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Articles

Privacy and Data Security: The New "Cyber" World of Insurance Coverage and Risk Management

by Neil B. Posner and Rukesh Korde

I. INTRODUCTION: WHY ARE WE TALKING ABOUT PRIVACY AND DATA SECURITY?

According to the Privacy Rights Clearinghouse (PRC), 512,317,699 records were breached from 2306 data breaches made public since 2005.[1] To print out the list of all the breaches in the PRC database would take 451 pages. On April 16, 2010, the number of records breached was 353,387,188, and it would have taken approximately 200 pages to print the list as of that date.

Data security breaches, and the loss of data and private information, are escalating problems.

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The views expressed by the authors are theirs alone and do not necessarily reflect those of their law firms or their clients.

Verdicts Within Policy Limits: Is the Carrier Still Liable for Failure to Settle?

by J. Mark Hart

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The established rule is that a carrier is liable in tort for wrongful failure to settle when it unreasonably rejects an offer within the policy limits *and* the insured suffers an excess judgment at trial. In that instance, actions exist for negligent failure to settle and bad faith failure to settle.[1]

But what if a failure to settle caused the insured other harm even though the verdict was within the policy limits? Does failure to settle liability exist only for excess verdicts? Two emerging scenarios question whether an excess verdict is still a precondition to liability for wrongful failure to settle. One is a failure to settle that results in a non-covered punitive award, and the other is a failure to settle that causes the insured to personally pay the deductible.

I. FAILURE TO SETTLE AND PUNITIVE DAMAGE EXCLUSIONS

A. A carrier has no per se duty to settle a compensatory claim within the limits to avoid a punitive verdict

Punitive damages exclusions have become widespread in liability policies over the past 20 years. In a small number of cases, insureds have sued the carrier when it failed to settle and the jury returned a non-covered punitive verdict along with a covered compensatory verdict.

Courts have been careful to prevent a non-covered punitive count from becoming a vehicle to demand unreasonably high compensatory settlements within the policy limits to avoid threats of bad faith liability

The courts consistently hold that a carrier does not have a duty to settle a non-covered punitive claim when coupled with a covered claim.[2] Practically, this means a carrier does not have to pay extra to settle a compensatory claim in order to avoid the risk of a non-covered punitive award. "The proposition that an insurer must settle, at any figure demanded within the policy limits, an action in which punitive damages are sought is nothing short of absurd."[3] Accordingly, courts have been careful to prevent a non-covered punitive count from becoming a vehicle to demand unreasonably high compensatory settlements within the policy limits to avoid threats of bad faith liability.

For example, in *Lira v. Shelter Ins. Co.*,[4] after drinking, the insured rear-ended another car, fought the other driver, and left his car on the road where plaintiff's auto collided with it. Plaintiff offered to settle for the $50,000 policy limit, but the carrier offered $10,000 based on its assessment on plaintiff's comparative negligence. The jury at trial returned a verdict for $87,300 compensatory damages and $87,300 punitive damages (reduced by half post-trial under state statute so no excess verdict). The carrier satisfied the compensatory award that fell within the policy limits but refused to pay the punitive award because of the exclusion.

The insured sued for bad faith failure to settle and obtained a $58,000 judgment. The court of appeals reversed and was affirmed by the state supreme court that held:

> An insurer who has not contracted to insure against its insured's liability for punitive damages has no duty to settle the compensatory part of an action in order to minimize the insured's exposure to punitive damages . . . Thus, if the insurer has no contractual duty to indemnify the insured for punitive damages, the insurer has no tort duty to settle in good faith with regard to punitive damages . . . The insured may not later utilize the tort of bad faith to effectively shift the cost of punitive damages to his insurer when such damages are expressly precluded by the underlying insurance contract.[5]

The court concluded:

> To hold otherwise would, in practical application, force insurers to settle cases involving punitive damages in order to avoid liability for the same punitive damages in subsequent bad faith actions. Such a result would be contrary to the principle that insurers have no absolute duty to settle in order to protect their insureds from punitive damages.[6]

B. Dispelling the "punitive damages are not our problem" mentality

Do these cases mean a carrier can simply ignore the excluded punitive count, that punitive damages are not its problem? That approach was unsuccessful for the carrier in *Magnum Foods, Inc. v. Continental Cas. Co.*,[7] where a Little Cesar's Pizza manager raped a 16-year-old employee. The manager had been repeatedly reported to company management for lewd behavior, and several female employees had refused to work alone with him. The manager had a prior felony sexual assault conviction that the employer had failed to uncover before hiring him. The victim and her parents sued Magnum, which was insured by CNA.

