IN THE SUPREME COURT OF MISSOURI

SCOTTSDALE INSURANCE AND WELLS TRUCKING, INC	)))	**Supreme Court No. SC93792**
Appellants,	))	
vs.	))	
ADDISON INSURANCE COMPANY AND UNITED FIRE & CASUALTY CO.,	)))	
Respondents.	)	

BRIEF OF AMICUS CURIAE
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INTEREST OF THE AMICUS CURIAE

The Missouri Association of Trial Attorneys is a professional organization of approximately 1,400 trial lawyers in Missouri. MATA attorneys represent injured persons who have judgments against individuals that are payable from the proceeds of insurance policies. MATA attorneys represent Missouri injured persons and insurance policy holders in trial court on issues of insurance disputes and bad faith. MATA attorneys believe the court's holding in this case will affect the rights and duties of insurance policy holders going forward, and, therefore, has implications beyond the facts of this individual case.

CONSENT OF PARTIES

MATA has received consent from counsel for Appellants, Scottsdale Insurance Company and Wells Trucking, Inc., and from counsel for Respondents, Addison Insurance Company and United Fire & Casualty Company to file this brief.

POINTS RELIED ON

Point I

The trial court erred in granting summary judgment to United on the basis that Missouri law does not allow Scottsdale, an excess insurer, to use the doctrine of equitable subrogation to recover for United's bad faith because Missouri law should allow an excess insurer to recoup the proceeds that it spent solely due to the primary insurer's bad faith.

Fireman's Fund Ins. Co. v. Continental Ins. Co., 519 A.2d 202, 205 (Md. 1987)

Commercial Union Assurance Companies v. Safeway Stores, Inc., 610 P.2d 1038, 1041 (1980)

Certain Underwriters of Lloyd's v. General Acc. Ins. Co. of America, 699 F. Supp. 732, 738 (S.D. Ind. 1988)

Point II

The trial court erred in granting summary judgment to United on the basis that United, the primary insurer, did not owe a legal duty to Scottsdale, an excess insurer, because the primary insurer's and excess insurer's relationship requires the primary insurer to exercise due care because the primary insurer has full control over the litigation and it is foreseeable that the primary insurer's failure to settle will cause harm to the excess insurer.

Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc./Special Products, Inc., 700 S.W.2d 426, 432 (Mo. banc 1985)

Westerhold v. Carroll, 419 S.W.2d 73, 80 (Mo. banc 1967)

New England Ins. Co. v. Healthcare Underwriters Mut. Ins. Co., 352 F.3d 599, 607 (2d Cir. 2003)

Point III

The trial court erred in concluding that Wells Trucking's bad faith claim against United was not assignable to Scottsdale because bad faith claims for an excess judgment or settlement are assignable in a majority of jurisdictions and should be assignable in Missouri.

Forsthove v. Hardware Dealers Mut. Fire Ins. Co., 416 S.W.2d 208, 216 (Mo. App. 1967)

Insurance Co. of North America v. Travelers Ins. Co., 692 N.E.2d 1028, 1035-36 (Ohio App. 1997)

Warren v. Kirwan, 598 S.W.2d 598 (Mo. App. 1980)

Certain Underwriters of Lloyd's v. Gen. Accident Ins. Co. of Am., 699 F. Supp. 732, 738 (S.D. Ind. 1988)

Point IV

The trial court erred in concluding that a demand to settle by the insured is an essential element of a bad faith failure to settle claim because the essential elements of a bad faith failure to settle claim are that the insurer has the authority and opportunity to settle an excess claim within the policy limits and fails to do so in bad faith, causing the insured or excess carrier damages and requiring technical compliance with procedural steps is contrary to the public policy allowing bad faith failure to settle claims.

Shobe v. Kelly, 279 S.W.3d 203, 210-11 (Mo. App. 2009)

Landie v. Century Indem. Co., 390 S.W.2d 558, 564 (Mo. App. 1965)

Zumwalt v. Utilities Insurance Co., 228 S.W.2d 750 (Mo. 1950)

State Farm Mut. Auto. Ins. Co. v. Jackson, 346 F.2d 484, 490 (8th Cir 1965)

JURISDICTIONAL STATEMENT

MATA adopts Appellant's jurisdictional statement.

STATEMENT OF FACTS

MATA adopts Appellant's Statement of Facts.

Point I

The trial court erred in granting summary judgment to United on the basis that Missouri law does not allow Scottsdale, an excess insurer, to use the doctrine of equitable subrogation to recover for United's bad faith because Missouri law should allow an excess insurer to recoup the proceeds that it spent solely due to the primary insurer's bad faith.

In most cases the primary insurer retains the right to investigate, defend, negotiate, settle or refuse to settle the lawsuit against an insured. The primary carrier's power to reject any settlement offer may result in the insured receiving an excess judgment at trial. In those cases, the courts use the tort of bad faith failure to settle to compensate an insured who has been wrongly subjected to an excess judgment. *Shobe v. Kelly*, 279 S.W.3d 203, 211 (Mo. App. 2009).

Because of this tort, an insurer owes a duty to its insured to act in good faith to resolve any claims against the insured. *Id.* If the insurer fails to act in good faith, its insured may file a bad faith case against it. *Id*. The insurer acts in bad faith when it disregards its insured's interests in the hopes of escaping its responsibility under the policy and exposes its insured to an excess judgment over the policy limits. *Id*.

So, for example, in the underlying case, if the trucking company's insurer, United, failed to settle the case, and the victim received a judgment in excess of United's policy limits, then the trucking company could have sued United for bad faith. In this case, however, the trucking company protected itself against an excess judgment by purchasing excess insurance and the excess insurer, Scottsdale, contributed proceeds to the settlement. Scottsdale sought to use the doctrine of equitable subrogation to sue United to recoup the proceeds that Scottsdale paid because United failed to settle the case.

Missouri recognizes the doctrine of equitable subrogation. Subrogation is a common law doctrine governed by equitable principles. *Kroeker v. State Farm Mut. Auto. Ins. Co.,* 466 S.W.2d 105, 110 (Mo. App. 1971). As a general rule, any person who, because of a legal obligation to do so, has paid for a loss or injury caused by a wrongdoer will be subrogated to the rights of the injured person against the wrongdoer. In that situation, the person who paid the money stands in the shoes of the injured person and can maintain an action against the wrongdoer. *Id.* Thus, subrogation substitutes the payer for the injured party and allows the payer to maintain the injured party's claim against the wrongdoer.

Equitable subrogation is a form of subrogation based on equity. *Am. Nursing Res. Inc. v. Forrest T. Jones & Co., Inc.*, 812 S.W.2d 790, 798 (Mo. App. 1991). As with all other forms of subrogation, the court uses equitable subrogation to prevent an unjust enrichment. *Id.* Although Missouri recognizes equitable subrogation generally, Missouri has never decided whether or not an excess insurer can use the doctrine to hold a primary insurer accountable for the primary carrier's bad faith.

a) Most jurisdictions allow an excess insurer to use equitable subrogation against a primary insurer to recoup proceeds that the excess insurer paid due to the primary insurer's bad faith.

