Vanderbilt Law Review

Volume 13
Issue 4 *Issue 4 - October 1960*

Article 1

10-1960

Ancillary Rights of the Insured Against His Liability Insurer

Robert E. Keeton

VANDERBILT LAW REVIEW

VOLUME 13 OCTOBER, 1960 NUMBER 4

ANCILLARY RIGHTS OF THE INSURED AGAINST HIS LIABILITY INSURER

ROBERT E. KEETON*

The primary right of the insured against his liability insurer is the right to reimbursement of loss falling within the coverage defined in the policy. The scope of that right is ordinarily determined by construction of the clauses defining the Bodily Injury Liability and Property Damage Liability Coverages.[1] The present article is concerned with ancillary rights, arising in part from these and other policy provisions and in part from the relationship created by liability insurance. These rights of the insured are, from the opposite point of view, duties of the insurer—duties concerned principally with settlement of the tort claim or defense against it. This article is also concerned with preservation of the insured's rights in the face of a defense of non-co-operation and with preservation of the insurer's defenses in the face of conflicts of interest affecting the conduct of its representatives, including the attorney appointed to defend in the name of the insured. The company's duties regarding settlement are considered first, since the legal doctrines in this area are rather fully developed and will serve by analogy to support suggestions concerning unsettled problems in other areas.

I. THE INSURER'S DUTY REGARDING SETTLEMENT

A. The Standard Policy Provision and the Conflict of Interest

The current standard provision of the automobile policy concerning defense and settlement declares that the company *shall* defend but "may make such investigation, negotiation and settlement of any claim or suit as it deems expedient."[2] Though as an original question

* Professor of Law, Harvard University; editor, *Basic Insurance Law* (1960).

This article is adapted from a lecture prepared for the Institute on Automobile Liability Insurance at the Law School, Vanderbilt University, on October 16, 1959. The writer gratefully acknowledges the valuable research assistance of Stanley Belkin, LL.B. Harvard Law School, 1960, and Norton Hall, Class of 1962, Harvard Law School.

1. See Appleman, *Overlapping Coverages in Liability Contracts*, 13 VAND. L. REV. 897 (1960); Plummer, *Automobile Policy Exclusions, Id.* at 945.

2. *Standard Provisions for Automobile Combination Policies, Basic Auto-*

such a clause might have been construed as giving the company a privilege but not a duty concerning settlement of the tort claim against the insured, it is now clear that under this and similar clauses the company has a duty to the insured regarding settlement. The supporting rationale most commonly urged is that this duty arises out of the relationship created by the liability insurance contract, rather than being derived from any particular contractual provision. The most significant aspect of this relationship is the company's power of control over settlements that affect not only its own interests but also the interests of the insured. If, for example, the policy limit per person is $10,000, and the claimant, having sued for $50,000, offers to settle for $10,000, the insured's interests are best served by settlement except in unusual situations in which a settlement might adversely affect other interests of the insured. On the other hand, were there no potential liability for noncompliance with a legal duty to settle, usually the company's interests would be best served by refusal to settle since, in the gamble of litigation, it might win a verdict and in any event could lose nothing more than the proposed settlement figure and the cost of unsuccessful defense.

B. Tort or Contract?

The company's duty to settle is usually referred to as a duty sounding in tort rather than contract,[3] though the distinction is rarely essential to a decision. There are a few situations in which the classification is critical, however. For example, the characterization of the cause of action as one sounding in contract may result in the application of a longer period of limitation. A recent California case, taking the position that the cause of action sounds in both contract and tort, allows the plaintiff to elect the contract theory to take advantage of the longer limitation period.[4]

---

mobile Liability and Physical Damage Form, Insuring Agreements, para. II (2d rev. 1955). A similar clause appears in other standard policy forms; *e.g., Standard Provisions for Automobile Combination Policies, Family Automobile Form,* Part I—*Liability* (1st rev. 1958). The standard provisions for automobile policies are prepared by collaboration among voluntary associations of insurers—the National Bureau of Casualty Underwriters, the Mutual Insurance Rating Bureau, and the National Automobile Underwriters Association. See Faude, *The 1955 Revision of the Standard Automobile Policy Coverage: Insuring Agreements and Exclusions,* in 1955 ABA SECTION OF INSURANCE LAW PROCEEDINGS 48, reprinted 1955 INS. L.J. 647. Even insurance companies that are not members of one of these associations use most of the standard provisions in their policy forms.

3. See, *e.g.,* Tennessee Farmers Mut. Ins. Co. v. Hammond, 200 Tenn. 106, 290 S.W.2d 860 (1956); Southern Fire & Cas. Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (E.S. 1952).

4. Comunale v. Traders & Gen. Ins. Co., 50 Cal.2d 654, 328 P.2d 198 (1958).

C. The Standard of Conduct

The standard used in judging whether the company has complied with its duty regarding settlement involves two major issues. First, is the basis of liability bad faith or is it negligence? A number of cases have held that only good faith toward the insured is required,[5] and at the opposite extreme a few have held that both good faith and ordinary care are required.[6] In the middle ground fall the more numerous cases recognizing at least a duty of good faith and either expressly or silently leaving unresolved the question whether there is also a requirement of ordinary care with respect to settlement. Though efforts have been made to sustain the proposition that one or the other of these two rules is the majority rule, the jurisdictions falling in the middle group where no decisive choice has been made are so numerous that it is somewhat misleading to speak of a majority rule on the point.

In most of the Tennessee cases, the insured's attorney asserting liability on the theory that the company failed to exercise good faith has not asserted a duty of ordinary care even as a supplemental ground of claim. Tactical considerations often support this course of action. Usually the same evidence would be relied upon to support the inference of bad faith and the inference of negligence. If the jury were given the three-fold choice of finding (1) no fault, or (2) negligence only, or (3) bad faith, the hopes for obtaining a finding of bad faith would be somewhat reduced because of the tendency of juries toward compromise—a tendency that would favor the intermediate finding of the lesser degree of fault, negligence. It is usually a reasonable tactical decision to take the risk that a jury that might have found negligence if given a threefold choice will not find bad faith when given a twofold choice, in preference to the risk that a jury that might have found bad faith if given a twofold choice will find only negligence when given a threefold choice and that the supreme court will then decline to impose liability for negligence. But the argument that negligence without bad faith will support liability in excess of policy limits for failure to settle is not foreclosed by the Tennessee cases.

In *Aycock Hosiery Mills v. Maryland Casualty Co.*,[7] an employer

5. *E.g.*, Georgia Cas. Co. v. Mann, 242 Ky. 447, 46 S.W.2d 777 (1932); City of Wakefield v. Globe Indem. Co., 246 Mich. 645, 225 N.W. 643 (1929); Radio Taxi Serv., Inc. v. Lincoln Mut. Ins. Co., 31 N.J. 229, 157 A.2d 319 (1960) (4-2 decision); Best Bldg. Co. v. Employers' Liab. Assur. Corp., 247 N.Y. 451, 160 N.E. 911 (1928); Berk v. Milwaukee Auto. Ins. Co., 245 Wis. 597, 15 N.W.2d 834 (1944).

6. *E.g.*, Douglas v. United States Fid. & Guar. Co., 81 N.H. 371, 127 Atl. 708 (1924); Dumas v. Hartford Acc. & Indem. Co., 94 N.H. 484, 56 A.2d 57 (1947); G. A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929).

7. 157 Tenn. 559, 11 S.W.2d 889 (1928).

claimed that his workmen's compensation insurer mishandled the defense and wrongfully refused to settle, with the result that a judgment of damages at common law was rendered against the employer on the theory of responsibility for injuries sustained by a minor employed illegally without a certificate. In sustaining liability of the insurance company, the court remarked that "the contract of insurance created a relation out of which grew the duty of the casualty company to exercise, not only good faith, but ordinary care."[8] It is not clear, however, whether the court intended the negligence theory to apply to the refusal to settle as well as the manner of defense. Moreover, even if so construed, this passage was arguably dictum, and if not dictum was at best only one of several grounds of decision, since the court found bad faith and negligence with respect to the *defense*.

In *Southern Fire & Casualty Co. v. Norris*,[9] a judgment of liability of the company upon a jury finding of bad faith was affirmed, and in the appellate opinion the following passage appeared: "In view of the charge requiring a showing of bad faith in failing to settle within the policy limit there is no occasion to consider whether the negligence rule should have been applied to that aspect of the case."[10]

More recently the Supreme Court of Tennessee has said, "We think our cases, and the authorities generally, support the complainant's [insurer's] contention that there is no liability upon an insurer for judgments in excess of the policy limits except in case of bad faith."[11] The holding of the supreme court, however, was an affirmance of the lower court's dismissal of declaratory proceedings filed by the insurer, on the ground that the insurer should not be permitted to force the defendant insured into a forum of its choosing and compel him to litigate his tort claim, involving a fact issue of good faith, in the chancery court. Since this reasoning is equally applicable to a claim based on negligence, the passage quoted above appears to be dictum.

Thus, in Tennessee, as in many other states, the question whether negligence can be a ground of liability in excess of policy limits has not been squarely decided, but in this state a decision against liability for negligence seems likely. This point is significant since circumstances may arise in which it will appear unlikely that a jury will make the nominally harsh finding of bad faith, yet likely that they will find negligence. For example, if the conduct on which the case against the company must be made is exclusively the conduct of

8. *Id.* at 568, 11 S.W.2d at 892.
9. 35 Tenn. App. 657, 250 S.W.2d 785 (E.S. 1952).
10. *Id.* at 675, 250 S.W.2d at 793.
11. Tennessee Farmers Mut. Ins. Co. v. Hammond, 200 Tenn. 106, 112, 290 S.W.2d 860, 862 (1956).

a lawyer who is known and respected in the community, clearly a jury will be more hesitant to find bad faith than to find negligence.

