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LIABILITY INSURANCE—A MOVE TO LIMIT THE EXCESS JUDGMENT DAMAGES AWARD

I. INTRODUCTION

Whenever a liability insurer refuses to settle claims against his insured within the applicable policy limits, the possibility of a cause of action for the failure to settle¹ between the insured² and the insurer arises.³ In the typical situation, the insured has been involved in an accident with a third party which results in legal action. During the course of the litigation, the insurer refuses an opportunity to settle the injured third party's claim within the insured's policy limits. As a result of the insurer's refusal to offer a settlement, the law suit continues and, eventually, a recovery in excess of the insured's policy limits is awarded to the injured third party. At this point, the insured has the right to bring an action against the insurer for that portion of the judgment won by the third party in excess of the monetary limits of the insurance policy.⁴

This action by the insured commonly is referred to as an "excess judgment suit." Although it has been the subject of numerous law review articles, the majority of them focus on the existence of the insurer's liability⁵ rather than on the quantity of damages recoverable in excess of the policy limits. This

1. The insured also may have a cause of action for the insurer's failure to defend claims brought against the insured, or for the breach of other express covenants in the insurance policy. The elements of such actions and the remedies available must be distinguished from those available when the cause of action is for failure to settle or compromise claims. Specifically, when an insured sues for damages resulting from the insurer's failure to defend, the maximum damages recoverable is limited to the face value of the policy. Similarly, a breach of other express covenants of the insurance policy by the insurer normally cannot result in damages of a greater value than the insurance coverage. See Comment, *Insurance—Insurer's Liability for Wrongful Refusal to Defend or Settle*, 36 U. Mo. K.C.L. Rev. 304 (1968) [hereinafter cited as *Insurer's Liability*]; Comment, *The Insurer's Duty To Defend Under A Liability Insurance Policy*, 114 U. Pa. L. Rev. 734 (1966); cf. Annot., 34 A.L.R.3d 533 (1970). See generally R. Keeton, *Insurance Law* (1971) [hereinafter cited as *Keeton*].

2. The action also may be brought by a party suing in place of the insured. Any reference to the insured in this Note will encompass all possible representatives. See, e.g., *Peterson v. Allcity Ins. Co.*, 472 F.2d 71 (2d Cir. 1972) (assignee); *Atlantic City v. American Cas. Ins. Co.*, 254 F. Supp. 396 (D.N.J. 1966) (third party beneficiary); *Turgeon v. Shelby Mut. Plate Glass & Cas. Co.*, 112 F. Supp. 355 (D. Conn. 1953) (subrogee).

3. See 7A J. Appleman, *Insurance Law and Practice* §§ 4711-13 (1962) [hereinafter cited as *Appleman*]; Keeton, *supra* note 1, at 508-20. For a concise discussion of the problems surrounding the duty of an insurer to settle claims see Keeton, *Liability Insurance and Responsibility for Settlement*, 67 Harv. L. Rev. 1136 (1954).

4. "[T]he more modern and better reasoned view is that the cause of action arises when the insured incurs a binding judgment in excess of the policy limits." *National Farmers Union Prop. & Cas. Co. v. O'Daniel*, 329 F.2d 60, 66 (9th Cir. 1964); accord, *Brown v. Guarantee Ins. Co.*, 155 Cal. App. 2d 679, 319 P.2d 69 (2d Dist. 1957).

5. See, e.g., Comment, *Excess Judgments and the Bad Faith Rule*, 36 Albany L. Rev. 698 (1972); Note, *Recent Developments in the Excess Judgment Suit*, 36 Brooklyn L. Rev. 464 (1970); *Insurer's Liability*, *supra* note 1.

Note, on the other hand, will emphasize primarily the quantity of damages currently recoverable, the factors which affect recovery, and the most recent trend toward limiting the excess judgment damages award. As a preface to this analysis, the elements of insurer liability will be considered briefly.

II. ELEMENTS OF INSURER LIABILITY

The courts have developed two tests to aid in determining when an insurer will be liable in damages for refusing to settle claims against the insured. Depending on the jurisdiction involved, the excess judgment cause of action may be considered either tortious or contractual, triggering either a "negligence" or "bad faith" test of liability.⁶

In a jurisdiction where liability is predicated on "bad faith" the court imposes upon the insurer the obligation⁷ to consider in good faith "the insured's interests as well as its own when making decisions as to settlement."⁸ Under this test, if the insurer acted in bad faith in refusing a settlement it will be liable. The vast majority of American jurisdictions follows this test.⁹

A minority of jurisdictions apply the "negligence test," thereby imposing the following standard of care¹⁰ upon the insurer:

Under a liability policy in which the insurer assumes the duty of settling suits against the insured, the obligation is one requiring due care and a strict performance

6. Keeton, *supra* note 1, at 510. See generally Note, Recent Developments in the Excess Judgment Suit, 36 Brooklyn L. Rev. 464 (1970). At least one jurisdiction imposes strict liability as well. *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 430-31, 426 P.2d 173, 176-77, 58 Cal. Rptr. 13, 16-17 (1967). See generally Comment, Approaching Strict Liability of Insurer for Refusing to Settle Within Policy Limits, 47 Neb. L. Rev. 705 (1968); Comment, Insurer's Strict Liability for Entire Judgment, 13 S.D.L. Rev. 375 (1968).

7. Although numerous courts impose the good faith obligation, a recent Second Circuit decision points out that "[w]hile the New York rule is unquestionably that the insurer must act in good faith, in the unending variety of fact patterns which continue to plague courts . . . there is no pat formula which can be routinely applied to determine its presence." *Peterson v. Allcity Ins. Co.*, 472 F.2d 71, 77 (2d Cir. 1972).

8. *Harris v. Standard Accident & Ins. Co.*, 191 F. Supp. 538, 540 (S.D.N.Y.), *rev'd* on other grounds, 297 F.2d 627 (2d Cir. 1961), *cert. denied*, 369 U.S. 843 (1962); see *Appleman*, *supra* note 3, §§ 4711-13. Professor Keeton states that the "equality of interest" standard would be stated better in terms regarding the limit. "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." Keeton, *supra* note 1, at 511; accord, *Lange v. Fidelity & Cas. Co.*, 290 Minn. 61, 65, 185 N.W.2d 881, 884 (1971).

