Duty of Insurer to Settle

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This construction is supported by Code of Civil Procedure article 3007, which provides that succession creditors may demand security when an intestate's heirs, or the heirs and the surviving spouse, have been sent into possession of the property of the intestate, which includes only half of the former community over which the survivor has a usufruct. Code of Civil Procedure article 3008 provides that when security pursuant to article 3007 is not given, the court, on an ex parte motion of the creditors, may order an administration of the succession, and the parties sent into possession must surrender to the administrator all of the property of the deceased, which they have received, which in the case of the survivor will only be the deceased's half interest over which he has a usufruct. It is submitted that these articles are not authority for allowing any administration of the survivor's half-interest in the former community; nor do they require the survivor to give security for his share. This construction gives the fullest effect to all of these articles; and it is consistent with Civil Code articles 584 and 585, which indicate that where the usufructuary does not advance the amount necessary to discharge debts of the property subject to his usufruct, then so much of the property as is necessary to pay the debts may be sold.\footnote{See Succession of Bringier, 4 La. Ann. 389 (1849); Succession of Fitzwilliams, 3 La. Ann. 489 (1848).} Likewise, under articles 3007 and 3008, if the usufructuary does not furnish security, the property burdened with the usufruct may be administered with the succession of the deceased.

Since Code of Civil Procedure articles 3001-3008, 3031-3035, and 3061-3062 only involve possession of undivided interests, it is suggested that they should not be construed to defeat the right of the wife or her heirs to sue for a partition. Once the community has been accepted, the right to a partition is absolute.

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\section*{DUTY OF INSURER TO SETTLE}

In a society of increasing complexity, insurance has assumed a role of significant utility. The contract of insurance has become sophisticated and inclusive in its provisions; thus, interpretation of the contract and determination of its legal con-
sequences are of particular interest. By the terms of an automobile liability policy, the insurer, to the exclusion of the insured, usually undertakes to defend the insured in a potential lawsuit and is given control of the preparation and negotiation involved in the litigation. If a complainant prior to the trial offers to compromise his claim against the insured for an amount within the policy limits, the insurer has the option to either accept or reject the offer. If the insurer chooses to reject the offer and a subsequent judgment is rendered against the insured in excess of the policy limits, it must be determined what recourse, if any, the insured has against the insurer.

**Duty to Defend**

By the terms of the usual insurance policy the insurer is obligated to defend a suit against the insured even if it is

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1. Aetna Casualty and Surety Company Family Automobile Policy (Custom-Rite): 
"[The Company promises to] pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages . . . and the Company shall defend any suit . . . even if . . . groundless, false or fraudulent; but the Company may make such investigation and settlement of any claim or suit as it deems expedient.

"The Insured shall cooperate with the Company and, upon the Company's request, assist in making settlement . . . The Insured shall not, except at its own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such . . . as shall be imperative at the time of the accident." Cited in Comment, 43 WASH. L. REV. 799 n.1 (1968).

Another sample of an ordinary insurance policy is found in E. SAWYER, AUTOMOBILE LIABILITY INSURANCE 73-74 (1936): "It is further agreed that as respects insurance afforded by this policy the company shall

"(a) defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company

"(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interest accruing after entry of judgment until the company has paid, tendered or deposited in the court such part of such judgment as does not exceed the limit of the company's liability thereon, and any expense incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of the accident.

"The company agrees to pay the expenses incurred under divisions (a) and (b) of this section in addition to the applicable limit of liability of this policy."

There is an additional problem as to whether the insured may retain an attorney himself and then compromise the claim with the injured party; this specific problem is not dealt with in this Comment.
"groundless, false, or fraudulent." The rule in most American jurisdictions, including Louisiana, is that the duty of the insurer to defend an action against the insured is measured by whether the allegations in the injured party's complaint constitute a claim within the scope of the insurance policy, regardless of


According to Appleman, "an insurer's duty to defend an action against the insured is measured in the first instance by the allegations in the plaintiff's pleadings, and if such pleadings state facts bringing the injury within the coverage of the policy, the insurer must defend, irrespective of the insured's ultimate liability to the plaintiff." 7A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4683 (1962).


A somewhat anomalous situation arises when although the complaint fails to aver facts which are included within the policy coverage, the insurer knows that the actual facts are within the coverage. When such situations have confronted the judiciary, there has been an inconsistent disposal of such cases—either no duty of the insurer if the facts do not appear in the complaint (Brenner v. McCullough, 216 F. Supp. 496 (E.D. Pa. 1963); Maxon v. Security Ins. Co., 214 Cal.App.2d 603, 29 Cal.Rptr. 586 (1963); Loftin v. United States Fire Ins. Co., 106 Ga. App. 257, 127 S.E.2d 53 (1962)); Benoit v. Fuselier, 195 So.2d 679 (La. App. 3d Cir. 1967); Employers' Fire Ins. Co. v. Beals, 240 A.2d 397 (R.I. 1968)); or a duty of the insurer when there are facts not in the complaint giving rise to a potential of liability under the policy. Sears, Roebuck & Co. v. Liberty Mut. Ins. Co., 199 F. Supp. 769 (N.D. Ill. 1961); Gray v. Zurich Ins. Co., 419 P.2d 168, 54 Cal.Rptr. 104 (1966); Sims v. Illinois Nat'l Cas. Co., 43 Ill.App.2d 184, 193 N.E.2d 123 (1963); Employers' Fire Ins. Co. v. Beals, 240 A.2d 397 (R.I. 1968). A complaint being determinative of the insurer's duty to defend was justified under older methods of pleading requiring specific theories to be pleaded (J. GOULD, PRINCIPLES OF PLEADING IN CIVIL ACTIONS (3d ed. 1849); J. MCKELVEY, PRINCIPLES OF COMMON LAW PLEADING (2d ed. 1917)); yet today with the advent of notice pleading there seems to be little justification (Journal Pub. Co. v. General Cas. Co., 210 F.2d 202 (9th Cir. 1954)), but that the insurer has a definite basis on which he may determine his duty to defend. Comment, 65 W. Va. L. Rev. 175 (1963). Increasingly, courts have expressed concern for the diminishing bargaining position of the individual in a highly organized and integrated society and that the contract must be interpreted to satisfy the reasonable expectations of the insured. R. POUND,
insured's ultimate liability to the complainant; for the insurance company’s duty to defend is independent of the obligation to pay. As a corollary to this proposition, the insurer is under no duty to defend where the averments do not constitute a claim within the policy’s coverage, although the true facts of the incident from which the claim arises may be within the scope of the policy’s protection. When an insurer refuses to defend for whatever reason and a subsequent determination of his duty to defend follows, the insurer is exposed to liability for the insured’s expenses in handling his own defense.

In Louisiana, as in a majority of jurisdictions, an insurer’s duty to defend is determined by the allegations of the petition. Therefore, if the allegations of the petition allege facts within an unambiguous exclusionary provision of the policy, the insurer is justified in refusing to defend the suit against the insured.