The second major issue involved in the standard by which the company's conduct regarding settlement is tested concerns the relative degree of consideration the company must give to the insured's interests in comparison with its own, where they come into conflict. Where this issue has been squarely faced and carefully considered, almost uniformly it has been resolved in a rule that the company must give the insured's interests equal weight to its own, or as it is often expressed, it must give his interests "at least equal weight". This formulation is somewhat confusing, since at the point of decision whether to settle or decline settlement it may seem that one interest or the other is being sacrificed. The rule is more readily understood, especially as part of a jury charge, if expressed in another form. The combination of the requirements of good faith and equal consideration may be expressed in the following simple proposition, which could appropriately be used as an instruction to the jury:

> 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.[12]

Though this formulation has not been specifically approved in appellate opinions, it seems well supported in principle by opinions stating the duty as one of good faith and "equal consideration" to the interests of the insured. The concept of equality referred to is like the concept of equality of men before the courts. It refers to impartiality—in this instance, impartiality in the weighing of the two competing interests. The easiest way to conceive of the exercise of such impartiality is to conceive of the two competing interests as being held by a single person, who thus would have no inducement to sacrifice one over the other except on the basis of their relative merit.

The special meaning ascribed to "bad faith" in this context, however, sharply limits the practical significance of the facts (1) that it may be permissible for the company to give its own interests equal weight in reaching a decision concerning a settlement proposal and (2) that juries are less likely to reach severe judgments against respected local attorneys than against less well-known adjusters. The bad faith referred to is not synonymous with dishonesty. This point is illustrated in the recent case of *Tennessee Farmers Mutual Ins. Co. v. Hammond*.[13] The trial judge, in passing on the motion for a new

12. For a more detailed statement of the arguments supporting this formulation, see Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1142-48 (1954). Also see Annot., 40 A.L.R.2d 168, 181-83, 186-90 (1955).

13. 306 S.W.2d 13 (Tenn. App. W.S. 1957). Another phase of this litigation is referred to in note 11 *supra*.

trial, remarked that it was clear that the attorney employed by the company to represent the insured in the tort claim had not been guilty of dishonesty.[14] The appellate court nevertheless affirmed a judgment for the insured on the theory that the conduct of the company's representatives, including the attorney, amounted to "bad faith" such as to support liability in excess of policy limits. In short, in many jurisdictions at least, bad faith can be established by proof that the defendant engaged in a course of conduct involving a deliberate preference of the company's interests over the insured's irrespective of whether the company's representatives honestly believed that such a course of conduct was within their legal rights.

D. Settlement Demands

Some aspects of the duty to settle, though not fully developed in case law, appear to be readily determinable in principle. One of these concerns a settlement demand that exceeds the policy limit. The duty to settle can nevertheless be invoked if the insured is willing to contribute the difference between the policy limit and the total settlement demand.[15] It should be noted that the company would be asking for trouble, however, if it suggested such a contribution without making it clear that the company stood ready to contribute its entire policy limit. Such a proposal would clearly support the inference that the company was preferring its own interests over those of the insured by declining to offer its policy limit though the settlement proposal in excess of the policy limit was a reasonable one.

It is also clear that a demand by the insured that the company settle is not a prerequisite of liability in excess of policy limits; nor is the making of an offer by the claimant a prerequisite.[16] But without the claimant's offer and the insured's demand, the insured might sometimes find himself unable to prove an opportunity to settle and bad faith or negligent refusal to make it; in any case, the insured's problems of proof are greatly reduced if the claimant has made an

---

14. *Id.* at 17.

15. See, *e.g.*, Boling v. New Amsterdam Cas. Co., 173 Okla. 160, 46 P.2d 916 (1935). *Cf.* Peerless Ins. Co. v. Inland Mut. Ins. Co., 251 F.2d 696 (4th Cir. 1958).

16. For its bearing on both points, see Fidelity & Cas. Co. v. Robb, 267 F.2d 473 (5th Cir. 1959). The jury found for the insurer in relation to a theory that it acted unreasonably in declining claimant's settlement offer before trial, but against the insurer on a second theory that it acted unreasonably, after the tort case had developed unfavorably at trial, in failing to accept the original offer if it remained open or to initiate new discussions and bring about settlement if it did not remain open. Though reversing because of error in the charge, the appellate court were "of the view that the district judge did not err in instructing the jury that they could consider whether the insurer was negligent either or both in rejecting the firm offer and in not thereafter undertaking to make a settlement. . . ." *Id.* at 476.

offer of settlement and the insured has advised the insurer of his contention that the offer should be acepted.

E. Multiple Insurers and Claimants

Another proposition that seems clear in principle is that the duty of settlement remains in effect, though its application becomes considerably more complex, in situations involving several insurance companies (because of reinsurance or other insurance) or several claimants. Whether "other" insurance is proratable or instead is excess coverage, it would seem that each insurer has a duty *to the insured.* As a matter of factual proof, it might be somewhat more difficult than in single-insurer cases for the insured to fix responsibility, but this potential difficulty is reduced by the fact that three-party law suits have a way of resolving themselves into fights over whether only one of the defendants should be required to pay, and if so which one, rather than whether plaintiff should win or lose.

It would seem also that each insurer has a duty *to the other insurer* in the case of proratable coverage, and that in the case of excess coverage the primary insurer is responsible to the excess insurer for improper failure to settle, the position of the latter being analogous to that of the insured where only one insurer is involved.[17]

With respect to the duty of each company *to the insured,* reinsurance might be distinguished from "other" insurance. In "other" insurance situations each insurer plainly has a direct relation with the insured, and therefore a duty to him. In reinsurance situations, however, where the primary carrier has made an independent contract with the reinsurer, the latter bears no direct relation to the primary carrier's insured, and probably would not be liable to him. The primary carrier would not escape responsibility to its insured by yielding to the judgment of the reinsurer concerning settlement, however, and where the primary carrier incurred liability in excess of policy limits by failing to settle, the reinsurer might be liable for reimbursement of the primary carrier, depending on the provisions of the reinsurance contract.[18]

The analogy to the case of the single insurer and single claimant holds also for cases involving multiple claimants as well as multiple insurers. Suppose that one policy provides $10,000 of primary cover-

17. On the last point, see Hawkeye-Security Ins. Co. v. Indemnity Ins. Co., 260 F.2d 361 (10th Cir. 1958). The right of the excess carrier might be supported either on the theory that it is subrogated to the right of the insured against the primary carrier or on the theory that the relationship between primary and excess carriers gives rise to an independent duty of the former to the latter.

18. See Peerless Ins. Co. v. Inland Mut. Ins. Co., 251 F.2d 696 (4th Cir. 1958).

age, a second provides $10,000 of excess coverage, and the total claims of three claimants could be settled without exceeding the combined policy limits, either for any single claim or for the total for all these claims. These added factual complexities do not affect the basic principle, though they increase the difficulties of proof that misconduct of one or both insurers blocked a potential settlement within policy limits.

Situations involving multiple claimants and limited coverage present problems of preferential settlement also. For example, if the coverage limit per accident is $10,000 and there are half a dozen claimants whose total claims far exceed $10,000, what happens to the insurance proceeds? From the point of view of the insurance company, there is danger of paying the full $10,000 and then being confronted with a claim that part of the payment was misapplied. From the point of view of the claimant, there is danger the $10,000 will be paid out to other claimants and he will get nothing. This problem has been considered in detail elsewhere,[19] and is discussed in summary fashion here, primarily to urge that the problem deserves the creative attention of courts and counsel. As the cases have developed, the insurance companies have been successful in avoiding liability beyond the policy limit in the absence of bad faith or negligence *toward the insured,* rather than the claimant—bad faith, for example, in failing to settle when there was a total settlement offer within the policy limit. One of the several techniques of company protection that has produced desirable collateral effects is interpleader. There have been technical difficulties with interpleader, but the trend has been toward freely allowing this procedure as a reasonable means of judicial allocation of the policy proceeds, in preference to leaving the allocation to out-of-court methods. On the other hand, to date no claimant in any reported case has ever succeeded in requiring that an allocation be made when the company was not willing for it to be made. In some cases wherein a claimant sought allocation, the company, not yet having paid out the policy proceeds, responded with interpleader. In others the claimant's attempt occurred after the company had settled several of the claims and had exhausted the policy limit in settling. In such situations, the company has not been held liable beyond the policy limit.