9. *Insurer's Liability*, *supra* note 1, at 323-25 n.88.

10. *Appleman*, *supra* note 3, § 4713. "The standard of care is at least what a reasonable man would exercise in the management of his own affairs." *Dumas v. Hartford Accident & Indem. Co.*, 94 N.H. 484, 488, 56 A.2d 57, 60 (1947). The above standard is part of the "Stowers Doctrine," established in *G. A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544, 547 (Tex. Comm'n. App. 1929).

. . . and the insurer owes the duty to exercise reasonable care in conducting the defense¹¹

The authorities are in conflict as to the merits of the two tests. It is felt that the tests "are to some extent interchangeable"¹² and that "virtually the same evidence will be relied upon"¹³ under either test. In fact, many assert that the final resolution of the liability issue "would not depend on the court's choice between bad faith and negligence standards."¹⁴ More importantly, the court's selection of either a bad faith or a negligence standard can indirectly affect the damages recoverable by the insured, since the damages available in a tort action differ from those available in a contract action.¹⁵

III. THE DAMAGES AWARD

Assuming the insurer's liability, the key question is the "[c]ontroversy over remedies for breach of the company's duty regarding settlement."¹⁶ Thus, the question before the court and the plaintiff-insured is the amount of damages. Since more often than not a third party plaintiff has substituted for the insured,¹⁷ damages outstanding from prior litigation¹⁸ as well as any additional damages and costs sought in the excess judgment suit itself must be determined.

A. *The General Rule*

Most, if not all American jurisdictions agree that an insurer can be held liable for the full amount of a judgment obtained against the insured in excess of the applicable policy limits.¹⁹ Thus, the vast majority of cases result in

11. 14 G. Couch, *Cyclopedia of Insurance Law* § 51:5 (1965).

12. Appleman § 4712, at 562. Professor Appleman states, "it should be pointed out that there is more of a difference in verbiage than there is in result Some courts in weighing the responsibilities of the liability insurer, speak of bad faith; some speak of negligence, others use the two terms interchangeably. And, in truth, they are to some extent interchangeable." *Id.* at 561-62. One writer has gone further and has concluded that the standard upon which liability is ultimately based is "reasonable care." 30 *Fordham L. Rev.* 188, 193 (1961).

13. Keeton, *supra* note 1, at 510. See *State Farm Mut. Auto. Ins. Co. v. White*, 248 Md. 324, 328-32, 236 A.2d 269, 271-73 (1967). The court in *White* cited 7 *Am. Jur.* 2d *Automobile Insurance* § 156 (1963), which states: "And in a large number of the more recent cases the two tests of 'good faith' and 'negligence' have tended to coalesce, with many of the courts which have in terms rejected the 'negligence' test agreeing, nevertheless, that the insurer's negligence is a relevant consideration in determining whether or not it exercised the requisite good faith." *Id.* at 331, 236 A.2d at 272. See Keeton, *Liability Insurance and Responsibility for Settlement*, 67 *Harv. L. Rev.* 1136, 1140-42 (1954).

14. Keeton, *supra* note 1, at 510.

15. See notes 27-38 *infra* and accompanying text.

16. Keeton, *supra* note 1, at 516.

17. See note 2 *supra* and accompanying text.

18. Normally, the judgment obtained by the injured party against the insured will have to be proven.

19. See, e.g., *Nationwide Mut. Ins. Co. v. Smith*, 280 Ala. 343, 194 So. 2d 505 (1966);

damage awards measured by the "excess judgment."²⁰ "It is . . . held that since the insurer has reserved control over the litigation and settlement it is liable for the entire amount of a judgment against the insured, including any portion in excess of the policy limits"²¹ The primary reason for imposing liability for the entire excess judgment relates to the insurance company's power to control settlement negotiations, and possibly "adversely affect the insured's interests."²²

Although willingness to protect the citizen from unscrupulous insurance practices is admirable,²³ the decisions allowing recovery of the entire excess judgment have resulted in several inconsistencies. Conflicts have arisen concerning the theory of recovery (in contract or in tort),²⁴ the necessity of proof of actual damages, and the effect of the insured's economic status²⁵ on actual damages.

American Underwriters Ins. Co. v. Shook, 247 Ark. 1082, 449 S.W.2d 402 (1970); *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198 (1958); *Bashor v. Northland Ins. Co.*, 29 Colo. App. 81, 480 P.2d 864 (1970), aff'd, 494 P.2d 1292 (Colo. 1972); *American Fidelity Fire Ins. Co. v. Johnson*, 177 So. 2d 679 (Fla. Dist. Ct. App. 1965); *United States Fidelity & Guar. Co. v. Evans*, 116 Ga. App. 93, 156 S.E.2d 809, aff'd, 223 Ga. 789, 158 S.E.2d 243 (1967). "The normal recovery, where the insurer's actionable bad faith or negligence is established and an excess judgment is recovered, is the amount for which the insured becomes charged in excess of his policy coverage." Couch, *supra* note 11, § 51:27.

20. *Gordon v. Nationwide Mut. Ins. Co.*, 30 N.Y.2d 427, 448, 285 N.E.2d 849, 861, 334 N.Y.S.2d 601, 618-19 (1972), cert. denied, 410 U.S. 931 (1973) (dissenting opinion). "Regardless of the insured's financial responsibility most courts automatically adopt the excess judgment as the measure of damages in the insured's contract action." *Id.* at 448, 285 N.E.2d at 861, 334 N.Y.S.2d at 618-19. See, e.g., cases cited note 63 *infra*.

21. *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 657, 328 P.2d 198, 201 (1958). "[S]ince a liability insurer has absolute control over any negotiations for settlement or compromise of claims against the insured . . . it may be liable to answer for the entire amount of a judgment—even in excess of the policy limits" Appelman, *supra* note 3, § 4713, at 578. The control over settlements stems from a clause in the insurance policy. An example of such a clause is as follows: "With respect to such insurance as is afforded by this policy . . . the company shall . . . make such investigation and settlement of any claim or suit as it deems expedient." E. Patterson & W. Young, *Cases on Insurance* 698 (4th ed. 1961).

