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The courts of the minority, and most recently the court in *Beaudette*, have recognized the necessity to break from tradition. They have effectively rebutted the criteria developed by the majority courts. This step is clearly a positive one, for the law can only function when it affords a means to hear the complaints of all of its subjects. Thus, the fiction of marital unity should no longer be used to prevent the furtherance of a goal of society: *the promotion of harmony through justice*.

*Daniel E. Wanat*

**INSURANCE—EXCESS EXPOSURE—INSURER’S DUTY TO ADVISE INSURED OF HIS RIGHT TO CONTRIBUTE**

John F. Kiely was fatally injured when struck by a truck owned by Nathan and Manuel Brockstein and driven by Irving Bloom, an employee of the Brocksteins. Kiely’s estate sued the Brocksteins and Bloom on two causes of action, one for wrongful death, asking $50,000 for the widow, and the other claiming $500,000 for decedent’s pain and suffering. The Brocksteins were insured by Nationwide Mutual Insurance Company for bodily injury liability arising out of the use of the truck. The maximum coverage for any one person was $50,000. Settlement negotiations collapsed, and a judgment was finally entered for $106,413.33. Nationwide paid $50,000, plus costs and interest of $8,847.81. The balance of the judgment was settled by the payment of $25,000 by the Brocksteins.

The Brocksteins then brought an action against Nationwide on the theory that the insurer did not properly represent the interests of the insured in its efforts to settle the case. The United States District Court for the Eastern District of New York entered judgment for Nationwide. On appeal, the United States Court of Appeals reversed and remanded, holding that the insurer was guilty of bad faith because the insurer did not advise the insured during the settlement negotiations that he could contribute toward a settlement within the policy limits. *Brockstein v. Nationwide Mutual Insurance Company*, 417 F.2d 703 (2d Cir. 1969) (hereinafter cited as *Brockstein II*).

The significance of this decision is that in situations where a claim potentially exceeds policy limits, and a settlement demand is made within 1. *Brockstein v. Nationwide Mut. Ins. Co.*, 266 F. Supp. 223 (E.D. N.Y. 1967) [hereinafter cited as *Brockstein I*]. Note that the spelling of this case title differs from the spelling of the title in the appellate court, *Brockstein v. Nationwide Mut. Ins. Co.*, 417 F.2d 703 (2d Cir. 1969) [hereinafter cited as *Brockstein III*]; the “Brockstein” spelling will be used in this note.
such limits, an insurer, if he is not willing to meet the demand, is required to advise the insured that he may contribute toward a settlement of the claim if he is so disposed. Implicit in this requirement is a further duty of informing the insured of the possibilities of the risk he runs if he chooses not to contribute. The purpose of this note is to analyze and critically evaluate this extension in the law of excess exposure.

The theory that liability insurers may be liable for amounts exceeding the limits of their indemnity insurance policies where a settlement offer within policy limits was rejected, has developed dramatically over the past several years. At first, the courts adopted the rule that the insurer had no duty to consider the interests of the insured in determining whether or not to settle a claim. One of the earlier cases to discuss the issue held that:

The rights of the parties are to be determined by the agreement into which they entered. By the provisions of the policy the insurance company was obliged to defend at its own cost any action against the insured, and the entire management of the defense was expressly intrusted to it, and the insured was forbidden to settle any claim, or to interfere in any negotiations for settlement . . . . The insurer was under no obligation to pay in advance of trial, and the decision whether to settle or to try was committed to it. The plain words of the policy have no other meaning.  

Gradually, over the years, the interests of the insured during the settlement stages were granted protection and the rule evolved that the insurer has a duty to consider settlement possibilities. The rationale of that rule is as follows:

In every contract, including policies of insurance, there is an implied covenant of good faith and fair dealing that neither party will do anything that will injure the right of the other to receive the benefits of the agreement; that it is common knowledge that one of the usual methods by which an insured receives protection under a liability policy is by settlement of claims without litigation; that the implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose the duty; that in determining whether to settle the insurer must give the interest of the insured at least as much consideration as it gives to its own interests; and that “when there is a great risk of recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured’s interest requires the insurer to settle the claim.”