7. In all cases wherein the insurer has been held liable for a wrongful refusal to defend it has been held liable to the insured for all costs, the amount of the policy, and reasonable attorney’s fees. Phoenix Indem. Co. v. Anderson’s Groves, Inc., 176 F.2d 246 (5th Cir. 1949). See Note, 3 U. Fla. L. Rev. 247 (1950); Comment, 6 U.C.L.A. L. Rev. 124 (1959).


However, if the insurer unjustifiably refuses to defend the insured and so breaches his contract, he is liable to the insured for the amount of the policy, plus reasonable attorney's fees and costs expended by the insured in his defense.

Duty to Settle

Early decisions indicated that the insurer was under no duty to settle, and that there was consequently no liability for a failure to accept a compromise. The rationale of these decisions was based upon the fact that the insurance contract phrased the obligation to settle in discretionary terms; thus, when an insurer rejected a settlement offer, he was only doing what he had an absolute right to do.

In New Orleans & Carrollton R.R. v. Maryland Cas. Co., a 1905 decision, the Louisiana Supreme Court employed this language:

"Parties must be held bound as they choose to bind themselves. Negotiation and settlement of suits were left to the insurer. The insurer has the right to decide upon the advisability of resisting the payment of a claim in suit and the


However, if the facts of the petition are within coverage, the insured may force the insurer to defend by calling it in warranty. Sherman v. O'Sullivan, 164 So. 343 (La. App. 2d Cir. 1935).

10. The insurer's liability for attorney's fees for a refusal to defend are established by jurisprudential decisions. See note 11 infra.


plaintiff appears to have consented not to interfere. It reserved the right absolutely not to be interfered with in the settlement of suits."\textsuperscript{14} (Emphasis added.)

Although there were probably at least two overriding considerations in its decision,\textsuperscript{15} the court clearly recognized no duty on the insurer to settle claims against the insured under the contract. Approximately twenty-five years later in \textit{Davis v. Maryland Cas. Co.},\textsuperscript{16} the insurer refused an offer to compromise within the policy limits both prior to and subsequent to the trial. The court once again found the insurer not liable for the excess judgment rendered against the insured. The court concluded that in the absence of bad faith the insurer's action in exercising its legal right not to settle had left it free from liability for an excess of judgment.\textsuperscript{17} Thus, Louisiana jurisprudence was in accord with the decisions of other jurisdictions in finding no duty on the insurer to settle claims.

This early position presupposed equality of bargaining power and freedom of contract. A literal interpretation of the modern insurance contract imposes no duty upon the insurer to settle. During the infancy of the insurance industry such a position was probably justified; an insured could possibly negotiate to some extent the terms and conditions of his policy. Furthermore, a laissez-faire approach to the conduct of business rejected interference by the judiciary with the freedom to contract. Because, however, of the advent of highly standardized contracts and widespread adoption of compulsory insurance, the problem could no longer be solved by a literal interpretation of the insurance contract. Conflict of interests existed as the insurer wished to reduce its liability within the policy limits and the insured cared only to settle for an amount not to exceed the policy limits. Thus, the problem presented was how the law could effectively readjust the rights of the parties.\textsuperscript{18}

\textsuperscript{14} \textit{Id.} at 159, 38 So. at 91.
\textsuperscript{15} The amount of excess awarded over the policy limits was a minimal $500. \textit{New Orleans & Carrollton R.R. v. Maryland Cas. Co.}, 114 La. 153, 38 So. 89 (1905).
\textsuperscript{16} 16 La. App. 253, 133 So. 769 (2d Cir. 1931).
\textsuperscript{17} \textit{Id.} at 259, 133 So. at 771.
\textsuperscript{18} Naturally, the attorney representing both the insured and the insurer is posed with a difficult problem in considering the conflicting interests of both. He must perform so as to serve the interests of both of his clients. Canon 6 of the Canon of Professional Ethics of the American Bar Association provides: "It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full
Contract or Tort

A majority of jurisdictions now consider a failure to settle as giving rise to a cause of action in tort.19 Under a tort theory, disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." H. DRINKER, LEGAL ETHICS 103 (1953).

Throughout Drinker's book he speaks of conflicting interests in terms of representing clients opposed to one another in the same litigation. However, when an attorney assumes initially to defend both the insurer and insured, their interests do not conflict as they both seek to recover against a tortfeasor or successfully defend against one. But, when a settlement is offered within the policy limits, the insurer's and insured's interests diverge: "When the interests of clients diverge and become antagonistic, their lawyer must be absolutely impartial between them, . . ." Id. at 112. Thus, ethically once the interests of the insurer and insured diverge with a compromise proposal within the policy limits the insurer is under a duty to act impartially considering the interests of the lawyer equally with those of the insurer.

Because of the frequency with which problems of conflicting interests arise in connection with insurance contracts, there has been a justification for the practice of a policy provision requiring the insurer's attorney to defend the insured—the justification being advance consent on the part of the insured obviating an improper conflict of interest. Id. at 114. See also ABA Opinion 232 (1950).

Recently, the Code of Professional Responsibility was enacted and became effective January 1, 1970; it was primarily enacted to revise the Code of Professional Ethics. Under Canon 5—a lawyer should exercise independent professional judgment on behalf of a client—the problem of representing conflicting interests is discussed: "Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent . . . an insured and his insurer. . . . Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case."

In American Employers Ins. Co. v. Goble Aircraft Specialties, 205 Misc. 1066, 1075, 131 N.Y.S.2d 393, 401 (1954), the court summarized the attorney's duty as the following: "When counsel, although paid by the casualty company, undertakes to represent the policyholder and files his notice of appearance, he owes to his client, the assured, an undeviating and single allegiance."

Thus, it seems that the propriety of representing two clients with conflicting interests actually is determined by each case. But, the attorney should be aware of the circumstance and remain impartial in considering the two interests of his clients. The clients should be informed of the implications of the common representation; and if the interests of the clients become conflicting, the lawyer should provide the clients or client (usually, in the insurer-insured situation, the insured) the opportunity to obtain independent counsel. See Canon 5, Code of Professional Responsibility (1969).


Other jurisdictions classify the relationship of the insurer to the insured as that of an independent contractor. Attleboro Mfg. Co. v. Frankfort Marine Ins. Co., 240 F. 573 (1st Cir. 1917); Foremost Dairies v. Camp-
liability flows from the wrongful conduct of the insurer and not from any duty arising from the terms of the contract. The policy of insurance is said to create a fiduciary relationship between the insurer and insured, each owing the other the duty of good faith in exercising the privileges and discharging the duties specified in the policy. Because of the existence of this relationship, the insurer has the duty to consider the interest of its insured equally with its own, and a breach of this duty results in tort liability.

Other courts have held that the contract of insurance contains an implied covenant of good faith and fair dealing which the insurer might breach in failing to settle a claim.

"There is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring..."
the right of the other party to receive the fruits of the contract, in other words, in every contract, there exists an implied covenant of good faith and fair dealing."

