

PRESERVING OR DENYING INSURANCE COVERAGE:

The Declaratory Judgment Action

By

Timothy J. Perry, Esq.
SUGARMAN LAW FIRM, LLP
360 South Warren Street
HSBC Center - Fifth Floor
Syracuse, New York 13202
Telephone: (315) 474-2943
e-mail: tperry@sugarmanlaw.com
www.sugarmanlaw.com

INTRODUCTION

The declaratory judgment action is an effective device to determine whether an insurer is obligated to defend or indemnify an insured for liability arising from a particular incident. See David Siegel, *NEW YORK PRACTICE* §707 [3d ed. 1999]; 3 WEINSTEIN-KORN-MILLER *NY CIVIL PRAC.* ¶3001.22; see also *White v. Nationwide Mutual Ins. Co.*, 228 AD2d 940 (3d Dept. 1996); *Curreri v. Allstate Ins. Co.*, 37 Misc2d 557 (Sup. Ct. New York Co. 1963). New York statutory authority for a declaratory judgment is provided by CPLR §3001, and in federal procedure by 28 USC 2201, the Federal Declaratory Judgment Act.

I. DECLARATORY JUDGMENT ACTIONS INVOLVING INSURANCE COVERAGE: PRACTICE, PROCEDURE AND STRATEGY

A. Factors to Consider in Commencing Action

- the probability and size of a potential judgment in favor of the claimant, the identities and legal acumen of the parties affected by the disclaimer, including the insured and claimant, and the necessary incidental costs of commencing the action, particularly where the insurer has previously issued a reservation of rights.
- Choice of law and choice of forum
- A court's attitude toward third-party practice
- Timing of the declaratory judgment action

B. Elements of the Complaint

- the parties
- the jurisdictional bases for the suit (i.e., subject matter jurisdiction in federal diversity cases and *in personam* jurisdiction under the state long-arm statute)
- identify the insurance policy, and recite the relevant policy terms and conditions, perhaps attaching the policy as an exhibit
- the factual background of the claim
- clearly state all demands for relief, equitable and legal, including declaratory judgment, breach of contract, reformation or rescission, or bad faith where applicable. CPLR §3017(b).

Counterclaims (or cross-claims) for declaratory relief

Is a jury trial available? Independent Church of Realization of Word of God v. Board of Assessors of Nassau County, 72 AD2d 554 (2d Dept. 1979); see Simler v. Conner, 372 US 221 (1963).

An insurer that wishes to disclaim after it has assigned defense counsel with a reservation of rights should not ask counsel to move to withdraw; rather, the insurer should continue to provide a defense until it has successfully secured a declaratory judgment. Brothers v. Burt, 27 NY2d 905, 906 (1970); Monaghan v. Meade, 91 AD2d 1014, 1015 (2d Dept. 1983).

II. PROPER AND NECESSARY PARTIES: INSURANCE LAW §3420(a)(2) and (b)

Insurance Law §3420(a)(2) and §3420(b) authorize an injured third party to bring a direct suit against an insurer to recover damages as a judgment creditor against the insured's liability policy. §3420(b) identifies those persons who may bring such a direct action against that insurer. A party who has obtained a judgment against the insured which has not been paid for 30 days from service of notice of entry can sue the insurer directly for payment under the policy.

There is a split among the Appellate Divisions on the question of whether a third-party (injured claimant or cross-claiming defendant) has standing to maintain a declaratory judgment action against the alleged tortfeasor's insurer prior to obtaining a money judgment.