CNA defended under a reservation of rights. The policy limits were $6,000,000. Plaintiffs offered to settle for $495,000, but CNA would not offer above $350,000. The jury awarded $675,000 in compensatory damages and $750,000 in punitive damages against the employer (that the employer later settled for $600,000), as well as $5 million in punitive damages against the manager.

Magnum filed a declaratory judgment action seeking a declaration of coverage for the punitive award and seeking damages against CNA for bad faith. The district court granted partial summary for CNA holding that the policy did not cover the punitive award because Oklahoma public policy prevents insurance coverage for willful and malicious acts. But the district court denied summary judgment on the insured's bad faith failure to settle claim and submitted it to the jury. The jury awarded Magnum $750,000 in compensatory damages and $750,000 in punitive damages, and the trial court awarded the insured attorney fees for the bad faith claim and for the underlying case.

On appeal, CNA argued the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict. In denying CNA's motions, the court rejected the carrier's argument it had no duty to settle because that duty is triggered only by excess exposure and not a potential verdict on a non-covered count. The key facts were: the claim representative initially treated the claim as "merely a sex discrimination case for settlement purposes," the case was perceived as more dangerous as it moved closer to trial but CNA failed to take those developments into account, the senior claims representative reviewed the file the day before mediation (that gave her only a short period to make her evaluation), CNA did not increase its final offer despite defense counsel's recommendation, and CNA rejected plaintiff's counsel's offer to return to mediation shortly before trial.[8] Further, the claims representative told plaintiff's counsel and the insured's chief financial officer that *punitive damages were the insured's problem.*[9] The court held the carrier owed the following duty:

> When an insurer owes or undertakes the duty to defend its insured in a suit seeking both insured and uninsurable damages, it has the duty to conduct settlement negotiations in good faith as part of that defense. For one thing, this includes warning the insured of any potential exposure to him and apprising him of settlement opportunities within a reasonable time after they are presented. [Internal citations omitted]
>
> We hold that here, where both compensatory and uninsurable punitive damages are sought, and CNA assumed the defense of the entire suit under the obligations of the policies, the presence of the punitive claim did not absolve CNA from its obligation of good faith in handling the entire case. That duty of good faith does not include settlement or a contribution to settlement by CNA of the uninsurable punitive claim. We are convinced, however, that CNA's duty of good faith included working cooperatively with Magnum throughout in both defending and attempting to settle the entire case, with fair consideration given to Magnum's concerns because of its exposure to the uninsured punitive claim. The good faith duty of CNA thus required cooperative efforts by CNA with Magnum throughout to handle and settle the entire case.... The jury should also be told that CNA's duty of good faith and cooperation with Magnum did not obligate CNA to make more than a reasonable payment to settle the covered compensatory damages liability to avoid the uninsurable punitive exposure of Magnum.[10]

The court, however, remanded for a new trial because the damage award was based on evidence the insured had paid $600,000 to settle the punitive award, and the amount of the non-covered punitive award was not a proper element of damages. The court held that in a re-trial (1) the jury should not consider the insured's payment of $600,000 to settle the punitive award, and (2) the duty of good

faith "did not obligate CNA to make more than a reasonable payment to settle the covered compensatory damages liability to avoid the uninsurable punitive exposure of Magnum."[11]

An approach similar to that suggested in *Magnum* resulted in no liability for the carrier as a matter of law in *Ross Neely Systems, Inc. v. Occidental Fire & Cas. Co.*,[12] where a Ross Neely truck driver rear-ended a car stopped at a red light. Before trial, the carrier offered $35,000 while the plaintiff demanded $95,000. The trial went poorly for the insured, and the jury returned a verdict for the plaintiff of $45,000 compensatory damages and $250,000 punitive damages. Occidental promptly paid the compensatory award; Ross Neely paid the punitive award and sued Occidental for bad faith. The district court granted summary judgment for the carrier, which the Eleventh Circuit affirmed, using an analysis of the duties owed by a carrier in reservation of rights defenses (in the absence of direct precedent under Alabama law):

> In defending an insured under a reservation of rights, an insurer has a potential conflict of interest. Because the insured may face greater liability than the insurer, whose liability is capped by policy exclusions and limits, the insurer's duty of good faith includes four elements: (1) the insurer must thoroughly investigate the cause of the accident and the severity of the plaintiff's injuries; (2) the insurer must retain competent defense counsel who will represent only the insured; (3) the insurer must fully inform the insured of all developments relevant to its coverage and the progress of the lawsuit, including all settlement offers; and (4) the insurer must refrain from any action that demonstrates a greater concern for the insurer's monetary interest than for the insured's financial exposure.[13]

The court found that there was no genuine issue of material fact as to whether Occidental fulfilled its duty of good faith in defending Ross Neely and affirmed summary judgment for Occidental. Applying the enhanced duty factors, the court held that Occidental conducted an adequate investigation, Ross Neely did not assert the defense was inadequate, and the evidence showed Occidental kept Ross Neely informed of case developments and settlement offers as the case progressed.