Most jurisdictions that have considered the issue allow an excess insurer like Scottsdale to maintain an equitable subrogation action against the primary insurer for bad faith. See *Fireman's Fund Ins. Co. v. Cont'l Ins. Co.*, 519 A.2d 202, 205 (Md. 1987) (citing numerous cases); see also *Auto-Owners Ins. Co. v. American Yachts, Ltd.*, 492 F.Supp.2d 1379, 1383 (S.D. Fla. 2007); *Commercial Union Assurance Companies v. Safeway Stores, Inc.*, 610 P.2d 1038, 1041 (1980). When there is no excess insurer, the insured becomes its own excess insurer, and the insured's single primary insurer owes the insured a duty of good faith in protecting it from an excess judgment and personal liability. *Auto-Owners Ins. Co.*, 492 F.Supp.2d at 1383. These courts have explained that if the insured had not protected itself by purchasing excess insurance, the insured would be able to maintain a bad faith case against its primary insurer for failing to settle. *Id.* Once the insured purchases excess coverage, the insured has essentially substituted an excess insurer for itself.

These courts believe that it would be inequitable to allow a primary insurer to avoid liability under the tort of bad faith merely because the insured purchased excess insurance. These courts, therefore, allow an excess insurer to use equitable subrogation to assume the insured's rights to maintain a bad faith case. *Fireman's Fund Ins.*, 519 A.2d at 205; *Commercial Union Assurance Companies*, 610 P.2d at 1041. Under doctrine of equitable subrogation, the benefits of the insured's bad faith cause of action accrue to the excess insurer that absorbs the loss that the insured would otherwise suffer if it had not purchased excess insurance. As one court has explained:

> Since the insured would have been able to recover from the primary carrier for a judgment in excess of policy limits caused by the carrier's wrongful refusal to settle, the excess carrier, who discharged the insured's liability as

a result of this tort, stands in the shoes of the insured and should be permitted to assert all claims against the primary carrier which the insured himself could have asserted.

Commercial Union, 610 P.2d at 1041.

This rule does not rest on the court finding that the primary carrier owed a separate and independent duty to the excess carrier. *Id.* Rather, the primary insurer still has a duty only to the insured. But, since the excess insurer absorbed the insured's injury by paying the excess judgment, the courts allow the excess insurer to stand in the insured's shoes to file a cause of action against the primary insurer. Thus, the excess insurer must first prove that the primary insurer failed to fulfill a duty owed to the insured. *Gen. Star Indem. Co. v. Vesta Fire Ins. Corp.*, 173 F.3d 946, 949 (5^{th} Cir. 1999). Once the excess insurer proves that, the excess insurer must establish that (1) the insured has suffered a loss for which the insured would be liable; (2) the excess insurer has compensated the insured for that loss; 3) the insured has an existing cause of action against the primary insurer; 4) the excess insurer has suffered damages from the primary insurer's actions or omissions; (5) justice requires that the loss should be entirely shifted from the excess insurer to the primary insurer; and (6) the excess insurer's damages are reasonable. *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 21 Cal. App. 4^{th} 1586, 1596 (Cal. Ct. App. 4 Dist. 1994).

b) Numerous public policy rationales support an excess insurer's right to use equitable subrogation to hold a primary insurer responsible for the primary insurer's bad faith.

This court should follow this majority rule and allow an excess insurer to use the doctrine of equitable subrogation to maintain an action against a primary insurer that engages in bad faith claim handling practices. The court's adoption of the equitable subrogation doctrine will recognize the differences between excess and primary insurance and uphold the purpose of Missouri's bad faith tort, while imposing no greater obligations on a primary insurer.

The rights and obligations of a primary insurer and excess insurer are different. *Certain Underwriters of Lloyd's v. Gen. Accident Ins. Co. of Am.*, 699 F. Supp. 732, 738 (S.D. Ind. 1988). The primary insurer has a duty to defend and, because it settles most claims within its limits, the primary insurer generally charges a higher premium for a similar amount of coverage. *Id.* The primary insurer also has the right to accept or reject settlement offers. *Id*. The excess insurer's obligations, however, do not generally arise until the primary insurer has exhausted its limits. Because it generally suffers less frequent exposure, the excess insurer generally charges a lower premium. *Id*.

But the excess insurer is at a disadvantage because the primary insurer has greater control over the lawsuit, which allows the primary insurer to adversely affect the excess insurer's interests. *Peter v. Travelers Ins. Co.*, 375 F.Supp. 1347, 1350-51 (Cal. 1974). When the insured purchases excess insurance, the primary insurer knows that can pass the risk of an excess judgment off to the excess insurer. *Fireman's Fund Ins.*, 519 A.2d at 205. Without the ability to hold a primary insurer accountable, the insured's purchase of excess insurance gives the primary insurer less incentive to settle a case since the primary insurer knows that it will not suffer the consequences of its own bad faith. *Id.*

This is not mere speculation. An employee from a primary insurer has actually admitted in court records that the insurer will often change its behavior once it realizes that there is excess insurance. In *Continental Cas. Co. v. U.S. Fid. and Guar. Co.*, the claims manager, upon learning of excess coverage, ceased his attempts to settle on the mistaken belief that the excess insurer did not have a cause of action against the primary insurer. 516 F. Supp. 384, 391 n.8 (N.C. Cal., 1981). He testified that, upon discovery of the excess coverage, "there was no longer the same exposure on our insured. [W]e knew there was an excess carrier so there was no concern about bad faith." *Id*.

That type of thinking completely runs contrary to the purpose the tort of bad faith, which seeks to deter insurance companies from engaging in bad faith claims handling practices. *Shobe v. Kelly*, 279 S.W.3d 203, 211 (Mo. App. 2009). A primary insurer should not be able to ignore its duty to engage in good faith and be in a better place for failing to do so merely because the insured was careful enough to purchase excess insurance. This change in behavior in a primary insurer also has a dramatic effect on litigants. Courts have explained that this change in behavior prevents prompt and reasonable settlements and increases insurance and litigation costs. *Fireman's Fund Ins.*, 519 A.2d at 205. It also places an additional financial liability on the excess insurer, which causes excess insurers to charge a higher premium. *Peter*, 375 F. Supp. at 1351.

Thus, equitable subrogation recognizes the essential disparity in coverage and control between an excess and primary insurer and requires the primary insurer to consider the excess insurer's interest in the same way that it considers the insured's interest. By doing so, the equitable subrogation doctrine prevents a primary insurer from shifting risks and losses to the excess insurer. *Certain Underwriters of Lloyd's v. Gen. Accident Ins. Co. of Am.*, 699 F. Supp. 732, 738 (S.D. Ind. 1988). Equitable subrogation also prevents a primary insurer from unjustly enriching itself from shifting the excess judgment to the excess insurer. *Fireman's Fund Ins. Co.*, 519 A.2d at 205.