The insurance contract issued to the Brocksteins obligated Nationwide: (i) to pay all sums (up to the policy limit) which plaintiff assureds were legally obligated to pay as damages for bodily injury and death, and (ii) to defend any suit for such damages “even if the suit is groundless . . . but the Company may

make such investigation, negotiation and settlement of any claim or suit as it deems expedient.” The contract required that the insured shall cooperate with the company “and shall assist in effecting settlements . . . and in the conduct of suits.” The contract continues: “The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense” except for emergency medical aid.4

This is a typical defense and settlement provision,5 wherein the insurance carrier takes complete control of both the defense of any action against the insured and any settlement decisions within policy limits. The purpose of this provision is to permit the insurance carrier to retain its own legal counsel on behalf of the insured and thus assure itself that the defense will be in experienced and competent hands. This, hopefully, will reduce the ultimate liability of the insurer.6 Thus, the insured gives up his right to defend an action against him to the extent of the policy limits; the duty to defend is then imposed upon the insurer.7

The policy provisions regarding settlement are permissive in form but most courts have long held that there is some duty to settle.8 This duty arises out of the defense and settlement provisions of the insurance policy and the resulting relationship of the insurer and the insured.9 Where

7. This duty, along with the insured’s surrender of control, arises out of the express provisions of the policy.
8. As early as 1914, in the case of Brassil v. Maryland Cas. Co., 210 N.Y. 235, 242, 104 N.E. 622, 624 (1914), the New York Court of Appeals found an insurer liable for failure to settle a claim against its insured or, in the alternative, to pay for the prosecution of a successful appeal of a verdict entered against him on the grounds that if “it was incumbent on the [insured] to ‘deal fairly and in good faith . . . and that he should not voluntarily or knowingly do any acts which would impose or tend to impose on him or on [the insurer] a loss’ . . . it was not less the correlative obligation of the [insurer] to ‘deal fairly and in good faith’ with him.” See also Keeton, Ancillary Rights of the Insured Against His Liability Insurer, 28 Ins. Counsel J. 395 (1961).
9. The courts are divided as to whether this duty arises out of the contract directly or whether it sounds in tort. The Brassil case, supra note 8, finds the obligation to arise from implied terms of the contract. See, e.g., Hilker v. Western Auto. Ins. Co., 204 Wis. 1, 231 N.W. 257 (1930), 204 Wis. 12, 235 N.W. 413 (1931).

Generally, however, this duty is held to sound in tort rather than contract. See supra note 5, at 1138 n.5. The duty to settle arises out of the relationship created by the contract between the insurer and the insured, but the breach of that duty is considered a tort. See, e.g., Olympia Fields Country Club v. Bankers Indem. Ins. Co., 325 Ill. App. 649, 662, 60 N.E.2d 896, 901 (1945).
the claim against the insured is within the policy limits, the insured has no interest in the decision of the insurer as to whether or not it will settle the claim.\(^{10}\) However, a conflict of interests arises between the insurer and the insured where the claim against the insured exceeds the policy limits.\(^{11}\) It is in these situations where the insurer, in settlement negotiations has the power to affect the insured's as well as its own interests, that courts have imposed upon the insurer a duty to exercise this power with care.\(^{12}\)

A sharp division of authority exists among the courts in determining the standard against which the duty to settle will be judged. A majority of jurisdictions presently work within the "bad faith rule."\(^{13}\) The application


11. Cernocky v. Indemnity Ins. Co., 69 Ill. App. 2d 196, 206, 216 N.E.2d 198, 204 (1966). Were the insurer to settle the claim against the insured within the policy limits, the insured would escape all personal risk of loss. However, if the claim is not settled and is allowed to go to judgment, the insured stands the risk of personal loss should the judgment exceed the applicable coverage. It is therefore in the insured's interests that a settlement within limits be reached. Unless it is certain that a judgment would approach or exceed policy limits, it is in the insurer's interests to "take a chance" on a possible favorable verdict. See, supra note 5, at 1142.


