Insurance Coverage Litigation
September-October 2013, Vol. 23 No. 4

To the Policy Limits and Beyond

By Jill B. Berkeley[1] -- December 4, 2013

How often does a plaintiff have an opportunity to collaborate with an insured defendant to pressure the defendant's insurance company into settlement? What are the elements necessary to support an agreement to settle for the policy limits without the insurer's consent? More critically, is there a strategy that would allow the plaintiff and defendant to agree to settle for more than the policy limits, to limit collection against the insurer only, and to provide the defendant with a full release and covenant not to execute? In certain circumstances, the answer to that last question is "yes," provided the parties overcome several obstacles.

A standard provision in liability insurance contracts gives the insurer control over the defense of any claim against the insured, and an implied correlative of this right is the duty not to gamble with the insured's money by forgoing reasonable opportunities to settle a claim on terms that will protect the insured against an excess judgment.[2]

The Seventh Circuit court reasoned as follows:

> Were it not for this duty, a duty fairly implied in the insurance contract, in a case in which a claim could be settled at or near the policy limit, yet there was a good although not certain chance that it could be beaten at trial, the insurance company would be sorely tempted to take the case to trial. For that would place it in a "Heads I win, tails you lose," position. Suppose the claim was for $2 million, the policy limit was $1 million, the plaintiff was willing to settle for this amount, but the defendant's insurer believed that if the case was tried the plaintiff would have a 50 percent chance of winning $2 million and a 50 percent chance of losing. The insurer's incentive would be to refuse to settle, since if it lost the trial it would be no worse off than if it settled—in either case it would have to pay $1 million—but if it won it would have saved itself $1 million. It is in order to quench this kind of temptation that the liability insurer's duty to settle in good faith was read into liability insurance contracts.[3]

Typically, if a plaintiff gives an insurer the opportunity to settle and the insurer refuses, the plaintiff will be willing to take an assignment from the defendant of its rights against the insurer in exchange for a covenant not to execute against the defendant's assets and agree to collect the entire judgment from the insurer. The risk to collect is on the plaintiff. However, to win the breach of the good-faith duty to settle, the plaintiff must have the defendant make a demand on the insurer to settle.

The four components for establishing the plaintiff's entitlement to collect its excess verdict against the insurer are these:

1. The plaintiff and the defendant have to agree, in advance, on all other conditions of settlement other than what the insurance company must pay.

2. The plaintiff has to make a demand within remaining policy limits and within a specific reasonable time limit.

3. The defendant has to put in writing its demand on the insurance company to accept the plaintiff's demand within the policy limits. It must acknowledge the risk to the insured that if the jury finds against it, the judgment will be in excess of the policy limits. The defendant must provide a reasoned basis to support the contention that the risk is greater that a jury verdict will exceed policy limits than a probability that it won't.

4. The insurance company must be given an opportunity to negotiate with a neutral for a settlement within policy limits.

What is the incentive for a defendant to present the plaintiff's demand to the insurer with its own demand that the case settle? Obviously, getting the case settled within policy limits is the goal of every policyholder that faces potential liability in excess of the policy limits. Even greater incentive exists for the policyholder to protect its assets from collection in cases in which the insurer has issued a reservation of rights indicating that some or all of the potential judgment may not be covered.

To start the settlement process, the plaintiff must make a settlement demand that

explains why a potential jury award is reasonably likely to exceed available policy limits;

sets a reasonable deadline for a response so that the claim adjuster has sufficient time to evaluate the defense file and procure adequate settlement authority;

makes a demand for policy limits (subject to confirmation of the amount of remaining limits);

provides a full release for the policyholder or sufficient consideration to support payment; and

expresses a willingness to participate in mediation with a neutral, in order to provide the insurer with an opportunity to explore the potential to settle for less than policy limits.

The only downside for the plaintiff to initiate this process is if the insurer agrees to pay limits. Once the insurer has made an acceptable offer and the plaintiff has accepted it, the defendant and its insurer are released from any further liability. The plaintiff will not be able to try the case and obtain a verdict in excess of the policy limits.[4] The good news is the case settles without trial or risk to either side.