On the other hand, the equitable subrogation doctrine does not increase the primary insurer's duties or obligations. *Peter*, 375 F. Supp. at 1350-51. The primary insurer already has a duty to act in good faith. In considering whether or not to settle, the primary insurer may consider its own interests, but it must also consider the insured's interests, which become the excess insurer's interests when the insured purchases excess insurance. *Id.* The equitable subrogation doctrine simply gives the primary insurer an incentive to continue to consider the insured's interest even though the insured has purchased excess insurance.

Thus, the court's adoption of the equitable subrogation doctrine would help to fulfill the purpose of bad faith law while not imposing any greater obligations on a primary insurer. Because of these public policy reasons, the court should allow an excess insurer to use equitable subrogation to maintain a cause of action against a primary insurer.

Point II

The trial court erred in granting summary judgment to United on the basis that United, the primary insurer, did not owe a legal duty to Scottsdale, an excess insurer, because the primary insurer's and excess insurer's relationship requires the primary insurer to exercise due care because the primary insurer has full control

over the litigation and it is foreseeable that the primary insurer's failure to settle will cause harm to the excess insurer.

The tort of bad faith failure to settle compensates an insured who has been wrongly subjected to an excess judgment and to deter insurance companies from failing to perform their duties to their insureds. *Shobe v. Kelly*, 279 S.W. 3d 203, 211 (Mo. App. 2009). Under this tort, an insurer owes a duty to its insured to act in good faith to resolve any claims against the insured. *Id.* While an insurance contract is the basis for the relationship between the insurer and the insured, the insured's bad faith case against the insurer is a tort action and not a contract action. *Id*. Thus, the insured's bad faith case is governed by the traditional tort law concepts of duty, breach, causation, and damages. *Id*.

In this case, if the trucking company had not purchased excess insurance from Scottsdale, then the trucking company could have maintained a bad faith case against United. Recognizing that it absorbed the trucking company's losses, Scottsdale filed a bad faith case against United. The trial court concluded that Scottsdale could not maintain a bad faith claim because United's duty of good faith to settle did not extend to Scottsdale.

Scottdale's argument that United owed it an independent duty to exercise reasonable care to avoid harming an excess insurer is consistent with the law in numerous states. *See e.g. New England Ins. Co. v. Healthcare Underwriters Mut. Ins. Co.*, 352 F.3d 599, 607 (2d Cir. 2003) (New York law); *Baen v. Farmers Mut. Fire Ins. Co. of Salem County*, 723 A.2d 636, 639 (N.J. Super Ct. App. Div. 1999); *North American Van Lines, Inc. v. Lexington* Ins. Co., 678 So. 2d 1325, 1331 (Fla. Dist. Ct. App. 1996); *Kitchnefsky* *v. Nat'l Rent-A-Fence of Am., Inc.*, 88 F. Supp. 2d 360, 369 (D. N.J. 2000). Missouri, however, has not yet addressed this issue. *Reliance Ins. Co. in Liquidation v. Chitwood*, 433 F.3d 660, 664 (8th Cir. 2006). This court should conclude that the primary insurer's relationship with the excess insurer requires it to exercise due care to avoid harming the excess insurer.

a) A primary insurer and an excess insurer have a close enough relationship that the primary insurer should exercise due care to avoid harming the excess insurer.

The creation of a legal duty is a question of law for the court. *Hoffman v. Union Elec. Co.*, 176 S.W.3d 706, 708 (Mo. banc 2005). A legal duty owed by one to another may arise from at least three sources: (1) a statute or regulation; (2) a contract; or 3) the common law. *Lumbermens Mut. Cas. Co. v. Thornton*, 92 S.W.3d 259, 263 (Mo. App. 2002). When the court imposes a duty under the common law it does so because the relationship between the parties under a particular set of circumstances requires the actor to exercise due care to avoid foreseeable injury. *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc./Special Products, Inc.*, 700 S.W.2d 426, 432 (Mo. banc 1985).

In those situations, the court has determined that the law should protect the plaintiff's interests from the defendant's negligent conduct. *Id.* The court uses a variety of factors to determine whether or not the law should impose a duty onto a defendant to exercise due care in his or her relationship with the plaintiff. These factors include: 1) the social consensus that the interest is worthy of protection; 2) the foreseeability of harm and the degree of certainty that the protected person suffered injury; 3) moral blame society attaches to the conduct; 4) the prevention of future harm; 5) consideration of cost and ability to spread the risk of loss; and 6) the economic burden upon the defendant and the community. *Id.* at 432; see also *Hoffman v. Union Elec. Co.*, 176 S.W.3d 706, 708 (Mo. banc 2005).

In imposing a common law duty, the court's overriding consideration is foreseeability or a reasonable anticipation that harm or injury is a likely result of acts or omissions. *Westerhold v. Carroll*, 419 S.W.2d 73, 80 (Mo. banc 1967). The court's foreseeability analysis is forward-looking and focuses on whether or not the defendant did or could have foreseen some risk of injury to the other party. *Lopez v. Three Rivers Electric Cooperative*, 26 S.W.3d 151, 156 (Mo. banc. 2000). This court has applied this rule to find a duty based upon the fact the defendant could have foreseen that some injury was "likely to ensue" from their conduct. *Zuber v. Clarkson Const. Co.*, 251 S.W.2d 52, 56 (Mo. 1952).

These factors help to explain why the court allows an insured to sue his or her insurer for bad faith. The court recognizes that an insurer's failure to act in good faith to settle a case could reasonably lead to excess judgment against the insured (Factor 2). When the insured has only one insurance policy, the tort of bad faith encourages the primary insurer to act in good faith to settle the case because it knows that, if it does not, then it may be liable for the excess judgment (Factors 3 and 4). *Shobe v. Kelly*, 279 S.W.3d 203, 211 (Mo. App. 2009)*; Fireman's Fund Ins. Co. v. Cont'l Ins. Co.*, 519 A.2d 202, 205 (Md. 1987). The tort of bad faith is the court's acknowledgment that the primary insurer that has control over the litigation and that it is foreseeable that a primary insurer's failure to exercise good faith in controlling that litigation could expose an insured to injury. Thus, the tort seeks to hold the primary insurer liable for its failure to act in good faith to settle a case (Factors 5 and 6).

The same considerations that led the court to create a cause of action for bad faith to protect the insured should persuade this court to extend similar protection to the excess insurer that is forced to pay a claim because the primary insurer unreasonably rejected a settlement offer within its policy limits. The primary insurer has the complete right to control the lawsuit to the detriment of the insured and the excess insurer. The primary insurer's failure to exercise good faith in settling the case has a direct effect only on three groups of people: the injured party, the insurer's insured, and, when the insured has purchased excess insurance, the excess insurer.

When an insured purchases an excess policy, the excess insurer bears the risk—normally borne by the insured—that the primary insurer may abuse its power to control the defense by not acting in good faith. Thus, if it is foreseeable that the primary insurer's failure to settle can cause harm to the insured then the court must also conclude that it is foreseeable that the primary insurer's failure to settle can harm the excess insurer.