Claimants should have protection against preferential settlements. If no kind of remedy is provided in the courts, fair allocation of limited policy proceeds is left to chance or worse. One possible result is the disposition of policy proceeds on a first come, first served basis—the one who can rush through and get his tort judgment first,

19. Keeton, *Preferential Settlement of Liability-Insurance Claims,* 70 HARV. L. REV. 27 (1956).

and file his garnishment proceeding, gets as much as is needed (up to the policy limit per person) to satisfy his judgment, and other claimants are left to fight over the remains. Another possibility is that the insurance company will be able to say to each claimant, "Cooperate with us, and get your settlement demand down, or else we will settle with others and you will get nothing." This bargaining weapon should not be placed in the hands of the insurance company. A solution to this problem lies within the inherent power of those courts exercising equitable jurisdiction. It ought to be possible for a claimant (or for that matter, an insurer or an insured) to get judicial protection against preferential settlement upon showing that there are several claims, that the potential claims are far in excess of the policy limit, that the insured himself is not financially responsible, at least to the extent of these claims, and that there is a limited fund of insurance available for the satisfaction of all these claims. The fair method of disposition is an allocation of the policy limits among claimants—a proration according to the value of their claims. This should not be done in a way that prevents settlement; full litigation of all such claims would be disadvantageous to the parties and unduly burdensome upon courts. But a court could enter an order allocating the policy coverage tentatively to the several claims. That is, if there were six claims, the judge would make not a dollar valuation but a relative valuation of the six claims in this equitable hearing and would allocate the policy limit of $10,000 among those six claims, then leaving it to the parties to negotiate on each claim separately and to settle if possible within the policy limit allocated to it. Of course this proposal is debatable, but it is surely within the power of the courts of equity, without departing from precedent, to grant such relief in this new kind of case that has only arisen with the development of liability insurance. It may be hoped that some attorney will seek such relief at an early stage in his case, since it is more likely that a court would then find it equitable to grant it. If relief is not sought until after one or more settlements have already been made by the company and the proceeds have been paid out, the chances of establishing this principle are minimal, because it then involves imposing liability on the company in excess of the policy limit.

F. Has the Insured a Duty of Mitigation?

There have been suggestions from time to time that the defendant company, in a suit for excess liability, might urge in defense that the insured has violated a duty to mitigate damages, that is, a duty to settle at a reasonable figure rather than allowing the case to go to a judgment in excess of policy limits. One of the clearest judicial inti-

mations that such a defense would be sustained appears in *Southern Fire & Cas. Co. v. Norris.*[20] A grave doctrinal difficulty with this notion is that it implies a transfer of control over the settlement decision from the company to the insured. It is inconceivable that courts would subject the insured to a duty to mitigate damages by settling unless they would also hold the company bound by a reasonable settlement made by the insured after the company's wrongful refusal to settle; that is, the insured would be able to recover from the company the amount he paid in settlement. It seems most improbable that the mitigation theory suggested in the *Norris* case will be accepted upon mature consideration. The issue was not squarely presented in that case because it was not proved that the insured's financial condition was adequate for him to effect the settlement; obviously, even if a duty of mitigation were recognized, no breach would be demonstrated in the absence of proof that the insured was financially able to make the settlement which it is claimed he should have made. Not only would a decision finding a duty to mitigate seem unwise, however; it would also seem unwise from the long-range point of view for insurance companies to urge such a duty. For the benefit of potential victory in a few cases, they would be sacrificing to a considerable degree the measure of control they now have over settlement negotiations and decisions. In the long run, the detriment to the companies from that loss of control would outweigh the benefit of an occasional victory on the theory that the insured failed to act in mitigation.

II. THE INSURED'S DUTY OF COOPERATION

A. The Source of the Duty

Standard automobile policies contain, among the "conditions," this provision:

> The insured shall co-operate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits.[21]

The list, in the latter part of this clause, of things that the insured shall do upon the company's request is not all-inclusive; that is, the more general phrase stating that the insured shall co-operate with

20. 35 Tenn. App. 657, 250 S.W.2d 785 (E.S. 1952).

21. The "assistance and co-operation" clause, of which the first sentence is quoted above, concludes with a second sentence as follows: "The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident." *Standard Provisions for Automobile Combination Policies, Basic Automobile Liability and Physical Damage Form, Conditions,* para. 18 (2d rev. 1955).

the company is not limited by the succeeding list of specific items. Canons of construction concerning the resolution of ambiguities against the company and the limitation of the general by the particular are not likely to be applied to this duty of co-operation, since it is a duty that would surely be inferred by the courts from the relationship between the company and the insured even if the insurance contract were silent on the matter. In this respect it is analogous to the insurer's duty of good faith in relation to settlement, as to which, it is generally argued, the insurance contract is silent.

B. Attendance at Trial

American Fire & Casualty Co. v. Vliet[22] involved a dispute over the meaning of the provision in the assistance and co-operation clause stating that the insured shall, upon the company's request, attend hearings and trials. After Vliet had recovered a judgment against the Battles, who were the insureds under the policy in question, he proceeded in garnishment against the company. The company defended on the ground that the Battles had failed to attend the garnishment trial and to give the garnishee other assistance contemplated by the insurance contract. At the time of the garnishment trial in Miami, the Battles were living 750 miles away. Mr. Battle had become insane. Mrs. Battle rendered "every assistance possible" up to the time she left Miami, and offered to return for the trial, but only if the garnishee would pay her expenses. In allowing a verdict and judgment for Vliet against the company, the Florida court stated that while courts have uniformly construed the assistance and co-operation clause to mean that the assured must attend trial without pay for loss of time, he is not required to attend at his own expense.[23] On the proposition that the insured need not incur out-of-pocket expenses, there is not likely to be any dissent. A "supplementary payments" clause in standard policy forms states that the company shall "reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request."[24] Even the supposition in *Vliet* that the insured can be required to attend trial without compensation for his lost wages may be challenged, at least in extreme cases of severe impact upon the insured's income or job status. The duty to attend trial upon request probably applies only if the request is reasonable, and the statement in the supplementary payments clause that the company shall reimburse expenses other than loss of

22. 148 Fla. 568, 4 So.2d 862 (1941).
23. *Id.* at 571, 4 So.2d at 863. *Cf.* Beam v. State Farm Mut. Auto. Ins. Co., 269 F.2d 151 (6th Cir. 1959).
24. *Standard Provisions for Automobile Combination Policies, Basic Automobile Liability and Physical Damage Form, Insuring Agreements,* para. II (b) (4) (2d rev. 1955).

earnings surely would not be construed as an agreement by the insured to bear the loss of wages incident to attendance at trial under circumstances such that it was not reasonable for the company to request it of him.[25] An obligation to incur such a loss seems inconsistent with the concept of insurance as a protection to the insured from financial risks, rather than a source of additional financial burdens. It is not to be expected that such an obligation will be imposed when not expressed.

C. Must the Insurer Prove Prejudice?

Another ground of decision by the Florida court in the *Vliet* case was that the company must show substantial prejudice in the particular case from the failure to co-operate, in order for such failure to constitute a defense.[26] On this point, there has been much disagreement. A point of view contrary to that of the Florida court is represented by Judge Cardozo's opinion in *Coleman v. New Amsterdam Casualty Co.*[27] In that case, a customer sued an insured corporation, which operated a drugstore, for damages resulting from error in the filling of a prescription for a mixture of belladonna and nitro-glycerin. The insurance company's attorney, preparing to defend, sent for one Weiss, who had compounded the prescription and was also secretary of the insured corporation. Weiss stated that there had been a mistake, but refused to say more unless the insurance company would undertake to pay any judgment recovered against him personally as well as any judgment recovered against the insured. The insurance company disclaimed liability, and judgment for damages followed by default. After the insured was adjudged bankrupt and execution was returned unsatisfied, the claimant then brought action against the company, and the company defended on the ground of breach of the assistance and co-operation clause. Plaintiff claimed that the default was immaterial, since there was no evidence that co-operation would have defeated the claim for damages or diminished its extent. Judge Cardozo responded: "Co-operation with the insurer is one of the conditions of the policy. When the condition was broken, the policy was at an end, if the insurer so elected."[28]

---

25. In some current policies there is a provision for compensation of the insured's loss of wages, not to exceed $25 per day, incurred at the company's request. Though this provision would serve as a maximum limit on the amount of the insurer's liability for lost time, as well as clarifying the fact of such liability, still in some cases the argument might prevail that it would be unreasonable to demand that the insured attend trial without reimbursement of his loss of income if the loss would be much greater than $25 per day.

26. 148 Fla. at 571, 4 So.2d at 863.

27. 247 N.Y. 271, 160 N.E. 367 (1928).

28. *Id.* at 277, 160 N.E. at 369.

A recent Illinois decision appears to adopt an intermediate position between the Cardozo view and the requirement of proof of prejudice.[29] The alleged breach was the insured's false statement to the company that he rather than another occupant of the car was driving at the time of the accident. The statement was corrected about nine months later. The court stated in dicta that "timely revelation of the truth might render an incipient breach immaterial . . ." but that an actual showing of prejudice is not required.[30] Concluding that the revelation in this case was not timely, the court found a breach of the co-operation clause. This breach, however, was held to have been waived by the company, since it failed to attempt a reservation of its rights for a period of almost a year and a half, during which interval its attorney took the insured's deposition in contemplation of the filing of a declaratory judgment action concerning the breach, but without notifying the insured of such purpose.

It could be argued that this Illinois decision, rather than occupying an intermediate position as suggested above, is consistent with the Cardozo view that co-operation is a condition of the policy and that the company's obligation is at an end if it is broken; the reconciliation would be on the ground that once breach is established, prejudice need not be shown, but that trivial irregularities do not amount to breach of the duty to co-operate. But the tone of the opinion seems inconsistent with this explanation of the result.

The Cardozo opinion in *Coleman* was cited with approval by the Supreme Court of Tennessee in *Pennsylvania Ins. Co. v. Horner*.[31] That case, however, involved a statement by the insured admitting fault and accepting responsibility for damages to the other vehicle, signed apparently because the insured was worried about hit-and-run charges. It might be argued that this conduct was such clear proof of prejudice that the opinion does not have weight as a considered choice among the competing views on the necessity for proof of prejudice.