What happens, however, if the insurer is unwilling to make an acceptable offer? The plaintiff now has several options. The obvious and traditional route is to move forward and try the case. The plaintiff, the defendant, and its insurer are at risk that the decision not to settle will not work out in their favor. What if the plaintiff and the defendant want to diminish that risk, at the expense of the insurer? The following section explores the option in which the plaintiff settles directly with the defendant for policy limits and seeks to collect from the insurer pursuant to the insurer's duty to indemnify the insured. The final section addresses whether the plaintiff can settle directly with the defendant for more than the policy limits and take an assignment of the insured's rights against the insurer for breach of the duty to settle in good faith.

Settle for the Policy Limits

If the plaintiff has followed the strategy outlined above and the insurer has failed to settle, the plaintiff should explore settlement for policy limits directly with the defendant, in exchange for giving the defendant a covenant not to execute. The basis for allowing the defendant to settle without the insurer's consent is proof that the insurer's failure to settle constituted a breach of the duty to settle or duty to defend. As in enforcing the insurer's obligation to indemnify the insured, after trial, the plaintiff must still prove the settlement is covered. However, if there was a settlement, the plaintiff has the additional burden to prove the reasonableness of the amount of the settlement and that there was no fraud or collusion between the plaintiff and the defendant.

As a rule, an insured must obtain the insurer's consent before settling with an injured plaintiff in the absence of a breach of the duty to defend.[5] Nevertheless, courts have consistently recognized that where an insurer unreasonably refuses to settle, "the insured may effect a reasonable settlement himself without breaching any conditions of the policy."[6] Even if there is no reservation of rights or denial of coverage, there is authority for the proposition that a failure to settle is a breach of the insurer's obligations.[7]

In *Swedish American Hospital Association of Rockford v. Illinois State Medical Inter-Insurance Exchange* (*ISMIE*), a doctor settled a medical malpractice action for his policy limits after the doctor's insurer refused to participate in settlement discussions.[8] The insurer argued that the settlement agreement was unenforceable because the doctor failed to obtain the insurer's consent before settling.[9] The court rejected the insurer's argument, reasoning that "[i]f the circumstances at the time of settlement establish that the potential loss and the proposed settlement by far exceed … the limits of the policy, the insured need not await the outcome of the trial and may proceed to make a prudent settlement. Then, upon proof of the insurer's breach of its good-faith duty to settle, it may recover the amount of the policy limits from the insurer."[10] *ISMIE* makes clear that even if the insurer fulfills its duty to defend, the insured may still effect a reasonable settlement where the insurer breaches its duty to settle.[11]

The right of the plaintiff to collect from the insurer is based on the insurer's obligation to indemnify the insured. In this regard, the plaintiff who has settled with the defendant has standing as a "judgment creditor" seeking to collect the settlement from the insurer who controls the policy as an asset of the defendant. The duty to indemnify can be determined only after the insured becomes legally obligated to pay damages in the underlying suit.[12] An insurer must indemnify the insured for a loss if it actually falls within the insurance policy's coverage.[13] The plaintiff, standing in the insured's shoes, has the burden to prove that the liability incurred in the underlying suit is covered by the policy.[14] Where liability was incurred because of settlement, the insured must establish that it settled "an otherwise covered loss in 'reasonable anticipation of personal liability.'"[15]

Recently, the supreme court of Connecticut addressed a certified question from the U.S. District Court for the Northern District of Alabama, to decide in a pre-suit situation whether an insurer that wrongfully denied coverage must pay where only some of the underlying claims should have been covered. In *Capstone Building Corp. v. American Motorists Insurance Co.*,[16] the court held that the insured had the burden of proving that the settlement was reasonable in proportion to the insurer's liability under its duty to defend. The court reasoned that holding the insurer liable for the portion of a pretrial settlement that may be reasonably allocated to allegations that form the basis of claims for which the insurer had an independent duty to defend was more appropriate in global settlements with multiple claims. The court stressed that the insured is not required to prove actual liability, only "potential liability on the facts known to the insured."