Second Department: declaratory judgment action may be brought by the injured person against both the insured and the insurer. Watson v. Aetna Cas. & Sur. Co., 246 AD2d 57 (1998) [rejecting the court's contrary prior holding in Latoni v. Mount Vernon Fire Ins. Co., 219 AD2d 698]; Tepedino v. Zurich-American Ins. Group, 220 AD2d 579 (2d Dept. 1995); Abate v. All-City Ins. Co., 214 AD2d 627 (2d Dept. 1995); Reliance Ins. Co v. Garsart Building Corp., 122 AD2d 128 (2d Dept. 1986); Costa v. Colonial Penn Ins. Co., 204 AD2d 591 (2d Dept. 1994). *But see* Castagna v. Aiezza, 265 AD2d 364 (2d Dept. 1999); Islip Business Corp. v. Merrill Lynch Business Financial Services, Inc., 262 AD2d 363 (2d Dept. 1999) [actions for property damage against insurer dismissed, since not sued as declaratory judgment].

First, Third and Fourth Departments: an action for a declaratory judgment by an injured claimant against the carrier is barred by Insurance Law §3420 unless the plaintiff has obtained a money judgment against the insured tortfeasor which has remained unsatisfied by the carrier for 30 days. Absent satisfaction of the statutory condition, the injured claimant as a stranger to the insurance policy and not in privity with the carrier may not seek enforcement of the insurer's obligations under the policy. *Compare* Abdalla v. Yehia, 246 AD2d 373 (1st

Dept. 1998); Mt. Vernon Fire Ins. Co v. NIBA Constr. Inc., 195 AD2d 425 (1st Dept. 1993); Clarendon Place Corp. v. Landmark Ins. Co., 182 AD2d 6 (1st Dept. 1992) with Sincerbeaux v. Nationwide Mut. Fire Ins. Co., 206 AD2d 907 (4th Dept. 1994); Hershberger v. Schwartz, 198 AD2d 859 (4th Dept. 1993); Lang v. Hanover Ins. Co., 309 AD2d 1123 (3d Dept. 2003); Booth v. Hartford Cas. Ins. Co., 2003 WL 21709744 (Sup. Ct. St. Lawrence Co. 2003).

Declaratory judgment action will be subject to dismissal if the insured is not likewise joined as a necessary party. White v. Nationwide Mut. Ins. Co., 228 AD2d 940 (3d Dept. 1996); see Travelers Prop. Cas. v. Windsor Group (Sup. Ct. Chemung Co. March 21, 2002); Bello v. Employees Motor Corp., 240 AD2d 527 (2d Dept. 1997).

Non-party's right to intervene: will follow above rationale

Declaratory judgment action's collateral estoppel or *res judicata* effect on the missing party: a non-party claimant may be collaterally estopped from later challenging a declaratory judgment in favor of the insurance carrier. See D'Arata v. New York Cent. Mut., 76 NY2d 659 (1990); Clarendon Place v. Landmark Ins. Co., 182 AD2d 6 (1st Dept. 1992); New York Cent. Mut. Fire Ins. Co. v. Kilmurray, 181 AD2d 40 (3d Dept. 1992); Oest v. Excelsior Ins., 170 Misc.2d 787 (2d Dept. 1996); but see Schwartz v. Public Administrator, 24 NY2d 65 (1969); Arida v. Essex Ins. Co., 299 AD2d 902 (4th Dept. 2002) [plaintiffs would not be estopped from litigating whether commercial general liability policy covered plaintiffs' claims against insured, in action against insurer seeking to recover on money judgment issued in related action against insured, although insured executed release of insurer from all duties with respect to the claim, where plaintiffs were not provided with notice of the release]; Continental Casualty Co. v. LaDuke Bros., Inc., (Sup. Ct. Onondaga Co. 1998) [denying intervention by personal injury defendant/third-party plaintiff, but explicitly ruling that the denial of intervention would have no collateral estoppel effect on the rights of the proposed intervenor in any subsequent suit under Insurance Law §3420].

