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portant factor in the infant's failure to correct the attorney's mistake.[227] The Court felt that wherever the fault might lie, it is the plaintiff who stands to suffer.[228]

While the Court of Appeals' unanimous affirmance was a refusal to interfere with the discretion of the lower court, its flexible stand in permitting this presumption of disability attending infancy increases the possibility that infants may institute otherwise untimely actions. In accommodating the plaintiff, the Court also recognized the difference in treatment afforded to similar fact situations.[229] Judge Breitel, in concurring, stated that the statute should provide greater discretion in granting relief because it is presently a "mousetrap" to all but the most sophisticated practitioners.[230]

INSURANCE LAW

Ins. Law: Insurer not liable in excess judgment suit where refusal to defend or settle is based on good faith belief that policy had been cancelled.

In handling a negligence claim against its policyholder which is in excess of policy limits, a liability insurer is invariably faced with the choice of either attempting to negotiate a settlement within policy limits or proceeding to trial in the hope of absolving its insured from liability. Because of the conflict between the interests of the insurer and its insured inherent in this situation, the Court of Appeals early recognized a duty on the part of the insurer to act in good faith in carrying out its obligations under the insurance contract. In *Brassil v. Maryland Casualty Co.*,[231] the insurer was held liable for the expenses incurred by the insured in prosecuting an appeal which the company had unjustifiably refused to pursue on his behalf.

Even after *Brassil*, however, courts often afforded the insurer wide discretion in deciding whether or not to settle.[232] Then, in 1928, the

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Hosp., 33 App. Div. 2d 779, 307 N.Y.S.2d 830 (2d Dep't 1969) (mem.), *aff'd mem.*, 26 N.Y.2d 997, 259 N.E.2d 499, 311 N.Y.S.2d 34 (1970); Pandoliano v. New York City Transit Authority, 17 App. Div. 2d 951, 234 N.Y.S.2d 99 (2d Dep't 1962) (mem.).

227 30 N.Y.2d at 120, 282 N.E.2d at 108, 331 N.Y.S.2d at 15.

228 *Id.*, 282 N.E.2d at 107, 331 N.Y.S.2d at 15.

229 *Id.* at 119, 282 N.E.2d at 107, 331 N.Y.S.2d at 14.

230 *Id.* at 121, 282 N.E.2d at 108, 331 N.Y.S.2d at 16.

231 210 N.Y. 235, 104 N.E. 602 (1914).

232 *See, e.g.*, Auerbach v. Maryland Cas. Co., 236 N.Y. 247, 140 N.E. 577 (1923); McAleenan v. Massachusetts Bonding & Ins. Co., 173 App. Div. 100, 159 N.Y.S. 401 (1st Dep't), *aff'd mem.*, 219 N.Y. 563, 114 N.E. 114 (1916); Levin v. New England Cas. Co., 101 Misc. 402, 166 N.Y.S. 1055 (App. T. 1st Dep't 1917), *aff'd mem.*, 187 App. Div. 935, 174 N.Y.S. 910 (1st Dep't 1919), *aff'd mem.*, 233 N.Y. 631, 135 N.E. 948 (1922).

Court of Appeals made what was until recently[233] its final statement on the subject, and the rule it prescribed became the controlling standard in excess judgment suits in New York against insurers who refused to settle within policy limits. In *Best Building Co. v. Employers' Liability Assurance Corp.*,[234] the Court refused to hold an insurer liable for an excess judgment which, argued the insured, resulted from its negligence. The company had received a settlement offer above the figure it was willing to meet, and did not inform its insured, who testified that he would have paid the difference. The judgment was $6,000 over the policy limit. The unanimous Court held that negligence was too tenuous a concept to be applied in this context, and approved the *Brassil* principle of an implied obligation to exercise good faith in adhering to the terms of the contract.[235] In rejecting the notion that the insurer has an implied obligation or absolute duty to settle, *Best* determined that the insurer is vested with discretion in deciding whether to settle,[236] qualified by the good faith requirement.

Federal courts sitting in New York have provided some impetus in the direction of liberalizing, or at least clarifying, the standards which determine the liability of an insurer charged with bad faith in settlement negotiations. In *Brown v. United States Fidelity & Guaranty Co.*,[237] the Second Circuit Court of Appeals acknowledged the indefiniteness of New York law on this point, but felt that New York would, under the *Best* rule, follow the modern trend and require that the insured's interests be given at least equal consideration with those of the insurer.[238] Thus, in reversing the district court's dismissal of the complaint, the court held that it stated a prima facie case of bad faith.[239] To the same effect is *Harris v. Standard Accident & Insurance Co.*,[240] which applied the *Best* rule in finding bad faith on the part of

233 *See* Gordon v. Nationwide Mut. Ins. Co., 30 N.Y.2d 427, 285 N.E.2d 849, 334 N.Y.S.2d 601 (1972).