D. The Fact Issue Concerning Breach

Aside from a few specific rules such as that under which the insured

29. Allstate Ins. Co. v. Keller, 17 Ill. App. 2d 44, 149 N.E.2d 482 (1958).
30. *Id.* at 50, 149 N.E.2d at 485.
31. 198 Tenn. 445, 281 S.W.2d 44 (1955). But *cf.* Central Nat'l Ins. Co. v. Horne, 326 S.W.2d 141 (Tenn. App. M.S. 1959), dismissing an insurer's suit against its insured for recovery of the amount paid under collision coverage. The insurer's theory was that the insured had committed an actionable breach of policy obligations by failing to co-operate in the prosecution of a subrogation claim against a third party. The court held the Assistance and Co-operation Clause inapplicable, and as an alternate reason for dismissal stated that even if the clause applied to the subrogation suit, the insurer could not recover without proof that it was damaged by the insured's conduct. Of course *Horne* is easily reconciled with *Coleman* and *Horner* on the facts, though the *Horne* opinion arguably points toward a requirement of proof of prejudice.

need not pay the costs of transportation to attend trial, the question whether particular conduct on the part of the insured amounts to non-co-operation is a fact question. Directly relevant to litigation over the assistance and co-operation clause is the general trend of increasing reluctance of courts to rule that reasonable jurors could not differ concerning a particular fact issue on the evidence before them.

The point is illustrated in *Lumbermens Mutual Casualty Co. v. Chapman*,[32] a recent case before the Court of Appeals for the Fourth Circuit. The act of non-co-operation charged by the company was collusion between the insured, Foster, and the claimant, who was his sister-in-law. On the evening before the trial, Foster, at the request of the claimant's attorney extended through the claimant, went to the office of the claimant's attorney, for an interview. The attorney stated that his purpose was to get information to prepare his case properly, and he assured Foster that in the event of a verdict beyond the coverage the claimant would release Foster of any responsibility for the excess. The company's attorney did not know of this meeting. Previous to such meeting, the settlement figure demanded by the claimant was $15,000; at the start of trial, the claimant's attorney raised his settlement demand to $20,000 and gave notice to the company that he would also look to the company for any amount of the verdict beyond $20,000. The claimant's attorney called Foster as a witness during the presentation of claimant's case. In answering a question, Foster expressed the opinion that he was legally responsible for the accident. In his opening statement the claimant's attorney had described the occurrence just as Foster outlined it in his testimony, and the claimant's account closely paralleled Foster's. Trial resulted in a verdict for $7,500, which was within policy limits, and thereafter the claimant commenced this action against the company. The court of appeals sustained a jury verdict for the claimant on this evidence. The court noted that the conduct of the claimant's counsel in arranging an interview with the insured after he was represented by counsel appointed by the company was a violation of the canons of ethics, but observed that the misconduct of the claimant's attorney was not chargeable to the insured. The court considered that ordinary candor demanded of the insured that he inform the company of the conference, but that this breach of obligation by the insured was not so substantial as to require a conclusion that the company was relieved of liability. Perhaps even today other courts would have found the defense of non-co-operation established as a matter of law in these circumstances. Certainly a different result would have been probable

32. 269 F.2d 478 (4th Cir. 1959).

twenty years ago, and this case is an illustration of the trend toward the unwillingness of courts to withdraw a fact issue from a jury today —a trend that probably is going too far to serve the best interests of the community in sound procedures of adjudication. This change has a very significant impact upon the practical meaning of the duty of co-operation. Though some claimant's attorneys have been inclined toward willingness to submit an issue of breach of co-operation to nonjury trial, it would appear that generally a claimant's attorney better serves his client's interests by insisting on jury trial. Neither judges nor jurors can be depended upon to resolve such fact issues in favor of claimants in all situations, however, and conduct such as that of the claimant's attorney in the *Chapman* case is not only improper under the canons of ethics but also unwise as unduly risking the effectiveness of the insurance coverage.

III. The Insurer's Duty of Defense

A. The Source of the Duty

The standard policy clause, within the scope of its applicability, requires the company to "defend any suit against the insured alleging such injury . . . even if such suit is groundless, false or fraudulent. . . ."[33] From this clause is derived the proposition, quite generally recognized, that the insurer's duty to defend is determined by the allegations of the complaint against the insured rather than by the true circumstances of the incident on which suit is based.[34]

B. The Standard of Conduct—Negligence or Bad Faith?

In most of the cases concerning liability of the company for the manner in which it has conducted the defense, it has been assumed or stated that the insurer must exercise ordinary care.[35] Though occasionally good faith rather than ordinary care has been stated as the standard of performance required of the insurer, usually such statements have occurred in cases involving an alleged breach of the duty to settle, in association with an alleged breach of the duty to defend. Nevertheless, the acts or omissions involved in most of the cases holding or assuming that ordinary care is required could be distinguished from the act of deciding not to settle. That is, these cases of negligence in defense have concerned inadvertence or thoughtless omis-

33. *Standard Provisions for Automobile Combination Policies, Basic Automobile Liability and Physical Damage Form, Insuring Agreements,* para. II (a) (2d rev. 1955).
34. Annot., 50 A.L.R.2d 458 (1956).
35. See, *e.g.,* Anderson v. Southern Sur. Co., 107 Kan. 375, 191 Pac. 583, (1920); Abrams v. Factory Mut. Liab. Ins. Co., 298 Mass. 141, 10 N.E.2d 82 (1937).

sions, *e.g.*, failure to discover important evidence, failure to advert to and develop a particular ground of defense that apparently was sound, failure to answer, or failure to perfect appeal in due time. In contrast, the conduct involved in the cases concerning liability for failure to settle is usually a considered exercise of judgment. If this distinction between inadvertence and mistake of judgment is given effect, marginal cases will arise in which it will be difficult to determine factually whether an omission (*e.g.*, failure to urge a particular ground of defense) was due to inadvertence or instead to an error of tactical judgment. Often the issue in marginal cases will be one of fact. But these difficulties of administration are not alone enough to condemn the distinction.

If inadvertence and mistake of judgment are distinguished, a considered decision not to appeal an adverse judgment in excess of policy limits is more nearly analogous to the decision not to settle than to failure to discover a witness or inadvertence to a deadline for answer or appeal. This suggestion has support in the recent case of *Hawkeye-Security Ins. Co. v. Indemnity Ins. Co.*[36] In a tort action against Northern Utilities Co., a claimant recovered a judgment of more than $22,000. The attorney for the liability insurer, Hawkeye, recommended an appeal on the ground that no specific acts of negligence were proved and that the trial court erred in applying the doctrine of *res ipsa loquitur* to the case. Hawkeye declined to appeal except on condition that the costs of appeal would be prorated between Hawkeye and the insured (or Indemnity Insurance Co., which occupied the position of the insured in these negotiations since Indemnity carried coverage for the insured's liability in excess of the $10,000 primary coverage provided by the Hawkeye policy). Indemnity Insurance Co. arranged for the appeal to be prosecuted in the name of the insured, and after the appeal proved unsuccessful, brought suit, as subrogee of the insured, Northern, to recover the cost of appeal. Recovery was denied on the theory that mere proof that Hawkeye declined to follow the advice of its counsel failed to establish the bad faith necessary to liability for failure to appeal. Though it might also have been considered that such proof was insufficient to establish negligence in failing to appeal, the opinion plainly indicated that the court regarded the standard of liability as one of bad faith rather than negligence.

An analogy that might be urged in support of the suggested distinction between inadvertence and mistake of judgment is the dual standard adopted by some courts, in relation to the failure to settle, requiring only good faith as to the *decision* regarding settlement but

36. 260 F.2d 361 (10th Cir. 1958).

ordinary care as well in the *investigation* leading to such decision.[37] Another instructive analogy, however, is the troublesome distinction between discretionary and ministerial acts, in relation to governmental immunity from liability for negligence. The modern trend of reducing the scope of the immunity from liability for a negligent discretionary decision suggests that it would be better not to import the distinction into the area of law concerned with the insurer's duty of defense. Moreover, the public policy justifications for the immunity of public officials are inapplicable here. A consistent requirement of ordinary care in all matters pertaining to defense seems preferable.

C. Effect of the Insurer's Tender of Policy Limits

One of the sharply disputed problems concerning the duty of defense is the question whether the insurer may discharge its entire duty by paying out the policy limit in settlement, or else tendering the policy limit for applicaiton to settlements at the discretion of the policyholder. The few decisions in point are not in harmony.

American Casualty Co. v. Howard[38] is one of the decisions favoring the insured. It was held that the company's duty of defense was not discharged by payment of the policy limit on a judgment obtained against the insured, under the South Carolina Death Act, and that the insurer was obligated to defend a second suit, the latter under the Survival Act, for conscious pain and suffering of the same decedent.

Denham v. LaSalle-Madison Hotel Co.[39] is one of the decisions favoring the company. In that case the insured contended that regardless of whether the company was liable for payment of claims in excess of $10,000 which it had tendered, the company had severable obliga-

37. *E.g.*, Ballard v. Citizens Cas. Co., 196 F.2d 96 (7th Cir. 1952); Olympia Fields Country Club v. Bankers Indem. Ins. Co., 325 Ill. App. 649, 60 N.E.2d 896 (1945); Southern Fire & Cas. Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (E.S. 1952). See Radio Taxi Serv., Inc. v. Lincoln Mut. Ins. Co., 31 N.J. 299, 157 A.2d 319 (1960). In Hilker v. Western Auto. Ins. Co., 204 Wis. 1, 231 N.W. 257 (1930), *affirmance upheld on rehearing*, 204 Wis. 12, 235 N.W. 413 (1931), the duty of care was extended also to negotiation, though only good faith was required with respect to the insurer's decision to settle or not.