How would the New York Court of Appeals rule if the standing issue were before it? A clue may be taken from how the federal courts have addressed the issue in their attempts to resolve the conflict. While the Second Circuit Court of Appeals has not spoken, the District Courts for the Eastern and Southern Districts of New York in a handful of decisions appear to side with the First, Third and Fourth Departments. Compare Vargas v. Boston Chicken, Inc., 269 FSupp2d 92 (EDNY 2003) with Nap, Inc. v. Shuttletex, Inc., 112 FSupp2d 369 (SDNY 2000); see Travelers Prop. Cas. v. Winterthur Intern., 2002 WL 1391920 (SDNY June 25, 2002); Becker v. Allcity Ins. Co., 2000 WL 33179289 (EDNY 2000) [marine insurance contracts are exempt from direct action suits]; see also Richards v. Select Ins. Co., 40 FSupp2d 163 (SDNY 1999); but see DeBruyne v. Clay, 1997 WL 471039 (SDNY 1997) [suit could be maintained by injured plaintiff where insurance carrier itself had brought a declaratory judgment action]; see also Hartford Fire Ins. Co. v. Mitlof, 2000 WL 1847581 (SDNY 2000) (citing the Second Department's Watson rule with approval).

III. DIRECT ACTIONS AGAINST INSURERS BASED ON POLICY COVERAGE BREACH OF CONTRACT

Insurance Law at section 1101(a)(1) defines an insurance contract:

"Insurance contract" means any agreement or other transaction whereby one party, the "insurer", is obligated to confer benefit of pecuniary value upon another party, the "insured" or "beneficiary", dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening, a material interest which will be adversely affected by the happening of such event."

The essential prerequisite to a contract of insurance is the assumption of the risk of loss and the undertaking to indemnify the insured against such loss. The essential terms of a contract of insurance are the subject matter of the risk, the risk insured against, the amount of insurance, the commencement and duration of the policy, and payment of the premium by the insured. DeGrove v. Metropolitan Ins. Co., 61 NY 594 (1875).

An insured's cause of action for breach of insurance contract must allege the elements of breach of contract action, including allegations that all conditions precedent in the policies have been satisfied, have been waived, or are the subject of estoppel; that the policyholder paid premiums for the coverage; that the carrier breached its policy by its refusal to defend or indemnify for the subject loss; and that the insured has been deprived of his insurance coverage as a direct and proximate result of the breach. Elements of claims and defenses to a variety of insurance contract actions are addressed by the New York Pattern Jury Instructions (PJI), volume II at 4:45-4:66.

Six-year statute of limitations applicable to contract claims applies to actions to enforce policies of insurance. CPLR 213(2); Medical Facilities, Inc. v. Pryke, 62 NY2d 716 (1984). The insurance policy itself may specifically provide for a shorter limitations period. 1303 Webster Ave. Realty Corp. v. Great Amer. Surplus Lines Ins. Co., 63 NY2d 227 (1984). The legislature may also mandate a particular limitations period or accrual date for actions on specific types of policies. *See, e.g.*, INSURANCE LAW §3404 [two-year limitations period for fire policy]; INSURANCE LAW 3216(d)(1)(K) [three-year limitation on disability income policy].

Where an insurance carrier breaches its duty to defend, the measure of damage is the cost of defense to the insured and the amount of recovery, if any, against the insured within

the policy limits. Gordon v. Nationwide Mutual Ins. Co., 30 NY2d 427, 436 (1972), *cert. den.* 410 US 931 (1973). For a breach of contract based solely on a failure to make reasonable settlement of a claim within the policy limits, damages are measured by the policy limits. Id.

The insurer will not be liable for any sums in excess of the policy limits unless the insurer acted in bad faith [*See Soto v. State Farm Ins. Co.*, 83 NY2d 718 (1994); Pavia v. State Farm Mut. Auto. Ins. Co., 82 NY2d 445 (1993)], or unless a statute proscribes certain conduct by an insurer and provides for recovery of money damages. See N.Y. GENERAL BUSINESS LAW §349; Riordan v. Nationwide Mut. Fire Ins. Co., 977 F2d 47, *cert. question withdrawn* 984 F2d 69 (2d Cir. 1993); Hart v. Moore, 155 Misc2d 203 (Sup. Ct. Westchester Co. 1992). To recover exemplary or punitive damages, the insured must prove that the insurer's wrongdoing was "morally culpable, or is actuated by evil and reprehensible motives." Royal Globe Ins. Co. v. Chock Full O'Nuts Corp., 86 AD2d 315, 320 (1st Dept. 1982) quoting Walker v. Sheldon, 10 NY2d 401, 404 (1961).