Where the insured elects to settle the third party's claim, the settlement is binding on the insurer so long as the claim was within the policy's coverage and the settlement was reasonable and made in good faith.[17]

A settlement that effectively lets the insured off the hook gives rise to concerns about collusion.[18] The insurer has the right to rebut any showing of reasonableness.[19] In determining reasonableness, the court should consider whether the settlement was made in reasonable anticipation of liability and "whether, considering the totality of circumstances, the insured's decision conformed to the standard of a prudent uninsured."[20] Some factors to consider include the facts bearing on liability and damages and the costs and risks of going to trial.[21]

In general, there is a direct correlation between proving the reasonableness of the settlement and avoiding the insurer's defense that the settlement was a result of collusion or fraud. Even though the insurer may be defending the insured, if there was a reasonable basis for the insured to believe that a jury would have found the insured liable for more than the policy limits, or for damages that might potentially not be covered (e.g., punitive damages), courts have agreed that the insured has the right to take reasonable steps to protect itself.

For example, in *Home Federal Savings Bank v. Ticor Title Insurance Co.*,[22] the insurer argued it had no duty to defend the insured or settle the claims against the defendant because the claims against the defendant were meritless and the defendant had excellent chances to win. The Seventh Circuit disagreed:

> However dim Wilhelm's prospects of success, that was precisely what Home Federal had insured against in the mechanic's lien endorsement. Ticor denied Home Federal's request for a defense, saying, effectively, "Handle this yourself—it's a slam dunk." Home Federal defended its position but eventually chose to settle with Wilhelm rather than risk paying for litigation and possibly losing priority of its security interest. Bearing those costs is a risk against which Home Federal had already insured through its policy with Ticor by paying for the mechanic's lien endorsement. As we see the case, Home Federal was seeking only the peace of mind it had paid for, not a windfall. The district court should have granted Home Federal's motion for summary judgment and denied Ticor's.[23]

The test of reasonableness is a question of fact and one that courts have routinely found must be specifically litigated, giving the insurer an opportunity to introduce evidence. In a recent case in the Northern District of Illinois, Judge Lefkow held that, when a settlement "effectively lets the insured off the hook," the insurer has the "right to rebut any showing of reasonableness."[24] Even though the judge in the underlying litigation had already held a "fairness hearing," Judge Lefkow instructed the parties to submit additional materials because "the record [wa]s not well-developed."[25]

In *Guillen ex rel. Guillen v. Potomac Insurance Co. of Illinois*, the Illinois supreme court similarly emphasized that "the insurer retains the right to rebut any preliminary showing of reasonableness with its own affirmative evidence bearing on the reasonableness of the settlement agreement."[26] Because the insurer in that case had not had any "opportunity to present evidence" on the issue of the reasonableness of the insureds' decision to settle, the court remanded for further proceedings.[27] In addition, in *Stonecrafters, Inc. v. Wholesale Life Insurance Brokerage, Inc.*, the Illinois court of appeals held that the trial court had "no basis" to find that the settlement was reasonable without a hearing during which the insurer was able to present its own evidence.[28] Thus, given the right combination of factors, the plaintiff may be willing to forgo trial, the defendant may be willing to enter into a settlement, and the insurer may be at risk.

Settle for More Than the Policy Limits

If the plaintiff has followed the strategy outlined above and the insurer has failed to settle, typically, the plaintiff will try the case and get a jury verdict in excess of the policy limits in order to prove up the bad-faith failure to settle. Can the plaintiff avoid the necessity of a jury trial and enter into a settlement agreement with the defendant for more than policy limits? In addition to the positive value of forgoing trial, the plaintiff may be faced with a judgment-proof defendant, which makes the potential of an excess verdict not worth the effort. A proposed settlement in excess of the policy limits may put more pressure on the insurer to settle, if it knows that its failure to settle for policy limits has exposed it to liability in excess of its policy.

If the plaintiff wants to proceed to collect an amount in excess of the policy limits from the insurer, the agreement must have the following terms and conditions:[29]

1. Plaintiff and defendant agree to a judgment by consent (no admission of liability) in an amount in excess of the policy limits, pursuant to a settlement agreement that recites the insurer's refusal to settle within the policy limits and the defendant's exposure to uninsured liability.