A minority of jurisdictions stress that the rights of the parties should be determined by their agreement and that any obligation of the insurer to settle should arise from the contract.

Louisiana courts in disposition of claims against an insurer by an insured for a refusal to settle have rarely discussed the nature of the duty imposed on the insurer by his contract. Those that have discussed it find the duty of the insurer to settle arising in contract. In Roberie v. Southern Farm Bureau Cas. Co., the First Circuit Court of Appeal took a unique approach, finding a contractual duty to settle included in the obligation to defend any suit, a breach of which results by failing to inform the insured of an offer of settlement. Wooten v. Central Mut. Ins. Co. held that although breach of a contractual obligation may give rise to actions both in contract and in tort, the insured had pleaded a breach of contract and

25. 3 S. Williston, Contracts § 670, at 1926 (rev. ed. 1936). However, one writer points out that an implied covenant of good faith does not apply to conduct of one, upon whom, by contract, a right has been conferred. Note, 34 N.Y.U. L. Rev. 783 (1959).


28. 185 So.2d 619 (La. App. 1st Cir. 1966).

29. "... (t)he insurer ... had the right to make such settlement of any claim or suit as it deems expedient, and conversely, the right not to make settlement as it deems expedient. However, the exercise of this right is not plenary. It is qualified to the extent it must be used in manner reasonable, not arbitrary." (Emphasis added.) Id. at 625.

30. 166 So.2d 747 (La. App. 3d Cir. 1964).

the question whether the same conduct constituted a tort was immaterial to disposition of the case.\textsuperscript{32} In holding the insurer liable to the insured for the excess judgment, the court acknowledged the existence of an implied covenant of good faith and fair dealing in the settlement of claims,\textsuperscript{33} a breach of which resulted in the insurer's liability.\textsuperscript{34} Under prevailing Louisiana jurisprudence the effect of the pronouncement that a breach of the duty to settle may give rise to an action in tort or contract allows an insured the option of choosing either theories.\textsuperscript{35} The nature of the duty of the insurer is of some significance in determining (1) the period of prescription applicable to the action,\textsuperscript{36} (2) the amount of damages recoverable,\textsuperscript{37} and (3) the

\begin{footnotesize}
\textsuperscript{33} Id. The decision seems sound and there is some basis for the conclusion under Louisiana law. LA. CIV. CODE art. 1901: "Agreements legally entered into have the effect of laws on those who have formed them. "They can not be revoked, unless by mutual consent of the parties, or for causes acknowledged by law. "They must be performed in good faith." (Emphasis added.)
\textsuperscript{34} Despite the pronouncements of both appellate courts, there is no authoritative decision as to whether the nature of the duty is contractual or delictual as the Supreme Court has never specifically ruled on the question.
\textsuperscript{35} Lafleur v. Brown, 223 La. 976, 67 So.2d 556 (1953); Kramer v. Freeman, 198 La. 244, 3 So.2d 609 (1941); American Heating & Plumbing Co. v. West End Country Club, 171 La. 482, 131 So. 466 (1930).
\textsuperscript{36} Under the Louisiana Civil Code, actions for breach of contract are prescribed by ten years (article 3544); whereas, actions for damages resulting from "offenses or quasi offenses" prescribe in one year (article 3538).
\textsuperscript{37} Damages recoverable for breach of contract are governed by article 1934 of the Louisiana Civil Code and are limited to the amount of loss that the plaintiff has sustained and the profit of which he has been deprived. Furthermore, if the defendant (which in this case would be the insurer) has not been guilty of fraud or bad faith, the amount of damages are limited to those contemplated by the parties at the time of entering the contract. If the defendant was in bad faith, damages recoverable are those which are the immediate and direct consequence of the breach. Bad faith damages would include attorney's fees and the court has never awarded the fees to an insured suing an insurer for breach of its duty to settle. Therefore, it may be surmised that thus far damages have been limited to those "contemplated by the parties" which amount substantially to the excess judgment awarded against the insured above the policy limits.

On the other hand, damages resulting from an offense are not so limited by the Louisiana Civil Code. Article 2315 states that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Thus, a tort basis for recovery against the insurer would allow recovery of consequential damages. An example of the extent to which damages may be recoverable for an action in tort against the insurer is Crisci v. Security Ins. Co., 66 Cal.2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967), wherein the insured was awarded the amount of the excess judgment plus an award for mental suffering amounting to $25,000—due to the change in her financial condition accompanied by a decline in physical health, hysteria and a suicide attempt.
\end{footnotesize}
possibility of assignment by the insured of his action against the insurer. 8

Rather than look to the general law of tort or of contract, Louisiana might utilize its Civil Code provisions of mandate. 30 The insurance contract, whereby the insured agrees to relinquish the control of a possible lawsuit to the insurer, is analogous to a mandate given by one person to another "to transact for him and in his name, one or several affairs." 40 (Emphasis added.) A mandate may be given by an agreement under private signature, 41 and it may be general or special. 42 Specifically, an insurer's duty to settle is in the nature of a special mandate (for the one affair only) with an indefinite power "to do whatever may appear conducive to the interest of the principal." 43 The Code even contemplates the situation in which a power may be conferred to compromise or "to make a transaction in matters of litigation. . . ." 44 on behalf of the principal. Furthermore, article 3003 provides:

"The attorney [mandatary] is responsible, not only for unfaithfulness in his management, but also for his fault and neglect. Nevertheless, the responsibility with respect to faults, is enforced less vigorously against the mandatary acting gratuitously, than against him who receives a reward." 46

Since mandate is a special type of contract governed by its own provisions in the Civil Code, general principles of contract

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38. See note 151 infra. Tort actions are usually considered nonassignable, whereas assignment is usually allowed for a breach of contract.
40. Id. art. 2985: "A mandate, procuration or letter of attorney is an act by which one person gives power to another to transact for him and in his name, one or several affairs."
41. Id. art. 2992: "A power of attorney may be given, either by a public act or by a writing under private signature, even by letter."
42. Id. art. 2994: "It may be either general for all affairs, or special for one affair only."
43. Id. art. 2995: "It may vest an indefinite power to do whatever may appear conducive to the interest of the principal, or it may restrict the power given to the doing of what is specified in the procuration."
44. Id. art. 2997: "Thus, the power must be express and special for the following purposes:
   "..."
   "To compromise or refer a matter to arbitration.
   "To make a transaction in matters of litigation. . . ."
45. Id. art. 3003. At least one other writer recognized the possibility of utilizing this particular article to solve Louisiana's problems with the liability of the insurer for a wrongful refusal to settle. See Note, 39 Tul. L. Rev. 388 (1965).
law would be applicable if not provided for by the articles of mandate. These general provisions of contract law would include prescription, damages "ex contractu," and the assignability of an action for breach of contract.