and scope of the rule have greatly varied. In Johnson v. Hardware Mutual Casualty Co., the Supreme Court of Vermont defined “bad faith” as “the intentional disregard of the financial interests of the [insured] in the hope of escaping the full responsibility imposed upon [the insurer] by its policy . . . . Bad faith [is a] state of mind, indicated by acts and circumstances.”

However, in Hilker v. Western Automobile Insurance Co. the Wisconsin Supreme Court held that a decision whether or not to settle “must be honest and intelligent if it be a good faith conclusion.” This is much more stringent than the requirement that the insurer must not intentionally disregard the insured's interests. The Hilker case then blends considerations which normally apply to negligence situations. The court stated:

In order that [the conclusion] be honest and intelligent it must be based upon a knowledge of the facts and circumstances upon which liability is predicated and upon a knowledge of the nature and extent of the injuries so far as they reasonably can be ascertained. This requires the insurance company to make a diligent effort to ascertain the facts upon which only an intelligent and good faith judgment may be predicated.

A small minority of jurisdictions apply the negligence rule to determine the liability of insurers for excess verdicts. These states consider the negligence test a more rigid one than bad faith. They define bad faith in a strict fashion, holding it to constitute fraud or deceit. The negligence rule is defined as: “that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business.”


15. Supra note 9.
16. Supra note 9, at 15, 235 N.W. at 414.
17. Supra note 9, at 15, 235 N.W. at 414 (emphasis added).
19. Id.
gence standard and a bad faith standard. For all practical purposes, however, it makes little difference in the final outcome which standard is applied; since liability is generally founded upon the same facts and circumstances, what is considered negligence in a negligence standard jurisdiction is simply considered bad faith by a court applying the bad faith standard.

A growing minority of jurisdictions in grappling with the elusive distinction between the negligence rule and the bad faith rule have adopted a dual standard and allow recovery upon either the negligence or bad faith theories. Those states which follow this dual standard generally require the insurer to use ordinary care in acquiring sufficient facts upon which to make the good faith determination of whether to settle or defend, as well as in the defense of the suit itself. However, they still apply the "good faith" standard in evaluating the insurer's decision to settle or defend.

The scope of the insurer's duty toward its insured in the settlement stage of the defense varies from holdings that an insurer is strictly liable for judgments in excess of policy limits where settlement could have been


22. Keeton, supra note 5, at 1141.


effected within those limits but was not,25 to those finding the carrier liable only for such excess judgment where it can be shown that the insurer was guilty of fraud or deceit.26 Between these two extremes, where most jurisdictions lie,27 the definition of the duty to settle arises out of the conflicting interests of the insured and the insurer.28 Thus, the question becomes one of whose interests are paramount or whose interests are to be sacrificed.29

Some courts have held that in determining whether or not to settle the insurer must give the interests of the insured some consideration, but the courts have not indicated what relative weight the two conflicting interests should receive.30 Another line of cases permits the insurer to give primary consideration to its own interests.31 The cases following this standard32

25. No decisions have, as yet, expressly held in favor of the absolute liability doctrine, but it did receive strong support as dicta in Crisci v. Security Ins. Co., supra note 3, at 431, 426 P.2d at 173, where the court said: "[T]here is more than a small amount of elementary justice in a rule that would require that, in this situation where the insurer's and insured's interests necessarily conflict, the insurer, which may reap the benefits of its determination not to settle, should also suffer the detriments of its decision."