On the other hand, the court imposing this duty does not impose any additional cost on the primary insurer. Rather this duty requires only that the primary insurer do what it is already obligated to do, which is perform its claim handling in good faith. As such, the court's expansion of the primary insurer's duty to include an excess insurer would not place additional burden on a primary insurer. But holding the primary insurer accountable for its bad faith properly allocates responsibility among the parties and removes the severe economic burden on the party who had no control over the primary insurer's conduct.

b) The fact that the excess insurer and the primary insurer do not have a contractual relationship should not change this result.

Of course, the primary difference in a relationship between a primary insurer and insured and the relationship between a primary insurer and an excess insurer is the fact that there is a contract between the primary insurer and the insured but no contract between the primary and excess. This difference, of course, does exist. But, this fact should not prevent the court from establishing that a primary insurer has a duty to act in good faith to protect an excess carrier's interests.

While an insurance contract is the basis for the relationship between the insurer and the insured, the insured's bad faith case against the insurer is a tort action and not a contract action. *Shobe v. Kelly*, 279 S.W. 3d 203, 211 (Mo. App. 2009). Thus, the mere fact that the excess insurer and the primary insurer have not signed a contract should not prevent this court from concluding that a primary insurer has a duty to exercise reasonable care to avoid harming an excess insurer.

Moreover, even if the insurance contract does form the basis of the primary insurer's duty of good faith, the court should conclude that this duty extends to the excess insurer. The court has recognized exceptions to the general rule that a party must have privity to use the duties under the contract as a basis in tort. *Westerhold v. Carroll*, 419 S.W.2d 73, 81 (Mo. banc 1967). Thus, the court recognizes that a party may sign a contract that places himself or herself in such a position that the law imposes upon him or her an obligation to act in a manner to avoid injuring a third party. *Id*; *Vickers v. Progressive Cas. Ins. Co.*, 979 S.W.2d 200, 204 (Mo. App. 1998). The court has explained that when a person assumes responsibilities under a contract, which if left undone, would likely injury a third party, then the law should hold that person responsible for the foreseeable harm. *Westerhold*, 419 S.W.2d at 81.

These exceptions apply in cases where the relationship between the third party and the contracting party is so close "'as to approach that of privity.'" *Id.* at 78. The court has explained that it will abandoned the general rule as long as the purpose of the privity requirement—prevent exposing the parties to unlimited liability to an unlimited number of persons—is not damaged. *Id.* at 79.

The court uses several factors to determine whether or not a third person not in privity with the contract can use the duties under the contract as a basis in tort. These factors include 1) the extent to which the transaction was intended to affect the plaintiff, 2) the foreseeability of harm to the plaintiff, 3) the degree of certainty that the plaintiff suffered injury, 4) the closeness of the connection between the defendant's conduct and the injury suffered, 5) the moral blame attached to defendant's conduct, and 6) the policy of preventing future harm. *Id.* at 81.

These factors are essentially the same factors that the court uses to determine whether or not a party has a common law duty to use reasonable care to avoid harming another party. For the same reasons that Amicus points out above, the court should find that the primary insurer's and excess insurer's relationship meets these factors.

c) **Numerous public policy rationales support the court finding that a primary insurer had a legal duty to exercise due care towards an excess insurer.**

For the most part, the same public policy rationales that support allowing an excess insurer to use equitable subrogation to sue a primary insurer also support allowing the excess insurer to do so in tort. But in at least one situation the source of the excess insurer's right to use (direct duty or equitable subrogation) makes a difference.

The equitable subrogation doctrine would not apply in a situation where a primary insurer does not settle a case because the plaintiff was willing to settle only for an amount in excess of the primary policy's limit. *Westchester Fire Ins. Co. v. American Contractors Ins. Co. Risk Retention Grp.*, 1 S.W.3d 872, 874 (Tex. App. 1999) (equitable subrogation shifts the risk from the excess carrier to the primary carrier, but only when the demand is within the primary insurer's policy limits.); Alan Windt, Duty to settle owed to excess insurer, 2 Insurance Claims and Disputes § 7:8 (6th ed.). In that case, the equitable subrogation doctrine would not help the excess insurer because the insured could not maintain a bad faith case against the primary insurer. Windt, 2 Insurance Claims and Disputes § 7:8.

Under the equitable subrogation doctrine, the primary insurer does not have a direct obligation to the excess insurer and would not be obligated to inform the excess insurer of the settlement offer so as to afford the excess insurer an opportunity to contribute to the settlement. *Id.* The primary insurer could have simply rejected the settlement offer because the offer exceeded its policy limits. *Id*. But, if the primary insurer had an independent duty of good faith towards the excess insurer then the primary insurer would have a duty to inform the excess insurer of the offer so that both insurers can have an opportunity to resolve the case. Because of these public policy reasons, the court should conclude that a primary insurer has an independent duty to exercise due care to avoid harming an excess insurer.

Point III

The trial court erred in concluding that Wells Trucking's bad faith claim against United was not assignable to Scottsdale because bad faith claims for an excess judgment or settlement are assignable in a majority of jurisdictions and should be assignable in Missouri.

The issue of assignability of bad faith failure to settle (BFFS) claims has plagued both courts and practitioners for decades. Finding a suitable route to shift the insured's loss, as a judgment debtor, to the injured claimant, the judgment creditor, is a noble goal. The bench and bar lack a clear path to reconcile Missouri's public policy prohibition on the assignment of personal torts with compensating the loss an excess judgment debtor sustains from insurers' bad faith conduct. As Judge Smart stated in his thoroughly researched and defended historical account of the decisions that have dealt this issue only a glancing blow:

> Despite the existence of the foregoing cases, because neither the Court of Appeals nor the Missouri Supreme Court have addressed the matter of public policy differences between assignment of BFFS claims and assignment of other personal tort claims (such as legal malpractice), the

> answer to the issue of the assignability of BFFS claims seems to me to be less than certain.

Johnson v. Allstate Ins. Co., 262 S.W.3d 655, 674 (Mo. App. 2008) (footnote 7 omitted).

The time has come for this court to address this matter once and for all. *Amicus* urges this Court to join the overwhelming majority of jurisdictions that allow assignability of BFFS and to adopt a specific rule allowing the assignment of the economic consequences, whether liquidated by judgment or settlement, while preserving the non-assignability of personal damages to the insured. This case provides such an opportunity given the trial court's grant of summary judgment on Scottsdale's claim for bad faith as assigned from its insured, Well's Trucking, despite the Western District's finding that by adopting equitable subrogation as the mechanism for relief, the unresolved question of assignability need not be resolved. *Scottsdale Ins. Co. v. Addison Ins. Co.,* WD75963, 2013 WL 5458918, *6 (Mo. Ct. App. Oct. 1, 2013).