**Duty of Good Faith**

Most courts agree that an insurer is bound to give some consideration to the insured's interest. There is, however, a split of authority on the question whether the insurer's obligation is to act with "good faith" in considering an offer of compromise, or whether it is required to exercise "due care." In a great majority of the cases considering the question, the courts have found the insurer liable in excess of the policy limits for failing to exercise "good faith" in considering offers to compromise a claim within the policy limits. Some courts in determining liability for failure to exercise "good faith" expressly reject liability based on negligence, while other jurisdictions consider negligence as a factor in determining "bad faith" on the part of the insurer.

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46. La. Civ. Code art. 3544. The prescriptive date for actions for breach of contract is ten years.
47. Damages recoverable for a breach of contract are governed by id. art. 1934: "Where the object of the contract is any thing but the payment of money, the damages due to the creditor for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived. . . ."
48. Generally, a right for breach of contract is assignable. See notes 150, 151 infra.


As to application of a formulated rule of "good faith," some courts have indicated that the insurer is entitled to regard his own interests as paramount; others, that the insured's interest must be given equal consideration; while at least one court has said that in the event of a conflict of interests the insured's interest must be given priority.

To determine what constitutes bad faith of the insurer in rejecting a compromise offer, the facts leading toward the insurer's liability are his:

1. failure to settle where liability of the insured is highly probable and evidence points to a clear case of liability;
2. inadequate investigation of the claim making it impossible to intelligently assess the facts, the circumstances, and their ramifications;
3. failure to settle where evident that a judgment would probably exceed policy limits because of the seriousness of the injuries and amount of damages claimed;
4. express rejection of suggestions of settlement by his attorney and agent before trial.

57. See note 55 supra.

Some weight should be given to the fact that a compromise offer was
5. non-disclosure of relevant facts to the insured, such as settlement offers made, or the possibility if excess liability resulting from a compromise rejection; and

6. sacrifice of a sizable amount of the insured's money to salvage a small amount of his own.

On the other hand, factors pointing to a finding of non-liability include: (1) the presence of distinctly litigable issues as to liability and the amount of damages; (2) reasonable prospects for non-liability due to exclusionary provisions; (3) active concurrence by the insured in rejection of a compromise offer or actions by the insured which induce rejection of an offer of settlement; (4) mere errors in judgment on the part of the insurer.

In accord with the majority of jurisdictions, Louisiana decisions generally state that the insurer owes the insured a duty of "good faith." As early as 1931, Louisiana courts, although using the language of no duty of the insurer to settle, held rejected after the trial for the insurer has been unsuccessful and there is less possibility of a reasonable belief to escape liability. In some cases, rejection of an offer after the trial has been evidence of bad faith. Foundation Reserve Ins. Co. v. Kelly, 388 F.2d 528 (10th Cir. 1968); Fidelity & Guar. Co. v. Evans, 223 Ga. 739, 158 S.E.2d 243 (1967); Bowers v. Camden Fire Ins. Ass'n, 51 N.J. 62, 237 A.2d 857 (1968).

Frequently, an insurer charged with a wrongful rejection of a compromise offer has sought to escape liability on the ground that he had turned the conduct of the defense over to a competent attorney. Such attempts have usually been unsuccessful. Attleboro Mfg. Co. v. Frankfort Marine, Accident & P. G. Ins. Co., 240 F. 573 (1st Cir. 1917).


64. Hall v. Preferred Accident Ins. Co., 204 F.2d 844 (5th Cir. 1953); Buffalo v. United States Fld. & Guar. Co., 81 F.2d 833 (10th Cir. 1936).

that "in the absence of bad faith" there was no liability to the insured.66 Almost all of the Louisiana decisions have required a finding of the breach of an insurer's duty of "good faith."67 Louisiana's definition of "good faith" includes an obligation to give equal consideration to the interests of the insured:68

"One acts in good faith if he acts honestly and according to his best judgment, but one acts in bad faith if he uses his authority to save himself from loss in total disregard of his insured's rights. In its simplest form, bad faith means a breach of faith and a willful failure to respond to plain obligations."69

Despite the regularity with which Louisiana courts have applied the duty of "good faith," later cases indicate a combination of both "good faith" and "due care" tests to determine the duty of an insurer to its insured.70

Factors found in Louisiana jurisprudence indicative of the insurer's breach of his duty of "good faith" include: (1) likelihood of recovery by the injured claimant;71 (2) seriousness of the injuries indicating that a judgment would be rendered in excess of the policy limits;72 (3) non-disclosure of relevant facts to the insured (i.e., settlement offers);73 and (4) sacrifice by insurer of a sizable amount of the insured's money to salvage a small amount of its own.74 In refusing to find the insurers liable, Louisiana courts have predicated their decisions on such

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69. Id. at 155 (trial judge's instructions approved on appeal).
71. See note 70 supra.
72. See note 70 supra.
factors as (1) the existence of distinctly litigable issues as to liability,\textsuperscript{7}\textsuperscript{5} (2) mere errors of judgment on the part of the insurer,\textsuperscript{7}\textsuperscript{8} and (3) fault of the insured in rejection of the compromise.\textsuperscript{7}\textsuperscript{7}

Breach of the insurer's duty of good faith does not necessarily result in a finding of bad faith on the part of the insurer. In Civil Code article 1934,\textsuperscript{7}\textsuperscript{8} bad faith—defined as a designed breach of the contract from some motive of interest or ill will—is distinguished from the mere breach of good faith in not complying with the contract. Although not guilty of affirmative "bad faith," the insurer may still be held liable for a breach of the implied covenant of good faith. Such a breach, while not equivalent to affirmative bad faith, is equivalent to a "negligent breach of the covenant." This confusion has resulted from application of the "good faith" test as distinguished from the "due care" test.

Duty of Due Care

In an effort to require less exacting proof by the insured of a breach of the duty to settle, some jurisdictions base the insurer's duty upon a requirement of "due care," defined as a negligent rejection of a compromise offer resulting in liability.\textsuperscript{7}\textsuperscript{9}


78. LA. CxV. CODE art. 1934: "Where the object of the contract is anything but the payment of money, the damages due to the creditor for its breach are the amount of loss he has sustained, and the profit of which he has been deprived, under the following exceptions and modifications:

"(1) When the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. By bad faith in this and the next rule, is not meant the mere breach of faith in not complying with the contract, but a designed breach of it from some motive of interest or ill will.

"(2) When the inexecution of the contract has proceeded from fraud or bad faith, the debtor shall not only be liable to such damages as were, or might have been foreseen at the time of making the contract, but also to such as are the immediate and direct consequence of the breach of that contract; but even when there is fraud, the damages cannot exceed this."