2. Plaintiff agrees not to execute on any property or assets of the defendant other than its insurance policies and agrees to satisfy the judgment only from the insurer.

3. Plaintiff agrees not to execute against the defendant's noninsurance assets even if a determination is made that its insurance carrier did not owe coverage, or agrees to a limited amount if there is any unsatisfied amount of the judgment.

4. Defendant assigns to plaintiff all of its claims and rights to payment from insurer for bad-faith failure to settle.

5. Defendant agrees to cooperate with plaintiff to consummate the agreement to achieve the settlement provided and to obtain recovery.

6. Plaintiff releases defendant.

7. Plaintiff dismisses the case against defendant with prejudice.

As set out above, the plaintiff, as judgment creditor, will enforce the judgment against the insurer's duty to indemnify the defendant and must prove that the settlement is covered, up to the policy limits, and that the amount is reasonable. In addition, the plaintiff accepts the burden of pursuing the bad-faith case as an assignee of the insured's rights against the insurer.

As an assignee for bad-faith failure to settle, the plaintiff must prove the failure to settle was unreasonable and that the insured suffered damages as a result of a judgment being entered against it in excess of the policy limits. The insurer defends against bad faith on the basis that it appropriately balanced its rights with the rights of the policyholder and had a reasonable basis on which to refuse to settle.

In the cases in which the defendant insured receives a covenant not to execute against its corporate assets, insurers routinely argue that if the insured is fully insulated from liability by a covenant not to execute, an essential element of the bad-faith cause of action is lacking; therefore, an assignee of such a bad-faith claim cannot prevail.[30] The Eighth Circuit in *West American Insurance Co. v. RLI Insurance Co.* rejected such an argument by the primary insurer. The court concluded that under Kansas law, the fact that the insured was financially protected does not excuse the insurer from exercising the same good faith it would be expected to exercise were the insured fully financially liable.[31] The court noted that an insurer's duties of good faith and due care in evaluating settlement offers "are not diminished when the insured is also protected by excess insurance."[32]

If a judgment in excess of policy limits supports an action for bad-faith failure to settle, is there any reason that a settlement in excess of the policy limits would not require the same result? This was the question addressed by Judge Shadur in *National Union Fire Insurance Co. v. Continental Illinois Corp.*[33] In *National Union*, the Federal Deposit Insurance Corporation (FDIC), as assignee of a distressed bank, brought a series of derivative securities litigation actions against the bank's officers and directors for breach of fiduciary duty and other related claims.[34] The FDIC proposed to settle the claims for $68 million.[35] When the insurers refused, the FDIC entered into a settlement agreement on its own with the defendants for $88 million.[36] Under the settlement agreement, the defendants assigned to the FDIC their right to seek indemnification for the larger settlement amount in exchange for a covenant not to execute.[37]

The insurers argued that the FDIC could not state a cause of action for bad faith because the insureds' liability resulted from a settlement, rather than a judgment.[38] Judge Shadur rejected this argument, reasoning that there was "no reason to treat a settlement any differently than a judgment in excess of the policy limits, so long as the settlement was reasonable and reached in good faith."[39] He concluded that

> [s]o long as the insurer's breach of its duty to settle is shown to have deprived the insured of the opportunity for a favorable settlement, no rational distinction separates the insured's striking the next best deal it can make from the insured's going to trial and getting hit with a larger judgment. Either way the insured has been compelled to accept liability because of the insurer's negligence or bad faith in rejecting the more favorable judgment.[40]

However, Judge Shadur ultimately concluded that the FDIC failed to state a cause of action for bad faith because it did not subject the insureds to any personal financial exposure.[41] Describing the situation as "a classic instance of winning the battle but losing the war," Judge Shadur noted that it is essential for the "insured to be at risk for the amount in excess of the policy limits before it can seek to thrust that risk onto its insurer."[42] "If the insured is speculating only with the insurer's dollars—a sort of 'Heads I win, tails I lose nothing'—there is no rational limit imposed on the putative settlement."[43] On this basis, Judge Shadur concluded that the FDIC, as assignee, could not enforce the $88 million settlement against the insurers because the insureds were "not in any way personally liable for the $88 million amount of the settlement"; therefore, the FDIC could not show "causation."[44]

