins Co v Washington Pub Utils Dists' Util Sys, 111 Wash 2d 452, 454-59, 760 P2d 337, 339-41 (1988). *See, e.g.*, State ex rel. Brison v. Kaufman, 213 W. Va. 624, 630, 584 S.E.2d 480, 486 (2003). *See also* Wall, Avoiding "Bad Faith" in Settlement: What are the Developments?, 63 Defense Couns J 249 (April 1996).

[FN2] *See* § 9:1. *E.g.*, Thomas V. Flaherty, Rebecca L. Ross, Michael D. Sullivan, & Charles T. Blair, Developments in West Virginia's Insurance Bad Faith Law -- Where do we go From Here?, 98 W Va L Rev 267, 269 & n.3 (1995), CITING THIS BOOK.

[FN3] *E.g.*, A&E Supply Co v Nationwide Mut Fire Ins Co, 798 F2d 669, 676 n8 (4th Cir 1986) (Virginia law), cert denied, 479 US 1091 (1987); Rova Farms Resort, Inc v Investors Ins Co of Am, 65 NJ 474, 323 A2d 495, 505 (1974); Radio Taxi Serv, Inc v Lincoln Mut Ins Co, 31 NJ 299, 157 A2d 319, 322 (1960); Beck v Farmers Ins Exch, 701 P2d 795, 798 n2 (Utah 1985); Wall, Bad Faith, Excess Liability Actions by or Against Excess Insurers, 48 Ins Couns J 311, 312-15 (1981).

Cf Boeing Co v Aetna Casualty & Sur Co, 113 Wash 2d 869, 784 P2d 507, 510 (1990) (en banc):

The question before us is whether these response costs to remedy an actual release of hazardous substances constitute damages within the meaning of the insureds' comprehensive general liability policies issued by insurers. In order for the policyholders to be indemnified, the plain meaning of the contract must provide coverage for the subject "response costs." Alternatively, before the insurers can avoid indemnifying the policyholders, this court must be satisfied that the plain meaning of "damages," as it would be understood by the average lay person, unmistakably precludes coverage for response costs, and any ambiguity is to be construed against the insurer.

See generally Anderson, Tydings & Lewis, Liability Insurance: A Primer for Corporate Counsel, 49 Bus Law 259 (1993). *E.g.*, Best Place, Inc. v. Penn Am. Ins. Co., 82 Haw. 120, 920 P.2d 334, 338 n.4 (1996).

[FN4] *E.g.*, Comment, Expanding the Insurer's Duty to Attempt Settlement, 49 U Colo L Rev 251, 251 & n2 (1978); *see, e.g.*, Maine Bonding & Casualty Co v Centennial Ins Co, 298 Or 514, 693 P2d 1296, 1298 (1985) (en banc); Appleman, Duty of Liability Insurer to Compromise Litigation, 26 Ky LJ 100, 100 & n2 (1938). Aside from vesting control over limiting liability in the hands of the insurer's agents, a further purpose behind this provision is to vest control in those same hands over the costs of investigation and defense. *See* Keeton, Liability Insurance and Responsibility for Settlement, 67 Harv L Rev 1136, 1166 (1954).

Where the insured controls the settlement decision because the policy requires the insured's consent, the contract "is more than a simple liability policy." Brion v Vigilant Ins Co, 651 SW2d 183, 185 (Mo Ct App 1983). Such a so-called pride provision is found in some professional malpractice liability policies and gives the insured "control over litigation which could jeopardize his professional reputation." Id 184. The liability insurer's basis of liability should it ignore this contractual provision and settle without obtaining the insured's consent is in contract. It is liable for the same damages to reputation and for mental anguish which the pride provision purchased by the insured was to prevent. *See* id 184-85.

A contrary result was reached in a recent case where the insurer had reserved the exclusive right to settle and settled against the insured's wishes. Shuster v South Broward Hosp Dist Physicians' Prof Liab Ins Trust, 570 So 2d 1362, 1368 (Fla Dist Ct App 1990), affd, 591 So 2d 174 (Fla 1992). To the same effect, analyzing *Shuster* and similar cases and considering the facts at bar, is Doe v. South Carolina Med. Mal. Liab. Joint Underwriting Ass'n, 347 S.C. 642, 653, 557 S.E.2d 670, 676 (2001):

Under these circumstances, JUA's decisions to settle the case on behalf of Doe and to charge a portion of the settlement against his policy were eminently reasonable.