IV. EQUITABLE ACTIONS: Rescission and Reformation

The equitable remedies of rescission and reformation are applied to void or alter an insurance contract in those cases in which it would be unfair to enforce the policy as written. A claim for either rescission [Gould v. Board of Educ., 81 NY2d 446, 453 (1993); Goldberg v. Manufacturers Life Ins. Co., 242 AD2d 175, 179 *lv. to appeal dsmd. in part, den. in part* 92 NY2d 1000 (1998); *see Cabrera v. DeGuerin*, 1999 WL 438473 (EDNY 1999)] or reformation [Chimart Assocs. v. Paul, 66 NY2d 570, 573 (1986); Golberg, 242 AD2d at 179] of a contract must be based either on mutual mistake or fraudulently induced unilateral mistake.

Rescission is a favored remedy by insurers seeking to avoid coverage on the basis of alleged misrepresentation by their insureds, or where the insurer did not intend to cover certain types of underlying claims, or where the premiums charged did not contemplate certain types of risks. Gibbons v. John Hancock Mut. Life Ins. Co., 227 AD2d 963 (4th Dept. 1996).

A claim for reformation must be supported by clear and convincing evidence. Koskey v. Pacific Indem. Co., 270 AD2d 461 (2d Dept. 2000); Judge v. Travelers Ins. Co., 262 AD2d 983 (4th Dept. 1999).

**GOOD FAITH/BAD FAITH:
WHAT IS IT?**

I.

THIRD-PARTY CLAIMS: FAILURE TO SETTLE

A.

The Standard

What the Cases Say:

Insurer's duty to the insured is to act in good faith: negligence, while the standard recognized in some states, is not the test in New York. Pavia v. State Farm Mutual Auto Ins. Co., 82 NY2d 445 (1993). Carrier may not be held liable if its decision not to settle was the result of an error of judgment on its part, or even by a failure to exercise reasonable care. St. Paul Fire & Marine Ins. Co. v. USF&G, 43 NY2d 977 (1978). Bad faith claim may not be based on alleged malpractice of defense counsel retained by the insurer. Feliberty v. Damon, 72 NY2d 112 (1988).

To establish bad faith refusal to settle, plaintiff must establish that the insurer's conduct constituted a "gross disregard" of the insured's interests, defined as a "deliberate or reckless failure to place on equal footing the interests of its insured with its own interests" when considering a settlement offer. Smith v. General Accident, 91 NY2d 648 (1998); Pavia v. State Farm Mut. Auto Ins. Co., *supra*; Monarch Cortland v. Columbia Casualty Co., 224 AD2d 135 (3d Dept. 1996).

Gross disregard involves a "pattern of behavior evincing a conscious or knowing indifference" to the probability that an insured would be held personally accountable for large judgment if a settlement offer within the policy limits were not accepted. Daus v. Lumbermen's Mut. Cas. Co., 241 AD2d 665 (3d Dept. 1997).

Note: Insurer's duty runs not only to the named insured, but also to any excess carrier, St. Paul Fire & Marine Insurance Co. v. USF&G, *supra*, as well as to an additional insured. Smoral v. Hanover Ins. Co., 37 AD2d 23 (1st Dept. 1971).

If the industry practice, or the internal practice of the insurer, is to keep the insured advised of settlement negotiations, it may be bad faith for the carrier to fail to advise its insured of such negotiations. Smith v. General Accident Ins. Co., 91 NY2d 648 (1998); *see* Redcross v. Aetna Cas. & Sur. Co., 260 AD2d 908 (3d Dept. 1999). Insured must be advised that he may elect to personally contribute the difference between the carrier's offer and the plaintiff's demand.

What the Jury Hears:

See New York Pattern Jury Instructions, 4:67 (separate sheet)

B.