While this court has not ruled specifically on the assignability of bad faith claims, thirty-six other states have. *Kaplan v. Harco Nat. Ins. Co.*, 716 So.2d 673, 676 (Miss. App. 1998). The Mississippi court found that, of states which had addressed this issue, thirty-five of thirty-six permitted assignment of a bad faith claim against an insurance company, with only Tennessee refusing. *Id.* Other courts have found a similar majority permitting such assignments. *Id.* (*citing Medical Mut. Liab. Ins. Soc'y of Maryland v. Evans*, 622 A.2d 103, 116-117 (Md. App. 1993). As here, the cases dealt mostly with "an assignee suing for an amount in excess of the policy limits" following a "failure to comply with an implied good faith settlement obligation." *Kaplan*, 716 So.2d at 676 (internal citations omitted). This court should formalize the rule that claims for the economic consequences of bad faith involving a failure to settle or the failure to defend are assignable.

a) Missouri should adopt the California rule whereby the assignment of economic losses but not personal tort claims is allowed.

Missouri public policy prohibits the transfer of personal injury claims. *Travelers Indem. Co. v. Chumbley*, 394 S.W.2d 418, 423-25 (Mo. App. 1965). This prohibition dates back to English common law and the Middle Ages. W.S. Holdsworth, *The History of the Treatment of Choses of Action in English Common Law*, 33 Harv. L.Rev. 997, 1006-07 (1920). Missouri courts have long found distasteful the concept of monetizing the pain and suffering of injured plaintiff's and have refused to create a secondary market therefor. *Schweiss v. Sisters of Mercy, St. Louis, Inc.*, 950 S.W.2d 537 (Mo. App. 1997); *see also Beechwood v. Joplin-Pittsburg Ry. Co.*, 158 S.W.868, 870 (Mo. App. Spfd.D. 1913) (Where the damages recovered are for physical pain and/or mental anguish the claim should not be the subject of barter or trade).

Bad faith claims, however, do not neatly fit the mold of a claim made based on physical pain or mental anguish. While tort actions based on acts resulting in personal injuries are not assignable, actions claiming damages to property, real or personal, are. *See, e.g., Forsthove*, 416 S.W.2d at 213. The general rule now is that:

> [t]he assignability of things in action is now the rule and non-assignability the exception. Practically the only classes of choses in action which are not assignable are those for torts for personal injuries, and for wrongs done to

> the person, the reputation, or the feelings of the injured party, and those based on contracts of a purely personal nature, such as promises of marriage.

Id. at 214-15.

i) Separating the economic claims from the personal ones is proper.

When the primary insurer commits a bad faith refusal to settle, it is the insured that is harmed. *See e.g., Johnson*, 262 S.W.3d 655. Any settlement or judgment amount greater than primary coverage is essentially an excess judgment against the insured. *Zumwalt*, 228 S.W.2d at 753. When an insured has a judgment entered against her, she faces downgraded credit, increased difficulty in obtaining insurance, higher premiums if insurance can be found, possible bankruptcy, and "other intangibles not easily calculated." *Shobe v. Kelly*, 279 S.W.3d 203, 212 (Mo. App. 2009). This is the basis for a bad faith refusal to settle claim. *See e.g. Zumwalt*, 228 S.W.2d 750.

Thus there are two types of damage caused by the primary insurer's failure to settle. The first and primary type of injury suffered is economic loss as described in *Zumwalt* which result from excess judgments or settlements wherein the insured is liable for some liquidated amount due to a judgment or settlement in excess of his policy limits. The second type of damages is the more personal *Shobe* type, which flow as natural consequences of the first. Purely personal torts, as discussed above, are not assignable. *Travelers Indem. Co. v. Chumbley*, 394 S.W.2d at 423-25. Thus claims arising from emotional distress and other intangible damages are not assignable, and it is these more personal damages that make outright assignability problematic.

A review of the pertinent California rulings demonstrate the parallels to Missouri's bad faith common law. As in Missouri, California recognizes that the duty to settle is owed to the policy holder, not the injured party. *Murphy v. Allstate Ins. Co.*, 553 P.2d 584, 586 (Cal. 1976). An insured whose insurer has rejected a reasonable settlement demand within policy limits may try to minimize further injury to itself. *Hamilton v. Maryland Cas. Co.*, 41 P.3d 128, 137 (Cal. 2002). Claimant willing, the insured may exchange an assignment to the claimant of a BFFS cause of action for "a covenant not to execute" on an excess judgment. *Id.* Because the duty to settle is owed to the insured, it must be first assigned to the underlying claimant before that party may prosecute it. *Murphy*, 553 P.2d at 586. The BFFS "cause of action becomes operative after the excess judgment has been rendered." *Hamilton*, 41 P.3d at 137. The covenant not to execute is not a release, and the insurer is therefore still obligated to pay the judgment rendered against its insured. *Critz v. Farmers Ins. Group*, 41 Cal.Rptr. 401, 410 (Cal. Dist. Ct. App. 1964).

Where the secondary insurer must indemnify its insured for a judgment or settlement in excess of primary coverage, two parties are harmed. A type of hybrid claim exists where the secondary insurer has suffered a purely economic loss, while the insured has suffered a personal one. Under the California rule, only economic losses may be assigned. *See Archdale v. American Intern. Specialty Lines Ins. Co.*, 64 Cal.Rptr.3d 632, 651 (Cal. Ct. App. 2007). As in Missouri, purely personal tort causes of action and claims for punitive damages therefrom are not assignable in California. *Murphy*, 553 P.2d at 587. Because excess judgment damages are consequential to the breach of the implied duty of good faith, assignee claimants may bring suit for the full amount of the judgment. *Archdale*, 64 Cal.Rptr. at 651.

The prohibition on assignment of claims for personal injuries is not violated because the loss suffered was a commercial one resulting from United Fire's breach of its duties under the contract of insurance. The excess coverage policy at issue here included a clause under which Wells Trucking was directed to assign any rights to recover payments made pursuant to the policy to Scottsdale. The claim assigned was not for any personal injury suffered by Wells Trucking, but rather was an economic claim against United Fire for refusing to settle the underlying claim within policy limits.

While bad faith refusal to settle does sound in tort, the claim is not for the personal injury suffered by the plaintiff in the underlying case, but rather is brought by the insured for the breach of the duty of good faith implied in the insurance contract. *Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750, 753 (Mo. 1950). Payments made by an insurance company on insurance contracts are business losses. *See State Farm Mut. Auto. Ins. Co. v. C.I.R.*, 698 F.3d 357, 360 (7th Cir. 2012); *see also* 26 U.S.C. § 832(b)(5).It is logical then, that if the claim for bad faith refusal to settle belongs solely to the insured, the insured should be able to assign that portion of the claim which directly addresses the excess judgment to the real party in interest, the secondary insurer.

Allowing the assignment of a cause of action for a business loss is clearly distinguishable from the objectionable practice of buying and selling claims for personal physical injuries. In this case, no personal losses were claimed. Scottsdale's was a business loss, and Well's Trucking's cause of action springs from its contractual relationship with Addison Insurance and United Fire, therefore no public policy reason exists to oppose the assignment of Well's bad faith claim to Scottsdale. However, this court should take this opportunity to adopt the California rule that purely economic claims resulting from BFFS may be assigned, and hold that Wells Trucking may assign that portion of its claim against United for its bad faith refusal to settle within policy limits to Scottsdale.

ii) Economic and personal claims may be joined to further judicial efficiency.