> As for the fourth element—acting with a greater concern for Occidental's interest than Ross Neely's—there is no material issue of fact. Merely refusing to settle does not mean the insurer breached its duty; and the carrier's actions must be viewed in light of information it had at the time and not in hindsight. An 'insurer [is not] under a duty to settle a compensatory damage award merely to minimize its insured's exposure to punitive damages.'[14]

This trend . . . protects insureds by dispelling the carrier's 'it's not our problem' mentality

In summary, the trend seems to be that a carrier does not have a duty to accept an offer within the policy limits to avoid the insured's punitive damages exposure at trial. A carrier must, however, work cooperatively with the insured in assessing the case, including keeping the insured informed, and it must make reasonable offers on the covered compensatory claim. This trend seems to employ a balanced approach. It protects carriers from the extortive practice of exorbitant compensatory demands under threats of bad faith suits. It protects insureds by dispelling the carrier's "it's not our problem" mentality.

The insurance company might offer an unreasonably high settlement within the deductible to avoid the expense of diligent investigation or adjustment. Or it might expend insufficient effort to investigate a claim unless or until the insurance company's own money is at risk when the value of the claim approaches or exceeds the deductible

II. DEDUCTIBLES AND RETENTION LIMITS

A related question is whether a carrier, in addition to its duty to act reasonably to avoid excess liability, has a duty to act reasonably to limit the insured's personal liability for the deductible.

As to the deductible, traditionally the carrier is not liable for failure to settle when the verdict is within policy limits even when the insured personally pays the deductible portion of the judgment.[15] The rationale is that the policy provision giving the carrier "the right . . . to investigate and settle any 'accident,' claim or suit" vests in the carrier alone the right to settle the suit.[16]

> [A] majority of jurisdictions that have considered similar language . . . [have] held that an insured cannot complain that such a provision inevitably allows an insurer to commit an insured's funds—the policy deductible—without the insured's consent, because that is exactly the bargain that the insured struck under the policy that it bought and paid for. . . .[17]

Some courts, however, are re-examining the issue of deductibles and settlement. Recently, in *Roehl Transp., Inc. v. Liberty Mut. Ins. Co.*,[18] the insured's truck caused a collision and injury to a third party. Roehl's policy with Liberty Mutual had a $2 million limit and $500,000 deductible. The verdict at trial was for $830,000 that was within the $2 million limits, yet it cost the insured all of the $500,000 deductible. Roehl sued Liberty Mutual for bad faith failure to settle the claim at a lower amount within the deductible.

The trial of the bad faith claim resulted in a verdict for Roehl for $127,000.[19] The jury returned a special verdict finding (1) Liberty Mutual breached duties in handling the claim, (2) the failure to perform its duties demonstrated significant disregard of Roehl's interests and was done in bad faith, and (3) $127,000 was the sum necessary to fairly and reasonably compensate Roehl.[20]

The court first considered whether an action for bad faith failure to settle existed in the deductible context. In recognizing that cause of action, the court reasoned when:

> the insured has a significant deductible, the insurance company's and the insured's interests might diverge, and the insurance company could make decisions in settling claims that favor its own interests over those of the insured. The insurance company might offer an unreasonably high settlement within the deductible to avoid the expense of diligent investigation or adjustment. Or it might expend insufficient effort to investigate a claim unless or until the insurance company's own money is at risk when the value of the claim approaches or exceeds the deductible.[21]

[W]e likewise conclude that an insurance company may be liable for the tort of bad faith when the insurance company fails to act in good faith and exposes the insured to liability for sums within the deductible amount

Recognizing the parallel with excess failure to settle cases, the court held:

> The present situation is thus analogous to the third-party situation in which a claim may exceed the policy limits. In both instances, the insurance company has control over settlement, the insured has direct financial exposure as a result of the insured's conduct, and the interests of the insurance company and the insured diverge.... [W]e likewise conclude that an insurance company may be liable for the tort of bad faith when the insurance company fails to act in good faith and exposes the insured to liability for sums within the deductible amount."[22]

Turning to review of the bad faith verdict, the court held: "[A] jury could conclude from the evidence that Liberty Mutual's decisions demonstrated a significant disregard of Roehl Transport's rights and economic interest and were not honest."[23] The court found:

> The evidence showed that Liberty Mutual employed claims personnel on the Groth claim who had little training or experience with trucking claims; that there was a high turnover in staffing on the Groth claim; that Liberty Mutual failed to adequately supervise the staff's handling of the claim; that the investigation of the accident and Groth's injuries were inadequate; that the insurance company mishandled the independent medical examination so that the extent of injury and disability liability attributed to Roehl Transport was exaggerated; that Liberty Mutual made no attempt to settle Groth's claims when it had the opportunity to do so; and that Liberty Mutual failed to retain experts, including an accident reconstructionist, who could have provided evidence limiting Roehl Transport's liability to Groth.[24]

The court summarized the rather amorphous instruction to the jury, holding that "as a whole ... the jury was properly instructed":

> That " '[B]ad faith' is a term of broad application, and it is sometimes difficult to exactly define within the framework of every case"; that the jury must "consider whether the company in failing to perform the duties it owed to Roehl Transport[,] demonstrated a significant disregard of Roehl Transport's rights and economic interests"; that the company's "decision not to settle should be an honest one, taking into consideration both the interest of the company and the interests of the insured;" that the company's [negligence] alone is not enough to show the company acted in bad faith"; that the jury is to consider the totality of the insurance company's decision in the handling of the injured party's claim to determine whether those decisions were intellectually honest and reasonable"; that if the jurors determine that the company's decisions "were not honest and reasonable decisions, then the company may be said to have acted in bad faith"; and that if the jurors "conclude that important facts were recklessly ignored and disregarded during Liberty Mutual's adjustment of the claim, then the company may be said to have acted in bad faith."[25]

The court rejected Liberty Mutual's argument the judgment was speculative because neither plaintiff Groth nor defendant Roehl—the parties to the claim—testified as to the amount they would have paid and accepted to settle the case. The evidence of the claim value was given by four witnesses. Roehl called an experienced trucking litigation attorney who testified that a reasonable settlement value was under $100,000 and Liberty Mutual should have been willing to pay $100,000 before suit was filed.[26] Roehl also called an experienced claim manager in the trucking industry whose opinion was Liberty Mutual should have attempted a settlement for $100,000, and that Liberty Mutual committed errors in the way it handled the medical information.[27] When called, plaintiff's counsel refused to testify about his evaluation of the case based on the attorney-client privilege, but he did testify in response to a "hypothetical" question that the reasonable settlement value of the "hypothetical claim" was $103,000 to $133,000.[28] Finally, a Liberty Mutual adjuster testified a claim like Groth's settles 99 percent of the time under $100,000.[29] The court held that although Groth's and Roehl's testimony may have been relevant, their testimony was not required, and it affirmed the judgment.

As in *Roehl*, the minority view is that a carrier cannot unilaterally settle a claim, but needs the insured's consent, when settlement results in the insured's personal liability for the deductible. For example, in *St. Paul Fire & Marine Ins. Co. v. Edge Mem. Hosp.*,[30] the Alabama Supreme Court broke with the majority view that contract language giving the carrier the right to settle when it controls the defense vests in the carrier sole discretion on settlement negotiations. The insured filed a declaratory judgment seeking a ruling the carrier must defend and pay certain claims against it. The carrier counterclaimed for the deductible on another claim it had settled. The carrier had settled the underlying claim for $10,000 that was within the $50,000 deductible. The insured contended it was not liable for reimbursement of the deductible because it was not legally required to pay claimant the damages, and further, it was not informed of the settlement before it was made and did not consent.[31] The court affirmed summary judgment for the insured because it had no opportunity to consent to or reject the option to settle. The court held:

> Where the insured must ultimately pay the amount of a settlement as part of the deductible amount, a reasonable construction of the applicable provision of the insurance contract where it is also considered that the insured must itself pay the amount of the deductible is that the insurer cannot agree to pay money in a settlement which must be repaid by the insured without first obtaining the consent of the insured.[32]

The idea 'we have the right to settle' should no more govern the carrier's actions than should the idea 'it's not our problem' in non-covered punitive damages claims

In sum, when the carrier controls the defense under policy language giving it the right to settle within the limits, wrongful failure to settle may occur (1) when the carrier rejects settlement at a lower amount within the deductible that ultimately costs the insured a higher settlement or verdict, or (2) when the carrier over-pays the claim causing the insured to personally pay more than it should. Because deductibles expose the insured's personal funds as do excess claims, the carrier cannot ignore the insured's personal risks. The idea "we have the right to settle" should no more govern the carrier's actions than should the idea "it's not our problem" in non-covered punitive damages claims. Requiring a duty to reasonably consider the insured's deductible interest in negotiating settlements will help provide "checks and balances" in the policyholder-carrier relationship.