A more recent opinion by the Illinois supreme court suggests that a covenant not to execute does not negate an insured's ability to assign away its policy limits.[45] In *Guillen*, the court held that a settlement agreement that included a stipulated judgment, a covenant not to execute, and an assignment was valid and enforceable against an insurer where the insurer breached its duty to defend.[46] The insurer argued that the settlement was unenforceable because the insured was never "legally obligated to pay damages" because the payment obligation was limited solely to the assignment. The court rejected the insurer's argument that a "covenant not to execute effectively extinguishes the insured's legal obligation to pay," reasoning that

> [t]he construction of the "legally obligated to pay" language adopted by the majority of courts is a technical, rather than practical, one. Courts accepting the conclusion that the insured remains "legally obligated to pay" when the settlement consists of a judgment, covenant not to execute, and an assignment hold that a covenant not to execute is a contract and not a release. The insured still remains liable in tort and a breach of contract action lies if the injured party seeks to collect on the judgment. Thus, under this construction, the insured is still "legally obligated" to the injured plaintiff, and the insured retains the right to indemnification from the insurer.[47]

The court went on to explain that the rationale supporting this technical construction is premised on the policy considerations underlying the breach of the duty to defend.[48]

> Once the insurer has breached its duty to defend, it is in no position to demand that the insured be held to a strict accounting under the policy language. Fairness requires that the insured, having been wrongfully abandoned by the insurer, be afforded a liberal construction of the "legally obligated to pay" language.[49]

The court acknowledged that the insured "never faced any personal financial risk under the settlement agreement," but reasoned that because the insurer breached its duty to defend, the insured was entitled to a "liberal construction of the 'legally obligated to pay' language."[50]

National Union may be less effective on the basis that it involved only a settlement agreement, as opposed to a stipulated judgment. Although this distinction may seem artificial, its ramifications could be significant. Illinois courts have repeatedly recognized that, in cases involving claims of bad faith, "[t]he very fact of the entry of a judgment itself constitutes damage and harm sufficient to permit recovery."[51] Thus, if the judgment itself constitutes the harm to the insured, the parties could potentially avoid the fatal impact of *National Union* by structuring the settlement to include a stipulated judgment, as opposed to a mere agreement to pay. Given the Seventh Circuit's pronouncements on the excess insurers' rights to recover against a primary insurer,[52] it would appear that Judge Shadur's rationale in *National Union* should no longer be given any effect.

Indeed, a recent, factually analogous decision by the Colorado supreme court offers support for this position.[53] In *Nunn v. Mid-Century Insurance Co.*, a passenger in an automobile accident suffered injuries after the driver lost control of the vehicle causing it to crash.[54] The passenger offered to settle with the driver's insurer for the driver's policy limit of $100,000, but the insurer allegedly refused.[55] The passenger and the driver subsequently entered into a settlement agreement, whereby the driver agreed to a stipulated judgment for $4,000,000 and assigned his claim for bad faith to the passenger in exchange for a covenant not to execute.[56] The passenger, as assignee, sued the driver's insurer for bad faith.[57]

Both the trial court and court of appeals dismissed the passenger's bad-faith claim, reasoning that, "by virtue of the covenant not to execute, [the driver] would never face personal liability for the excess judgment, and thus there were no damages to assign to [the passenger.]"[58] The Colorado supreme court reversed, holding that the "entry of judgment in excess alone is sufficient damage to sustain a recovery against an insurer for breach of the duty to act in good faith."[59] Citing cases from other jurisdictions, the court noted that its holding was consistent with the "majority rule," and concluded that the court of appeals incorrectly affirmed summary judgment on the basis that the driver "had no damages to assign."[60] *Nunn* and *Guillen* represent the "modern trend," and *National Union* is both distinguishable and outdated.

