Liability Insurance--A Move To Limit the Excess Judgment Damages Award

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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].


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 obligation\(^7\) to consider in good faith "the insured's interests as well as its own when making decisions as to settlement." 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.\(^8\)

A minority of jurisdictions apply the "negligence test," thereby imposing the following standard of care\(^9\) 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

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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).


EXCESS JUDGMENT AWARDS

... and the insurer owes the duty to exercise reasonable care in conducting the defense... 11

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

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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).
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."\textsuperscript{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 . . . .\textsuperscript{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."\textsuperscript{22}

Although willingness to protect the citizen from unscrupulous insurance practices is admirable,\textsuperscript{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),\textsuperscript{24} the necessity of proof of actual damages, and the effect of the insured's economic status\textsuperscript{25} on actual damages.

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\textsuperscript{22} 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 . . . ." Appleman, 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).

\textsuperscript{23} 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.


\textsuperscript{25} See text accompanying notes 27-38 infra.

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B. Controversies

1. Contract versus Tort Theories

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

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, costs, attorneys’ fees and damages for mental distress can be significantly affected. However, the basic

26. See notes 6-11 supra and accompanying text.
27. See note 9 supra and accompanying text.
recovery for the financial injury incurred by the solvent insured, due to the excess judgment, is not affected by classifying the action as contractual or tortious. 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 . . . ." In a tort action "'[c]ompensatory damages' are the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him." 37

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. 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, 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. 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, 1182-83 (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).


39. See notes 52-55 infra and accompanying text.

40. See, e.g., Peterson v. Allcity Ins. Co., 472 F.2d 71 (2d Cir. 1972); Bourget v. Gov-
EXCESS JUDGMENT AWARDS

occasions. In *Harris v. Standard Accident & Insurance Co.*, the Second Circuit Court of Appeals denied the recovery of any excess judgment to plaintiffs suing in place of the insolvent insured. 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.

In *Bourget v. Government Employees Insurance Co.*, 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's . . .

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."

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.

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

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. This appears especially attractive when the plaintiff insured is insolvent, since out-of-pocket damages do not exist. While the theory underlying punitive damages is in accord with the purpose of the excess judgment suit (protecting the insureds by penalizing the insurers for unscrupulous or reckless practices), normally punitive damages are not recoverable in a contract action. However, courts have awarded punitive damages on occasion when the breach has been accompanied by an intentional wrong or gross negligence. 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." 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.

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


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).


52. See note 23 supra and accompanying text.


EXCESS JUDGMENT AWARDS

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. The leading case setting forth the “prepayment rule” is *Dumas v. Hartford Accident & Indemnity Co.*, 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 . . . "

Although *Dumas* involved a solvent, possibly wealthy insured, the ramifications of the holding clearly affect insolvent insureds. Since excess judgments involve thousands and usually tens of thousands of dollars, 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

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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).

both the "actual injury" and the "prepayment rule." These cases recognize that even an insolvent insured is actually injured when a judgment against him remains unpaid. Similarly, the court in Gray v. Nationwide Mutual Insurance Co. 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 . . . .

In short, recent decisions treat "extant, unpaid judgments as injuries in themselves, their overburden measuring the pecuniary damages." 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. and Peterson v. Allcity Insurance Co., have taken the actual damages requirement a step further.

In Gordon, the New York Court of Appeals reversed a lower court which had awarded the insolvent an excess judgment of $259,058.87 (over twelve-
EXCESS JUDGMENT AWARDS

and-a-half times the policy limit). Judge Bergan, writing for a plurality of three, considered the action as contractual, 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." 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." The opinion illustrates the reluctance of courts to attach punitive damages to contract actions. Indeed, the insured will have to establish an extraordinary degree of bad faith or "the damage for refusal to settle [will be] limited . . . by the policy coverage."

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

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.

On the other hand, then Chief Judge Fuld specifically did reject the pre-payment rule. 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, 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


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 . . . ." Judge Breitel realized this method of assessing damages would be difficult, but no more so than in many other instances of damages assessment. 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." 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 Brietel 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 Gordon100 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).


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,\textsuperscript{108} since the insolvents would be more likely to litigate or assign their claims as a means of extinguishing outstanding liability. \textit{Joseph R. Simone}

\textsuperscript{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).