While such a solution to the conflict of interests problem would be much simpler to administer than the more subjective standards discussed infra, there are varied arguments against its adoption. The subject has created much commentary. See, e.g., Seiver, Beyond the "Bad Faith" Rule: New Excess Liability for Insurance Carriers and Their Attorneys, PROCEEDINGS, A.B.A. SECTION OF INSURANCE, NEGLIGENCE, AND COMPENSATION LAW 391 (1969); Keeton, supra note 5; Levit, supra note 21; Snow, Excess Liability—Crisci and Lysick, 36 INS. COUNSEL J. 51 (1969) Comment, Excess Liability Suits—The Mounting Need for Strict Liability, 13 ST. LOUIS U.L.J. 292 (1968); Comment, California—In Search of a Solution for Excess Liability Problems, 8 SANTA CLARA LAW. 97 (1968); Comment, An Insurance Company's Duty to Settle: Qualified or Absolute?, 41 So. CAL. L. REV. 120 (1968).


27. No jurisdictions have expressly adopted strict liability. See generally supra note 25. Texas has come quite close to that standard with its so-called "Stowers Doctrine," whereby the insurer is liable for damages "if the ordinarily prudent person, in the exercise of ordinary care, as viewed from the standpoint of the assured, would have settled the case, and failed or refused to do so." G.A. Stowers Furniture Co. v. American Indem. Co., supra note 18, at 547 (emphasis added). The fraud or deceit standard has been abandoned by all jurisdictions. See notes 13, 18 and 23 supra.

28. Supra note 11.

29. Supra note 5, at 1142.


32. Roos, supra note 21, n.2, speaks of this as the "archaic bad faith test."
represent but a slight advance over the old, strict contract principle cases such as *C. Schmidt & Sons Brewing Co. v. Travelers' Insurance Co.*\(^3\)

At the other extreme are the cases which hold that the insurer must give paramount consideration to the insured's interests to the detriment of its own interests.\(^3\) Application of this standard is, practically speaking, an application of strict liability since it is only in rare cases (such as where a settlement would injure the insured's business or professional interests) that it is not in the best interests of the insured to have a case settled within his policy limits and thus avoid any risk of excess liability.\(^3\) The standard accepted by most courts is that of "equal consideration."\(^3\) Professor Keeton has stated the rule in the following form:

With respect to the decision whether to settle or try the case, the insurance company must in good faith view the situation as it would if there were no policy limit applicable to the claim.\(^3\)

This standard has been well accepted by the courts\(^3\) and is the standard applied by the *Brockstein II* court.\(^3\)

The general rule, as stated, is relatively simple and would seem to supply a fair and equitable solution to the conflict of interests problem inherent in the relationship of the insurer and the insured in cases where the

\(^{33}\) Supra note 2.


\(^{35}\) See *supra* note 27.


\(^{37}\) *Supra* note 5, at 1148.

\(^{38}\) "[T]he fairest method of balancing the interests is for the insurer to treat the claim as if it were alone liable for the entire amount." Bell v. Commercial Ins. Co., 280 F.2d 514, 515 (3d Cir. 1960).


\(^{39}\) Brockstein II, *supra* note 1, at 705.
claim against the insured exceeds the limits of the applicable policy. However, there is a great divergence among the courts as to what conduct is prescribed or proscribed by the rule.

Asking what constitutes negligence, bad faith, or lack of good faith is somewhat like asking what constitutes sin. From Mount Sinai, we have basic prohibitions against sin, but these have been implemented and changed by reason of man-made laws in various jurisdictions.  

The courts have considered various factors in determining whether an insurer is liable for judgments in excess of policy limits. Some of the more important ones are: (1) the strength of the injured claimant’s case on the issues of liability and damages;  


sel.\(^\text{48}\) (9) an election by the insurer to defend on damages but not on liability (or vice versa) without the consent of the insured;\(^\text{49}\) and (10) various other specific acts or omissions that have been found to be indicative of bad faith.\(^\text{50}\)