Conclusion

Thus, a plaintiff's strategy to join forces with a defendant at risk presents a "win-win" solution. This strategy provides the plaintiff the opportunity to collect policy limits if there is coverage. The plaintiff also has the opportunity to collect more than policy limits if it can meet the elements of a bad-faith failure to settle case and is spared the cost of trying a case against a potentially judgment-proof defendant, and the defendant is protected from an unlimited or uninsured judgment. Moreover, the insurer bears the consequences of its own decision not to settle within policy limits when it was offered the opportunity to do so. The realignment of interests gives the plaintiff the right to step into the shoes of the defendant insured and assert its contractual rights against the "misbehaving insurer"[61] and potentially reap the benefits.

Keywords: litigation, insurance, assignment of rights, bad faith, duty to settle, duty to defend, policy limits, settlement

Jill B. Berkeley is a partner at Neal, Gerber & Eisenberg LLP, Chicago.

[1] Jill B. Berkeley chairs the Insurance Policyholder Practice Group of the Chicago law firm of Neal, Gerber & Eisenberg LLP. She focuses her practice on representing policyholders and claimants in insurance coverage disputes.
[2] *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198 (1958); *Olympia Fields Country Club v. Bankers Indem. Ins. Co.*, 325 Ill. App. 649, 60 N.E.2d 896, 905 (1945); *Hilker v. W. Auto. Ins. Co.*, 204 Wis. 1, 231 N.W. 257 (1930); *Brassil v. Md. Cas. Co.*, 210 N.Y. 235, 104 N.E. 622 (1914).
[3] *Twin City Fire Ins. Co. v. Country Mut. Ins. Co.*, 23 F.3d 1175, 1179 (7th Cir. 1994).
[4] *See, e.g.*, *Amer. Guar. & Liab. Ins. Co. v. USF&G*, 668 F.3d 991 (8th Cir. 2012) (primary insurer's bad-faith refusal to settle for $5 million limit resulted in jury verdict of $46 million); *Sequoia v. Royal*, 971 F.2d 1385 (9th Cir. 1992) (plaintiff repeatedly offered to settle for the $500,000 policy limit; jury ultimately awarded plaintiff $700,000).
[5] *See Guillen v. Potomac Ins. Co. of Ill.*, 203 Ill. 2d 141, 149 (Ill. 2003).
[6] *See Swedish Am. Hosp. Ass'n of Rockford v. Ill. State Med. Inter-Ins. Exch.* (*ISMIE*), 395 Ill. App. 3d 80, 97–98 (Ill. App. Ct. 2d Dist. 2009) (quoting *Krutsinger v. Ill. Cas. Co.*, 10 Ill. 2d 518, 527 (Ill. 1957)); *see also Ill. Tool Works, Inc. v. The Home Indem. Co.*, 24 F. Supp. 2d 851, 854–56 (N.D. Ill. 1998); *WestAmerica Mortg. Co. v. Tri-County Reports, Inc.*, 670 F. Supp. 819, 821 (N.D. Ill. 1987); *U.S. Gypsum Co. v. Admiral Ins. Co.*, 268 Ill. App. 3d 598, 625 (Ill. App. Ct. 1st Dist. 1995).
[7] *ISMIE*, 395 Ill. App. 3d at 101 ("Breach of the good-faith duty to settle is considered by other jurisdictions, and we agree, to be an extension of the duty to defend."); *see also R.C. Wegman Constr. Co. v. Admiral Ins. Co.*, 629 F.3d 724 (7th Cir. 2011) (insurer breached duty to notify insured of opportunity to settle); *Liberty Mut. Ins. Co. v. Am. Home Assurance Co.*, 348 F. Supp. 2d 940, 959 (N.D. Ill. 2004) ("The defense and settlement of a case are hopelessly intertwined.").
[8] *ISMIE*, 395 Ill. App. 3d at 84–85.
[9] *ISMIE*, 395 Ill. App. 3d at 97–102.
[10] *ISMIE*, 395 Ill. App. 3d at 99.
[11] *ISMIE*, 395 Ill. App. 3d at 101; *see also Cay Divers, Inc. v. Raven*, 812 F.2d 866 (3d Cir. 1987) (if insurer reserves right to contest coverage and provides insured with independent counsel, it has renounced control of the litigation and insured is free to enter into a reasonable settlement and pursue an action for indemnification against insurer); *In re Halo*, 310 B.R. 710, 724 (Bankr. N.D. Ill. 2004) (holding that insurer loses its right to consent to a settlement by denying coverage, notwithstanding its compliance with its duty to defend); *United Servs. Auto. Ass'n v. Morris*, 154 Ariz. 113 (1987) (insured only forbidden from settling without insurer's consent when the insurer has unconditionally assumed liability under the policy); *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982) (insurer disputing coverage cannot compel insured to forgo settlement in insured's best interest); *G. A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929) (same); *Whitehead v. Lakeside Hosp. Ass'n*, 844 S.W.2d 475, 480 (Mo. Ct. App. W.D. 1992) (insured properly refused to accept defense pursuant to a reservation of rights and was entitled to make a reasonable settlement or compromise); *Butters v. City of Independence*, 513 S.W.2d 418 (Mo. 1974) (same).