79. State Farm Mut. Auto. Ins. Co. v. Smoot, 381 F.2d 331 (5th Cir. 1967); Nationwide Mut. Ins. Co. v. Rice, 370 F.2d 370 (5th Cir. 1966); Seguros Tepeyac, S.A. v. Bostrom, 347 F.2d 168 (5th Cir. 1965); Fidelity & Cas. Co. v. Robb, 267 F.2d 473 (5th Cir. 1959); Smith v. Transit Cas. Co., 281 F.
The liability of an insurer for negligence is based upon the duty of the insurer to perform the settlement proceedings with reasonable care and skill. The degree of care required under a “negligence test” of liability has ordinarily been phrased as “that which an ordinary prudent person would exercise in the conduct of his own affairs.” Many of the factors indicating “negligence” on the part of the insurer are identical to those required to prove a breach of an insurer’s duty of good faith: likelihood of recovery by the injured claimant, possibility of recovering damages in excess of the policy limits, failure to investigate the facts, insurer’s rejection of the advice of its own attorney or agent, and rejection of a compromise offer after judgment has been rendered.

In *Roberie v. Southern Farm Bureau Cas. Ins. Co.*, the Louisiana First Circuit, while finding that the insurer had not acted in bad faith, held it liable for negligent failure under the contract to communicate an offer of compromise to the insured. Not finding the insurer in bad faith for failure to compromise the claim within the policy limits, the court held the insurer liable as negligent for lack of proper attention in protecting the rights of the insured and for not discharging a duty imposed by the contract of insurance. The insurer on appeal argued that there was no precedent for finding insurer liability on negligence grounds. Seemingly rejecting liability for negligent action by the insurer, the supreme court held that the

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Footnotes:

81. See note 79 supra.
83. See note 82 supra.
87. 185 So.2d 619 (La. App. 1st Cir. 1967).
88. Id. at 622, 623.
89. Id. at 622.
90. Id. at 628.
insurer was more than negligent, and that by ignoring the insured it had acted in utter disregard of the insured's desire to protect himself from financial loss.\textsuperscript{93} In \textit{Trahan v. Central Mut. Ins. Co.},\textsuperscript{93} however, the Third Circuit found the insurer liable to the insured for failure to act "in the most \textit{reasonable} manner under the circumstances."\textsuperscript{94} (Emphasis added.) Confusion seemingly exists, therefore, in contemporary Louisiana jurisprudence as to whether the duty owed by the insurer is one of "good faith" or "due care."\textsuperscript{95}

\textit{An Immediate Solution}

Obviously the distinction between good faith and negligence is somewhat nebulous and superficial;\textsuperscript{96} moreover, some courts use the two terms interchangeably.\textsuperscript{97} No reason for this difficult distinction between "good faith" and "negligence" need exist under Louisiana law by virtue of the Civil Code articles governing mandate.\textsuperscript{98} Once the insurance contract has been char-

\begin{itemize}
\item \textsuperscript{92} \textit{Id.} at 115, 194 So.2d at 716.
\item \textsuperscript{93} 219 So.2d 187 (La. App. 3d Cir. 1969). \textit{See also Younger v. Lumbermen's Mut. Cas. Co.}, 174 So.2d 672 (La. App. 3d Cir. 1965).
\item \textsuperscript{94} \textit{Trahan v. Central Mut. Ins. Co.}, 219 So. 187, 194 (La. App. 3d Cir. 1969).
\item \textsuperscript{95} \textit{In Younger v. Lumbermen's Mut. Cas. Co.}, 174 So.2d 672, 675 (La. App. 3d Cir. 1965). Judge Tate quotes from Appleman: "The conclusion must be drawn that mere terminology means little. It is rather the factual situation which is significant in light of the duty which exists." \textit{See} 7A \textit{J. APPLEMAN, INSURANCE LAW & PRACTICE} § 4712, at 578 (1962).
\item \textsuperscript{97} "Some courts, in weighing the responsibility of the liability insurer, speak of bad faith; some speak of negligence; others use the two interchangeably. And, in truth, they are to some extent interchangeable. The insurer, as a professional defender of lawsuits, is held to a standard higher than that of an unskilled practitioner. What might be ignorance in his instance may be unforgivable oversight of the insurer; what might be neglect in his instance would well constitute bad faith on the part of the insurer. The question is always: 'Did the insurer exercise that degree of skill, judgment, and consideration for the welfare of the insured which it, as a skilled professional defender of lawsuits having sole charge of the investigation, settlement and trial of the suit may have been expected to utilize?' If it did, there is no problem; it is not liable. If it did not, then a court could easily describe its conduct as being negligent, or as not in accordance with the high duty of good faith which it owed to its insured." 7A \textit{APPLEMAN, INSURANCE LAW & PRACTICE} § 4712 at 562 (1962).
\item \textsuperscript{98} \textit{La. Civ. Code} arts. 2985-3034. One writer suggested that Louisiana's problem with the liability of an insurer for an excess judgment would be solved by the Direct Action Statute (\textit{La. R.S.} 22:655 (1950)), giving the injured party the right to sue on the contract of liability insurance; thus, when the injured party elects to sue the insurer alone, there can be
acterized as a special mandate, the insurer as mandatary becomes bound "to do whatever may appear conducive to the interest of the principal." The sanction for departure from the assumed duty is provided in article 3003: "The attorney is responsible, not only for unfaithfulness in his management, but also for his fault or neglect." (Emphasis added.) Being responsible for his fault, neglect and unfaithfulness to the principal, Louisiana's solution to the distinction between good faith and negligence would be solved since a mandatary may be held fully responsible to his principal for either his bad faith or his negligence.

Therefore, by applying Louisiana's articles on mandate, the duty of the insurer to settle becomes contractual, and he is responsible for a breach of the duty resulting from either his fault or neglect.

no excess judgment to be awarded against the insured. Comment, 8 LOYOLA L. REV. 98 (1958). Practically speaking, however, the problem of the insurer's liability for an excess judgment is still present in Louisiana litigation. 99. LA. CIV. CODE art. 2995. 100. Id. art. 3003. Inherently, in the insurer-insured relationship a conflict of interests exists. Thus, the mandatary of the insured may upon the proposal of a compromise within the policy limits have interests which conflict with those of the principal (insured). By analogizing the mandate to a contract relative to labor, which mandate is (2 PLANIOIL, CIVIL LAW TREATISE no. 2233 (La. St. L. Inst. transl. 1959)), it may be assumed that the mandatary has agreed to perform the services and thus consider first the interests of the principal. Planiol does not discuss in his treatise the effect of conflicting interests of the mandatary and the responsibility of the agent in such a situation.

Louisiana jurisprudence had repeatedly enunciated the principle that a mandatary cannot lawfully serve or acquire any private interest in opposition to the principal's. Neal v. Daniels, 217 La. 679, 47 So.2d 44 (1950); Robinson v. Commercial Cattle Co., 82 So.2d 108 (La. App. 1st Cir. 1955). Despite the fact that the mandatary may not lawfully serve interests in opposition to the principal's, no rule forbids a mandatary with inherently conflicting interests from becoming an agent. However, once he does contract to assume the position of mandatary, he must serve the interests of the principal faithfully. "It is the duty of an agent to fully inform the principal of all facts relating to the subject matter of the agency which come to the knowledge of the agent and which it is material for the principal to know for the protection of his interests." Dauzat v. Simmesport State Bank, 167 So.2d 681, 685 (La. App. 3d Cir. 1964). So, solution to the problem of the insurer's duty to settle offered by the mandate articles would be in accord with those cases holding the insurer's duty to be that of considering the interests of the insured above that of its own.