In the Kiely-Brockstein settlement negotiations, the plaintiff's lawyer had told the insurer's lawyer that if the policy limits were $50,000 he would settle for $45,000.\(^\text{51}\) During the trial, the presiding judge told the attorney that the case could be settled for $40,000.\(^\text{52}\) The highest offer ever made by Nationwide was $35,000,\(^\text{53}\) though it is not clear whether or not plaintiff was prepared at that time to accept $40,000.\(^\text{54}\) Prior to the trial, when the demand was still $45,000, the highest offer made was $32,500.\(^\text{55}\) The liability question was heavily weighted against the insureds\(^\text{56}\) and the damages, though not specified in the opinions, included a wrongful death claim where the decedent had a life expectancy of 16.4 years and an income of $7,000 per year.\(^\text{57}\) In addition, there were eight days of hospitalization, medical expenses, funeral expenses and pain and suffering prior to the victim's death.\(^\text{58}\)

It would certainly seem that Nationwide could have been held liable under either of two traditional theories: (1) failure of Nationwide to consider the Brocksteins' interests when it made its decision not to meet the settlement demand, or (2) failure of Nationwide to keep the Brocksteins informed in the matter of settlement negotiations and to communicate offers received to the Brocksteins. As to the first basis of liability,


The American Bar Association, in cooperation with various insurance carriers, formulated a statement of principles to the effect that insurers will inform insured's of the progress of suits against them and of the probable results. It further indicated that the insurer will invite the insured to retain his own counsel if a conflict of interests arises. The carriers state that this procedure should be followed in any case where the amount involved will probably exceed policy limits, where the defense was undertaken under a reservation of rights, or where a counterclaim appears advantageous to the insured. Appleman, \textit{Circumstances Creating Excess Liability}, 1960 \textit{Ins. L.J.} 533, 591.


\(^{50}\) \textit{See generally} \textit{supra} note 21.

\(^{51}\) Brockstein II, \textit{supra} note 1, at 706.

\(^{52}\) Brockstein II, \textit{supra} note 1, at 706.

\(^{53}\) Brockstein II, \textit{supra} note 1, at 706.

\(^{54}\) Brockstein II, \textit{supra} note 1, at 706.

\(^{55}\) Brockstein II, \textit{supra} note 1, at 706.

\(^{56}\) \textit{See text infra}.

\(^{57}\) Brockstein II, \textit{supra} note 1, at 706.

\(^{58}\) Brockstein II, \textit{supra} note 1, at 707.
New York applies a good faith standard requiring that the insurer give consideration to the insured's interests when it makes its decision whether to accept or reject a settlement demand within its policy limits.\textsuperscript{59}

For example, in \textit{Harris v. Standard Accident and Insurance Co.},\textsuperscript{60} the court, applying New York law, stated that:

\begin{quote}
[B]ad faith . . . is most readily inferable when the severity of the plaintiff's injuries is such that any verdict against the insured is likely to be greatly in excess of the policy limits, and further when the facts in the case indicate that a defendant's verdict on the issue of liability is doubtful . . . When these two factors coincide and the company still refuses to settle, the inference of bad faith is strong.\textsuperscript{61}
\end{quote}

The facts on the issue of liability in \textit{Brockstein} indicate that "Bloom, the driver of the truck, had no visibility 'in the center rear.'"\textsuperscript{62} Although Bloom stated that he had sounded his horn, the first time he mentioned this fact was in his deposition. He had never previously mentioned it either to the investigating police officer or to the Motor Vehicle Board.\textsuperscript{63} The issue of liability would on these facts weigh heavily in the plaintiff's favor. As to the injuries, Circuit Judge Feinberg in his decision in \textit{Brockstein II} stated that from the injuries "it was obvious—in the words of \textit{Harris} and \textit{Brown}—that a verdict 'greatly in excess of policy limits' was 'likely,' if liability is assumed."\textsuperscript{64}