III. PRACTICE POINTERS

From the carrier's perspective, it should promptly investigate claims and continuously evaluate the flow of information, especially information that may change the assessment of the claim on liability or damages. The carrier should also keep the insured informed of material developments and should consider the insured's viewpoints on settlement even if the carrier ultimately reaches a different conclusion. In that regard, communications with the insured and the carrier evaluation should be thoroughly and professionally documented in the claims file. Finally, as to non-covered punitive damages claims, the carrier would do well in not using a too finely "sharpened pencil" in calculating the amount of its settlement authority.

From the insured's perspective, he/she should request an early evaluation from the carrier, particularly on policies with a deductible. The insured should also attempt collaborative discussions with the carrier to decide strategies on deductible claims, such as early settlement hopefully at lower amounts, or rejecting settlement in cases of no or weak liability. Likewise, at key points, the insured should attempt collaborative discussions with the carrier on

reasonable settlement strategies for covered claims when non-covered punitive claims are included. Refusals to respond or less than good faith responses should be documented and consideration given to hiring private counsel on the coverage and claims handling issues. Involving counsel pre-verdict may achieve better outcomes for the insured and posture the insured's legal rights in the event of a later adverse verdict.

IV. CONCLUSION

Recent case law shows a developing trend that carriers cannot simply ignore insureds' interests in claims with either non-covered punitive damages or policy deductibles. These court decisions supply needed "checks and balances" where insureds' personal money is at stake. As the cases show, carriers should make careful and informative reviews of non-covered or deductible claims. On the other hand, as this trend indicates, in adjudicating wrongful failure to settle cases courts are careful to protect against manipulation of the legal principles governing these actions. Hopefully, as the law continues to develop, the case law will provide a steadier roadmap for these coverage issues.

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[1] *See* Mutual Assurance, Inc. v. Schulte, 970 So.2d 292, 296 (Ala. 2007).

[2] *See, e.g.*, Lira v. Shelter Ins. Co., 913 P.2d 514, 516 (Colo. 1996); St. Paul Fire & Mar. Ins. Co. v. Convalescent Serv's, Inc., 193 F.3d 340, 343 (5th Cir. 1999)(Tex.); Ross Neely Systems, Inc. v. Occidental Fire & Cas. Co., 196 F.3d 1347 (11th Cir. 1999)(Ala.).

[3] Zieman Mfg. Co. v. St. Paul Fire & Mar. Ins. Co., 742 F.2d 1343, 1345–46 (9th Cir. 1983)(Cal.).

[4] Lira v. Shelter Ins. Co., 913 P.2d 514 (Colo. 1996).

[5] *Lira*, 913 P.2d at 516–17.

[6] *Lira*, 913 P.2d at 518. *Accord, Zieman* Mfg. Co. v. St. Paul Fire & Mar. Ins. Co., 724 F.2d 1343 (9th Cir. 1983)(Cal.).

[7] Magnum Foods, Inc. v. Continental Cas. Co., 36 F.3d 1491 (10th Cir. 1994)(Okla.).

[8] *Magnum Foods*, 36 F.3d at 1507.

[9] *Magnum Foods*, 36 F.3d at 1507.

[10] *Magnum Foods*, 36 F.3d at 1506.

[11] *Magnum Foods*, 36 F.3d at 1506. Accord, Ging v. American Liberty Ins. Co., 423 F.2d 115 (5th Cir. 1970)(Fla.) In reversing summary judgment for carrier in a bad faith action, the Fifth Circuit held that where the insurer undertakes a defense of the entire case, the insurer must (1) apprise the client of settlement opportunities; (2) warn the client of danger of punitive damages; (3) advise the client of the outcome of the litigation; (4) advise the client of any proceedings that might lessen the financial impact upon him; (5) conduct settlement negotiations in good faith to the interests of the insured wherever those interests might be divergent from the interests of the carrier. As to the latter element, the court added: "an insurance company—once having undertaken the defense of an action—may properly consider its own interests in conducting the litigation or settlement negotiations, but in so doing it may never forget the interest of its Assured." *Id.* at 120. The court reversed summary judgment for the carrier because of its egregious conduct, essentially abandoning the insured and remanded the case for trial.