Damages

Where bad faith is found and the insured is solvent, damages recoverable are the amount by which the tort judgment exceeds the policy limits. Gordon v. Nationwide Mut. Ins. Co., 30 NY2d 427 (1972). Also, costs of defense. USF&G v. Copfer, 48 NY2d 871 (1979).

Where insured is insolvent, it appears that no bad faith claim will lie. See Henegan v. Merchants Mut. Ins. Co., 31 AD2d 12 (1st Dept. 1968); see Gordon v. Nationwide Mut., *supra*; but see Roldan v. Allstate Ins. Co., 149 AD2d 20; Pavia v. State Farm Mut. Auto Ins. Co., 183 AD2d 189, *reversed on other grounds* 82 NY2d 445 (1993).

C.

Punitive Damages

Punitive damages awarded against the insured are not a proper element of compensatory damages recoverable in bad faith refusal to settle. Soto v. State Farm Ins. Co., 83 NY2d 718 (1994).

A private party seeking to recover punitive damages against an insurer must demonstrate not only egregious, tortious conduct by which claimant was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally. Rocanova v. Equitable Life, 83 NY2d 603 (1994); Bennion v. Allstate Ins. Co., 284 AD2d 924 (4th Dept. 2001). Even if a breach is willful and without justification, an isolated transaction will be insufficient unless it constitutes a "gross and wanton fraud upon the public". Fleming v. All-State Ins. Co., 106 AD2d 426 (2d Dept. 1984), *aff'd* 66 NY2d 838 (1985). Absent evidence from which malice, as distinct from lack of good faith, can be found, punitive damages should not be charged. Dano v. Royal Globe Ins. Co., 59 NY2d 827 (1983).

II.

FAILURE TO DEFEND

A.

The Standard

A finding of bad faith based on refusal to defend requires a showing that no reasonable carrier would have asserted non-coverage on the facts of the case. Sukup v. State, 19 NY2d 519 (1967). Refusal to defend when based on a claim of non-coverage is not bad faith unless in asserting non-coverage the carrier acts in gross disregard of the policy obligations. Gordon v. Nationwide Mut. Ins. Co., 30 NY2d 427 (1972). Failure to properly investigate or enter into any discussions with plaintiff's counsel may constitute bad faith. Oppel v. Empire Mutual, 517 FSupp 1305 (SDNY 1981); Young v. American Cas. Co., 416 F2d 906 (2d Cir. 1969); Daus v. Lumbermen's Mut. Ins. Co., 241 AD2d 665 (3d Dept. 1997).

Generally, the carrier is not liable in bad faith for denying coverage based on late notice, unless there is no arguable case for the denial. Gordon v. Nationwide Mutual, 30 NY2d 427 (1972); Bennion v. Allstate Ins. Co., 284 AD2d 924 (4th Dept. 2001). However, bad faith may be found where an insurer contemplates disclaiming coverage before ascertaining the facts of the underlying action. Mold Maintenance Serv. v. General Accident, 56 AD2d 134 4th Dept. 1977); Ogden v. Allstate Ins. Co., 112 Misc.2d 891 (Sup. Ct. Chenango Co. 1982).

B.

Damages

Damages recoverable are the policy limits plus cost of defense. USF&G v. Copfer, 48 NY2d 871 (1979). Insured is entitled to indemnification for reasonable sums paid in settlement. When the underlying action proceeds to judgment, the insurer is bound by that judgment, including a default judgment. Ramos v. National Cas Co., 227 AD2d 250 (1st Dept. 1996); Matychak v. Security Mutual, 181 AD2d 957 (3d Dept. 1992). If the underlying judgment exceeds policy limits, insured can recoup the excess only if bad faith is established. USF&G v. Copfer, *supra*.

III.