234 247 N.Y. 451, 160 N.E. 911 (1928).

235 *Id.* at 455, 160 N.E. at 912.

236 *See* Auerbach v. Maryland Cas. Co., 236 N.Y. 247, 252, 140 N.E. 577, 579 (1923), which held that the contractual provisions must control, and that if the policy imposes no duty upon the insurer to settle, none can be implied.

237 314 F.2d 675 (2d Cir. 1963).

238 The court quoted with approval the rule of thumb formulated by Professor Keeton that the insurer must view the situation as if there were no policy limit applicable to the claim. *Id.* at 678. *See* Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1148 (1954).

239 314 F.2d at 682.

240 191 F. Supp. 538 (S.D.N.Y.), *rev'd on other grounds*, 297 F.2d 627 (2d Cir. 1961), *cert. denied*, 369 U.S. 843 (1962). The Second Circuit Court of Appeals reversed on the ground that the plaintiff, a trustee in bankruptcy for the defendants in the personal injury action, had not shown any damage to have resulted from the excess judgment.

an insurer who refused to settle. The District Court for New York's Southern District stated:

> Since the company, therefore, has power through the control of settlement, to adversely affect the insured's interests, it must necessarily bear a legal responsibility for the proper exercise of that power. Thus, the law imposes on the insurer the obligation of good faith — basically, the duty to consider, in good faith, the insured's interests as well as its own when making decisions as to settlement.[241]

Subsequent Second Circuit decisions contributed additional and more precise indicia for determining whether the insurer acted in bad faith.[242]

The developments fostered by the federal courts have been followed by more frequent activity in this area among the state's appellate tribunals. In *Cappano v. Phoenix Assurance Co.*,[243] the Appellate Division, Fourth Department, relying on *Harris*, held that the trial court's instruction with respect to bad faith was highly prejudicial and constituted reversible error. The charge required a sinister motive and a wilful refusal to fulfill an obligation with intent to injure. In addition, the First Department, in *Pipoli v. United States Fidelity & Guaranty Co.*,[244] while holding that an insurer had not acted in bad faith in refusing to settle, added a qualification to *Brown's* good faith factors: "An insured who steadfastly proclaims his own freedom from fault cannot complain if his insurer believes him and acts accordingly."[245]

The most significant development in recent years in this area of New York law occurred when the Court of Appeals decided *Gordon v. Nationwide Mutual Insurance Co.*[246] The plaintiff, the insured's receiver,[247] based his action on the insurer's alleged bad faith in refusing

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241 *Id.* at 540.

242 *See* Brockstein v. Nationwide Mut. Ins. Co., 417 F.2d 703 (2d Cir. 1969), *cert. denied*, 405 U.S. 921 (1972); Young v. American Cas. Co., 416 F.2d 906 (2d Cir. 1969). The *Young* court held that bad faith may be found from the insurer's failure to notify its insured of a settlement offer, or from its failure to attempt to negotiate a reduction in the offer. *Id.* at 910. *Brockstein* imposed the additional burden on the insurer to inform its insured of any opportunity for the latter to make a relatively small contribution to avoid an excess judgment. 417 F.2d at 709.

243 28 App. Div. 2d 639, 280 N.Y.S.2d 695 (4th Dep't 1967).

244 38 App. Div. 2d 249, 328 N.Y.S.2d 688 (1st Dep't), *aff'd mem.*, 31 N.Y.2d 679, 289 N.E.2d 178, 337 N.Y.S.2d 257 (1972).

245 *Id.* at 250, 328 N.Y.S.2d at 689.

246 30 N.Y.2d 427, 285 N.E.2d 849, 334 N.Y.S.2d 601 (1972), *rev'g* 37 App. Div. 2d 265, 323 N.Y.S.2d 550 (2d Dep't 1971).

247 The receiver, appointed pursuant to CPLR 5228, was the alter ego for the judgment creditors of the insured. The use of this procedural device in the context of an excess judgment suit was directly approved in *In re* Kreloff, 65 Misc. 2d 692, 319 N.Y.S.2d 51 (Sup. Ct. Bronx County 1971). *See* 7B McKINNEY'S CPLR 5201, supp. commentary at 15 (1971).

to negotiate a settlement of a negligence claim against its insured, Louis Porter. The refusal of the insurer, Nationwide Mutual Insurance Company, to settle stemmed directly from its refusal to defend Porter in the action, based upon its assertion that the policy had been cancelled.[248] The Court, by a 4-3 majority, reversed the appellate division's determination that the insurer's bad faith had been established.