22. *Harris v. Standard Accident & Ins. Co.*, 191 F. Supp. 538, 540 (S.D.N.Y.), rev'd on other grounds, 297 F.2d 627 (2d Cir. 1961), cert. denied, 369 U.S. 843 (1962). "The interests of the insured and insurer often conflict. A settlement within the limits of the policy coverage is usually advantageous for the insured, for then he avoids all risk of personal liability for a judgment in excess of the policy limits. On the other hand, rather than consent to a settlement which would require the payment of substantially the entire amount of its coverage, the insurance company would generally prefer to proceed to trial and seek to avoid liability; should it lose, it may not be liable for much more than it would have had to pay in settlement." 297 F.2d at 630. See Couch, *supra* note 11, at § 51:3.

23. In particular, courts do not wish "to impair the usefulness of insurance for the poor man." *Gray v. Nationwide Mut. Ins. Co.*, 422 Pa. 500, 506, 223 A.2d 8, 10 (1966) (quoting Note, 27 U. Pitt. L. Rev. 726, 728 (1966)). See also *Ammerman v. Farmers Ins. Exch.*, 22 Utah 2d 187, 190, 450 P.2d 460, 462 (1969). But see *Harris v. Standard Accident & Ins. Co.*, 297 F.2d 627, 633 (2d Cir. 1961), cert. denied, 369 U.S. 843 (1962).

24. See text accompanying notes 27-38 *infra*.

25. See text accompanying notes 39-67 *infra*.

B. *Controversies*

1. Contract versus Tort Theories

As previously mentioned,²⁶ the confusion stems from the fact that while a vast majority of jurisdictions employ the "bad faith" test of liability,²⁷ individual courts impose the good faith standard as an implied covenant of the insurance contract,²⁸ whereas still others impose it as a fiduciary duty owed the insured by the insurer.²⁹ Consequently, bad faith is a breach of contract in the former jurisdictions³⁰ and a tortious injury in the latter.³¹

The importance of the alternative classification is twofold: it directly affects the type of damages recoverable, and, depending upon the financial status of the insured, it indirectly can affect the availability of the cause of action itself. Moreover, while the same type of evidence and proof of injury is required in all jurisdictions, the recovery of punitive damages,³² costs, attorneys' fees³³ and damages for mental distress can be significantly affected.³⁴ However, the basic

26. See notes 6-11 *supra* and accompanying text.

27. See note 9 *supra* and accompanying text.

28. See, e.g., *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 429, 426 P.2d 173, 176, 58 Cal. Rptr. 13, 16 (1967); *Grundy v. Manchester Ins. & Indem. Co.*, 425 S.W.2d 735, 737 (Ky. 1968); *Best Bldg. Co. v. Employers' Liab. Assur. Corp.*, 247 N.Y. 451, 453, 160 N.E. 911, 912 (1928).

29. See, e.g., *Fetter Livestock Co. v. National Farmers Union Prop. & Cas. Co.*, 257 F. Supp. 4, 10, 11 (D. Mont. 1966); *Bostrom v. Seguros Tepeyac, S.A.*, 225 F. Supp. 222, 233 (N.D. Tex. 1963), modified, 347 F.2d 168 (5th Cir. 1965); *Gedeon v. State Farm Mut. Auto. Ins. Co.*, 410 Pa. 55, 59, 188 A.2d 320, 322 (1963).

30. *Gray v. Nationwide Mut. Ins. Co.*, 422 Pa. 500, 508, 223 A.2d 8, 11 (1966). "We believe that . . . recent case law, employing contractual terms for the obligation of the insurer to represent in good faith the rights of the insured, indicates that a breach of such an obligation constitutes a breach of the insurance contract . . ." *Id.* at 508, 223 A.2d at 10; see, e.g., *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 430, 426 P.2d 173, 176-77, 58 Cal. Rptr. 13, 16-17 (1967); *Terrell v. Western Cas. & Sur. Co.*, 427 S.W.2d 825, 827 (Ky. 1968); *Gordon v. Nationwide Mut. Ins. Co.*, 30 N.Y.2d 427, 436-37, 285 N.E.2d 849, 853-54, 334 N.Y.S.2d 601, 607-09 (1972), cert. denied, 410 U.S. 931 (1973).

31. See, e.g., *Landie v. Century Indem. Co.*, 390 S.W.2d 558, 565 (K.C. Ct. App. 1965); *Clark v. Hartford Accident & Indem. Co.*, 457 S.W.2d 35, 38 (Tenn. Ct. App. 1970). Of course, those jurisdictions applying the "negligence test" of liability assume the cause of action is in tort. See, e.g., *Dumas v. Hartford Accident & Indem. Co.*, 94 N.H. 484, 487, 56 A.2d 57, 60 (1947); *Dumas v. Hartford Accident & Indem. Co.*, 92 N.H. 140, 141, 26 A.2d 361, 362 (1942); accord, *Knudsen v. Hartford Accident & Indem. Co.*, 26 Conn. Supp. 325, 222 A.2d 811 (New Haven C.P. 1966).

32. *Peterson v. Allcity Ins. Co.*, 472 F.2d 71 (2d Cir. 1972). "[T]he theory would create a question . . . of an allowance of punitive damages." *Id.* at 80 n.13. See notes 49-57 *infra* and accompanying text.

33. See *Zumwalt v. Utilities Ins. Co.*, 360 Mo. 362, 373-74, 228 S.W.2d 750, 755-56 (1950). See generally Keeton, *Liability Insurance and Responsibility for Settlement*, 67 *Harv. L. Rev.* 1136, 1178-79 (1954).

34. *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 433, 426 P.2d 173, 178-79, 58 Cal. Rptr. 13, 18-19 (1967). The court in *Crisci* acknowledged the reluctance of courts to award damages for mental suffering in a contract action. "Recovery of damages for mental suffering in the instant case does not mean that in every case of breach of contract the injured

recovery for the financial injury incurred by the solvent insured,³⁵ due to the excess judgment, is not affected by classifying the action as contractual or tortious.³⁶ The contract rule states that "[w]here a right of action for breach exists, compensatory damages will be given for the net amount of the losses caused . . . by the defendant's breach . . ."³⁷ In a tort action "[c]ompensatory damages' are the damages awarded to a person as compensation, indemnity or restitution for *harm* sustained by him."³⁸

2. Actual Damages and the Insolvent Insured

When the plaintiff-insured is either insolvent, semi-insolvent, or bankrupt, the classification of the action as tortious or contractual indirectly affects the right to bring any action. For example, if the plaintiff is insolvent, he will not incur actual damage since, in all likelihood, he cannot pay the excess judgment.³⁹ Unable to prove possible out-of-pocket damages, the insured's cause of action is partially, if not totally, eliminated. One possible method of avoiding this result is to classify the excess judgment as a punitive damages award. However, as will be shown,⁴⁰ this alternative is repugnant to a contract action.