DISCOVERY OF INSURER'S FILE

Unlike some other jurisdictions [see, e.g., Boone v. Vanliner Ins. Co., 744 NE2d 154 (Ohio 2001)], in New York mere allegations of bad faith do not deprive the insurer of the

attorney-client privilege that attaches to its communications with coverage counsel. See National Industri Transformers, Inc. v. Atlantic Mut., 1993 WL 158373 (SDNY 1993); Magee v. Paul Revere Life Ins. Co., 172 FRD 627 (EDNY 1997); Mount Vernon Fire Ins. Co. v. Try 3 Bldg. Serv., 1998 WL 729735 (SDNY 1998); Aldrich v. Catel Serv. Co., 51 Misc2d 16 (NYC Civil Court NY County 1966).

But: privilege attaches only to the actual substance of the communication, not to inquiries regarding the subject matter. Westhemeco Ltd. v. New Hampshire Insurance Co., 82 FRD 702 (SDNY 1979); California Union Ins. Co. v. National Union Fire Ins. Co., 1989 WL 48413 (NDNY 1989).

Privilege under "*work product*" doctrine will not attach to all activities involving an attorney; if investigation reports did not necessarily have to be prepared by an attorney, they will not be protected. Merrin Jewelry Co., Inc. v. St. Paul, 49 FRD 54 (SDNY 1970); USF&G v. Braspetro Oil Services Co., 2000 WL 744369 (SDNY 2000).

Privilege for "*materials prepared in anticipation of litigation*" are not protected to the extent they created for a "mixed purpose" (e.g., to decide whether to accept or reject a claim as well as for purpose of defending possible litigation). Hawley v. Travelers Indem. Co., 90 AD2d 684 (1982); Colbert v. Home Indem. Co., 45 Misc.2d 1093, *aff'd* 24 AD2d 1080 (4th Dept. 1965). Carrier's file is not protected in bad faith claim by insured since the file was produced and the services were rendered in the interests of both the insured and the insurer. Colbert, supra; Woodson v. American Transit Ins. Co., 280 AD2d 328 (1st Dept. 2001).

As to demands for discovery of the insurer's file by a plaintiff in an underlying third-party claim (not an insured seeking coverage), New York continues to recognize the privilege attached to the contents of the insurer's file as material prepared or obtained in anticipation of litigation, and thus not discoverable. Kandel v. Tocher, 22 AD2d 513 (1st Dept. 1965).

IV.

LEGISLATIVE REMEDIES

Insurance Law §2601: prohibits "unfair claim settlement" practice, i.e., not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear.

Enforcement is solely with Insurance Department. Recurrent, rather than isolated, deceptive business practice aimed at the public at large is required before the statute will be found violated. Myers, Smith & Granady v. New York Property Insurance Underwriting, 201 AD2d 312 (1st Dept. 1994).

General Business Law §349: Insured may have first-party claim for "deceptive practices". Insurer may be liable for consequential damages beyond the limits of the policy for its delays in paying claims. Acquista v. New York Life Insurance, 730 NYS2d 272.

ABOUT THE AUTHOR

Timothy J. Perry, Esq.

A partner in the Sugarman Law Firm, LLP, in Syracuse, Mr. Perry heads the firm's appellate/motion department and also concentrates on insurance coverage analysis and litigation. He is a frequent speaker at continuing legal education seminars on appellate, insurance and tort issues for the New York State Bar Association and Onondaga County Bar Association. His memberships include Director, Onondaga County Bar Association; Judicial Committee Chairman; Continuing Legal Education Committee member; Federal Practice Section member; New York State Bar Association, Insurance Coverage Committee member; Torts, Insurance and Compensation Law Committee member; Syracuse University, College of Law Alumni Association and Moot Court judge and evaluator. He received his B.A. degree from the College of the Holy Cross and his J.D. from Syracuse University.