Assuming that Nationwide was wrong as a matter of law on the issue of policy coverage, Judge Bergan, in the plurality opinion, stated that the insurer had nevertheless acted in good faith as long as there was an "arguable case" of coverage.[249] Another factor which was deemed relevant to the issue of good faith was that it was the error of Premier Credit Corporation, the financing agency which handled Porter's policy, and not its own error, which caused Nationwide to believe that the policy had been cancelled. But perhaps the most crucial factor was Porter's "complete indifference" to his contractual obligations or the claims against him,[250] since any claim of bad faith must be weighed against the background of the insured's attitude and willingness to cooperate. Thus the "heavy punitive judgment"[251] which had been imposed was considered unjustifiable under the facts. "[B]ad faith," stated Judge Bergan, "requires an extraordinary showing of a disingenuous or dishonest failure to carry out a contract."[252] Damages, therefore, were awarded only for breach of contract — Nationwide's failure to defend — and were measured by the policy limits.[253]

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248 The policy was issued to Porter through the Premier Credit Corporation, a finance agency with whom he contracted to pay the premiums. When Porter defaulted, Premier sent notices of cancellation to him and to Nationwide. Although the notice was defective under Banking Law § 576(1)(a) and (b), Nationwide relied upon it in asserting non-coverage. Moreover, as Judge Breitel in his dissent (30 N.Y.2d at 442-43, 285 N.E.2d at 858, 334 N.Y.S.2d at 613) and the majority in the Second Department (37 App. Div. 2d at 268-69, 323 N.Y.S.2d at 554) argued, Premier was authorized under its contract only to "request cancellation," and Nationwide itself had never cancelled the policy. The Court of Appeals felt, however, that this method of cancellation was sanctioned by the statute. 30 N.Y.2d at 434, 285 N.E.2d at 852, 334 N.Y.S.2d at 606.

249 30 N.Y.2d at 431, 285 N.E.2d at 850-51, 334 N.Y.S.2d at 603. *See* Sukup v. State, 19 N.Y.2d 519, 227 N.E.2d 842, 281 N.Y.S.2d 28 (1967), which involved a claim by the insured for expenses in litigating the issue of coverage in a separate proceeding. It was held that the imposition of such extra-contractual liability could not be justified on the basis of a mere difference of opinion over coverage; the facts must show a "gross disregard" of its policy obligation by the insurer. *Id.* at 552, 227 N.E.2d at 844, 281 N.Y.S.2d at 31.

250 Porter had ignored several notices by Nationwide advising him that he should retain other counsel, and defaulted both on his own attorney's application to the court to withdraw from the case and on application by the original plaintiff's attorneys to take inquests. In sum, "Porter showed no interest whatever in the consequences [of Nationwide's withdrawal from the defense of his case] to him or to anyone else." 30 N.Y.2d at 435, 285 N.E.2d at 853, 334 N.Y.S.2d at 607.

251 *Id.* at 436, 285 N.E.2d at 854, 334 N.Y.S.2d at 608.

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

253 Judge Bergan stated that an element of damages would also be the cost of defense,

In a lengthy dissent, Judge Breitel vociferously disagreed with the majority's determination as to the insurer's liability, as well as to the view implicit in the plurality opinion[254] and explicated by Chief Judge Fuld in his concurrence,[255] that there was no showing that the insured suffered any damage as a result of the excess judgment. Implying that the insurer had a duty to obtain a declaratory judgment on the issue of policy coverage,[256] Judge Breitel stated that the finding of bad faith was "virtually compelled by the record."[257] Furthermore, he stated that Porter's insolvency should not relieve Nationwide from liability, since there are other economic factors which should be weighed to determine the measure of damages.[258]

The ramifications of *Gordon* on the bad faith standards in excess judgment suits are not yet clear, but *Gordon* appears to represent a step backward from the recent trend to impose a more positive duty on the insurer to protect its insured's interests.[259] It must be remembered, however, that several factors were involved in *Gordon* which may make it distinguishable from many similar cases, *i.e.*, the issue of cancellation, the insured's insolvency, and the insured's complete lack of interest in

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if any. *Id.* at 436, 285 N.E.2d at 854, 334 N.Y.S.2d at 608. But here, Porter did not defend, and the excess judgment was by default.

254 *Id.* at 435, 285 N.E.2d at 853, 334 N.Y.S.2d at 607.

255 *Id.* at 439, 285 N.E.2d at 856, 334 N.Y.S.2d at 611.

256 *Id.* at 444, 285 N.E.2d at 858, 334 N.Y.S.2d at 615. In Western Cas. & Sur. Co. v. Herman, 405 F.2d 121 (8th Cir. 1968), the insurer refused to defend because of the pendency of a declaratory judgment action on the coverage issue, contending that to do so would be inconsistent and would create a conflict of interest. The court rejected this argument, stating that an insurance company is often in an inconsistent position, and that this is not a sufficient reason for refusing to defend or "at all material on the crucial issue of whether good faith was exercised in considering the settlement." *Id.* at 124.