As to the second theory upon which Nationwide's liability could have been grounded—the failure of Nationwide to keep the Brocksteins informed in the matter of settlement negotiations and to communicate the offers it received to the Brocksteins—there is little New York law on the subject. The only New York Court of Appeals decision touching on the issue is \textit{Streat Coal Co. v. Frankfort General Insurance Co.},\textsuperscript{65} which affirmed a dismissal of a complaint alleging the failure of the insurer to convey an offer of settlement to the insured. The case indicates that such failure does not constitute bad faith as a matter of law. The \textit{Streat Coal Co.} decision was criticized by the United States Court of

\begin{footnotes}
\item \textsuperscript{60} \textit{Supra} note 59.
\item \textsuperscript{61} Harris v. Standard Accident and Ins. Co., \textit{supra} note 59, at 540.
\item \textsuperscript{62} Brockstein II, \textit{supra} note 1, at 707.
\item \textsuperscript{63} Brockstein II, \textit{supra} note 1, at 707.
\item \textsuperscript{64} Brockstein II, \textit{supra} note 1, at 707.
\item \textsuperscript{65} 237 N.Y. 60, 142 N.E. 352 (1923).
\end{footnotes}
Appeals in *Brown v. United States Fidelity and Guaranty Co.*,66 which held that allegations of such failure, along with other enumerated acts or omissions, presented a prima facie case on the issue of bad faith.

In *Brockstein II*, Circuit Judge Feinberg stated that such failure “could itself contribute to an inference of bad faith.”67 While criticizing the lower court’s “unduly restrictive [view] in assessing the inferences open to [it] under New York law,”68 Judge Feinberg declined “to disturb Judge Dooling’s conclusion that Nationwide did not breach its obligations to plaintiffs”;69 and based his decision to remand upon a holding “that bad faith may be evidenced by the failure of the insurer even to mention to the insured his opportunity to make a relatively small contribution to avoid a large exposure.”70 In reaching this decision the court stated that at the time of the settlement negotiations, the Brocksteins needed the judgment of an informed expert to make an objective appraisal of the facts and law relevant to their case and to give them explicit, expert advice as to the realistic chances of an adverse verdict above the policy limits, as well as a reasonable estimate of the extent of the excess exposure.71 This is a novel and particularly delicate approach. The court thus held that the insurer could have avoided excess liability by informing the insured: (1) that a demand for settlement had been made; (2) that the demand was within policy limits; (3) that the insurer had evaluated the claim at a figure less than the demand and was only willing to pay that amount; (4) of the realistic chances of an excess verdict and how high such a verdict might be; and (5) that the insured possessed the right to contribute to the settlement.72 The court also said that if the insurer “presses its insured too hard—or even at all—that may be evidence of bad faith.”73

67. *Brockstein II, supra* note 1, at 708.
68. *Brockstein II, supra* note 1, at 707. At n.5 the court stated that Judge Dooling, in characterizing New York law as “unyielding in declining to recognize any duty to settle, or to see ‘bad faith’ in refusals to settle, or other acts that . . . suggest that the insurer pursued its own interest and left the insured to take care of his own exposure to uninsured liability,” was in conflict with *Brown v. United States Fidelity & Guar. Co.*, *supra* note 59.
69. *Brockstein II, supra* note 1, at 707.
70. *Brockstein II, supra* note 1, at 709.
71. *Brockstein II, supra* note 1, at 708.
72. It is interesting to note that the court will apparently only allow a “relatively small contribution.” *Brockstein II, supra* note 1, at 709. The amount involved in the Brockstein case was $7,500 on a demand of $40,000 or nearly 19%. The court does not state whether or not this is to be considered a limit on the percentage of contribution that insurers are bound to suggest.
73. *Brockstein II, supra* note 1, at 708.
The insurer is thus put into an almost impossible situation. He is told that he must fully apprise the insured as to the facts and law of his case and of the probabilities, in the event of a trial, of an adverse, excess verdict and of how high such verdict might be. This is all well and good, but the court now adds that the insurer is not only bound by these good faith standards, but must also inform the insured that he may, if he desires, contribute toward the within-limits settlement demand. Since the insurer is required to give full expert advice to the insured, it would follow that the insurer must also inform the insured as to the advisability of his making such a contribution.