38. 187 F.2d 322 (4th Cir. 1951). See also American Employers Ins. Co. v. Gobel Aircraft Specialties, Inc., 205 Misc. 1066, 131 N.Y.S.2d 393 (Sup. Ct. 1954).

39. 168 F.2d 576 (7th Cir. 1948). See also Travelers Indem. Co. v. New England Box Co., 157 A.2d 765 (N.H. 1960); Lumbermen's Mut. Cas. Co. v. McCarthy, 90 N.H. 320, 8 A.2d 750 (1939). But a dictum in the *McCarthy* case, *supra* at 323, 8 A.2d at 752, indicates that the duty is not discharged by merely paying the limit to the insured and casting on him the burden of investigation, settlement, or defense. Faude reports that the position taken by most insurance companies in 1955 was consistent with this dictum. Faude, *supra* note 2, at 53-54. See also DesChamps, *The Obligation of the Insurer To Defend Under Casualty Insurance Policy Contracts*, 26 INS. COUNSEL J. 580 (1959); Kemper, *Avoiding the Hazard of Excess Liability and the Expense of Defense by Settlements for Policy Limits*, 17 INS. COUNSEL J. 145 (1950); Annot., 126 A.L.R. 898 (1940).

tions to defend the insured against liability with respect to each of about 250 claims for damage to or loss of property of guests of the insured's hotel incident to a fire that compelled all guests to leave in haste. The court held that the company was obligated only "as respects insurance afforded by this policy,"[40] and was not required to defend after tendering the policy limit. "[The insured's theory] would produce the incongruous situation that plaintiff would have a continuing obligation to defend, notwithstanding its obligation to pay has been exhausted."[41]

It might be argued that placing the company in control of the litigation after it no longer has a stake is inconsistent with prohibitions against corporate practice of law.[42] But the point is debatable. Certainly an agreement of a company to reimburse the insured for whatever costs of defense are incurred, including fees to an attorney selected by himself, would not be violative of prohibitions against corporate practice of law. If it be considered that the company's right of control over the litigation under the defense clause of the policy is inconsistent with prohibitions against corporate practice of law, would not this conclusion be applicable irrespective of payment or nonpayment of the policy limit in damages? The only difference is that the company has a direct interest in the result of the litigation in one instance and not in the other. But surely prohibitions against corporate practice of law, if applicable at all to this problem, should not be subject to evasion by the corporation's contracting for an interest in the very litigation the handling of which is urged to amount to corporate practice of law. That would be exactly the effect of liability insurance. It seems preferable to acknowledge that recognition of the validity of the defense clause of liability insurance policies is inherently a determination that the kind of control of litigation that a liability insurance company exercises in selecting and instructing an attorney who appears as counsel for the insured is not corporate practice of law within the meaning of prohibitions against such practice, and that the potential evils and countervailing benefits are not so different in the case of defense after the company's payment of the policy limit in damages as to warrant a conclusion that an insurance contract expressly providing such a benefit to the insured would be against public policy. It follows that the issue whether such benefit is provided by current policies should be determined on the basis of a fair and reasonable construction of the policy clause.

Some of the policy forms in use many years ago clearly gave the

40. 168 F.2d at 584.
41. *Ibid.*
42. See Appleman, *Conflicts in Injury Defenses*, 1957 INS. L.J. 545, 560; Faude, *supra* note 2, at 53; DesChamps, *supra* note 39, at 586.

company a three-way option of defending, settling, or paying to the insured the face amount (thus leaving the insured to defend at his own expense, or settle.)[43] Under those circumstances, the insurer could avoid any liability for defense by tendering the face amount of the policy. But forms currently in use provide as follows:

> With respect to such insurance as is afforded by this policy for bodily injury liability and for property damage liability, the company shall:
>
> (a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent. . . .[44]

This is only a slight modification of the form commonly used just prior to the 1955 revision. The language then used was as follows:

> As respects the insurance afforded by the other terms of this policy under coverages A [Bodily Injury Liability] and B [Property Damage Liability], the company shall [defend, etc.] . . . .[45]

It has been stated that the editorial amendments of the 1955 revision,

> while seemingly minor in nature, are designed to make the defense provision more clearly subordinate to the main introductory paragraph of the policy, which [after the 1955 revision as well as before] states the company's entire contractual undertaking as *"subject to the limits of liability, exclusions, conditions and other terms of this policy."*[46]

Apparently this statement refers to the change from the expression "the insurance afforded by the other terms of this policy under coverages A and B" to the expression "such insurance as is afforded by this policy for bodily injury liability and for property damage liability." Perhaps the idea is that the former expression may have been construable as referring only to the other terms stated under the sections of the policy designated coverages A and B, and not also to the "main introductory paragraph of the policy" that included the phrase, "subject to the limits of liability," etc. But even if this main introductory phrase is accepted as a qualification of the duty to defend, it is far from clear that it means that such duty is exhausted

43. See, *e.g.*, Brassil v. Maryland Cas. Co., 210 N.Y. 235, 104 N.E. 622 (1914).

44. *Standard Provisions for Automobile Combination Policies, Basic Automobile and Physical Damage Form, Insuring Agreements,* para. II (2d rev. 1955).

45. This phrasing appears in a specimen stock-company form supplied in the early 1950's by the Association of Casualty and Surety Companies for use in college insurance courses. The same phrasing appears in the specimen mutual-company policy, printed in PATTERSON, CASES ON INSURANCE LAW 792-93 (3d ed. 1955). See also DesChamps, *supra* note 39, at 582.

46. Faude, *supra* note 2, at 54 (Emphasis is Faude's.). *Cf.* DesChamps, *supra* note 39, at 582-84, 586-87.

by payment of the policy limits. If that was the intention of the drafters of the amended form, it was not clearly expressed, and the vagueness is the more significant in view of the former use of a clause clearly specifying a three-way option. Probably courts should, and most will, hold that the company's duty to defend continues even after payment of the policy limits in damages, and a fortiori after a mere tender of the policy limit to the insured. But the question remains one of considerable doubt. It was reported immediately after the 1955 amendment that the associations were considering a further clarifying amendment on this subject,[47] but the more recently revised *Family Automobile Form* does not contain any such clarification, though there have been editorial changes incident to incorporation of the defense clause into the coverage clauses.[48]

D. The Duty to Share Control of the Defense

In those cases that are concerned with only the tort claim against the insured, but in which he has an uninsured interest since the policy limit is insufficient to cover the entire risk, the defense clause of the policy appears to grant exclusive control of the defense to the company, though of course the companies concede that the insured may have independent counsel observing and participating in an advisory capacity. But the defense clause of the policy does not provide for cases of joint interest arising from other claims directly involved in or collaterally affected by the suit. One such situation is that arising where the insured has a reciprocal claim.[49] Another such situation was presented in *Krutsinger v. Illinois Casualty Co.*[50] It was there held that if a suit in tort against the insured involves some claims as to which the company has no responsibility, either

47. Faude, *supra* note 2, at 54.

48. *Standard Provisions for Automobile Combination Policies, Family Automobile Form,* (1st rev. 1958), includes the following clause within *Part I—Liability:*

> Coverage A—Bodily Injury Liability:
> Coverage B—Property Damage Liability
> To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:
> A. bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by any person;
> B. injury to or destruction of property, including loss of use thereof, hereinafter called "property damage";
> arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile and the company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient.

49. See text accompanying notes 53, 54 *infra.*

50. 10 Ill. 2d 518, 141 N.E.2d 16 (1957).

as to defense or payment of damages, and other claims as to which it affords at least some coverage, it is the duty of the company to share the defense with the insured. It was not necessary to the decision in that case to elaborate the nature of this duty, since there was a breach by refusal of the company to participate in the defense in any way. On principle, it would seem that a breach might also be committed by a company's insistence upon full control over the defense in the face of the insured's insistence upon a right to share in the conduct of the defense insofar as it might affect the non-covered claims within the suit.[51]

Sharing control of the defense is impractical, however, where full protection of the separate interests of the company and the insured requires inconsistent contentions that cannot be presented in a common defense. Other procedures according full protection to the conflicting interests of both the company and the insured should be recognized.[52]

IV. Conflicts of Interest Affecting Duties of Co-operation and Defense

Normally both the company and the insured desire that the tort claim of a third person be resisted effectively. Thus the insured is motivated by self interest as well as duty to co-operate with the company, and the company is similarly motivated to defend effectively. Only in abnormal cases, therefore, are the courts confronted with disputes over these duties of co-operation and defense. Such cases arise because of the conflict between the mutual interest of the company and the insured in effective resistence to the tort claim and their diverse interests of other types.