[12] *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204, 1221, 154 Ill. 2d 90 (1992).
[13] *Outboard Marine Corp.*, 607 N.E.2d at 1221.
[14] *St. Michael's Orthodox Catholic Church v. Preferred Risk Mut. Ins. Co.*, 496 N.E.2d 1176, 1179, 146 Ill. App. 3d 107 (1986).
[15] *Fed. Ins. Co. v. Binney & Smith, Inc.*, 913 N.E.2d 43, 48, 393 Ill. App. 3d 277, 332 Ill. Dec. 448 (2009).
[16] 308 Conn. 760, 67 A.3d 961 (2013).
[17] *See Midwestern Indem. Co. v. Laikin*, 119 F. Supp. 2d 831, 842 (S.D. Ind. 2000) (interpreting Indiana law as supporting rule that a "consent judgment . . . bind[s] the insurer on issues of its insured's liability and the extent of the injured parties' damages, so long as (1) the coverage is eventually shown, and so long as the consent judgment (2) is not the product of bad faith or collusion and (3) falls somewhere within a broad range of reasonable resolutions of the underlying dispute"); *Cincinnati Ins. Co. v. Young*, 852 N.E.2d 8, 14 (Ind. Ct. App. 2006) (endorsing *Laikin*'s approach); *see also* 7C Appleman, *Insurance Law & Practice* § 4714, at 531 ("A settlement made by the insured of a pending action must be reasonable; and the court will examine the merits of the claim to determine that question.").
[18] *Guillen ex rel. Guillen v. Potomac Ins. Co. of Ill.*, 203 Ill. 2d 141, 785 N.E.2d 1, 14 (2003).
[19] *Guillen*, 785 N.E.2d at 14.
[20] *Guillen*, 785 N.E.2d at 14.
[21] *Guillen*, 785 N.E.2d at 14.
[22] 695 F.3d 725 (7th Cir. 2012).
[23] *Home Federal Savings Bank*, 695 F.3d at 729.
[24] *Maxum Indem. Co. v. Eclipse Mfg. Co.*, No. 06-C-4946, 2012 U.S. Dist. LEXIS 11470, at *36 (N.D. Ill. Jan. 31, 2012).
[25] *Maxum Indemnity Co.*, 2012 U.S. Dist. LEXIS 11470, at *37–41.
[26] 203 Ill. 2d 141, 785 N.E.2d 1, 15 (2003).
[27] *Guillen*, 785 N.E.2d at 15.
[28] 915 N.E.2d 51, 62 (Ill. App. Ct. 3d Dist. 2009).
[29] See *Standard Mutual Insurance Co. v. Lay*, 2012 IL App (4th) 110527, as an example of a settlement with a covenant not to execute.
[30] *See, e.g., W. Am. Ins. Co. v. RLI Ins. Co.*, Nos. 11-3867, 11-3869, 2012 WL 5416088 (8th Cir. Nov. 7, 2012).
[31] *West American Insurance Co.*, 2012 WL 5416088, at *7 ("[A]n action against an insurer whose negligent or bad faith refusal to settle within the policy limits results in an excess judgment against the insured 'lies, whether or not the insured has paid or can pay an excess judgment.'").
[32] *West American Insurance Co.*, 2012 WL 5416088, at *7 (citing *Twin City Fire Ins. Co. v. County Mut. Ins. Co.*, 23 F.3d 1175, 1179 (7th Cir. 1994) ("No court has ever suggested that the difference in attitudes towards risk between an insured and an insurance company should alter the measure of recovery when an excess insurer is subrogated to an insured's claim of bad faith.")); *see also Certain Underwriters of Lloyd's v. Gen. Accident Ins. Co. of Am.*, 909 F.2d 228, 232 (7th Cir. 1990) ("The primary insurer's duty to act with due care and in good faith does not disappear