As might be expected, the argument that the insolvent insured is not injured by the excess judgment is asserted repeatedly by the insurance industry in an effort to avoid liability.⁴¹ The argument has met with success on at least two

party may recover such damages. Here the breach also constitutes a tort." *Id.* at 434, 426 P.2d at 179, 58 Cal. Rptr. at 19. Additionally, there are problems concerning the applicable statute of limitations and the possibility of subrogation or assignment. For a discussion of the effect of classifying the cause of action as tort or contract on the running of applicable statutes of limitation see Keeton, *Liability Insurance and Responsibility for Settlement*, 67 Harv. L. Rev. 1136, 1132-83 (1954). Problems concerning the assignability of the cause of action are discussed in *Gray v. Nationwide Mut. Ins. Co.*, 422 Pa. 500, 510-12, 223 A.2d 8, 12-13 (1966).

35. For the purposes of this Note, a solvent insured is one whose total assets are sufficient to enable him to pay the entire excess judgment; an insolvent insured cannot be forced to pay any part of the excess judgment, and semi-solvents can be forced to pay a part of, but not all of, the excess judgment.

36. *Peterson v. Allcity Ins. Co.*, 472 F.2d 71, 79 (2d Cir. 1972) (footnote omitted): "Whether the theory of the plaintiff's action be in contract or in tort, the rule of actual or compensatory damages would appear to be the same . . ." See *Ruzanoff v. Retailers Credit Ass'n*, 97 Cal. App. 682, 276 P. 156 (3d Dist. 1929). See generally *Rutherford v. Standard Eng'r Corp.*, 88 Cal. App. 2d 554, 199 P.2d 354 (1st Dist. 1948).

37. Restatement of Contracts § 329 (1932) (emphasis added). See, e.g., *Cottle v. Gallup*, 432 F.2d 43 (1st Cir. 1970); *General Ins. Co. of America v. Hercules Constr. Co.*, 385 F.2d 13 (8th Cir. 1967).

38. Restatement of Torts § 903 (1939) (emphasis added); see *Ohio Oil Co. v. Elliott*, 254 F.2d 832 (10th Cir. 1958); *Gagne v. Bertran*, 43 Cal. 2d 481, 275 P.2d 15 (1954); *McCurdy v. Union Pac. R.R.*, 68 Wash. 2d 457, 413 P.2d 617 (1966).

39. See *Bourget v. Government Employees Ins. Co.*, 456 F.2d 282 (2d Cir. 1972); *Harris v. Standard Accident & Ins. Co.*, 297 F.2d 627 (2d Cir. 1961), cert. denied, 369 U.S. 843 (1962).

40. See notes 52-55 *infra* and accompanying text.

41. See, e.g., *Peterson v. Allcity Ins. Co.*, 472 F.2d 71 (2d Cir. 1972); *Bourget v. Gov-*

occasions. In *Harris v. Standard Accident & Insurance Co.*,⁴² the Second Circuit Court of Appeals denied the recovery of any excess judgment to plaintiffs suing in place of the insolvent insured.⁴³ The insureds in *Harris* were insolvent both before and after the excess judgment, and were adjudicated bankrupt subsequent to incurring liability for the excess judgment.⁴⁴

In *Bourget v. Government Employees Insurance Co.*,⁴⁵ the insured was deceased. In denying any excess judgment, the court stated:

There could scarcely be a case where the insured's lack of interest in avoiding a judgment exceeding the policy limits was as clear as this one. Thompson [the insured] had no assets at all except his car. The insurance proceeds on this were completely consumed by claims to which Connecticut gave priority over Bourget's⁴⁶

The *Bourget* holding essentially followed the reasoning of then Chief Judge Lumbard in *Harris*:

The purpose of tort damages is to compensate an injured person for a loss suffered and only for that. The law attempts to put the plaintiff in a position as nearly as possible equivalent to his position before the tort. Recovery is permitted not in order to penalize the tortfeasor, but only to give damages "precisely commensurate with the injury."⁴⁷

If the viewpoint espoused by the insurance industry and accepted by the Second Circuit is correct, the insolvent insured cannot recover the excess judgment as *compensatory damages*.⁴⁸

As previously noted, the excess judgment can be classified alternatively as

ernment Employees Ins. Co., 456 F.2d 282 (2d Cir. 1972); *Harris v. Standard Accident & Ins. Co.*, 297 F.2d 627 (2d Cir. 1961), cert. denied, 369 U.S. 843 (1962); *Gordon v. Nationwide Mut. Ins. Co.*, 30 N.Y.2d 427, 285 N.E.2d 849, 334 N.Y.S.2d 601 (1972), cert. denied, 410 U.S. 931 (1973).

42. 297 F.2d 627 (2d Cir. 1961), cert. denied, 369 U.S. 843 (1962).

43. In *Harris* the action was brought by a trustee in bankruptcy against the bankrupt insured's insurer. 297 F.2d at 628. In *Bourget* the action was brought by the insured third party under a Connecticut statute which gave the injured third party "a right of action against the insurer to the same extent that the [insured] . . . could have enforced his claim against the insurer" 456 F.2d at 283 n.1.

44. 297 F.2d at 629. The court relied heavily on the insureds being insolvent "before" the incurrence of the excess judgment to distinguish the holding in *Brown v. Guarantee Ins. Co.*, 155 Cal. App. 2d 679, 319 P.2d 69 (2d Dist. 1957). 297 F.2d at 632. *Brown* was "[t]he only case in which the insured went through bankruptcy and thus was discharged from the necessity of future payments, as were the [insureds] in [Harris]" *Id.* In *Brown* the insured was forced to go into bankruptcy because of the excess judgment liability. Consequently, it was held that the complaint in *Brown* "sufficiently stated a cause of action in favor of the insured when he filed his bankruptcy petition." 155 Cal. App. 2d at 688, 319 P.2d at 77.

45. 456 F.2d 282 (2d Cir. 1972).