As noted above, the instant case involves only economic claims. However, were this court to adopt the California rule allowing the assignment of purely economic BFFS claims, the claims would still be subject to Missouri's rules of civil procedure. "The rationale that a partial assignment of an assignable cause of action conveys nothing but an equitable interest is not consistent with current trends." *Warren v. Kirwan*, 598 s.W.2d 598, 600 (Mo. App. 1980). Just adjudication requires that:

> A person shall be joined in the action if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been

> joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant.

Mo. Rule 52.04(a). Necessitating joinder means the cause of action would not be split, and while multiple parties may pursue their respective losses, they would have to be brought in a single proceeding.

The first joinder element "is designed to protect those who are already parties by requiring the presence of all persons who have an interest in the litigation so that relief may be complete." *Feinstein v. Feinstein*, 778 S.W.2d 253, 257 (Mo. App. 1989). It also promotes judicial efficiency. *Id.* A necessary party "is one who must be joined if feasible because that person has a direct and immediate interest in the subject matter of the litigation and who, if not joined, would have the right to relitigate the question. *State v. Planned Parenthood of Kansas*, 66 S.W.3d 16, 18 n.1 (Mo. 2002) (en banc).

The *Warren* court cited approvingly a concise description of this policy given by a California court:

> At common law, a partial assignee had no legal standing to sue; the underlying rationale was that the original creditor could not **split** his cause of action and sue the debtor in two actions, and he could not bring about the same result by assigning part of the claim to another and subjecting the debtor to two suits by different plaintiffs. Enforcement of a partial assignment of a claim was permitted in equity, however, by the process of requiring joinder of all interested parties; i. e., the assignor and all partial

> assignees . . . 'under the codes, which have merged legal and equitable actions and adopted the equity procedure of joinder, there is no longer any procedural obstacle to enforcement of the partial assignment. The plaintiff partial assignee may sue by joining the partial assignor . . .

Warren, 598 s.W.2d at 601 (*citing Cain v. State Farm Mutual automobile Insurance Co.*, 121 Cal.Rptr. 200, 207 (Cal. App. 1975)).

> The modern practice is that when "an obligation or demand has been assigned, the assignee can maintain an action to recover his share by joining the assignor as plaintiff, or, if he will not join, by making him a defendant, so that the whole controversy may be settled in one suit.

Id. (*citing* 6 Am.Jur.2d Assignments 132, pp. 313-314).

Both the insured and an assignee of the economic portions of the insured's BFFS claim have an interest in the litigation and the right to file suit for their damages. Both parties' claims arise from the same occurrence, the refusal of the insurer to settle within policy limits. The central issue in both claims will be to establish that the insurer acted in bad faith in failing to settle the claim within limits. Further, the insurer has an interest in having all claims against it resolved in one action. Because Rule 52.04(a) would require that all BFFS claims be joined in a single action, the public policy in favor of judicial efficiency would be served by adopting the California rule regarding the assignment of the economic loss portion of BFFS claims. California courts impose a similar requirement that all claimants be joined since it is a single cause of action and California, like Missouri, prohibits splitting claims.

b) Assigning the economic component of BFFS claims is consistent with § 537.065.

Otherwise non-assignable claims may be assigned when authorized by statute. *Forsthove v. Hardware Dealers Mut. Fire Ins. Co.*, 416 S.W.2d 208, 216 (Mo. App. 1967). Missouri law now includes a statutory vehicle whereby judgment creditors may contract with tortfeasors to limit recovery to specified assets and from the tortfeasor's insurer. The statute gives, in part, that:

> Any person having an unliquidated claim for damages against a tort-feasor, on account of bodily injuries or death, may enter into a contract with such tort-feasor or any insurer in his behalf or both, whereby, in consideration of the payment of a specified amount, the person asserting the claim agrees that in the event of a judgment against the tort-feasor, neither he nor any person, firm or corporation claiming by or through him will levy execution, by garnishment or as otherwise provided by law, except against the specific assets listed in the contract and except against any insurer which insures the legal liability of the tort-feasor for such damage and which insurer is not excepted from execution, garnishment or other legal procedure by such contract.

R.S.Mo. § 537.065 (2014). Past decisions have raised the question, but not definitively answered, whether an unliquidated claim for bad faith refusal to settle may be counted as an asset under § 537.065 and thereby assigned. *See Johnson v. Allstate*, 262 S.W.3d 655, 674 (Smart, J., concurring).

In Missouri, the traditional operation of a § 537.065 agreement has the insured granting what amounts to a lien on any BFFS judgment to the underlying tort claimant in exchange for a payment of a specified amount and the agreement not to levy execution of the judgment against the BFFS claim holder.

> I assume that the holder of a BFFS claim may agree *in advance* of a BFFS *judgment* to pay the ultimately-derived net proceeds of the BFFS *judgment* to the holder of the underlying tort claim, with payment to be made *after* the BFFS claim is prosecuted in the name of the BFFS claim holder (rather than in the name of the holder of the underlying tort judgment, and rather than in the names of both). I also assume that the parties may agree that the holder of the underlying tort claim may provide the attorney to act in behalf of the BFFS claim holder, while prosecuting the claim in the name of the BFFS holder. And, of course, a judgment for BFFS, once obtained, is absolutely assignable as property; or, as stated above, the net proceeds of the judgment may be paid pursuant to an agreement.

Id. (emphasis in original).

Because the insurer who breached its good faith duty to resolve the case within policy limits becomes liable for the entirety of the excess judgment, allowing the judgment creditor to pursue "any insurer which insures the legal liability of the tort-feasor for such damage" by assignment fulfills the express purpose and intent of the statute.

c) An insured may assign its bad faith claims against its primary insurer for excess insurer payments.

It is the duty of the primary insurer to provide a defense. *Missouri Public Entity Risk Management Fund v. American Cas. Co. of Reading*, 399 S.W.3d 68, 75 (Mo. App. 2013). Good public policy favors the assignability of bad faith claims because 1) the duty to defend attaches at the level of primary coverage, 2) settlement of claims at the primary level protects insureds, and 3) public policy already favors the settlement of claims. *Id. at 75* (primary insurer has duty to provide defense)*; see e.g., Shobe*, 279 S.W.3d at 212 (damages result from excess judgment); *Stewart v. USA Tank Sales and Erection Co., Inc.*, 2014 WL 836212, *5 (W.D.Mo. Mar. 4, 2014) (public policy favors settlement of claims).

The primary insurer is bound by contract to, in good faith, sacrifice its own interests in favor of its insured. *Zumwalt*, 228 S.W.2d at 756. The duty to settle in good faith "flows from or arises out of the contractual relationship." *Craig v. Iowa Kemper Mutual Insurance Co.*, 565 S.W.2d 716, 723 (Mo. App. 1978). No Missouri court has ruled on whether a similar duty is owed to a secondary insurer. *Scottsdale Ins. Co. v. Addison Ins. Co.,* WD75963, 2013 WL 5458918, *7 (Mo. Ct. App. Oct. 1, 2013).

