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Negligent Failure of an Insurer to Settle a Claim - New Mexico Does Not Recognize This Cause of Action: Ambassador Insurance Company v. St. Paul Fire & (and) Marine Insurance Company

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NEGLIGENT FAILURE OF AN INSURER TO SETTLE A CLAIM—New Mexico Does Not Recognize This Cause of Action: *Ambassador Insurance Company v. St. Paul Fire & Marine Insurance Company*

I. INTRODUCTION

A typical liability insurance contract provides that the insurer shall defend any suit against the insured even if the suit is groundless.[1] Thus, the insurer has a contractual duty to defend its insured and may be found liable if it negligently performs that duty. As to settlement of a claim, however, the contract typically provides that the insurer "may make such investigation, negotiation and settlement of any claim or suit as it deems expedient."[2] This provision gives the insurer complete control over decisions regarding settlement of a suit against the insured; the insured is contractually barred from interfering. In *Ambassador Insurance Company v. St. Paul Fire & Marine Insurance Company,*[3] a case of first impression, the New Mexico Supreme Court held that New Mexico does not recognize an insurer's negligent failure to accept a settlement offer as a cause of action.[4] The court did hold however, that an insurer has an obligation to act with good faith toward its insured.[5] Therefore, in light of *Ambassador,* to prevail in a failure-to-settle action an insured must allege bad faith, rather than negligence, on the part of the insurer. This Note examines the court's rationale for its decision and analyzes that rationale. Further, this Note also discusses the similarity of the bad faith and the negligence standards, and the fact that, because of this similarity, New Mexico's rejection of the negligence standard has little impact on the bringing of failure-to-settle claims in New Mexico.

II. STATEMENT OF THE CASE

Memorial General Hospital in Las Cruces, New Mexico, was sued for medical malpractice.[6] St. Paul Fire & Marine Insurance Company (St.

1. *See* Keeton, *Liability Insurance and Responsibility for Settlement* 67 HARVARD L. REV. 1136, 1137 (1954).
2. *Id.*
3. 102 N.M. 28, 690 P.2d 1022 (1984).
4. *Id.* at 29, 690 P.2d at 1023.
5. *Id.*
6. A suit for wrongful death was filed against a physician who made an alleged misdiagnosis, and against Memorial General Hospital, where the alleged misdiagnosis occured. Brief of Appellee at viii, Ambassador Insurance Company v. St. Paul Fire and Marine Insurance Company, 102 N.M. 28, 690 P.2d 1022 (1984).

Paul), the hospital's primary insurer, did not accept a pretrial offer to settle for $60,000, and ultimately settled for $120,000.[7] Ambassador Insurance Company (Ambassador), as the hospital's excess insurer, had to pay the $20,000 over St. Paul's policy limit of $100,000.[8] Therefore, Ambassador sued St. Paul in federal district court, claiming that St. Paul was negligent in not accepting the settlement offer.[10] St. Paul moved to dismiss the negligence claim on the ground that New Mexico does not recognize a cause of action for negligent failure to settle. The federal district court granted St. Paul's motion to dismiss the negligence claim.[11]

Ambassador appealed the dismissal of the negligence claim to the Tenth Circuit Court of Appeals.[12] The court of appeals recognized that it should allow New Mexico courts to interpret New Mexico law whenever possible.[13] Therefore, pursuant to New Mexico's Certification Statute,[14] it certified to the New Mexico Supreme Court the question of whether New Mexico recognizes negligent failure to settle as a cause of action.[15] The supreme court held that New Mexico does not recognize a cause of action for negligent failure to settle, acknowledging that such claims must be brought under a claim of bad faith.[16]

III. HISTORICAL BACKGROUND

To fully understand the implications of the New Mexico Supreme Court's decision, a brief discussion regarding the development of the bad faith and negligence standards is necessary. When a third party makes a claim for damages that is in excess of the insured's policy limits, a conflict of interest arises between the insurer and the insured. This conflict is greatest when the injured claimant offers to settle at or near policy limits. The insured bought the insurance policy for the very purpose of protecting

7. The plaintiff settled with the doctor for $60,000 and offered to settle with the hospital for the same amount. *Id.* St. Paul decided that the settlement with the doctor had the effect of releasing the hospital from the suit, and therefore filed a Motion for Summary Judgment based on that belief. *Id.* St. Paul believed that the $60,000 settlement offer would remain open until the Motion was decided. *Id.* The federal district court granted the Motion, but was reversed by the New Mexico Court of Appeals. *Id.* There was a trial and an appeal, after which the parties settled for $120,000. *Id.*

8. Ambassador Insurance Company v. St. Paul Fire and Marine Insurance Company, 753 F.2d 824, 825 (1985).

9. The case was brought in federal district court on grounds of diversity. 28 U.S.C. § 1332 (1982). This opinion was the result of the Tenth Circuit Court of Appeals submission of the case to the New Mexico Supreme Court. The supreme court reached its decision in November, 1984, but the decision was not formally accepted by the court of appeals until January, 1985.

10. *Ambassador,* 102 N.M. at 28, 690 P.2d at 1022. Ambassador also sued on a theory of bad faith refusal to settle; however, that issue is beyond the scope of this Note.

11. *Id.*

12. *Id.*

13. 753 F.2d at 827.

14. N.M. STAT. ANN. § 34-2-8 (1978).

15. 753 F.2d at 827.