A. Illustrations

One common situation in which there may be a conflict of interest between the insured and the insurer with respect to defense arises from the existence of a reciprocal claim. That is, *C*, the claimant, is asserting a claim against *D* and *D*'s liability insurer, and *D* is also asserting a claim against *C* and *C*'s liability insurer. The conflict may arise with respect to the conduct of litigation in which both claims are at issue, or litigation placing at issue one of these claims and collaterally affecting the other. Both *D* and *D*'s liability insurer are interested in proving that *C* was negligent and that *D* was not. But their interests do not always coincide; for example, trial tactics

51. This proposition is supported by Fidelity & Cas. Co. v. Stewart Dry Goods Co., 208 Ky. 429, 271 S.W. 444, (1925).
52. See § IV (B), *infra*, at 860.

will be affected by the fact that in some cases the insurer will be as well satisfied with findings of negligence against both parties as with a finding of no negligence against *D*, whereas *D* is insistent on aiming at the latter result.[53] Another potential conflict of interest is that concerning the advisability of an appeal which would possibly result in a new trial as to both the claim against *D* and *D*'s claim against *C*.[54] The resolution of these conflicts has not been the subject of enough appellate decisions to support any clear conclusions as to the probable course of legal development. On principle, however, it would seem that the company and the insured should be held to mutual obligations to give to the interest of the other such weight, relative to that given its own conflicting interest, as would be given by an individual holding both interests. There have been indications of a contrary view, which would permit the company to protect its own interest even at the expense of the interest of the insured.[55] But the suggestion of mutual obligations of the type stated above is strongly supported by the analogy to the company's obligation with respect to liability in excess of policy limits for failure to settle.[56]

Another type of conflict arises from the policy limit per person. This is well illustrated in the Pennsylvania case of *Perkoski v. Wilson*.[57] In the tort suit, a judgment was entered in favor of the wife-plaintiff for $10,000 and in favor of the husband-plaintiff for $3940, after verdicts of $10,000 and $6,000 respectively and the filing of a remittitur to avoid new trial. The jury were permitted by the instructions to award to the husband damages for loss of consortium and loss of the wife's services. The company refused to pay more than the $10,000 on the wife's claim and $769.13 of the award to the husband, asserting that the remainder of the award to the husband was damages consequential to the wife's injury and therefore in excess of the $10,000 limit per person. The court declined to allow the company's contention, one ground of decision being that the lower court, though requiring a remittitur, had left it to the plaintiffs to determine which of the verdicts should suffer the reduction, and counsel for the company, still representing the insured, stood by and permitted the husband-plaintiff to accept the reduction without disclosing to him that the company would then invoke a policy-limit

53. This idea has been developed in more detail in Keeton, *Liability Insurance and Reciprocal Claims from a Single Accident*, 10 SW. L.J. 1, 16-19 (1956), reprinted 1957 INS. L. J. 29, 37-38.

54. *Ibid.*

55. *E.g.*, Abrams v. Factory Mut. Liab. Ins. Co., 298 Mass. 141, 10 N.E.2d 82 (1937); Davison v. Maryland Cas. Co., 197 Mass. 167, 83 N.E. 407 (1908) (stating that the company had the privilege of appealing to protect its own interest, even though the insured's interest might be prejudiced by the additional legal proceedings).

56. See § I of this article, *supra*.

57. 371 Pa. 553, 92 A.2d 189 (1952).

argument that would not have been available if the remittitur had been applied to the verdict for the wife-plaintiff.

Still another situation of conflict is that arising from collision between two automobiles insured in the same company. The leading case on the subject is *O'Morrow v. Borad.*[58] After Borad sued O'Morrow, O'Morrow obtained counsel and through such counsel filed a cross-complaint, notifying the insuring group (affiliated companies) that his counsel would also present his defense to Borad's cause of action. O'Morrow then brought the suit in question for declaratory relief against Borad and the insuring group. The latter asserted that O'Morrow had violated the duty of co-operation, but the appellate court approved O'Morrow's conduct, noting that it would be contrary to public policy to allow a person to control both sides of litigation. The court concluded that compliance with the co-operation clause was excused and that the insuring group was liable for any judgment, costs, and reasonable attorney's fees incurred by O'Morrow in defending himself against the claims of Borad, such fees being recoverable in lieu of the defense required by the insurance contract. Some companies have attempted to meet this problem by assigning different claims personnel and different attorneys to the two sides of the controversy, but obviously such an arrangement is less desirable from the insured's point of view than that developed in the *O'Morrow* case, and it is doubtlessly the right of the insured to insist upon the *O'Morrow* arrangement. Another difficulty encountered if the company attempts to remain in control of the defense when it has coverage on both sides of the case concerns settlement. In one case, a company's refusal to discuss settlement with attorneys for either claimant, on the asserted theory that it could not place itself "in the position of showing partiality to one assured" over another, subjected the company to liability in excess of policy limits for failure to settle within policy limits.[59]

An additional type of competing interest is that incident to a close personal relationship between the insured and the claimant. *Lumbermens Mutual Casualty Co. v. Chapman,* discussed above,[60] is an example. This problem of potential collusion has led to the enactment in New York of a statute, as follows:

> No policy or contract shall be deemed to insure against any liability of an insured because of death of or injury to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provision relating specifically thereto is included in the policy.[61]

58. 27 Cal. 2d 794, 167 P.2d 483 (1946); noted 59 HARV. L. REV. 1316, 45 MICH. L. REV. 515, 31 MINN. L. REV. 380, 14 U. CHI. L. REV. 102.
59. Tully v. Travelers Ins. Co., 118 F. Supp. 568 (N.D. Fla. 1954).
60. See note 32 *supra* and accompanying text.
61. N.Y. INS. LAW § 167(3) (Supp. 1958).

This statute affects only a part of the field of relationships potentially giving rise to collusion. Moreover, it is an unusual statutory provision. Thus, numerous claims are being presented in circumstances such that the company suspects collusion between the claimant and the insured, and a small residue of that body of cases reaches the appellate courts.

B. Courses of Action in Cases of Conflicting Interests

When the company suspects collusion, what courses of action are available to it? One company, through its attorney, attempted to meet the problem by attacking, in the trial of the tort claim, the character and motives of both the claimant and the insured, urging that they were in collusion to present a false claim. The attack was effective before the jury, a verdict being returned for the defendant. The plaintiff appealed, asserting that the attorney was guilty of prejudicial misconduct. An intermediate appellate court in California, presented with this appeal in *Pennix v. Winton,* reversed for new trial.[62] To the argument that at most there was a breach of duty toward defendant and not plaintiff, and that defendant was not harmed since a verdict in his favor was obtained, the court responded that the defendant had other interests as well as those in defeating liability—among them, interests concerned with his integrity and standing in the community—that those interests might outweigh his interest in getting a favorable verdict, and that the plaintiff had a right to raise the issue of such breach of duty of the company toward the insured since the conduct amounting to such breach would tend to becloud the issues and confuse the jury.[63] It is a strange spectacle, no doubt, to observe a lawyer arguing that his client is a liar and a cheat. In the phrases of the court, "counsel cannot serve two masters and he can only properly represent the defendant so long as his duties as counsel for defendant do not conflict with his duties as counsel for the insurance carrier."[64]

If the company, through its attorney, does not argue collusion though it has evidence supporting such an argument, will its continuation in the defense of the case waive the breach of the duty of co-operation? In this situation, a reservation of rights, or even a non-waiver agreement to which the insured has consented, is not certain to preserve the company's defense, since in addition to the hurdle of waiver there is the hurdle of res judicata or estoppel by

62. 61 Cal. App.2d 761, 143 P.2d 940 (Dist. Ct. App. 1943), *hearing denied,* 145 P.2d 561 (1943).
63. *Id.* at 775, 143 P.2d at 947.
64. *Id.* at 774, 143 P.2d at 947. *Cf.* Spadaro v. Palmisano, 190 So.2d 418 (Dist. Ct. App. Fla. 1959); Annot., 48 A.L.R. 2d 1239 (1956).

judgment. If the company continues to handle the defense of the tort claim through its attorney, will the company be regarded as privy to the suit so that it is estopped by the judgment from asserting in subsequent policy litigation any fact that is contrary to those facts necessarily determined in the prior judgment?

A problem identical in nature is presented by cases in which the claimant sues the insured, alleging that his injuries were caused by the insured's negligence, and the available evidence suggests that the injuries may have been caused not by negligence but by intentional misconduct not covered by the insurance policy. Often the claimant prefers to proceed on the theory of negligence rather than intentional tort, because the insured is judgment proof and the claimant's only hope for monetary recovery is to bring the case within insurance coverage. When the insured is sued on the theory of negligence, his interests require that the attorney representing him contend (a) that his conduct was not even negligence and (b) in the alternative, that it was merely negligence and not an intentional tort. The insurance company's interests would be served by establishing contention (a), but where the evidence makes such a finding improbable, the company's interests are best served by contending (c) that the insured committed an intentional tort, beyond the scope of policy coverage. If the attorney employed by the company to represent the insured undertakes to make contention (c), he is acting in violation of canons of ethics and in violation of the sound principle recognized in *Pennix v. Winton.* Thus, the company's duty to defend for the insured and the right to defend its own interests are irreconcilable.[65] It is not necessary, however, that one right be wholly sacrificed. Two possible solutions avoiding that result may be suggested: (1) Allow the company to refuse to defend for the insured, and allow it to raise its policy defense, contention (c), in the later suit on the policy, rather than holding it estopped by the judgment in the tort suit. This result is supported by *Farm Bureau Mutual Automobile Ins. Co. v. Hammer*[66] and opposed by *Miller v.*

65. *Cf.* Prashker v. United States Guar. Co., 1 N.Y.2d 584, 593, 136 N.E.2d 871, 876 (1956), observing that in a comparable situation of conflicting interest, "the selection of the attorneys to represent the assureds should be made by them rather than by the insurance company, which should remain liable for the payment of the reasonable value of the services of whatever attorneys the assureds select."