46. *Id.* at 285 (footnote and citations omitted).

47. 297 F.2d at 631-32 (footnotes omitted). Although then Chief Judge Friendly in *Bourget* considered the action to be in contract, for the purposes of compensatory damages, the distinction is slight. See notes 35-43 *supra* and accompanying text.

48. 297 F.2d at 631-32.

punitive damages.⁴⁹ This appears especially attractive when the plaintiff insured is insolvent, since out-of-pocket damages do not exist.⁵⁰ While the theory underlying punitive damages⁵¹ is in accord with the purpose of the excess judgment suit (protecting the insureds by penalizing the insurers for unscrupulous or reckless practices),⁵² normally punitive damages are not recoverable in a contract action.⁵³ However, courts have awarded punitive damages on occasion when the breach has been accompanied by an intentional wrong or gross negligence.⁵⁴ Therefore, in those jurisdictions that find a good faith covenant implied in the insurance contract, an insured seeking to recover the excess judgment as punitive damages would be required to prove "an extraordinary showing of a disingenuous or dishonest failure to carry out [the] contract."⁵⁵ Conversely, in jurisdictions which classify the cause of action as one in tort, punitive damages are more readily recoverable. However, even in these jurisdictions, the insured has a heavy burden of proof.⁵⁶

Classifying the damages awarded to the insolvent insured as "punitive" raises further difficulties in light of the proposition, supported by numerous author-

49. At least one court has classified the recovery of the excess judgment as "punitive [in] nature." *Gordon v. Nationwide Mut. Ins. Co.*, 30 N.Y.2d 427, 437, 285 N.E.2d 849, 854, 334 N.Y.S.2d 601, 608-09 (1972), cert. denied, 410 U.S. 931 (1973).

50. "Damages are punitive when they are assessed by way of punishment to the wrongdoer or example to others and not as the money equivalent of harm done." Restatement of Contracts § 342, comment a at 561 (1932).

51. Generally it is held that punitive damages involve "a blending of the general interest of society with those peculiar to the aggrieved party." *South Texas Coaches v. Eastland*, 101 S.W.2d 878, 883 (Tex. Civ. App. 1937); accord, *Lampert v. Reynolds Metals Co.*, 372 F.2d 245, 247 (9th Cir. 1967). "[E]xemplary or punitive damages are said to be awarded, not as compensation but as 'smart money,' as punishment to the wrongdoer and as a deterrent, warning or example to defendant . . ." *Bucher v. Drause*, 200 F.2d 576, 587 (7th Cir. 1952), cert. denied, 345 U.S. 997 (1953); accord, *Reynolds v. Pegler*, 123 F. Supp. 36, 38-39 (S.D.N.Y. 1954), aff'd, 223 F.2d 429 (2d Cir.), cert. denied, 350 U.S. 846 (1955); *Fisher v. Miami*, 172 So. 2d 455 (Fla. 1965). See generally *C. McCormick, Damages 275-78* (1935).

52. See note 23 *supra* and accompanying text.

53. Restatement of Contracts § 342 (1932). See, e.g., *PSG Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 417 F.2d 659 (9th Cir. 1969), cert. denied, 397 U.S. 918 (1970); *Wood v. Citronelle-Mobile Gathering Sys. Co.*, 409 F.2d 367 (5th Cir. 1968); *King v. Insurance Co. of North America*, 273 N.C. 396, 159 S.E.2d 891 (1968); *Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publ. Co.*, 33 App. Div. 2d 766, 306 N.Y.S.2d 599 (1st Dep't 1969) (mem.), aff'd, 30 N.Y.2d 34, 281 N.E.2d 142, 330 N.Y.S.2d 329, cert. denied, 409 U.S. 875 (1972).

54. See, e.g., *Singleton v. Foreman*, 435 F.2d 962 (5th Cir. 1970); *Griffith v. Shamrock Village, Inc.*, 94 So. 2d 854 (Fla. 1957); *Hess v. Jarboe*, 201 Kan. 705, 443 P.2d 294 (1968).

55. *Gordon v. Nationwide Mut. Ins. Co.*, 30 N.Y.2d 427, 437, 285 N.E.2d 849, 854, 334 N.Y.S.2d 601, 609 (1972), cert. denied, 410 U.S. 931 (1973).

56. See *Smith v. Transit Cas. Co.*, 281 F. Supp. 661 (E.D. Tex. 1968), aff'd, 410 F.2d 210 (5th Cir. 1969); cf. *Gill v. Montgomery Ward & Co.*, 284 App. Div. 36, 129 N.Y.S.2d 288 (3d Dep't 1954). See generally Comment, *Exemplary Damages Awarded for Breach of Fiduciary Duty*, 33 N.Y.U.L. Rev. 877 (1958).

ities, that a claim for punitive damages alone is insufficient to support a cause of action. In other words, actual injury, sufficient to justify awarding compensatory damages, must be proven before punitive damages can be considered.⁵⁷ In this light, the possibility of recovery based solely on punitive damages is jeopardized.

3. The Prepayment Rule

Parallel to the position that actual damages are required before punitive damages can be awarded, a number of jurisdictions require, as a prerequisite to bringing the cause of action against the insurer for the excess judgment, either the prepayment of the judgment or proof of the ability of the insured to pay the judgment eventually.⁵⁸ The leading case setting forth the "prepayment rule" is *Dumas v. Hartford Accident & Indemnity Co.*,⁵⁹ wherein Justice Page, writing for a unanimous court, held that the right to sue for the excess judgment accrues only when the plaintiff has suffered an actual injury. "The possibility of injury is not injury itself In the case before us the injury will remain merely possible and conjectural until the plaintiff has paid the excess judgment . . . or at least until his financial status is such that the excess judgment is sure to be collected" ⁶⁰ Although *Dumas* involved a solvent, possibly wealthy insured,⁶¹ the ramifications of the holding clearly affect insolvent insureds. Since excess judgments involve thousands and usually tens of thousands of dollars,⁶² the doors of the courts would be closed to those unable to expend the large sums necessary to meet the excess liability.