This approach may be appropriate in the extreme cases where the claimant is simply unreasonable in his demand and the chances of a verdict greatly in excess of policy limits are slight. In such a case the insurer could proceed as required, with reasonable assurance that in a suit charging bad faith on the insurer's part in attempting to "induce" the insured into contributing toward a settlement within policy limits, the insurer would be able to convince a jury that its refusal to meet the demand was made in good faith and that it had not attempted to "induce" the insured to contribute. But, even in such a case, if a large excess verdict should be returned, the insurer would be in a difficult situation in attempting to keep the jury judging its motives from being influenced by hindsight. Thus, informing an insured of his right and opportunity to contribute to a settlement within policy limits (or to any settlement above policy limits if the insurer were not willing to expend such limits) would seem a very hazardous course for the insurer to follow even in rather obvious cases. As Professor Keeton has said:

Except when the company expresses willingness to pay the maximum sum within the policy limits, any suggestion to the insured that he contribute toward a settlement figure, in jurisdictions requiring that the company give equal consideration or more to the insured's interests, is likely to result in excess liability for the company in

74. Brockstein II, supra note 1, at 708.
75. Naturally, the demand here would have to be absolutely outrageous or the insurer would be faced later with the problem of convincing a jury that the demand was unreasonable. This would be a very difficult task when a jury has already found for the injured party in excess of that amount.
76. Once an excess verdict has been returned, it would seem a very difficult task to prove to a jury that the chances of such an occurrence, when viewed without the benefit of hindsight, were slight.
77. Supra note 5, at 1149-50 n.32.
78. So long as the insurer is only willing to pay a part of its limits, the same principles would apply whether the settlement demand was above or within policy limits so long as it was above the amount the insurer was willing to pay.
79. Supra note 5, at 1149-50 & n.32.
the event claimant obtains a judgment over the policy limits after a refusal of an opportunity to settle within them.\textsuperscript{80}

The \textit{Brockstein II} court chose to place this duty upon the insurer to meet the "need for a controlled arms-length discussion between the assured and the insurer about their respective interests in the settlement,"\textsuperscript{81} There would appear to be alternative ways which are better for meeting this need.

A number of courts hold that the insurer is duty-bound to communicate to the insured offers of settlement received by the insurer. These rulings are based upon the rationale that since a conflict of interest exists in such situations, the insured must be notified in order that he can take whatever course may be necessary to protect his interests if the insurer rejects the offer.\textsuperscript{82} For example, in \textit{Roberie v. Southern Farm Bureau Casualty Insurance Co.},\textsuperscript{83} the court found the insurer liable for a $28,000 judgment (on policy limits of $20,000) after making it clear that it found no fault with the insurer’s refusal to settle the case nor with its defense of the suit. The court said:

The most serious charge against the defendant is the failure of the insurer to keep the insured informed of any offers of compromise, thus nullifying and negating any possibility of settling the claims to avoid greater loss to the insured.\textsuperscript{84}

The Louisiana Supreme Court affirmed the decision and indicated that the insurer had a duty to inform the insured of the settlement offer, to advise him of the potential liabilities, and to advise him of the insurer’s declination of the offer. However, it did not indicate that the insurer had a duty to discuss contribution by the insured.\textsuperscript{85}

Thus, the \textit{Roberie} court and others following its line of reasoning consider the need for an "arms-length discussion between the assured and the insurer about their respective interests in the settlement"\textsuperscript{86} to be met by the communication of settlement offers received and advice of uninsured