66. 177 F.2d 793 (4th Cir. 1949) (2-to-1 decision), *cert. denied,* 339 U.S. 914 (1950). The company sought a declaratory judgment that its policy did not cover damages awarded against its insured in five tort actions from the defense of which the company's attorney withdrew after the insured had been convicted of murder in the second degree for intentionally causing the death of a passenger in another vehicle by driving his truck into it. After the company's withdrawal, the insured made no defense, and judgments grounded on allegations of negligence were entered against the insured. In the declaratory proceeding, the district judge entered summary judgment

United States Fidelity & Casualty Co.[67] Of course if the insured wins the second suit, he is entitled to recover the cost of defense of the first suit, thus having the monetary equivalent of satisfaction of the company's obligation to defend.[68] (2) Allow the company to refuse to defend for the insured (again with the expectation of holding the company liable for costs of defense if its policy defense finally fails), and further allow the company to be made a party to the suit by the claimant against the insured, by intervention at the instance of the company, by third party proceedings at the instance of the insured, or by joinder at the instance of the claimant. The considerations accounting for the customary refusal of courts to allow an insurance company to be a party to the tort suit are less forcefully applicable here (especially if the joinder is at the instance of the company or the insured, rather than the claimant) than to the ordinary case involving no such conflict of interest between the company and the insured. Probably the allowance of a three-party proceeding that will dispose of the entire set of controversies in one trial is the ideal solution of this problem. If this solution is denied on principle or is foreclosed by nonsatisfaction of procedural or jurisdictional requisites, however, it is plainly unjust to deny also the first solution suggested above, thus holding that the company shall never have any opportunity to urge its defense. Indeed, such a denial of hearing on its contention should be found to be offensive to principles of due process.

This type of case, involving irreconcilable conflict between the interests of the company and the insured concerning defense, is distinguishable from the more frequently occurring type in which the company has a policy defense of such nature that the insured and the

against the company on the theory that it was estopped to assert that the injuries were intentionally caused in view of the determination in the tort judgments that they were negligently caused. The court of appeals reversed and remanded.

67. 291 Mass. 445, 197 N.E. 75 (1935). The company contended that the insured, while driving on a highway, had an altercation with the driver of another car, sped past him and cut in sharply, causing the other driver to lose control of his car, which then overturned. The claimant sued the insured, alleging negligence only, and recovered a judgment, the company having refused to defend. In the later proceeding on the policy, the court held that the company was estopped to litigate its contention that the injury was not caused accidentally, since theories of negligence and wilful and wanton conduct were mutually exclusive and the company was bound by the determination in the prior suit that the insured was guilty of negligence. *Accord,* Stefus v. London & Lancashire Indem. Co., 111 N.J.L. 6, 166 Atl. 339 (1933) (10-to-4 decision), *cert. denied,* 290 U.S. 658 (1933). *Cf.* B. Roth Tool Co. v. New Amsterdam Cas. Co., 161 Fed. 709 (8th Cir. 1908) which held that the insured, after suffering a judgment against itself in favor of its employee for injuries allegedly due to the insured's negligence in allowing use of metals of explosive nature, was estopped to claim that the injuries were not due to explosives, when suing its insurer on an employer's liability policy containing a warranty against use of explosives on the property.

68. See note 65 *supra.*

company still have consistent interests in the defense of the tort claim (*e.g.*, late notice, cancellation, nonpermissive user by one other than named insured). In those cases, the problem of estoppel by judgment usually does not arise in any event, since the issue determinative of the dispute over coverage is not one of the issues decided in the tort case. If the same issue does arise (as where the claimant alleges that the insured was driving, the insured denies this, and the policy contains an endorsement by reason of which it provides no coverage unless the insured was driving[69]) it might be argued that estoppel by judgment should not apply.[70] But the fact remains that here the company and the insured have only consistent interests in the manner of defense. Thus, either the company or the insured can defend in a way that serves the interests of both, and the opportunity for hearing on defensive contentions can be preserved without imposing on the claimant the burden of trying one issue twice in order to recover on the liability insurance policy. In this situation, it would seem appropriate that the company be bound by the results of the tort trial.[71]

Because of the uncertainty about judicial recognition of either or both of the two solutions suggested above, there is no clearly safe way for the company to preserve an opportunity for hearing on its policy defense in cases involving this type of conflict of interest between the company and the insured. In view of the indisposition of the companies to attempt intervention in the tort suit, their more common course of action is to deny coverage and to decline to defend the tort case. In addition to the risk that the estoppel rule of the

69. Public Nat'l Ins. Co. v. Wheat, 100 Ga. App. 695, 112 S.E.2d 194 (1959), holding the company estopped by the judgment in the tort suit that it refused to defend; it might have been inferred from the evidence that the insured was honest but mistaken in his statement that he was not driving, having been severely intoxicated at the time of the incident.

70. It might be thought that this argument is supported by State Farm Mut. Auto. Ins. Co. v. Coughran, 303 U.S. 485 (1938). The policy provided coverage only if the vehicle was "being operated by the Assured, his paid driver, members of his immediate family or persons acting under the direction of the Assured" and not in violation of any law as to age or driving license. At the tort trial, defended by the company under a nonwaiver agreement, the claimant recovered a judgment against the assured and wife, on the theory of negligence of the wife as operator, imputed to the husband; the company successfully defended the later suit on the policy by showing that an unlicensed 13-year-old girl was operating the car under the wife's direction, in violation of law and contrary to the assured's express instructions, the wife being at most a joint operator. The case is not good support for the argument suggested in the text above, since the issue determinative of policy coverage was not exactly the same as any issue decided in the tort case. In the court's opinion it was said: "Defenses now presented by the Insurance Company against liability under the policy were not involved. Joint driving by Mrs. Anthony and the girl was not subject to inquiry." *Id.* at 492.

71. In support of this view, see the recent case of Public Nat'l Ins. Co. v. Wheat, *supra*, note 69.

Miller case will be invoked, there are disadvantages in this course of action. First, it is likely to increase the cost of defense since the amount allowed to the insured's independent counsel as a reasonable fee, in the event the dispute on the policy defense is eventually resolved against the company, will ordinarily be higher than would have been the payment to the company's own counsel. Of as much or more concern to the company, however, is the fear that the case will not be as effectively and vigorously defended as if it were in the hands of the company's counsel. Also, there is danger that the insured will settle for an amount that the company would have considered too high, and that the company will be bound by the settlement if it loses the suit on the policy. The combined force of all these disadvantages leads a company to prefer remaining in control of the defense of the tort claim, even at the expense of giving up the potential policy defense, unless there is a very strong probability that the policy defense will eventually be sustained in court.

Another course of action which a company might consider is a declaratory judgment proceeding. *Tennessee Farmers Mutual Ins. Co. v. Hammond*[72] was a suit in chancery by a liability insurance company for declaratory judgment to determine whether it was subject to liability in excess of policy limits. A decree sustaining a plea in abatement was affirmed, on the theory that the plaintiff insurance company was anticipating a tort action against it for alleged lack of good faith, which involved a fact issue, and that it was appropriate for the lower court to refuse to entertain a suit where a disputed issue of fact was determinative of the rights of the parties. The tort action was subsequently filed in the circuit court of the same county and was tried before a jury.

This opinion might arguably be read as precluding the use of declaratory proceedings with respect to any claim of liability in excess of policy limits, since an issue of bad faith (or perhaps negligence, as previously suggested) is always involved. The opinion need not be read so broadly, however, and on principle that should not be the rule.

Liability insurance litigation is one of the areas in which declaratory proceedings have been most frequently used. Wherever there is an issue of coverage, it affects not only the insured but also potentially the claimants against the insured. Occasionally an insurance company has preferred to have "two bites at the cherry" by trying to win in the defense of the tort claim against the insured and, if unsuccessful in that attempt, then making a second try to win on the policy defense in the garnishment proceeding or independent suit on the

72. 200 Tenn. 106, 290 S.W.2d 860 (1956).

policy. That is a risky course, however, because of the settlement problem. The point is illustrated by *Home Indemnity Co. v. Williamson.*[73] In that case, the proof was that the company offered less in settlement than would have been the case if it had not been relying in part upon the opportunity for a second bite with respect to the policy defense. In this situation, even a non-waiver agreement was ineffective to protect the company since the court considered that the company was representing conflicting interests without disclosure of the conflict, and was thus misleading the insured as to its true intent in the handling of the defense.

Because of this risk of liability for failure to settle and the additional factor of expense of defending the tort claim or claims, an insurance company ordinarily would prefer to have an immediate determination of the issue of coverage. In most courts, the insurance company's declaratory judgment proceeding would be allowed in this situation. But apparently the question is one that is left to the discretion of the trial judge in Tennessee. In *Southern Fire & Casualty Co. v. Cooper*[74] the insurer filed a declaratory judgment proceeding in a court of law, and the trial judge refused to make a declaration of rights as to the duty to defend. The supreme court held that this ruling was not an abuse of discretion since requiring the company to defend would not deprive it of its right to contest liability to the insured. This is hardly a realistic answer, in view of both the cost of defense and the dilemma which arises in the event of a settlement offer, as illustrated by the *Williamson* case. It is submitted that, in the absence of special circumstances beyond those disclosed in the report of the *Cooper* case, the denial of declaratory proceedings should have been held to be an abuse of discretion. The very purpose of declaratory proceedings is to avoid this kind of dilemma because of uncertainty concerning legal rights. It may be hoped that the Supreme Court of Tennessee will, in an appropriate case, be persuaded to overrule the *Cooper* decision. But whether that is done or not, that decision clearly leaves open to the trial judge the *discretion* to allow declaratory proceedings, and the discretion should be exercised in favor of such proceedings.