In Florida, by the provisions of a statute entitled, "Medical malpractice insurance contracts," the so-called pride provisions in such contracts of insurance have been severely limited or legislatively abrogated:

It is against public policy for any insurance or self-insurance policy to contain a clause giving the insured the exclusive right to veto any offer for admission of liability and for arbitration pursuant to s. 766.106, settlement offer, or offer of judgment, when such offer is within the policy limits. However, any offer of admission of liability, settlement offer, or offer of judgment made by an insurer or self-insurer shall be made in good faith and in the best interests of the insured.

Fla. Stat. § 627.4137(1)(b)1 (2005).

See Cohen v. Freeman, 914 So. 2d 449, 449 (Fla. 4th DCA 2005), in which the appellate court remanded on appeal from a trial court's "initial decision declining to enter a judgment of enforcement" due to "procedural irregularities" in a motion to enforce a settlement in a medical malpractice action. The opinion for the appellate court went on, nonetheless, to emphasize that the objection of the defendant doctor "would not bar that settlement":

The pending bad faith claims by the doctor may not be used to delay or impair the entitlement of the settling parties to immediate enforcement of their settlement.

Id. at 450.

Where the liability policy provides for a deductible and the insurer has the unfettered right to settle all claims, with or without the insured's consent, it has been held that there is no duty of good faith or fair dealing which would prevent the insurer from settling a claim within the deductible amount even if the insured does not consent. Casualty Ins Co v Town & Country Pre-School Nursery, Inc, 147 Ill App 3d 567, 498 NE2d 1177, 1178-79 (1986).

[FN5] *E.g.*, Northwestern Mut Ins Co v Farmers Ins Group, 76 Cal App 3d 1031, 1043, 143 Cal Rptr 415, 422 (1978); Farmers Group, Inc v Trimble, 691 P2d 1138, 1141 (Colo 1984) (en banc); General Accident Fire & Life Assurance Corp, 390 So 2d 761, 764 (Fla Dist Ct App 1980), review denied, 399 So 2d 1142 (Fla 1981); Fireman's Fund Ins Co v Continental Ins Co, 308 Md 315, 519 A2d 202, 204 (1987); Johnson v Federal Kemper Ins Co, 74 Md App 243, 536 A2d 1211, 1213, cert denied, 313 Md 8, 542 A2d 844 (1988); Bowers v Camden Fire Ins Assn, 51 NJ 62, 237 A2d 857, 861 (1968); Ambassador Ins Co v St Paul Fire & Marine Ins Co, 102 NM 28, 690 P2d 1022, 1024-25 (1984); Maine Bonding & Casualty Co v Centennial Ins Co, 298 Or 514, 693 P2d 1296, 1298 (1985) (en banc); Ranger County Mut Ins Co v Guin, 704 SW2d 813, 820 (Tex Ct App 1985), affd, 723 SW2d 656 (Tex 1987); Myers v Ambassador Ins Co, 146 Vt 552, 508 A2d 689, 690 (1986); Mowry v Badger State Mut Casualty Co, 129 Wis 2d 496, 385 NW2d 171, 178 (1986). *See* McNally v Nationwide Ins Co, 815 F2d 254, 263 (3d Cir 1987) (citing this book); Continental Casualty Co v Great Am Ins Co, 711 F Supp 1475, 1479 (ND Ill 1989) (holding that the rule obviously does not apply in the face of evidence that the insurer exercised no such control in the case at bar).

In a recent federal case, it was even held under a standard directors' and officers' liability policy, which does not contain a duty to defend but provides instead for reimbursement of the insureds' defense fees and costs, that "[a]n insurance company has a duty implied in law to conduct good faith settlement negotiations whether or not the policy explicitly requires it to defend." Okada v MGIC Indem Corp, 608 F Supp 383, 390 (D Haw 1985), affd in part, revd in part, 823 F2d 276 (9th Cir 1987). *Cf.* Manley Bennett, McDonald & Co v. St Paul Fire & Marine Ins Co, 792 F Supp 1070, 1073 (ED Mich 1992), affd mem, 933 F2d 55 (6th Cir 1994), in which the District Judge held that "I reject this view [that indemnity for defense costs is governed by different tests and rules than the duty to defend under a liability policy] and hold that the duty to defend is the same as the duty to indemnify for defense costs." Obversely, where an indemnity policy provides that the insured has control over defense and settlement, it has been held:

The duty of good faith is also present in an indemnity type policy, although the relationship between the insured and the insurer changes. Often, excess insurance policies take the form of indemnity policies because they leave the duty to defend and settle a claim against the insured to the primary insurer, or in this case, the insured .... Similarly, the duty of good faith engrafted into the contractual obligations of these policies requires that the insured exercise diligence and good faith in conducting the defense for the benefit of both the insured and the insurer who each

Continued on page 24

have a financial stake in the proceedings.
North Am. Van Lines v. Lexington Ins. Co., 678 So. 2d 1325, 1331 (4th Dist. Ct. App. 1996), review denied, 692 So.2d 185 (Fla. 1997).

The rule stated in the text was recently followed in the unique but recurring situation of multiple claimants. in Farinas v. Florida Farm Bureau Gen. Ins. Co., 850 So. 2d 555, 559 (Fla. 4th DCA 2003), review denied, 871 So. 2d 872 (Fla. 2004). The author was thereafter retained as an Expert Witness on behalf of several of the injured claimants in that particular case.

The liability insurer's good faith settlement duties can arise even before the claim against the insured is in suit. Smith v Blackwell, 14 Kan App 2d 158, 791 P2d 1343, 1346 (1989). *Contra* Morrell Constr, Inc v Home Ins Co, 920 F2d 576, 581 (9th Cir 1990) (Idaho law).

It has recently been held that a third-party carrier's nonrenewal is also subject to duties of good faith and fair dealing:
As a general principle, we agree that an insurer may choose to nonrenew an insured for any reason. ... However, an insurer is required to act in good faith when carrying out its decision not to renew either a single insured or entire blocks of business. In this setting, we believe that good faith should be measured according to the legal standard used in the first-party claims context: unreasonable conduct and either knowledge or reckless disregard of the unreasonableness of the conduct.
Ballow v. PHICO Ins Co, 875 P2d 1354, 1363 (Colo 1993) (en banc). The legal standards used throughout the nation in the first-party claims context to measure extracontractual liability are discussed in Chapter 9 and legal standards for defenses are discussed in Chapter 11.

[FN6] *E.g.*, Continental Casualty Co v United States Fidelity & Guar Co, 516 F Supp 384, 387 (ND Cal 1981) (applying California law); Zumwalt v Utilities Ins Co, 360 Mo 362, 228 SW2d 750, 753 (1950); Kranzush v Badger State Mut Casualty Co, 103 Wis 2d 56, 307 NW2d 256, 259 (1981).

[FN7] Northwestern Mut Ins Co v Farmers Ins Group, 76 Cal App 3d 1031, 1043, 143 Cal Rptr 415, 422 (1978). *E.g.*, Myers v Ambassador Ins Co, 146 Vt 552, 508 A2d 689, 691 (1986); *see, e.g.*, Continental Casualty Co v United States Fidelity & Guar Co, 516 F Supp 384, 387 (ND Cal 1981) (applying California law); General Accident Fire & Life Assurance Corp v American Casualty Co, 390 So 2d 761, 764 (Fla Dist Ct App 1980), review denied, 399 So 2d 1142 (Fla 1981).

[FN8] Coleman v Holecek, 542 F2d 532, 537 (10th Cir 1976) (applying Kansas law); *see* General Accident Fire & Life Assurance Corp v American Casualty Co, 390 So 2d 761, 765 (Fla Dist Ct App 1980), review denied, 399 So 2d 1142 (Fla 1981); Comment, Expanding the Insurer's Duty to Attempt Settlement, 49 U Colo L Rev 251, 258-59 (1978).

[FN9] The Supreme Court of Louisiana similarly observed in the recent case of Smith v. Audubon Ins. Co., 679 So. 2d 372, 377 (La. 1996):
The determination of good or bad faith in an insurer's deciding to proceed to trial involves the weighing of such factors, among others, as the probability of the insured's liability, the extent of the damages incurred by the claimant, the amount of the policy limits, the adequacy of the insurer's investigation, and the openness of communications between the insurer and the insured.