simply because the insured purchased excess insurance.”).
[33] 673 F. Supp. 267, 272–75 (N.D. Ill. 1986).
[34] *National Union Fire Insurance Co.*, 673 F. Supp. at 269–70.
[35] *National Union Fire Insurance Co.*, 673 F. Supp. at 269–70.
[36] *National Union Fire Insurance Co.*, 673 F. Supp. at 269–70.
[37] *National Union Fire Insurance Co.*, 673 F. Supp. at 269–70.
[38] *National Union Fire Insurance Co.*, 673 F. Supp. at 272.
[39] *National Union Fire Insurance Co.*, 673 F. Supp. at 274.
[40] *National Union Fire Insurance Co.*, 673 F. Supp. at 274.
[41] *National Union Fire Insurance Co.*, 673 F. Supp. at 274–75.
[42] *National Union Fire Insurance Co.*, 673 F. Supp. at 274–75.
[43] *National Union Fire Insurance Co.*, 673 F. Supp. at 275.
[44] *National Union Fire Insurance Co.*, 673 F. Supp. at 274.
[45] *See Guillen ex rel. Guillen v. Potomac Ins. Co. of Ill.*, 203 Ill. 2d 141, 785 N.E.2d 1 (2003).
[46] *Guillen*, 785 N.E.2d at 11–15.
[47] *Guillen*, 785 N.E.2d at 12.
[48] *See Guillen*, 785 N.E.2d at 13.
[49] *See Guillen*, 785 N.E.2d at 13.
[50] *See Guillen*, 785 N.E.2d at 13.
[51] *See Smiley v. Manchester Ins. & Indem. Co. of St. Louis*, 13 Ill. App. 3d 809, 814 (Ill. App. Ct. 2d Dist. 1973); *Wolfberg v. Prudence Mut. Cas. Co. of Chi.*, 98 Ill. App. 2d 190, 197 (Ill. App. Ct. 1st Dist. 1968); *see also Steele v. Hartford Ins. Co.*, 788 F.2d 441, 449 (7th Cir. 1986) (“Illinois is usually classed with those states which hold that an insured can recover an excess judgment caused by the insurer’s failure to settle the litigation in good faith even without proof that the insured would or could have paid the judgment.”).
[52] *See Twin City Fire Ins. Co. v. Country Mut. Ins. Co.*, 23 F.3d 1175, 1179 (7th Cir. 1994); *Certain Underwriters of Lloyd’s v. Gen. Accident Ins. Co. of Am.*, 909 F.2d 228, 232 (7th Cir. 1990).
[53] *See Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116, 118–123 (Colo. 2010).
[54] *Nunn*, 244 P.3d at 118.
[55] *Nunn*, 244 P.3d at 118.
[56] *Nunn*, 244 P.3d at 118.
[57] *Nunn*, 244 P.3d at 118.
[58] *Nunn*, 244 P.3d at 118.
[59] *Nunn*, 244 P.3d at 121.
[60] *Nunn*, 244 P.3d at 121–24.
[61] *See Twin City Fire Ins. Co. v. Country Mut. Ins. Co.*, 23 F.3d 1175, 1179 (7th Cir. 1994).