The *Cooper* case involved a policy defense of late notice. It is significant that the Supreme Court of Tennessee did not rule that the probability that a fact issue would be involved in such a defense would necessarily preclude the use of declaratory proceedings; rather, the theory was, as already noted, merely that it was not an abuse of discretion for the trial court to deny such proceedings. In another

73. 183 F.2d 572 (5th Cir. 1950).
74. 200 Tenn. 283, 292 S.W.2d 177 (1956).

recent case, *Pennsylvania Ins. Co. v. Horner*,[75] declaratory judgment was allowed by the chancellor and affirmed by the supreme court. The insured in that case, concerned about criminal prosecution for hit-and-run driving, had signed a statement admitting that the collision was his fault and assuming responsibility. The insurer was given a declaratory judgment of no liability. It might be argued that there was no fact issue involved in that declaration, on the theory that reasonable persons could not have differed as to whether the conduct of the insured amounted to breach of the assistance and co-operation clause of the policy. Thus, the decision is not conclusive on the question whether declaratory proceedings may be used even if there is a determinative fact issue, but it seems to point in the direction of allowing them. Neither the federal Declaratory Judgment Act nor the Uniform Declaratory Judgments Act, which has been adopted in Tennessee, contains any stated limitation on the scope of declaratory relief to cases not involving determinative fact issues. Trial of issues of fact by a jury is permissible in both state and federal declaratory proceedings.[76] It is a sound proposition, however, that no declaratory judgment act should be distorted for use as an instrument of procedural fencing—to secure delay, to affect the choice of a forum, or to affect the question whether the issue will be tried by a jury or a chancellor.[77] In the *Hammond* case, the chancellor's refusal to allow declaratory proceedings might have been sustained on the ground that the only apparent objective of the company in filing the proceedings, rather than awaiting a suit by the insured, was to affect the choice of forum and right to jury trial. Ordinarily there is little need for declaratory proceedings as to an issue of excess liability—the issue presented in *Hammond*. It would be impractical for the parties to rely on such proceedings to get advice on whether to settle, because of the delay while awaiting judicial decision; and it would be unwise for the courts to enter into the business of rendering advisory opinions on the question whether a settlement should be made. When an advisory opinion is no longer possible because the dispute has been ripened by a judgment in excess of policy limits, litigation at the instance of the insured will usually serve as well as declaratory proceedings at the instance of the company. But it is possible to imagine circumstances in which this would not be so, and it seems undesirable

75. 198 Tenn. 445, 281 S.W.2d 44 (1955).

76. See TENN. CODE ANN. § 23-1108 (1956); UNIFORM DECLARATORY JUDGMENTS ACT § 9; Declaratory Judgment Act 28 U.S.C. §§ 2201-02 (1959); Annot., 142 A.L.R. 8, 58 (1943). The original federal act provided for the submission of issues of fact to a jury on interrogatories. Declaratory Judgment Act ch. 512, 48 Stat. 955 (1934). This provision was omitted in the revision of the code as being covered by Rule 49 of the Federal Rules of Civil Procedure. *Reviser's Note* to 28 U.S.C. § 2202.

77. *Cf.* Annot., 142 A.L.R. 8, 58 (1943).

that declaratory relief should be arbitrarily proscribed. It may be expected, in any event, that either by virtue of rigid rules or by virtue of proper discretionary decisions of trial courts, excess liability claims will not often be determinable by declaratory proceedings. As has been noted with respect to negligence claims generally,[78] there is not as much justification for allowing declaratory proceedings in these cases as in disputes concerning a policy defense.

V. Attorneys' Responsibilities in Cases of Conflicting Interest

Although there has been speculation concerning the potential liability of an individual attorney designated by an insurance company to represent an insured against whom a tort claim is asserted, there is no reported decision up to the present moment imposing such liability. On principle, however, there are strong reasons for supposing that the attorney is subject to such potential liability both to the insured and to the insurance company. That is not to say that an attorney would be held responsible in each situation in which the insured is able to recover against the company. Probably in most instances the total conduct of the company on which liability is based involves not only the conduct of the attorney but also that of other representatives, including adjusters and home office claims examiners. Also, the attorney has some practical protection in the tactical undesirability, from the insured's point of view, of having an individual attorney as a defendant in the suit.[79] Despite the practical and doctrinal arguments against liability of the attorney, however, the potential exposure is enough to cause concern to any attorney, unless he has complete confidence that the company he is representing will not seek indemnity from him.

The attorney designated by the company to represent the insured in defense against the tort claim is representing clients whose interests are potentially in conflict. There is no objection to such representation if both clients fully understand the situation. Thus it would seem permissible, on principle, that an attorney represent both parties with respect to their mutual interest in effective defense against the tort claim, but represent neither with respect to settlement, or that he represent only the company with respect to settlement, the insured

78. See Annot., 28 A.L.R. 2d 957 (1953), suggesting that even though there is nothing in the Uniform Declaratory Judgments Act to exclude declaratory proceedings involving fact issues, yet the discretion of the court to deny declaratory relief has generally been thought to exclude such relief in "ordinary negligence cases."

79. See Peerless Ins. Co. v. Inland Mut. Ins. Co., 251 F.2d 696, 701 (4th Cir. 1958), explaining on a comparable basis the conduct of the primary insurer (who was seeking reimbursement from a reinsurer) in failing to assert a potential claim against its attorney.

fully understanding the situation.[80] Though most of the discussion of potential liability of the attorney appointed by the company to represent the insured has been speculative in the absence of primary authority on the subject, there is persuasive support for liability in opinions disapproving conduct of the attorney and penalizing the insurer in some way because of it. An example is the *Keller* opinion,[81] indicating that the attorney's nondisclosure of the purpose of taking the deposition of the insured—that is, to use it in support of a policy defense—was improper conduct and that its occurrence precluded the insurer's reliance upon the policy defense. If some special damage had been suffered by the insured, not reparable by allowing him to recover on the insurance policy, would he not have been allowed a cause of action against the attorney? Another example is the *Williamson* case,[82] indicating that it was improper to withhold disclosure of the fact that the company was relying on a two-bite plan of defense and was therefore not considering settlement. There are three other recent opinions of particular interest in relation to the role and responsibility of the attorney designated by the company to represent the insured.

In *Henke v. Iowa Home Mutual Casualty Co.*,[83] it was held that communications between the company and the attorney are not privileged as against the insured. The insured can often use evidence of such communications to great advantage in proving his claim of negligence or bad faith of the company in relation to settlement. Such communications might also be used effectively in a suit by the insured against the attorney himself.

In *Murach v. Massachusetts Bonding & Ins. Co.*,[84] as in *Keller* and *Williamson*, the court was directly concerned with the obligation of disclosure imposed on the company, but the court's opinion is relevant also to the obligations of the attorney. Though apparently reserving the question whether further disclosure might be required in some circumstances, the Massachusetts court found adequate, in the case at hand, a letter calling attention to the fact that the claim was in excess of policy limits and inviting the insureds to obtain their own counsel to protect their interests as to the excess. The evidence indicated that the insureds were experienced in business and legal matters and were unconcerned with the possibility of involvement of their own property because it appeared they had no equity of substance. Under

80. For more detailed consideration of this question, see Appleman, *Conflicts in Injury Defenses*, 1957 INS. L. J. 545; Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1167-73 (1954).
81. Allstate Ins. Co. v. Keller, 17 Ill. App.2d 44, 149 N.E.2d 482 (1958).
82. Home Indem. Co. v. Williamson, 200 Tenn. 106, 290 S.W.2d 860 (1956).
83. 249 Iowa 614, 87 N.W.2d 920 (1958).
84. 158 N.E.2d 338 (Mass. 1959).

these circumstances the court held that there was no obligation even to disclose to the insureds an offer of settlement, since it appeared that they were not concerned with knowing about it. These were unusual facts, of course.

A ruling of the Texas Committee on Interpretation of Canons of Ethics is more directly in point for run-of-the-mine fact situations involving potential liability in excess of policy limits.[85] The Committee rendered an advisory opinion in response to questions whether the attorney designated by the company to appear on behalf of the insured is required "to fully inform" the insured and whether, in particular, he must inform the insured of the holding of the *Stowers* case,[86] which imposed liability in excess of policy limits for negligent failure to settle. The Committee answered both questions in the affirmative.

If the Texas Committee opinion is sound, and it is submitted that this is so,[87] many insurers and their attorneys are currently treading on very dangerous ground in relying upon a letter of the type involved in the *Murach* case to discharge their duties of disclosure of conflict. The lack of more explicit disclosure may not be significant in those cases in which the insured employs independent counsel. But if the insured is not fully aware of this conflict and does not employ independent counsel, the failure of the attorney to make the more explicit disclosure suggested in the Texas opinion is not only a probable violation of canons of ethics but also a potential source of liability of the attorney and the company for loss resulting to the insured from a tort judgment against him in excess of policy limits.

85. COMM. ON INTERPRETATION OF CANONS OF ETHICS, STATE BAR OF TEX., OPINION No. 179 (June 1958), reprinted 21 TEX. B. J. 593 (1958).

86. G. A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929).

87. *But cf.* Waters v. American Cas. Co., 261 Ala. 252, 73 So.2d 524, 532 (1953).