To protect the interests of the insolvent insured, recent cases have rejected

57. See *Gill v. Montgomery Ward & Co.*, 284 App. Div. 36, 129 N.Y.S.2d 288 (3d Dep't 1954). "The claim for punitive damages is not a separate cause of action; it merely constitutes 'an element of the single total claim for damages'" *Knibbs v. Wagner*, 14 App. Div. 2d 987, 222 N.Y.S.2d 469, 470 (4th Dep't 1961) (mem.) (citation omitted). But cf. *Kent v. Buffalo*, 61 Misc. 2d 142, 304 N.Y.S.2d 949 (Sup. Ct. 1969), rev'd on other grounds, 29 N.Y.2d 818, 277 N.E.2d 669, 327 N.Y.S.2d 653 (1971) (libel action).

58. *Dumas v. Hartford Accident & Indem. Co.*, 92 N.H. 140, 26 A.2d 361 (1942); see *State Auto. Mut. Ins. Co. v. York*, 104 F.2d 730 (4th Cir.), cert. denied, 308 U.S. 591 (1939). But see 27 U. Pitt. L. Rev. 726, 727-28 & nn.4-5 (1966) (suggesting that the *Dumas* prepayment rule is based on a misreading of *State Auto. Mut. Ins. v. York*). See also *Norwood v. Travelers Ins. Co.*, 204 Minn. 595, 284 N.W. 785 (1939), overruled in *Lange v. Fidelity & Cas. Co.*, 290 Minn. 61, 185 N.W.2d 881 (1971).

59. 92 N.H. 140, 26 A.2d 361 (1942).

60. *Id.* at 141, 26 A.2d at 362 (citations omitted).

61. The insured was a physician. After the adverse ruling, he simply wrote a check for the \$7,000 excess judgment and re-instituted the cause of action, eventually recovering the entire excess judgment. See *Dumas v. Hartford Accident & Indem. Co.*, 94 N.H. 484, 56 A.2d 57 (1947).

62. See, e.g., *Anderson v. St. Paul Mercury Indem. Co.*, 340 F.2d 406 (7th Cir. 1965) (\$75,000 judgment); *Augustin v. General Accident Fire & Life Assur. Corp.*, 283 F.2d 82 (7th Cir. 1960) (\$22,500 judgment); *United States Fidelity & Guar. Co. v. Canale*, 257 F.2d 138 (6th Cir. 1958) (\$35,000 judgment).

both the "actual injury" and the "prepayment rule."⁶³ These cases recognize that even an insolvent insured is *actually* injured when a judgment against him remains unpaid.⁶⁴ Similarly, the court in *Gray v. Nationwide Mutual Insurance Co.*⁶⁵ listed three major reasons for abolishing the prepayment rule:

(1) such view prevents an insurer from benefiting from the impecuniousness of an insured who has a meritorious claim but cannot first pay the judgment imposed upon him; (2) such view negates the possibility that the insurer would be . . . less responsive . . . to its trust duties where the insured is able to pay the excess judgment. Were payment the rule, an insurer with an insolvent insured could unreasonably refuse to settle, for, at worst, it would only be liable for the amount specified by the policy. To permit this would be to impair the usefulness of insurance for the poor man . . . (3) such view recognizes that the fact of entry of the judgment itself against the insured constitutes a real damage to him because of the potential harm to his credit rating . . .⁶⁶

In short, recent decisions treat "extant, unpaid judgments as injuries in themselves, their overburden measuring the pecuniary damages."⁶⁷ Under this view, the loss can be recovered as compensatory damages and the problems surrounding a punitive damages theory avoided.

IV. RECENT CASES

Two recent New York cases, *Gordon v. Nationwide Mutual Insurance Co.*⁶⁸ and *Peterson v. Allcity Insurance Co.*,⁶⁹ have taken the actual damages requirement a step further.⁷⁰

In *Gordon*, the New York Court of Appeals reversed a lower court which had awarded the insolvent an excess judgment of \$259,058.87⁷¹ (over twelve-

63. *Jenkins v. General Accident Fire & Life Assur. Corp.*, 349 Mass. 699, 212 N.E.2d 464 (1965). "Despite some conflict in earlier cases, the weight of authority is that it is not necessary for the insured to allege that he has paid or will pay a judgment in excess of the policy limits in an action against the insurer for breach of its duty to act in good faith." *Id.* at 703, 212 N.E.2d at 467 (citations and footnote omitted); accord, *Gray v. Nationwide Mut. Ins. Co.*, 422 Pa. 500, 506, 223 A.2d 8, 10 (1966); *Henegan v. Merchants Mut. Ins. Co.*, 31 App. Div. 2d 12, 294 N.Y.S.2d 547 (1st Dep't 1968). See generally 27 U. Pitt. L. Rev. 726 (1966).

64. *Lee v. Nationwide Mut. Ins. Co.* 286 F.2d 295, 298 (4th Cir. 1961). "'Payment is no more a condition precedent to suit for recovery of the damage in the one case [bodily injury] than in the other [excess judgment].'" *Id.* (citation omitted).

65. 422 Pa. 500, 223 A.2d 8 (1966).

66. *Id.* at 506, 223 A.2d at 10 (citations omitted) (quoting 27 U. Pitt. L. Rev. 726, 728 (1966)).

67. 286 F.2d at 298.

68. 30 N.Y.2d 427, 285 N.E.2d 849, 334 N.Y.S.2d 601 (1972), cert. denied, 410 U.S. 931 (1973).

69. 472 F.2d 71 (2d Cir. 1972).

70. In each of the cases, the plaintiff was a party suing in place of the insured.

71. 30 N.Y.2d at 431, 285 N.E.2d at 850, 334 N.Y.S.2d at 603.

and-a-half times the policy limit). Judge Bergan, writing for a plurality of three,⁷² considered the action as contractual,⁷³ and stated that "a punitive measure of damages is not applied routinely for breach of contract; and bad faith requires an extraordinary showing of a disingenuous or dishonest failure to carry out a contract."⁷⁴ He concluded that "[n]o such remarkable showing of bad faith is made in this record to warrant . . . imposition of liability vastly beyond the policy limits."⁷⁵ The opinion illustrates the reluctance of courts to attach punitive damages to contract actions.⁷⁶ Indeed, the insured will have to establish an extraordinary degree of bad faith⁷⁷ or "the damage for refusal to settle [will be] limited . . . by the policy coverage."⁷⁸

Chief Judge Fuld's concurring opinion rejected those decisions holding that the unpaid judgment is an injury in and of itself.⁷⁹

There are . . . decisions in some jurisdictions which hold that an excess judgment entered against the insured measures the damages suffered by him even though he may be insolvent and the judgment uncollectible. I find such a rule both unreasonable and unfair. Recovery against an insurer should not be sanctioned or upheld as punishment or as a punitive measure. In my view, an insured is not harmed and, by that token, suffers no damage when an uncollectible judgment is entered against him.⁸⁰

On the other hand, then Chief Judge Fuld specifically did reject the prepayment rule.⁸¹ Essentially, he advocated a compromise solution to the controversy over actual damages. While his position does not require "prepayment," it does recognize the inequity in automatically awarding the complete excess judgment without any proof of actual damages.