E.g., Ross Neely Systems, Inc. v. Occidental Fire & Cas. Co. of North Carolina, 196 F.3d 1347, 1351 (11th Cir. 1999) (Alabama law); Haddick v. Valor Ins., 198 Ill. 2d 409, 763 N.E.2d 299, 304-05, 261 Ill. Dec. 329 (2001); *see* American Physicians Ins Exch v. Garcia, 876 SW2d 842, 849 (Tex 1994). *See, e.g.*, Brown v United States Fidelity & Guar Co, 314 F2d 675, 678-79 (2d Cir 1963) (case involved substantive law of New York); Henke v Iowa Home Mut Casualty Co, 250 Iowa 1123, 97 NW2d 168, 174, 179 (1959). *See* **3:31-3:39**.

[FN10] *See* § **3:48**. *See* Zurich Ins. Co. v. Texasgulf, Inc., 233 A.D.2d 180, 649 N.Y.S.2d 153 (App. Div. 1st Dep't 1996).

[FN11] Auto Mut Indem Co v Shaw, 134 Fla 815, 184 So 852, 859 (1938). *Accord* Bennett v Conrady, 180 Kan 485, 305 P2d 823, 827 (1957); Ranger County Mut Ins Co v Guin, 704 SW2d 813, 821 (Tex Ct App 1985), aff'd, 723 SW2d 656 (Tex 1987); Kranzush v Badger State Mut Casualty Co, 103 Wis 2d 56, 307 NW2d 256, 259 (1981). *E.g.*, Stetler v Fosha, 809 F Supp 1409, 1421 (D Kan 1992), aff'd mem, 7 F3d 1045 (10th Cir 1993). *see* Helfand v National Union Fire Ins Co, 10 Cal App 4th 869, 13 Cal Rptr 2d 295, 317 (1992), cert. denied, 510 U.S. 824, 114 S. Ct. 84 (1993). (arbitrary cancellation is a breach of covenant of good faith and fair dealing).

[FN12] *E.g.*, Torrez v State Farm Mut Auto Ins Co, 705 F2d 1192, 1195 (10th Cir 1982) (applying New Mexico law); Young v American Casualty Co, 416 F2d 906, 910 (2d Cir 1969) (applying New York law), cert dismissed, 396 US 997 (1970); American Fidelity & Casualty Co v All American Bus Lines, Inc, 190 F2d 234, 238 (10th Cir) (applying Oklahoma law), cert denied 342 US 851 (1951); Pavia v State Farm Mut Auto Ins Co, 82 NY2d 445, 454, 626 NE2d 24, 605 NYS2d 208, 212 (1993); *see, e.g.*, Camp v St Paul Fire & Marine Ins Co, 616 So 2d 12, 14 (Fla 1993); Warren v American Family Mut Ins Co, 122 Wis 2d 381, 361 NW2d 724, 727, 728 (Ct App 1984):
Bad faith has been described as being more than mere negligence on the part of the insurance company in deciding to litigate rather than settle. It is only when conduct evidences a significant disregard of the insured's interests that bad faith may be found .... The trial court properly noted that this is not the "bandana and pistol" type of dishonesty, and said when an insurance company's conscious decision not to settle a case within policy limits is the product of egregious failure on the company's part to perform the duties that it owes to its insured, then that conscious decision to expose its insured to a trial is deceitful and dishonest in the law. We agree with the trial court's statement that the "suggestion of dishonesty" is the equivalent of bad faith.