The primary insurer does have a duty to defend and, because it settles most claims within its limits, the primary insurer generally charges a higher premium for a similar amount of coverage. *Certain Underwriters of Lloyd's v. Gen. Accident Ins. Co. of Am.*, 699 F. Supp. 732, 738 (S.D. Ind. 1988). The primary insurer has the right to accept or reject settlement offers. *Id.* Like its insured, a secondary insurer has no authority to force a primary carrier to accept a settlement offer within the limits of the primary policy or to provide a defense. When a secondary insurer must provide a defense due to the wrongful refusal to do so by the primary insurer, it should be entitled to recoup its costs from the primary insurer. *Missouri Public Entity Risk Management Fund,* 399 S.W.3d at 76 (citing 44 Am.Jur.2d Insurance § 1396 (2012)).

If the secondary insurer has no recourse against the primary, it is basically relegated to the roll of an investor in the primary insurer's gamble not to settle a claim. *Peter v. Travelers Ins. Co.*, 375 F.Supp. 1347, 1350-51 (Cal. 1974) (primary insurer's control of the lawsuit allows it to adversely affect excess insurer). But insurers should not be permitted to "take a gamble on getting a favorable verdict rather than to make a settlement within the limits of the policy." *Zumwalt*, 228 S.W.2d at 754. When a primary insurer knows its insured has a secondary policy, it should not have carte blanche to make a bad faith decision not to settle within policy limits or refuse to defend a claim in order to take advantage of the secondary insurer. *Insurance Co. of North America v. Travelers Ins. Co.*, 692 N.E.2d 1028, 1035-36 (Ohio App. 1997).

As discussed above, damages from an excess judgment exceed merely the obligation to pay the judgment itself. An insured liable for an excess judgment, even (or especially) when that judgment is paid by a secondary insurer, faces downgraded credit, increased difficulty in obtaining insurance, higher premiums if insurance can be found, possible bankruptcy, and "other intangibles not easily calculated." *Shobe v. Kelly*, 279

S.W.3d 203, 212 (Mo. App. 2009). It is therefore in the insured's best interest for the primary insurer to accept a settlement within limits of the primary policy. These damages typically pale in comparison to the payments made by the excess carrier to resolve the claim. Absent the ability to assign the economic component of the bad faith claim to the excess carrier, a moral hazard is created in which the primary insurer in incentivized to take risks because it would not feel the full costs which normally result from its tortious conduct.

Absent the assignability of the economic component of its insured's bad faith claim, the primary carrier has no, or at least very little, incentive to settle within its policy limits, making it the beneficiary of the insured's decision to purchase secondary coverage. *See Fireman's Fund Ins. Co. v. Continental Ins. Co.*, 519 A.2d 202, 205 (Md. 1987). Any excess judgment is paid by the excess carrier, and the primary carrier is insulated from the bad faith claim by the secondary insurer's indemnification of the insured.

This Court's recognition of the right of an insured to assign the economic claim of bad faith would encourage primary carriers to put the interests of their insureds before their own when the insured has contracted for secondary insurance, rather than to rely on that secondary policy to protect the primary insurer from a claim of bad faith. For this reason, the court should allow an insured to assign the economic component of his refusal to settle claim based on an excess judgment or settlement to his secondary insurer.

d) Insured should not have to file for bankruptcy in order to assign the claim.

Public policy should not require the bankruptcy of insureds in order to assign their bad faith claims. Under one court's interpretation of Missouri law, bad faith claims may not be assigned. *Quick v. Nat'l Auto Credit*, 65 F.3d 741 (8th Cir. 1995). However, otherwise non-assignable claims may be assigned when authorized by statute. *Forsthove*, 416 S.W.2d at 216. The 1978 Bankruptcy Act gives that "all legal or equitable interests of the debtor" are part of an estate in bankruptcy. 11 U.S.C. § 541(a)(1) (1979). It is clear from the Historical and Revision notes to § 541 that "the legislative intent was to include all kinds of property, including causes of action, in the bankrupt's estate." *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554, 564 (Mo. App. 1990).

The *Ganaway* court found that bad faith refusal to settle claims were assignable under the 1978 Bankruptcy Act. *Id.* Thus, if the *Quick* is to harmonized with *Ganaway*, an insured must file for bankruptcy in order to assign his claim for bad faith refusal to settle. Missouri's public policy should not demand that an insured liable for excess judgments or settlements file bankruptcy in order to be able to assign their claim. Therefore this court should formalize the rule allowing an insured to assign his claim for economic losses caused by his carrier's bad faith refusal to settle.

Point IV

The trial court erred in concluding that a demand to settle by the insured is an essential element of a bad faith failure to settle claim because the essential elements of a bad faith failure to settle claim are that the insurer has the authority and opportunity to settle an excess claim within the policy limits and fails to do so in bad faith, causing the insured or excess carrier damages and requiring technical

compliance with procedural steps is contrary to the public policy allowing bad faith failure to settle claims.

a) Any requirement that the insured demand settlement is unjust and a mis-application of case law.

The tort of an insurer's bad faith refusal to settle was originally recognized by this Court in *Zumwalt v. Utilities Insurance Co.*, 228 S.W.2d 750 (Mo. 1950). The Court based its ruling on *McCombs v. Fidelity & Casualty Co.*, 89 S.W.2d 114 (Mo. App. 1936). As noted by the Western District in the underlying opinion neither of these cases (or for that matter any case) clearly identified the essential elements of the tort they created.

Twenty-six years following *Zumwalt*, the St. Louis District Court of Appeals in *Dyer* "purported to identify the essential elements of an insured's bad faith failure to settle third party claims." *Scottsdale Ins. Co. v. Addison Ins. Co.*, WD75963, 2013 WL 5458918 (Mo. App. Oct. 1, 2013). The court stated that:

> The elements of the tort ***appear to be*** that: (1) the liability insurer has assumed control over negotiation, settlement, and legal proceedings brought against the insured; (2) the insured has demanded that the insurer settle the claim brought against the insured; (3) the insurer refuses to settle the claim within the liability limits of the policy; and (4) in so refusing, the insurer acts in bad faith, rather than negligently.

Dyer v. General American Life Insurance Co., 541 S.W.2d 702 (Mo. App. 1976) (dictum) (emphasis added). As noted in *Scottsdale*, *Dyer* "cited no authority for its declaration" and indeed, that the first element had already been rejected. *Scottsdale*, 2013 WL 5458918, *14 (*citing Landie v. Century Indem. Co.*, 390 S.W.2d 558, 564 (Mo. App. 1965).

Dyer has spawned a body of case law in which technical non-conformance with its elements is used "to support the entry of judgment in favor of an insurer." *Id.* at 14; *see e.g.*, *Bonner v. Auto. Club Inter-Ins. Exch.*, 899 S.W.2d 925 (Mo. App. 1995) (demand by insured to settle required) *State Farm Fire & Cas. Co. v. Metcalf*, 861 S.W.2d 751 (Mo. App. 1993) (demand by claimant for limited required) and *Purscell v. TICO Ins. Co.*, 2013 WL 2450825 (W.D.Mo. May 24, 2013). The *Dyer* rule requiring a demand for compromise by an insured is without basis in law and is, in cases involving unjust demands, meaningless. As such, *Dyer* to the extent it stands for the proposition that a demand to settle by the insured is a necessary element of the tort of bad faith should be expressly overruled.

b) Requiring an insured to demand settlement is impractical and redundant given the practicalities of the insurance contract.