\textsuperscript{80} Supra note 5, at 1149. \textit{See also} supra note 47.
\textsuperscript{81} Brockstein II, \textit{supra} note 1, at 709.
\textsuperscript{84} Id. at 623.
\textsuperscript{85} Roberie v. Southern Farm Bureau Cas. Co., \textit{supra} note 44.
\textsuperscript{86} \textit{See} text \textit{supra}. 
potential liabilities without the further requirement that the insurer expose itself to a charge of bad faith by introducing the subject of contribution. Naturally, this only applies where the insurer is not willing to offer its maximum limits. 87 Where it is so willing, there is no bad faith chargeable by the mere advice to the insured that he may settle the claim by contributing the excess amount. 88

A strict liability doctrine has been suggested by many writers, and even some courts, as a solution to the conflict of interests problems. 89 This doctrine would make the insurer who declines to accept a possible settlement within policy limits strictly liable for the results of such decision. 90 This theory was rejected in McChristian v. State Farm Mutual Automobile Insurance Co. 91 where the court stated:

Quite obviously a reasonable settlement offer involves a proper assessment of the questions of damages and liability. Thus, where reasonable cause appears, in the form of a clearly litigable issue as to damages or liability, for rejecting a settlement offer and defending the action, the good faith of the company will be vindicated . . . Any other approach would deprive the insurer of practically all discretion and would result in virtual absolute liability, a wholly unbargained for and unintended consideration. 92

There is, however, an alternative solution to this problem. This solution recognizes that the stage of "the statistically most important aspect of defense, the negotiation of settlement," 93 is fraught with conflicts of interests, and that the attorney hired by the insurance carrier to defend the case for the insured is primarily representing the interests of the insurer and only nominally defending the insured. 94 In those situations where claims exceed policy limits, insurers could allow the insured to hire his own attorney, at the insurer's expense, to represent the insured's interests during settlement negotiations. 95

87. See text at note 79 supra.
88. Supra note 5, at 1148-49.
89. See note 25 supra.
90. Supra note 3, at 431, 426 P.2d at 177.
91. Supra note 47.
92. Supra note 47, at 753 (emphasis added on "any").
93. Brockstein I, supra note 1, at 227.
94. Supra note 5, at 1168-69.
95. If the insurers refuse to so take the burden upon themselves, legislatures, courts, or state insurance departments may find a solution for the problem. In New York, for example, a bill was introduced in 1950 which would have imposed nearly strict liability on insurers where settlement demands within policy limits are declined. Dempsey, Excess Liability, 1950 Ins. L.J. 734, 747. Also a bill which passed the Ohio Senate in 1949, provided that, in order to avoid excess liability, insurers would need the consent or approval of insureds in rejecting within-limits settlement offers. Id.
The present policy is for the insurer to either turn the matter over to house counsel or to an independent attorney. In any case, only one attorney is retained and he is to represent both the insured and the insurer.96 The law requires the insurer, in cases of excess-limits claims, to notify the insured that the claim against him exceeds his policy limits and that he has a right to hire personal counsel to represent his interests in the resulting conflict of interests situation.97 This notice is customarily given to the insured by letter.98 If the insured wishes to retain personal counsel, he must do so at his own expense.99

Since the policy requires the insurer to “defend” the insured and since the court in Crisci v. Security Insurance Co. said “it is common knowledge that one of the usual methods by which an insured receives [defense] under a liability insurance policy is by settlement of claims without litigation,”100 it does not seem an undue extension of present law to require that the insured be adequately represented by counsel at the insurer’s expense during the negotiation of such settlement. The insurer’s attorney would continue to represent both the insured and the insurer in trial and all phases of the defense where the interests are not in conflict.101 Such a solution would not relieve the insurer of its duties under present law, but it would avoid burdening the insurer with the impossible duty of discussing contributions as required by Brockstein.

Edward L. Schrenk

LANDLORD AND TENANT—IMPLIED WARRANTY OF HABITABILITY—HOW “CONSTRUCTIVE” IS “EVICTION”? 

Plaintiff, a New York businessman, his wife, and their four children arrived on the island of Oahu, Hawaii, on September 1, 1964. On September 21, they inspected a furnished Tahitian-style residence of relatively open structure owned by the defendant. The house was on