[12] Ross Neely Systems, Inc. v. Occidental Fire & Cas. Co., 196 F.3d 1347, 1352 (11th Cir. 1999)(Ala.).

[13] *Ross Neely Systems*, 196 F.3d at 1351.

[14] *Ross Neely Systems*. 196 F.3d at 1352.

[15] *See, e.g.*, American Prot. Ins. Co. v. Airborne, 476 F. Supp. 2d 985 (N.D. Ill. 2007)(insured had to reimburse carrier $1 million deductible as part of carrier's $2.85 million settlement that was made over insured's objection); Cas. Ins. Co. v. Town & Country Pre-School Nursery, 498 N.E.2d 1177 (Ill. App. 1986)(carrier had no duty to consider insured's interests in settling claim that fell within the policy deductible); Am. Home Assur. Co. v. Hermann's Warehouse Corp., 563 A.2d 444 (N.J. 1988)(carrier entitled to reimbursement from insured of deductible amount for settlement over insured's objection); Methodist Hosp. v. Zurich Am. Ins. Co., 2009 WL 3003251 (Tex. App. 2009)(no extra-contractual claim for carrier's improper claims handling of paying higher value than claims were worth but which insured had to pay under policy deductible). *See also Annot.*, "Liability of Insurer to Insured For Settling Third-party Claim Within Policy Limits Resulting in Detriment to Insured," 18A.L.R.5th 474 (on line ed. 2011).

[16] *American Prot. Ins. Co.*, 476 F. Supp. 2d at 990.

[17] *American Prot. Ins. Co.*, 476 F. Supp. 2d at 990.

[18] Roehl Transp., Inc. v. Liberty Mut. Ins. Co., 784 N.W.2d 542 (WI 2010).

[19] *Roehl Transp.*, 784 N.W.2d at 549.

[20] *Roehl Transp.*, 784 N.W.2d at 549.

[21] *Roehl Transp.*, 784 N.W.2d at 554.

[22] *Roehl Transp.*, 784 N.W.2d at 554. "Just as in traditional third-party excess judgments, the insured with a high deductible needs the protection of a bad faith cause of action to guard against the risk that an insurance company's exercise of control over a claim might favor its own financial interests over those of the insured." *Id.* at 554–55.

[23] *Roehl Transp.*, 784 N.W.2d at 567.

[24] *Roehl Transp.*, 784 N.W.2d at 567.

[25] *Roehl Transp.*, 784 N.W.2d at 567.

[26] *Roehl Transp.*, 784 N.W.2d at 567.

[27] *Roehl Transp.*, 784 N.W.2d at 567–68.

[28] *Roehl Transp.*, 784 N.W.2d at 567–68.

[29] *Roehl Transp.*, 784 N.W.2d at 568.

[30] St. Paul Fire & Marine Ins. Co. v. Edge Mem. Hosp., 584 So. 2d 1316 (Ala. 1991).

[31] *Edge Mem. Hosp.*, 584 So. 2d at 1326.

[32] *Edge Mem. Hosp.*, 584 So. 2d at 1327. In Rocor Internat'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 966 S.W.2d 559, 568 (Tex. App., San Antonio 1998), the insured truck driver while drunk caused a collision killing two highway patrol officers. National Union, the excess carrier, took over settlement discussions. While all parties expected a quick settlement because liability and substantial damages were clear, National Union took over two years to make a settlement. The insured was bearing the cost of its defense, so National Union's delay caused it to incur substantial expense. The court held the insured had claims under the state insurance code and common law negligence for the excess carrier's delay: "We recognize that National Union has no duty to defend Rocor [the insured] under the express terms of the agreement between the parties. However, National Union assumed the duty to fairly settle the claims against Rocor when it took over negotiations, including negotiations involving funds that it did not control. National Union may not have it both ways; it may not take exclusive control of the handling of claims against its insured and then claim in court that it cannot be held liable for mishandling those claims because it had no contractual duty to defend. The assumption of the exclusive right to negotiate a settlement gave rise to the 'special relationship' upon which the *Stowers* duty [duty to settle to avoid excess judgment] rests." *Id.* at 568.