E.g. Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 659, 328 P.2d 198, 201, 68 A.L.R.2d 883 (1958); Northfield Ins. Co. v. St. Paul Surplus Lines Ins. Co., 545 N.W.2d 57, 60 (Minn. Ct. App. 1996). Factors involved in the "equality of consideration" standard, which are followed in most jurisdictions, are set out at length under Idaho law in Truck Ins. Exchange v. Bishara, 128 Idaho 550, 555, 916 P.2d 1275, 1280 (1996). As the court described it in the case of State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62-63 (Fla. 1995), the standards in Florida are unique in that bad faith claims of third-party settlement are treated the same as all other situations of alleged bad faith:
Florida differs, however, from most jurisdictions given that first-party bad faith actions are actionable only under section 624.155 and not the common law. ... Additionally, as previously discussed, section 624.155 provides remedies for *both* first- and third-party causes of actions. Section 624.155 provides that an insurer has acted in bad faith if it has "[n]ot attempt[ed] in good faith to settle claims when, under all the circumstances, it could and should have done so had it acted fairly and honestly toward its insured and with due regard for [the insured's] interest." § 624.155(1)(b)1. Because this specific standard is set forth in section 624.155, we find it unnecessary and inappropriate to apply the "fairly debatable" standard to bad faith actions in Florida.
Recently, several district courts have also rejected the fairly debatable standard in both first-party unfair insurance trade practices and third-party bad faith actions, applying instead a totality-of-the-circumstances standard somewhat similar to the standard set forth in the statute. *John J. Jerue Truck Broker v. Insurance Co. of N. Am.*, 646 So. 2d 780 (Fla. Dist. Ct. App. 2d Dist. 1994); *Robinson [Robinson v. State Farm Fire & Casualty Co.*, 583 So. 2d 1063 (Fla. Dist. Ct. App. 5th Dist. 1991)]. In *Robinson*, the Fifth District Court of Appeal evaluated a number of Florida cases in concluding that a totality-of-the-circumstances approach should be used in evaluating third-party bad faith actions. The court determined that at least five factors should be taken into account: (1) whether the insurer was able to obtain a reservation of the right to deny coverage if a defense were provided; (2) efforts or measures taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit any potential prejudice to the insureds; (3) the substance of the coverage dispute or the weight of legal authority on the coverage issue; (4) the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage; and (5) efforts made by the insurer to settle the liability claim in the face of the coverage dispute. 583 So. 2d at 1068. In *Jerue*, the Second District Court of Appeal adopted this same approach, finding that the second, third, and fourth factors promulgated in *Robinson* should likewise be considered in a first-party cause of

Continued on page 26

action. We agree, finding that a determination of whether an insurer has acted "fairly and honestly toward its insured and with due regard for [the insured's] interests" includes a consideration of these factors. Consequently, we reject the fairly debatable standard of determining whether a reasonable basis exists for rejecting coverage.* * *
Interestingly, in the 1990 amendment to section 624.155, the Legislature, in addition to other changes, provided that "any person may obtain a judgment under either the common law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies." § 624.155(7), Fla. Stat. (Supp. 1990). Because the statute otherwise makes specific reference to third-party causes of action brought under the statute, *see, e.g.*, 624.155(2)(b)4., it is clear that a third-party cause of action can now be brought under either section 624.155 or the common law. This is untrue for first-party actions because, as discussed previously, first-party actions do not exist at common law. For consistency, however, we find that the standard set forth in this opinion should apply equally to third-party actions brought at common law.

Florida's common law "standard of care" to be followed by insurers handling claims against their insureds, was recently stated to be "further reflected" in Florida Statute Section 624.155(b)(1). Farinas v. Florida Farm Bureau Gen. Ins. Co., 850 So. 2d 555, 559 (Fla. 4th DCA 2003), review denied, 871 So. 2d 872 (Fla. 2004). After this opinion, the author was retained as an Expert Witness on behalf of several of the injured claimants in that case, and the case which had involved years of litigation among the parties settled a short time thereafter.

[FN13] *E.g.*, Kissoondath v. United States Fire Ins. Co., 620 N.W.2d 909, 916 (Minn. Ct. App. 2001), review denied (Minn. April 17, 2001). *E.g.*, Employers Natl Ins Corp v Zurich Am Ins Co, 792 F2d 517, 519 & n2 (5th Cir 1986) (Texas law); Bohemia, Inc v Home Ins Co, 725 F2d 506, 512 (9th Cir 1984) (applying Oregon law); North River Ins Co v St Paul Fire & Marine Ins Co, 600 F2d 721, 724 (8th Cir 1979) (applying South Dakota law); Coleman v Holecek, 542 F2d 532, 537 (10th Cir 1976) (applying Kansas law); Betts v Allstate Ins Co, 154 Cal App 3d 688, 706, 201 Cal Rptr 528, 538 (1984); Wierck v Grinnell Mut Reins Co, 456 NW2d 191, 195 (Iowa 1990); Maine Bonding & Casualty Co v Centennial Ins Co, 298 Or 514, 693 P2d 1296, 1299, 1303 (1985) (en banc); Keeton, Liability Insurance and Responsibility for Settlement, 67 Harv L Rev 1136, 1146-48 (1954).

[FN14] Bowers v Camden Fire Ins Assn, 51 NJ 62, 237 A2d 857, 861 (1968). *Accord* McChristian v State Farm Mut Auto Ins Co, 304 F Supp 748, 753 (WD Ark 1969) (applying Arkansas law); Shearer v Reed, 286 Pa Super 188, 428 A2d 635, 638 (1981); *see* Boston Old Colony Ins Co v Gutierrez, 386 So 2d 783, 785 (Fla 1980), cert denied, 450 US 922 (1981).