PJI 4:67. CONTRACTS--INSURANCE--COVERAGE--LIABILITY POLICY--EXCESS
LIABILITY FOR BAD FAITH SETTLEMENT OR FAILURE TO SETTLE

Defendant insured CD against liability for negligence under a policy providing that it would pay any judgment obtained against CD up to the sum of \$25. In an action previously tried, AB has obtained a judgment against CD, the plaintiff in this action, in the amount of \$25 for (personal injuries, death of AB's decedent, property damage) resulting from CD's negligent (operation of his automobile, maintenance of his real property). Defendant has paid AB the sum required by the policy in partial satisfaction of AB's judgment. Plaintiff seeks in this action to require defendant to pay the balance of AB's judgment, claiming that defendant had the opportunity to settle AB's claim (prior to, after) judgment by the payment of (the full policy sum, an amount less than the full policy sum, an amount in excess of the full policy sum to which CD offered to contribute the excess if defendant paid the full policy sum), and that defendant in bad faith refused to make the settlement.

The policy issued by defendant to CD provided (*insert provision re defense and settlement, such as:*) "...the company shall: (a) defend any suit against the insured even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient.") That provision gave the defendant the option to settle a claim, but did not require that it do so.

You are not here to retry the prior action between AB and CD. The judgment in that case is now final. However, many of the facts in that case have been reviewed in this trial to enable you to evaluate the situation confronting defendant's attorneys and employees when the decision was made not to settle AB's claim.

In determining whether a settlement with AB should have been made defendant was required to consider not only its own interests but also the interests of its insured, CD, and to act in good faith in reaching its decision. The company cannot be held liable for the excess of the judgment over the policy limits, if its decision not to settle was the result of an error of judgment on its part or even of a failure on its part to exercise reasonable care, but only if the decision was made in bad faith.

You should not, however, infer from the use of the words "bad faith" that defendant must have acted maliciously or dishonestly or with intent to harm CD. It is enough that it acted in gross disregard of CD's interests in reaching its decision. Gross disregard means a deliberate or reckless failure to place the interests of its insured on an equal footing with its own interests. In

deciding whether to settle or try the case defendant was required to view the situation as it would if there were no policy limit applicable to the claim and it alone were liable for the entire amount and to weigh the probabilities and reach a judgment which did not grossly disregard CD's interests.

In determining whether defendant acted in bad faith in deciding not to settle AB's claim, you will consider the testimony concerning the basis on which the decision not to settle was made, the expert testimony that has been adduced before you concerning what should be considered in making such a decision, and all of the facts and circumstances existing at the time the decision was made, including (*use such of the following factors as the evidence supports*) the probability in light of the evidence that it appeared would be presented to the jury by AB and CD in the prior trial that the jury would find in favor of AB; the probability in light of the evidence concerning ((injuries, damages)) that it appeared in the prior trial would be presented to the jury by AB and CD that a verdict, if in favor of AB, would be in an amount which exceeded the policy limit and the amount by which it appeared likely the judgment, if in favor of AB, would exceed the policy limit; whether the defendant had investigated the circumstances of the accident in which AB's ((person was injured, decedent was killed, property was damaged)) sufficiently to be able to evaluate the probability of a verdict against CD; what attempts defendant had made to settle AB's claim, at what point in the trial such attempts were made and whether in those attempts the attorney retained by the defendant informed AB's attorney what the insurance policy limit was; what recommendation concerning settlement had been made to defendant by the attorney whom defendant had retained to defend the action against CD; whether it had informed CD of the amount for which AB was prepared to settle his claim and of course the negotiations with AB; whether defendant had suggested to CD the advisability of his obtaining an independent attorney to advise him with respect to a possible settlement; whether defendant had offered CD the opportunity to contribute to such settlement as AB was willing to accept and if so what CD's response was to the suggestion; the financial risk involved for CD if the settlement was not made as compared with the risk in relation to the limit of its policy which defendant ran if the settlement was not made).

If, taking into consideration the evidence, expert and other, which you find credible, and weighing the various factors referred to, your conclusion is that in deciding not to settle AB's claim defendant did not act in bad faith, your verdict will be for defendant. If, taking into consideration such evidence and weighing those factors, your conclusion is that in deciding not to settle AB's claim defendant did act in bad faith, your verdict will be for plaintiff, CD.