In a persuasive dissent,⁸² Judge Breitel also proposed an intermediate solution:

The situation of the insolvent, the deceased, or the bankrupt insured presents an obvious difficulty, in contrast to the solvent insured. In many instances, measuring the damages by the amount of the excess judgments, especially when they are as great as in this case, incurs judicial resistance, even as against a carrier which has been proven to be grossly negligent and callously arrogant. Nevertheless, limiting damages to policy coverage and litigation expense, if any, incurred by an abandoned

72. Judges Scileppi and Jasen joined in Judge Bergan's opinion. Chief Judge Fuld wrote a concurring opinion. Judges Burke and Gibson joined in Judge Breitel's dissent.

73. 30 N.Y.2d at 433, 285 N.E.2d at 851-52, 334 N.Y.S.2d at 605.

74. *Id.* at 437, 285 N.E.2d at 854, 334 N.Y.S.2d at 609.

75. *Id.* at 433, 285 N.E.2d at 852, 334 N.Y.S.2d at 605.

76. See notes 51-55 *supra* and accompanying text.

77. The court recognized the insured's failure to pay his insurance premiums and the insurer's good faith reliance on the advice of its counsel as mitigating Nationwide's breach. 30 N.Y.2d at 433, 285 N.E.2d at 851-52, 334 N.Y.S.2d at 605.

78. *Id.* at 439, 285 N.E.2d at 855, 334 N.Y.S.2d at 610.

79. *Id.* at 439, 285 N.E.2d at 856, 334 N.Y.S.2d at 611. See notes 63-67 *supra* and accompanying text.

80. 30 N.Y.2d at 439-40, 285 N.E.2d at 856, 334 N.Y.S.2d at 611 (citations omitted).

81. *Id.* at 441, 285 N.E.2d at 856, 334 N.Y.S.2d at 612.

82. *Id.* at 441-53, 285 N.E.2d at 857-64, 334 N.Y.S.2d at 612-23.

insured would be patently unjust. In most instances, if that were the rule, the carrier will not have risked more by its faithless conduct than it would have lost if it had performed its obligations faithfully.⁸³

In rejecting both extremes, Judge Breitel favors a rational assessment of damages. Thus, any award to the insolvent insured would take into account pertinent economic factors relative to the insured's individual circumstances, including "the age, economic status, economic prospects, skills, health, and any other matters presently existing which would be reasonably predictive of the insured's economic future"⁸⁴ Judge Breitel realized this method of assessing damages would be difficult,⁸⁵ but no more so than in many other instances of damages assessment.⁸⁶ Furthermore, any difficulties encountered are far outweighed by the fact that "such a rational and considered assessment is both fair and pragmatic."⁸⁷

Judge Breitel also rejected the prepayment rule, stating:

[T]he insured or his representative has the burden of persuasion on damages. He satisfies the burden, prima facie, by proving the amount of the excess tort judgment. The insurer may always show that in fact the insured was invulnerable or immune to the judgment, in whole or in part, because of his economic circumstances, or bankruptcy. The insured or his representative may then controvert the insurer's evidence.⁸⁸

In essence, the dissent would extend the right to bring the cause of action once the excess judgment has been incurred but would reserve to the insurer the right to prove that the insured was invulnerable to the judgment.

Shortly after *Gordon*, the Second Circuit decided *Peterson v. Allcity Insurance Co.*⁸⁹ This latter action, involving a \$70,000 excess judgment, was brought by the assignee of a solvent, though financially depressed, insured.⁹⁰

In the majority opinion, Judge Mulligan, applying New York law, upheld the recovery of the entire excess judgment.⁹¹ The opinion acknowledged that under the reasoning of Judge Fuld and Breitel in *Gordon*, "the plaintiff insured (or his representative or assignee) should only be entitled to recover to the extent that he has been or, in the reasonably foreseeable future, will be damaged by the outstanding judgment."⁹² Although Judge Mulligan regarded "such a rule as sensible,"⁹³ he distinguished it, noting that Judge Breitel's "realistic

83. *Id.* at 450, 285 N.E.2d at 862, 334 N.Y.S.2d at 620.

84. *Id.* at 451, 285 N.E.2d at 863, 334 N.Y.S.2d at 620.

85. *Id.*

86. Judge Breitel drew the analogy to the assessments "required when persons have been permanently injured or have been killed and the damage to their prospects or to their dependents is to be assessed" *Id.*, 285 N.E.2d at 863, 334 N.Y.S.2d at 621.

87. *Id.*

88. *Id.* at 452, 285 N.E.2d at 863, 334 N.Y.S.2d at 622.

89. 472 F.2d 71 (2d Cir. 1972).

90. *Id.* at 73.

91. *Id.* at 81.

92. *Id.* at 79 (footnote omitted).

93. *Id.* at 80.

approach for the semi-solvent insured is limited to the extreme case where the magnitude of the excess judgment is so great as to make unjust, the imposition of liability to its full amount.⁹⁴ Accordingly, he compared the policy limits, the excess judgments, and the economic status of the insured involved in *Gordon* and *Peterson*,⁹⁵ and concluded that, on the facts of the case, the verdict in *Peterson* was not "extreme or punitive."⁹⁶

Judge Moore, dissenting, pointed out the inherent weaknesses in the majority's interpretation of *Gordon*:

Such an approach establishes a standard rife with arbitrary and inconsistent results, and one not susceptible of even-handed application. . . . The better rule, clearly, is to focus not on the magnitude of the excess judgment in ratio to the policy of coverage, but rather, on the amount of actual harm occasioned on the semi-solvent insured—and then impose on the bad faith insurer the amount of damage suffered by the insured.⁹⁷

The dissent, endorsing the reasoning of Judges Fuld and Breitel in *Gordon*, felt that the insured in *Peterson* was being awarded an undeserved windfall—a result cautioned against in prior Second Circuit cases.⁹⁸

Although *Gordon* and *Peterson* both ostensibly applied the law of New York, they are clearly in conflict as to the theory of the cause of action,⁹⁹ the punitive damage award,¹⁰⁰ and the necessity of actual damages.¹⁰¹ Indeed, the difficulty encountered by the courts reflects the continuing controversy and confusion surrounding excess judgment suits.