[FN15] Bowers v Camden Fire Ins Assn, 51 NJ 62, 237 A2d 857, 862 (1968). *Accord* State Farm Mut Auto Ins Co v Brewer, 406 F2d 610, 612-13 (9th Cir 1968) (applying Oregon law); Hazelrigg v American Fidelity & Casualty Co, 241 F2d 871, 873 (10th Cir 1957) (applying Oklahoma law).

[FN16] *E.g.*, American Fidelity & Casualty Co v Greyhound Corp, 258 F.2d 709, 716 (5th Cir 1958) (applying Florida law); Certain Underwriters of Lloyd's v General Accident Ins Co of Am, 699 F. Supp. 732, 742 (SD Ind 1988), affd with opinion, 909 F.2d 228 (7th Cir 1990); Glenn v Fleming, 247 Kan 296, 799 P.2d 79, 85 (1990); Commercial Union Ins Co v Liberty Mut Ins Co, 426 Mich 127, 393 N.W.2d 161, 166 (1986); Continental Casualty Co v Reserve Ins Co, 307 Minn 5, 238 N.W.2d 862, 867 (1976); Campbell v. State Farm Mut Auto Ins Co, 840 P.2d 130, 139 (Utah Ct App), *cert. denied*, 853 P.2d 897 (Utah 1992). The same standard is now being applied to first-party insurers' extracontractual liability for denial of covered claims. *E.g.*, Erwin v State Farm Fire & Casualty Co, 618 F. Supp. 1040, 1042 (ED Mo 1985); Duckett v Allstate Ins. Co, 606 F. Supp. 728, 731 (WD Okla 1984); Nationwide Mut Ins Co v Clay, 525 So. 2d 1339, 1342 (Ala 1987), cert denied, 488 US 1040 (1989). *See* §§ **9:1**, **9:6**, **11:4**. *E.g.*, Troutt v. Colorado W. Ins. Co., 246 F.3d 1150, 1161, 1163 (9th Cir. 2001) (noting in particular in this case arising under Montana law: "With respect to this last contention, Troutt is trying to impose oracle-like skills on CWIC, and then holding CWIC to the fact that its ESP is lacking."); Ross Neely Systems, Inc. v. Occidental Fire & Cas. Co. of North Carolina, 196 F.3d 1347, 1352 (11th Cir. 1999) (Alabama law); Behn v. Legion Ins. Co., 173 F. Supp. 2d 105, 113 (D. Mass. 2001) ("The relevant inquiry is what the insurance company reasonably believed at the time in question, not what the jury ultimately found."); Camelot by the Bay Condominium Owners' Assn. v. Scottsdale Ins. Co., 27 Cal. App. 4th 33, 32 Cal. Rptr. 2d 354, 361, 94 C.D.O.S. 5863, 94 Daily Journal D.A.R. 10619 (4th Dist. 1994).

A United States Magistrate Judge's Order And Memorandum predicted Montana substantive law in EOTT Energy Operating Ltd. v. Certain Underwriters at Lloyd's of London, 59 F. Supp. 2d 1072 (D. Mont. 1999), concerning the issue of evidence in certain categories which may *not* serve as evidence of "reasonableness" of a denial of coverage. The insured in that case settled the underlying liability case. The insured then "sought indemnification from its excess insurance carriers" for the settlement amount it paid. Id. at 1074. The insured's alleged causes of action included breach of contract and asserted violations of Montana's Unfair Trade Practices Act. The insured's causes of action, more specifically, were based on allegations that (1) the defendants had failed to indemnify the Plaintiff Policyholder without conducting a reasonable investigation and (2) the defendants had refused to attempt to effectuate prompt and equitable settlement of the Policyholder's claims to indemnification, in good faith, when liability had become reasonably clear. Id.

The basis for each of the pertinent holdings in the *EOTT* case is crucial to understand. The Magistrate Judge clearly bottomed all of the following decisions in the case on the stated understanding that Montana law requires a determination of Bad Faith, as of the time the decision to deny coverage was made. The following rulings were made concerning admissibility of evidence on the question of "reasonableness" of the insurance carriers' denial of coverage in the *EOTT* case:
(1)Not facts known after the time the Defendants made their decision to deny coverage, id. at 1075-76;
(2)Not law in terms of cases *published after* the defendants made their decision to deny coverage, id. at 1077, and
(3)Not a favorable *prior* ruling on coverage by the trial court in the same case, or the result in the appeal of that ruling. Id. at 1080.