101. LA. CIV. CODE art. 3556(13): "Fault—There are in law three degrees of faults: the gross, the slight, and the very slight.

"The gross fault is that which proceeds from inexcusable negligence or ignorance; it is considered as nearly equal to fraud.

"The slight fault is that want of care which a prudent man usually takes of his business.

"The very slight fault is that which is excusable, and for which no responsibility is incurred."
A Long-Term Solution—Strict Liability

The contention that the terms of the liability policies giving control of the settlement of claims to the insurer impliedly obligates it to accept any compromise offer within the policy limits at the risk of being held absolutely liable for any excess judgment has met with little success. Recently, however, in Crisci v. Security Ins. Co., the California Supreme Court suggested that in future cases it might adopt a rule of strict liability: "[C]ontract duties are strictly enforced and not subject to a standard of reasonableness." In addition, the court added that a strict liability rule would dispense with the determination of whether the refusal to settle was made in good faith. Since only the insurer might benefit from a refusal to compromise within the policy limits, it should bear the resulting loss.

Increasingly, legal writers advocate the adoption of a theory of strict liability because of its possible advantages. The adoption of strict liability with its degree of certainty and clarity facilitates application and avoids the inherent practical problems of present standards. Under present jurisprudence the various factors considered by the courts in determining if an insurer has breached his duty of good faith or due care serve as the only guideline to an insurer who is faced with the problem of whether to compromise or not. No general articulation of a duty to "act as a reasonable man" or its equivalent can be ascertained from the decisions holding the insurer liable for a breach of its duty of good faith. If litigation is necessary, the problem under strict liability would be predominantly a question of law—the jury's only role would

108. Comment, 9 B.C. Ind. & Com. L. Rev. 188 (1967).
be to determine if there had been a non-collusive offer of settlement.\textsuperscript{109} The only requirement for recovery would be an offer of settlement within the policy limits,\textsuperscript{110} and damages would be limited to the excess since the refusal would not be a tortious act but simply a waiver of the insurance company’s limited liability.\textsuperscript{111}

Practically speaking, a strict liability rule would put pressure on the insurer to settle\textsuperscript{112} and would remove the unavoidable invitation to gamble with the insured’s money.\textsuperscript{113} Reduction of litigation between the insured and insurer would eliminate the necessity of a second jury trial\textsuperscript{114} and would relieve the congested court calendars.\textsuperscript{115} The two main purposes of insurance—protection of the insured from sudden losses and compensation to the injured—would both be furthered by holding an insurance company strictly liable for the excess judgment.\textsuperscript{116} Adoption of the strict liability rule will not be substantially more expensive than the present standards\textsuperscript{117} and the insurance company can distribute the loss from the few to the many.\textsuperscript{118}

\textsuperscript{109} Comment, 47 Neb. L. Rev. 705 (1968). Elimination of the unenlightened jury question has been advocated by legal writers for some time; insurers object strenuously to the jury as they say that the jury favors as insured in a suit for recovery of an excess judgment.

\textsuperscript{110} For without an offer no liability attaches. Comment, 47 Neb. L. Rev. 705 (1968).

\textsuperscript{111} Note, 43 N.Y.U. L. Rev. 199 (1968).

\textsuperscript{112} Id.

\textsuperscript{113} Comment, 43 Wash. L. Rev. 799 (1968). Safeguards could be incorporated to avoid abuse: (1) the offer should not be valid for purpose of attaching strict liability until at least a certain stage of the proceedings, (2) assurance that offers remain open for a sufficient time to allow their evaluation, and (3) plaintiff must be allowed to reach amount of excess liability in the hands of the insurer.

\textsuperscript{114} Id.

\textsuperscript{115} Note, 43 N.Y.U. L. Rev. 199 (1968). Furthermore, the theory of strict liability in application would decrease the time and cost of handling claims. Comment, 47 Neb. L. Rev. 705 (1968).

\textsuperscript{116} Comment, 18 Stan. L. Rev. 475 (1966).

\textsuperscript{117} Comment, 9 B.C. Ind. & Com. L. Rev. 188 (1967).


At present under a standard $50,000 liability insurance policy a single male over twenty-one (one of the highest insurance rates) pays approximately $307 yearly. Under a $100,000 liability policy, the same person pays $328 a year—a difference of $21. In effect, if a strict liability rule were imposed an insured would be purchasing, for example, a $50,000 policy with $100,000 coverage if an excess judgment were awarded after a compromise offer within policy the policy limits. Thus, the insured would be paying a premium equivalent to that under a $100,000 policy, for example, minus an amount attributable to the reduced risk—as the extended coverage would only be necessary if an excess judgment were rendered after a refusal to compromise.
There are, however, arguments against the adoption of a rule of strict liability. Liability policies impose only a limited duty in the matter of settlement making it difficult to read a rule of strict liability into the contractual language. Increased costs attributed to the application of a rule of absolute liability would place an additional burden on individuals who purchase adequate coverage. Furthermore, it is argued that to force an insurer to provide protection to an insured for which no adequate premium has been paid is to place an inequitable burden on insurance companies and those policyholders who buy sufficient insurance. Another argument is that fear of excessive financial responsibility would induce insurers to accept nuisance claims and settlement offers which they currently reject.

No jurisdiction has yet held the insurer strictly liable to the insured for refusal to compromise a claim within the policy limits. Yet, the dictum pronouncement of the California court in the Crisci case indicates that at least one jurisdiction may be willing to apply a rule of absolute liability in future cases. Legal writers have advocated adoption of such a rule for many years. In an area of law previously imposing no duty of the insurer to settle whatsoever, the trend has been to impose more exacting requirements upon the insurer in its consideration of compromise offers within the policy limits.

Amount of Recovery

When an insurer acts negligently or in bad faith in failing to settle within the policy limits and an excess judgment results, it may be held liable for the amount required by the insured to pay the remainder of the judgment. Although earlier jurisprudence refused to allow recovery by the insured until he had satisfied the judgment, later cases allow recovery whether

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119. Other adverse considerations when considering adoption of a theory of strict liability are the fact that the change should be effected by the legislature to give the theory support not found in the contractual language and that the balance of negotiating power between the insurer and insured is upset. Comment, 9 B.C. IND. & COM. L. REV. 188 (1967).

120. Comment, 6 Am. Bus. L.J. 469 (1968). This argument is not tenable in view of the fact that the insured will be required to pay additional premiums. See note 118 supra.