V. PROPOSAL

As has been seen, the courts initially invoked the excess judgment award as a deterrent to the insurer's ability to control and manipulate the settlement procedure to the detriment of the insured. In contrast, the more recent decisions in *Gordon* and *Peterson* demonstrate the courts' inclination to eliminate the

94. *Id.* (citation omitted). However, this interpretation ignores Judge Breitel's further comment that a realistic assessment of damages should be given "in cases involving other than a solvent insured," not just in cases involving judgments of a great magnitude. 30 N.Y.2d at 451, 285 N.E.2d at 863, 334 N.Y.S.2d at 621 (dissenting opinion).

95. 472 F.2d at 80.

96. *Id.*

97. *Id.* at 83.

98. *Id.* at 81.

99. Judges Bergan and Mulligan regarded the action as contractual. Chief Judge Fuld and Judge Breitel regarded the action as tortious. Judge Moore relied heavily on the discussions of Judge Breitel and Chief Judge Fuld, apparently regarding the action as tortious.

100. Judge Bergan regarded the excess judgment as punitive. 30 N.Y.2d at 437, 285 N.E.2d at 854, 334 N.Y.S.2d at 608. Chief Judge Fuld specifically rejected the proposition that the excess judgment could "be sanctioned or upheld as punishment or as a punitive measure." *Id.* at 440, 285 N.E.2d at 856, 334 N.Y.S.2d at 611.

101. Compare Judge Mulligan's discussion of the damages award in *Peterson*, 472 F.2d at 79-81, with Judge Moore's dissenting opinion, *id.* at 81-84. See notes 79-87 *supra* and accompanying text.

excess judgment award when it appears that the insurer will be forced to provide a "windfall" for the insolvent or semi-insolvent insured. Confronted with these conflicting considerations, the courts have been unable to find an equitable solution. Indeed, both *Peterson* and *Gordon* continue the "all or nothing" approach to the excess judgment award.¹⁰²

The major hindrance to a compromise position such as advocated by Judge Breitel in *Gordon*¹⁰³ is the inability of the courts to restrict the liability of the insured to the injured third party. As noted in *Gordon*, "[t]his follows from the circumstance that as each increment of damage is paid [to the insured], it becomes subject to the tort creditor's claim, with an excess, albeit reduced, judgment liability still outstanding."¹⁰⁴ Thus, if the insolvent insured is forced to accept something less than the entire excess judgment in his action against the insurer, he will remain indebted to the injured party until he acquires sufficient funds to retire the debt or until he elects the embarrassing remedy of bankruptcy.¹⁰⁵

Since the courts are faced with divergent theories and considerations, it is time for legislative resolution of this matter. A statutory cause of action should encompass liability for an insurer's bad faith or negligent failure to settle claims, providing for both actual and punitive damages. Thus, if the insurer acted in bad faith or negligently, the insured could recover all actual damages. Moreover, if the insurer acted in a grossly negligent manner or with a malicious intent, the insured, at the discretion of the court, could recover punitive damages. Finally, if the plaintiff is any party other than the insured or if the insured is suing with the consent of a third party, any outstanding judgment owing to such party by the insured would be completely fulfilled by the resulting recovery.

The actual damages award would be measured in a manner similar to that delineated in Judge Breitel's dissent in *Gordon*.¹⁰⁶ Factors such as the insured's age, assets, and potential income, as well as sums already paid the injured party would be significant determinants. Punitive damages would be available only where a flagrant and intentional or grossly negligent disregard of the insured's interests is proved.¹⁰⁷

It is submitted that all parties affected would benefit from the certainty provided by such a statutory cause of action. The assurance that any liability

102. The party suing in place of the semisolvent insured in *Peterson* received the entire \$70,000 excess judgment. The party suing in place of the insolvent insured in *Gordon* received no part of the \$259,058.87 excess judgment.

103. See notes 82-88 *supra* and accompanying text.

104. 30 N.Y.2d at 450, 285 N.E.2d at 862, 334 N.Y.S.2d at 620 (dissenting opinion).

105. "[T]he submission to bankruptcy to avoid the excess judgment may be a significant loss for those who are sensitive or for those who have a reasonable likelihood of ever requiring credit." *Id.* at 450-51, 285 N.E.2d at 862, 334 N.Y.S.2d at 620 (Breitel, J., dissenting). See also Keeton, *Liability Insurance and Responsibility for Settlement*, 67 *Harv. L. Rev.* 1136, 1181 & n.110 (1954).

106. 30 N.Y.2d at 450-52, 285 N.E.2d at 862-63, 334 N.Y.S.2d at 620-22. See text accompanying notes 82-88 *supra*.

107. To avoid possible jury prejudice against the insurer, it could be recommended that such a determination be left to the judge as a matter of law.

incurred in excess of the policy limits could be satisfied with a recovery under the statute is beneficial to the insured. Similarly, the insurance industry benefits since recovery under the statutory cause of action would be limited, in a majority of cases, to the actual damages proved. Injured third parties also benefit indirectly,¹⁰⁸ since the insolvents would be more likely to litigate or assign their claims as a means of extinguishing outstanding liability.

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108. It must be emphasized that the primary purpose of the proposed statute is to provide an alternative to the inequities that flow from the award of the excess judgment as a measure of the insured's damages. Any benefit accruing to the injured third party can be considered incidental. "[I]f extensions of liability insurance coverage are to be provided by agreement or legislation for the purpose of benefiting claimants, it is arguable that the increased cost of insurance should be applied toward higher contract limits, rather than toward disregarding limits when a settlement offer is declined." Keeton, *Liability Insurance and Responsibility for Settlement*, 67 Harv. L. Rev. 1136, 1177 (1954) (footnote omitted).