In the world of liability claims, typically a claimant sustains an injury or damages and places the responsible party on notice by letter or suit. The responsible party with liability insurance is then obligated under the policy provisions to provide the carrier with notice of the claim which is typically accompanied with a demand for defense and indemnification in accordance with the policy terms.

At this juncture, the carrier has three options: 1) to deny coverage and deny a defense of the claim; 2) to reserve its right to deny coverage at a later date and provide a defense pursuant to that reservation; 3) agree to provide coverage and an unqualified defense under the policy.

The insured has certain rights by statute and common law to respond to the first and second scenarios. If the carrier abandons its insured and denies coverage, it does so at its own risk. *Assurance Co. of America v. Secura Ins. Co.*, 384 S.W.3d 224, 233 (Mo. App. 2012). The carrier's obligation to act in good faith regarding settlement continues even if an insurer denies coverage and refuses to defend the insured. *Truck Ins. Exch. V. Prairie Framing, LLC* 162 S.W. 3rd 64, 94 (Mo. App. 2005). If the carrier chooses to defend under a reservation, the insured has the ability to accept or reject that defense and insist on a definitive coverage determination. *State Farm Mut. Auto. Ins. Co. vs. Ballmer*, 899 S.W. 2d 523 (Mo. 1995).

If the carrier persists in its denial of coverage, the breach of the insuring agreement is treated as if the carrier has waived any control of the defense of the underlying tort action. *Auto-Owners Ins. Co. v. Ennulat*, 231 S.W.3d 297, 304 (Mo. App. 2007). The insured is thus free to enter into a reasonable settlement to protect its own interest without impairing its right to recover under the policy. *Cologna v. Farmers & Merchants,* 785 S.W. 2d 691, 701 (Mo. App. 1990).

Therefore, it would be the height of futility to require an abandoned insured to make a demand to settle a claim that has already been denied. *Shobe v. Kelly*, 279 S.W. 3d 203,210 (Mo. App. 2009); *see also Landie v. Century Indem. Co*., 390 S.W. 2d 558, 564 (Mo. App. 1965) (where refusal to defend can be actionable under tort of bad faith). The *Shobe* court concluded that:

> If an insurer wrongly denies coverage, denies even a defense under a reservation of rights, and then completely refuses to engage in settlement negotiations, it cannot avoid liability by its wrongful refusal to assume control of the proceedings.

Shobe, 279 S.W.3d at 211.

The terms of nearly all primary policies give the irrevocable power to determine whether an offer of compromise shall be accepted or rejected to the insurer. *See Certain Underwriters of Lloyd's v. Gen. Accident Ins. Co. of Am.*, 699 F.Supp. 732, 738 (S.D. Ind. 1988). In those cases, the requirement of a demand to settle is unreasonable. *State Farm Mut. Auto. Ins. Co. v. Jackson*, 346 F.2d 484, 490 (8th Cir 1965). The *Dyer* premise that liability is predicated on compliance with discreet procedural steps is contrary to the Missouri Supreme Court's holding in *Zumwalt*. *Shobe v. Kelly*, 279 S.W.3d 203, 210-11 (Mo. App. 2009).

The *Shobe* court succinctly stated the necessary elements when it sustained the plaintiff's verdict directing instruction, holding that "[t]he instruction premised Allstate's liability on a finding that Allstate: (1) had the opportunity to settle within the policy limits, (2) acted in bad faith through its refusal to do so, and (3) such failure caused damage to Ms. Shobe." *Shobe*, 279 S.W.3d at 209-10. In so holding, the *Shobe* court looked to the central core of the tort of bad faith as expressed by this Court's landmark ruling in *Zumwalt*:

> The insurance company incurs liability exposure … when the company refuses to settle a claim within the policy limits and the insured is subjected

to a judgment in excess of the policy limits as a result of the company's bad faith in disregarding the interests of its insured in hopes of escaping its responsibility under the liability policy.

Shobe, 279 S.W.3d at 210.

In those circumstances where the carrier acknowledges coverage and a duty to provide a defense but then engages in claims handling conduct involving a bad faith failure to settle for the policy limits, a demand by the insured to pay those limits is equally unnecessary.

The essence of the tort of bad faith refusal to settle is 1) that the insurer has the authority to settle a claim within policy limits, 2) that the insurer has the opportunity to do so, 3) that the insurer fails to do so in bad faith, and 4) that the insured suffers damage as a result. *See generally Zumwalt*, 228 S.W.2d 750, *and Shobe*, 279 S.W.3d 203, *and H & S Motor Freight, Inc. v. Truck Ins. Exch.*, 540 F.Supp. 766 (W.D.Mo. 1982) (predicting that Missouri courts would ultimately not require a demand by the insured).

Conditioning the insurer's obligation to perform its duty on formal procedural steps is contrary to the intent of Missouri's bad faith tort, which recognizes an insurer has an intrinsic duty to act in good faith when making settlement decisions for its insured. For this reason, the court should set forth that the elements required for a bad faith failure to settle claim do not include a demand made by the insured to his insurer to pay the limits (absent express policy provisions such as consent clauses).

The insured defendant in the underlying tort claim, Well's Trucking, made a demand upon the primary carrier to settle the tort Plaintiffs claim for the primary policy limits of One Million ($1,000,000.00) dollars. Scottsdale made a similar demand as the excess carrier.

As the Western District concluded:

> To condition the insurer's obligation to perform its duty on formal demands, refusals, or on express assumption of control over the proceedings, is to impose hyper-technical avenues for escape that are unrelated to the duty's existence.

Scottsdale, 2013 WL 5458918 *15. In the instant case, these demands were in fact made by both Scottsdale and Well's Trucking, but *Amicus* urges this court to adopt the Western District's holding that such a demand is not required for a claim on the tort of BFFS.

Conclusion

The question of a primary insurance carrier's duty to an excess insurance carrier can be answered by looking to any of the above doctrines. The duty can be found by looking to equitable subrogation, common law duties founded in contract or in tort, or by assigning the well-established rights of the insured to the excess carrier. Any of these arguments will support a determination that Scottsdale may prosecute a BFFS claim against Addison and United.

For these reasons, we urge this court to determine that the granting of summary judgment against Scottsdale was in error and that Scottsdale has a legal right to pursue a bad faith failure to settle claim against Respondents.

Respectfully submitted,

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Certificate of Service and Compliance

I certify that filed this brief with the Missouri Supreme Court's electronic filing system. I also certify that this brief (1) includes the information that 55.03 requires; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 12,432 words.

/s/ Tom Hershewe

CERTIFICATE OF SERVICE

I certify that on March 14, 2014, I electronically filed this brief with the Clerk of the Court using the CM/ECF system which sent notification of such filing to following, and further that I sent a electronic copy hereof by email to:

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