122. See notes 49, 79 supra.

or not the judgment has been paid. To determine the date on which prescription begins to run, many courts have held that the applicable limitations period begins on the date of the judgment against the insured. Thus, jurisdictions not requiring prepayment of the excess judgment as a prerequisite to a suit against the insurer reasoned that since the insured's cause of action arises on entry of the judgment against him, the incurrence—not satisfaction—of the liability is the legal injury sustained by the insured. The result reached by the later cases has a sound practical significance. The insured should not be required to suffer impairment of credit for the benefit of the insurance company. Moreover, an insolvent insured may never be able to press his claim against the insurer, thus depriving the injured claimant of the total amount of damages awarded to him by the court.

Early cases did not allow recovery for consequential damages, punitive damages, or attorney's fees. Later jurisprudence affords the insured the right to recover attorney's fees, and in some cases consequential damages. Where an insured's business was sold on execution because the insurer did not supply a supersedeas bond to protect the insured pending appeal, damages were recovered. Special damages were


125. See note 124 supra.

126. See note 124 supra.


131. Liberty Mut. Ins. Co. v. Davis, 412 F.2d 475 (5th Cir. 1969); American Fid. & Cas. Co. v. Greyhound Corp, 258 F.2d 709 (5th Cir. 1958); American Fire & Cas. Co. v. Davis, 146 So.2d 615 (Fla. App. 1st Dist. 1962).


awarded where the insured could not sell his house because of a judgment lien on it which resulted in its loss and credit destruction.\textsuperscript{134} A substantial award was made for mental suffering accompanied by a decline in physical health, hysteria, and a suicide attempt, due to a change in financial condition.\textsuperscript{135}

In Louisiana, if an insurer is liable for a breach of the duty to settle, the insured may recover the amount of judgment in excess of the policy limits, plus interest from the date of judicial demand and all costs.\textsuperscript{136} Furthermore, Louisiana does not require payment by the insured of the excess judgment as a prerequisite to a suit again the insurer.\textsuperscript{137} However, Louisiana courts have never allowed recovery of attorney's fees in the absence of bad faith.\textsuperscript{138}

If as suggested Louisiana bases the insurer's duty on the mandatory relationship,\textsuperscript{139} recovery of damages would be governed by Civil Code article 1934\textsuperscript{140} because the articles in the chapter on mandate provide no basis for determining the amount of damages allowable. In the absence of bad faith, the court is to award those damages contemplated by the parties at the time of the making of the contract,\textsuperscript{141} which would be the amount recoverable against the insured in excess of the policy limits. If the insurer is guilty of bad faith,\textsuperscript{142} it will be liable

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\textsuperscript{134} State Farm Mut. Auto. Ins. Co. v. Smoot, 381 F.2d 331 (5th Cir. 1967).
\textsuperscript{139} LA. CIV. CODE art. 3003.
\textsuperscript{140} See note 80 supra.
\textsuperscript{141} LA. CIV. CODE art. 1934(1): "When the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract . . . ."
\textsuperscript{142} Id.: "[B]y bad faith is not meant the mere breach of faith in not complying with the contract but a designed breach of it from some motive of interest or ill will."
to the insured for consequential damages resulting from the breach\textsuperscript{143} in addition to the amount in excess of the policy.\textsuperscript{144}

If the strict liability theory were adopted, damages would be limited to the amount of the excess recovered above the policy limits. There would be no administrative costs. Since the refusal to settle would be treated simply as a waiver of the insurance company's limited liability,\textsuperscript{145} there would be no recovery for consequential damages.

Assignment and Seizure of Insured's Right of Action Against Insurer

The vast majority of jurisdictions do not allow the injured party a direct cause of action against the insurer for a wrongful refusal to settle\textsuperscript{146} unless there is a provision in the policy allowing a claimant the right to recover directly from the insurer on the same cause of action that the insured would have been entitled to.\textsuperscript{147} Some jurisdictions allow the insured to validly assign his claim to the injured party on the basis of assignability of a contractual cause of action;\textsuperscript{148} other jurisd-

\textsuperscript{143} Id. art. 1934(2): "When the inexecution of the contract has proceeded from fraud or bad faith, the debtor shall not only be liable to such damages as were, or might have been foreseen at the time of making the contract, but also to such as are the immediate and direct consequence of the breach of that contract. . . ."

144. Louisiana courts have been applying article 1934 to determine recovery due to the fact that the duty has been determined one of an implied covenant of "good faith," and thus contractual.

145. See note 114 supra.


147. Automobile Mut. Indem. Co. v. Shaw, 134 Fla. 815, 821, 184 So. 852, 855 (1938): "If . . . an execution on a judgment against Assured is returned unsatisfied, the judgment creditor shall have a right of action against the Company to recover the amount of said judgment to the same extent that Assured would have had if he had paid the judgment." See Comment, 17 U. MIAMI L. REV. 557 (1963), 16 OKLA. L. REV. 110 (1963), 38 TEX. L. REV. 233 (1959).

dictions refuse to allow assignment of an action considered ex delicto. In most jurisdictions allowing assignment of an insured's right of action against an insurer, the assignment usually occurs after judgment has been obtained. However, at least one jurisdiction permits assignment of the insured's claim before judgment is rendered, the assignment operating as an equitable assignment or a contract to assign.

The main policy reason against assignability is the encouragement of fraud and collusion between the insured and the injured claimant. Such an argument is probably unwarranted in that such collusion will not be necessarily increased by assignment. If an insured's liability terminated, collusions would be perhaps even more remote, since the insured no longer has a pecuniary interest in the outcome of the litigation. Primarily, assignment would streamline the needlessly complicated and unjust procedures so that the injured could sue the insurer directly. Assignment also gives the insured a remedy without fearing being forced into bankruptcy before he can collect the excess.

In accord with the majority of jurisdictions, Louisiana has not yet allowed an injured party to sue the insurer directly for a wrongful refusal to settle. Although some jurisdictions allow injured parties to directly sue the insurer as a third party beneficiary of the contract of insurance, Louisiana in interpretation of its "direct action" statute making all injured persons


149. Dillingham v. Tri-State Ins. Co., 214 Tenn. 592, 381 S.W.2d 914 (1964); Carne v. Maryland Cas. Co., 208 Tenn. 403, 346 S.W.2d 259 (1961). "It is only in comparatively recent times that claims of this latter kind [claims to unliquidated damages] have been regarded as assignable, and then only with respect to claims for injuries to property rather than to person. A claim to unliquidated damages for tortious injury to person or reputation is still nonassignable, although the distinguishing line may sometimes be hard to recognize. . ." A. Corbin, Contracts § 857 (1952).


153. See note 146 supra.

154. La. R.S. 22:655 (1962): "It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs to whom the insured is liable. . ."
beneficiaries of the policy has held that the state does not make the liability insurance contract one containing a stipulation pour autrui.155 Such a decision seems sound as the injured party is only a third party beneficiary156 by statute as regards the insurance proceeds and not a beneficiary of the contractual duty owed the insured by the insurer to settle claims.157

In Louisiana assignability in this area has not been thoroughly examined by the courts. In Wooten v. Central Mut. Ins. Co.,158 the court affirmed the right of either the trustee of the insured or the trustee's assignee to enforce an insured's cause of action. However, in Younger v. Lumbermen's Mutual Insurance Company,159 a direct assignee of the insured pressed the claim, but the court passed on the merits of the action without considering the assignability of the insured's cause of action. Louisiana jurisprudence indicates that either a trustee of the insured or the trustee's assignee may enforce the insured's claim; yet, the right of an insured to validly assign this claim directly has not been definitely determined.