[FN17] *E.g.*, Pace v Insurance Co of N Am, 838 F2d 572, 580 (1st Cir 1988) (Rhode Island law); St Paul-Mercury Indem Co v Martin, 190 F2d 455, 458 (10th Cir 1951) (applying Oklahoma law); Continental Casualty Co v United States Fidelity & Guar Co, 516 F Supp 384, 390 n7 (ND Cal 1981) (applying California law); Higgs v Industrial Fire & Casualty Co, 501 So 2d 644, 645 (Fla Dist Ct App 1986), review denied, 511 So 2d 298 (Fla 1987); Ranger Ins Co v Travelers Indem Co, 389 So 2d 272, 277 (Fla Dist Ct App 1980); Grant v Transit Casualty Co, 71 Or App 777, 693 P2d 1328, 1329-30 (1985); Myers v Ambassador Ins Co, 146 Vt 552, 508 A2d 689, 692 (1986); Mowry v Badger State Mut Casualty Co, 129 Wis 2d 496, 385 NW2d 171, 181 (1986); *see, e.g.*, Maine Bonding & Casualty Co v Centennial Ins Co, 298 Or 514, 693 P2d 1296, 1303 (1985) (en banc); Ranger County Mut Ins Co v Guin, 704 SW2d 813, 820-21 (Tex Ct App 1985), affd, 723 SW2d 656 (Tex 1987). *See generally* Syverud, The Duty to Settle, 76 Va L Rev 1113 (1990).

Liability under unfair claims-handling statutes has been similarly held to generally present questions of fact. Kyriss v Aetna Life & Casualty Co, 624 F Supp 1130, 1133 (D Mont 1986). *See* §§ **3:25**, **3:58**, **3:87**.

Moreover, application of this same standard in a first-party case is likewise ordinarily left to the trier of fact. *E.g.*, Suggs v State Farm Casualty Co, 833 F2d 883, 891 (10th Cir 1987) (New Mexico law), cert denied, 486 US 1007 (1988); Erwin v State Farm Fire & Casualty Co, 618 F Supp 1040, 1042 (ED Mo 1985). See §§ **9:1**, **9:6**, **11:4**. *E.g.*, Smith v. Audubon Ins. Co., 679 So. 2d 372, 377 (La. 1996).

Dennis J. Wall, Esq., has been a member of the OCBA since 1978.

BIOGRAPHY OF DENNIS J. WALL

For twenty-eight (28) years, Dennis Wall has gathered the expertise and knowledge in Insurance Coverage and Insurance Bad Faith that have led many attorneys and corporations across the United States to retain him as an Expert Witness in many cases. Dennis Wall's law practice over that time has involved civil litigation and appeals. His nationwide client base includes representation of individuals and businesses in Insurance Coverage disputes of all types.

Dennis Wall is the author of the leading book on Bad Faith, Litigation and Prevention of Insurer Bad Faith (Second Edition Shepard's/McGraw-Hill; 2007 Supplement in process for publication in Spring, 2007 by West Publishing Company). To date in "Litigation and Prevention of Insurer Bad Faith," Dennis Wall analyzes over 3,300 cases, statutes, regulations, and other legal authorities.

In his frequent presentations on Insurance, Mr. Wall makes Florida Department of Insurance Ethics Credit available concerning "Good Faith Claim File Handling". He has also accepted an invitation from the American Bar Association to address its Property Insurance Law Committee at the Ritz Carlton at Amelia Island, Florida in April, 2007.

Dennis Wall writes the critically acclaimed Web Log, "Insurance Claims and Issues", which is located at www.insuranceclaimsissues.typepad.com. Insurance Claims and Issues is noted for fairness and analysis of all kinds of Insurance Questions. Mr. Wall is a Florida Supreme Court Certified Mediator.

Dennis J. Wall
Attorney at Law
A Professional Association
P.O. Box 195220
Winter Springs, FL 32719-5220
Office: (407) 699-1060
Facsimile: (407) 699-1065
EM: DJW@dennisjwall.com
Visit us at our Web Site: dennisjwall.com.