257 30 N.Y.2d at 446, 285 N.E.2d at 860, 334 N.Y.S.2d at 616.

258 *Id.* at 450-51, 285 N.E.2d at 862-63, 334 N.Y.S.2d at 620-21. Some factors listed by Judge Breitel were "age, economic status, economic prospects, skills, health," and any other existing conditions which might determine his economic future. *Id.* at 451, 285 N.E.2d at 863, 334 N.Y.S.2d at 620. *Cf.* Harris v. Standard Acc. & Ins. Co., 297 F.2d 627 (2d Cir. 1961), *cert. denied*, 369 U.S. 843 (1962), wherein it was held that a trustee in bankruptcy cannot recover in an excess judgment suit without a showing of actual loss to the insured. The court stated that New York's statutory prohibition against the use by the insurer of the insured's insolvency or bankruptcy as a defense only applies to liability within policy limits, and not to excess judgments. *Id.* at 631. *See* N.Y. INS. LAW § 167(1)(a) (McKinney 1966). The damages issue posed no problem for the *Gordon* majority in the appellate division, which stated that "the insured is damaged upon entry of the judgment, irrespective of whether he pays it or has the ability to pay it." 37 App. Div. 2d at 271, 323 N.Y.S.2d at 556. *See also* Henegan v. Merchant Mut. Ins. Co., 31 App. Div. 2d 12, 294 N.Y.S.2d 547 (1st Dep't 1968).

259 The developments in other jurisdictions have been more far-reaching. For example, California's highest court has suggested by way of dictum the imposition of strict liability on an insurer for its refusal to accept a compromise offer where an excess judgment might result. Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967). *See* Note, *Recent Developments in the Excess Judgment Suit*, 36 BROOKLYN L. REV. 464, 470 *et seq.* (1970).

his own defense. One result is clear: where it is found that the insurer's withdrawal from the defense of the negligence action was not made in bad faith, this fact will serve as justification for its refusal to participate in settlement negotiations, thereby avoiding liability for a resulting judgment in excess of policy limits.[260]

Ins. Law § 59-a: Unauthorized act in New York by agent of foreign insurer held sufficient basis for personal jurisdiction.

Many New York residents hold insurance policies issued by insurers not authorized to do business in this state, and Insurance Law section 59-a allows such residents to acquire personal jurisdiction over such insurers. The section permits service of process on the superintendent of insurance if an unauthorized foreign insurer has performed any of the acts enumerated therein,[261] including issuance or delivery of insurance contracts to New York residents.[262]

In *Ford v. Unity Hospital*,[263] the Appellate Division, Second Department, decided whether New York could exercise personal jurisdiction over a foreign insurance company whose agent had exceeded its authority in issuing and delivering a cover note for a malpractice policy to a New York medical partnership. The partnership was sued for malpractice and brought a third-party action against the insurer, which argued that under the agency agreement the agent was not authorized to issue medical malpractice insurance or to do business on its behalf in New York, and thus could not subject it to New York jurisdiction by the issuance of the cover note.[264] Nevertheless, the court held that juris-

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260 For a contrary view, see Blakely v. American Employers' Ins. Co., 424 F.2d 728, 734 (5th Cir. 1970), which held that an insurer's "breach of its contract to defend should not release it from its implied duty to consider [its insured's] interest in the settlement" even though its reasons for denying liability under the policy may not have been entirely groundless. Professor Keeton indicates that the insurer can manipulate the situation to its advantage: "[C]omplete denial of policy coverage and refusal to defend has proven to be one of the more effective ways for a company to prevent excess liability." Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1160 (1954).

261 *See, e.g.*, Zacharakis v. Bunker Hill Mut. Ins. Co., 281 App. Div. 487, 120 N.Y.S.2d 418 (1st Dep't 1953), which held Insurance Law § 59-a applicable to a foreign insurer which had issued a policy to a New York resident and collected the premiums through the mail.

262 N.Y. INS. LAW § 59-a(2)(a)(1) (McKinney 1966).

263 39 App. Div. 2d 569, 331 N.Y.S.2d 865 (2d Dep't 1972) (mem.).

264 The agent's dealings with the insurer, a Mexican company, were carried on through Mid-Continent Underwriters, Inc., a Louisiana corporation which was the insurer's managing agent in the United States. A third-party complaint against Mid-Continent was dismissed, for Mid-Continent was not a party to the agency agreement, the agent did not purport to act for it in New York, and its activity with respect to the transaction — the issuance of a cancellation notice to the defendants — was not sufficient under Insurance Law § 59-a or CPLR 302(a)(1) to subject it to jurisdiction. *Id.* at 571, 331 N.Y.S.2d at 868.