In view of the fact that the Civil Code recognizes assignment of litigious rights160 and that there is no prohibition against assignment of a contractual right of action, validity of a direct assignment can logically be upheld under Louisiana law. By adoption of the mandate articles as a basis for the relationship created between the insurer and insured, there would be finality in determining the nature of the action as one in contract and, therefore, assignable.

Generally speaking, under Louisiana law the property of the debtor is the common pledge of his creditors.161 In context the property of a debtor, the insured, may be seized by his creditor, the injured party, after a judgment has been rendered for

156. LA. CIV. CODE art. 1890: "A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation, and if such third person consents to avail himself of the advantage stipulated in his favor, the contract can not be revoked."
157. Not as regards the duty to settle is he a third party beneficiary because he is not adversely affected by a refusal to compromise.
159. 174 So.2d 672 (La. App. 3d Cir. 1965) (defendant's exception of no cause of action sustained because actions of the insurer were not arbitrary or capricious.)
160. See LA. CIV. CODE arts. 2652, 2653, 3556(18).
161. Id. arts. 1968, 3183.
the injured party. Upon entry of judgment against the insured in excess of the policy limits, a cause of action arises in favor of the insured against the insurer. It is necessary to determine whether the injured party as creditor of the insurer can seize his cause of action against the insurer. Is the cause of action property of the debtor?

If one proceeds from the general premise that all non-exempt property of the debtor may be seized, then the incorporeal right of action against the insurer by the insured debtor, may be seized by the injured party creditor, as the right of action is not exempt from seizure. Furthermore, the courts have stated that statutes exempting property from seizure are in derogation of the common right and will be strictly interpreted so as not to extend to objects not expressly designated in law. Under French law contractual causes of action were considered property and capable of being seized: "Contractual causes of action for the recovery of money ... are generally regarded in France as patrimonial assets susceptible of seizure by creditors." In Louisiana, some decisions indicate that claims deriving from contractual obligations cannot be seized by creditors prior to institution of suit by the debtor. However, in *In re Bonvillain* a life insurance policy of the debtor was seized by a creditor; and since the policy is essentially a contract right, it seems that the court permitted what in other cases it has forbidden. Logically, reasoning from the general premise that the property of the debtor is subject to seizure by his creditor unless the property is exempt, contractual causes of action should be subject to seizure by a creditor.

162. See note 127 supra.
164. McLemore v. Abell, 12 La. App. 147, 125 So. 601 (2d Cir. 1929). A lease (incorporeal) was subject to seizure and sale by lessee's judgment creditors.
167. 1 A. YIANNOPOULOS, LOUISIANA PRACTICE 78 (1966).
If the lawsuit against the insurer has been filed by the insured, the injured party as creditor has a right to seize the interest and right of the litigant who is his debtor. However, the seizing creditor may not interfere with the progress of the suit or acquire control over the litigation. Then if judgment be awarded in favor of the debtor, the litigant must pay the seizing creditor the amount of his claim against the debtor covered by the judgment. More important, if the debtor has neglected to prosecute his cause of action after his rights have been seized in a pending lawsuit, after failure of the debtor to show cause, he may sell the rights and interests of the debtor. The only limitation placed on the right of the creditor to seize the rights of a debtor in a pending lawsuit is that the creditor may not seize those actions personal to the debtor.

Conclusion

In light of an increasing concern as to the inequality of bargaining power between the insured and insurer, the courts have progressed from decisions holding that the insurer has no duty to the insured to settle, to those imposing either a limited duty of good faith or due care upon the insurer. Thus, the trend has been to demand from the insurer more consideration with regard to protection of the insured’s interest in rejecting a compromise offer. If there is adoption by the jurisdictions of a strict liability rule—which is still speculative—an insurer who was once under no duty to the insured regarding settlement will be absolutely liable if he refuses to settle resulting in a judgment in excess of the policy limits. But, presently courts are struggling with application of either a “good faith” or “due care” standard with respect to the insurer’s actions. What constitutes “good faith” or “due care” may only be surmised from the factors enumerated in the decisions.

By analogizing the relationship of the insurer and insured to a relationship of mandatory and principal, Louisiana could immediately solve many of the perplexing problems—such as

171. See note 170 supra.
173. Id.
the nature of the duty, amount of damages recoverable, assign-
ability and seizure of the insured's cause of action. Ideally, law
should be administered in a predictable manner providing cer-
tainty and stability. Louisiana courts need not become en-
meshed in meaningless distinctions and nebulous standards when
the Civil Code clearly provides a legal remedy for the insured
who is adversely affected by an insurer's refusal to compromise
a claim.

Katherine L. Shaw

HEARSAY, THE CONFRONTATION GUARANTEE
AND RELATED PROBLEMS

The hearsay rule excludes out of court assertions offered
to prove the matter asserted1 because they are not made under
oath and their veracity cannot be tested by cross examination.2
Of course, there are many exceptions to the rule based on the
circumstantial guarantees of trustworthiness and necessity.3

The sixth amendment provides in part: "In all criminal
prosecutions the accused shall enjoy the right . . . to confront
the witnesses against him. . . ."4 Presumably, the ratification
of the sixth amendment in 1789 did not crystallize into immu-
table form the rules concerning admission of hearsay in criminal

1. The definition used is essentially that found in Comment, Hear-
say and Non-Hearsay as Reflected in Louisiana Criminal Cases, 14 La. L. Rev. 611 (1954). Wigmore does not attempt to define hearsay in his treatise on
evidence. J. Wigmore, Evidence §§ 1360-1366 (3d ed. 1940) [hereinafter cited Wigmore]. McCormick offers a slightly different definition from the
one used in this Comment. C. McCormick, Evidence § 225 (1954) [hereinafter cited McCormick], but warns that not too much should be expected from
any definition. The word "assertion" is used instead of statement to em-
phasize that hearsay may be non verbal. McCormick § 229.

2. As McCormick points out, the absence of an oath and lack of
opportunity to cross examine are frequently mentioned together as justi-
fications for the hearsay rule. McCormick § 224 n.5. A third reason, perhaps
implicit in the first two, frequently given is that the trier of fact has no
chance to observe the demeanor of the declarant if hearsay evidence is
used. Generally it is agreed that the absence of an opportunity to cross
examine the declarant is the principle justification for the rule against
hearsay. McCormick § 224; Wigmore § 1365; Morgan, Hearsay Dangers
and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177 (1948).

For an examination of spurious reasons sometimes advanced to justify
the rule, see Wigmore § 1363.


4. U.S. Const. amend. VI. With the exception of Idaho every state con-
stitution has a similar provision. Wigmore § 1397 n.1.