16. *Ambassador,* 102 N.M. at 29, 690 P.2d at 1023.

herself against financial disaster; she wants the claim settled below policy limits because she would be personally liable for any excess amount. The insurer, on the other hand, has everything to gain by going to trial because its liability is limited by the policy.[17] If litigation results in a verdict of no liability or liability for damages less than policy limits, the insurer has saved money; if the verdict exceeds policy limits, the insurer still must pay only the amount of the policy. Thus, an insurer's interests are usually best served by accepting only those offers that are well below policy coverage.[18]

Because of the potential for conflicting interests, it is now universally held that, although the insurer contracted for complete discretion as to settlement, the insurer still has some obligation to its insured regarding acceptance or rejection of settlement offers.[19] Jurisdictions, however, are divided as to whether this obligation is to be measured by the bad faith standard or the negligence standard.

Under the bad faith standard, an insurer must consider in good faith the insured's interest as well as its own in settlement decisions.[20] If the insurer does not give sufficient consideration to the insured's interest in refusing a settlement offer, the insurer is liable for any excess judgment.[21] A majority of jurisdictions follow the bad faith standard.[22]

The jurisdictions which follow the bad faith standard, rejecting the negligence standard, do so apparently for two major reasons. First, the courts reason that acceptance of the negligence standard would extend the insurer's obligation beyond that for which it had contracted.[23] Second, the courts believe that it is impossible to predict what will be considered negligence in a given case because of the vagaries of juries.[24] Even a claim which an insurer, through diligent investigation, has decided is weak and should be litigated, might be lost at trial.[25] And the jury in the

17. Leair, *Insurer's Excess Liability: Evaluating Conduct and Decisions in Refusal of Settlement Offers*, 37 FED'N OF INS. COUNSEL Q. 371 (1983).

18. *Id.*

19. Some early opinions on this issue held that the insurer had no duty whatsoever regarding settlement. *See* Rumford Falls Paper Co. v. Fidelity and Casualty Company, 92 Me. 74, 43 A. 503 (1899), and Auerbach v. Maryland Casualty Company, 236 N.Y. 247, 140 N.E. 577, 579 (1923).

20. R. LONG, THE LAW OF LIABILITY INSURANCE § 5.29 (1966).

21. *Id.*

22. *See* Annotation, *Duty of Liability Insurer to Settle or Compromise*, 40 A.L.R. 170, 178-81 (1955). However, many of these jurisdictions hold that negligence may be relevant to the determination of bad faith. *See, e.g.*, Georgia Casualty Co. v. Cotton Mills Products Co., 159 Miss. 396, 132 So. 73 (1931) and Best Bldg. Co. v. Employer's Liability Assurance Corp., 247 N.Y. 451, 160 N.E. 911 (1928) (quoted with approval by the *Ambassador* court).

23. *See, e.g.*, Best Bldg. Co. v. Employer's Liability Assurance Corp., 247 N.Y. 451, 160 N.E. 911 (1928); Georgia Casualty Co. v. Mann, 242 Ky., 447 S.E.2d 777 (1932).

24. *Id.*

25. Georgia Casualty Co. v. Mann, 242 Ky. 447, 46 S.W. 2d 777 (1932) is widely quoted by courts which reject the negligence standard: "The gift of prophecy has never been bestowed on ordinary mortals." *Id.* at 449, 46 S.W.2d at 779.

ensuing failure-to-settle case might decide that, although the case for the insured was strong, no "reasonable insurance company" would refuse an offer of settlement rather than risk a trial. Therefore, because courts find no contractual obligation to settle, and because it is difficult to predict what a particular jury will find to be "negligence" in a particular case, the majority of courts accept only bad faith failure to settle as a cause of action.

In contrast, the negligence standard imposes upon the insurer a standard of due care which may be expressed in one of the following ways: (1) a prudent insurer responding to an offer to settle,[26] (2) a prudent insurer with no policy limits,[27] or (3) a reasonable attorney responding to a settlement offer.[28]

The courts which accept the negligence standard commonly recognize that although the insurer does not agree in the contract of insurance to accept reasonable settlement offers, it has undertaken to perform a service. Furthermore, these courts reason, the insurer has taken away the insured's right to accept settlement offers on his own; therefore, the insurer has an obligation to use due care.[29]

IV. DISCUSSION OF THE COURT'S RATIONALE

The New Mexico Supreme Court based its decision rejecting the negligence standard on two grounds: on dicta in *American Employer's Insurance v. Crawford*[30] that duties between insurer and insured are contractual, and on the rationale that acceptance of the negligence standard would result in automatic settlement of all claims.[31] Having rejected the negligence standard, the supreme court then considered what duty an insurer *does* owe to its insured. Each of these points will be discussed in turn.

A. *The Court's Reliance on* Crawford

In rejecting a cause of action for negligent failure to settle, the supreme court relied on *American Employer's Insurance v. Crawford*[32] for dicta

26. *See, e.g.*, Dumas v. Hartford Accident & Indemnity Co., 94 N.H. 484, 56 A.2d 53 (1947).

27. *See id.*

28. *See, e.g.*, American Casualty Co. v. Howard, 187 F.2d 322 (4th Cir. 1951).

29. Dumas v. Hartford Accident & Indemnity Co., 94 N.H. 484, 56 A.2d 57 (1947), a leading case holding an insurer to a standard of due care, recognized that an insurer need not have "the gift of prophecy" but only that "anticipation of loss to the insurer [sic] need only be such as a reasonable person would have and would guard against." 94 N.H. at 487, 56 A.2d at 60.

30. 87 N.M. 375, 533 P.2d 1203 (1975).

31. *Ambassador*, 102 N.M. at 30, 690 P.2d at 1024.

32. In *Crawford*, the insured, Crawford, had an automobile insurance policy which excluded coverage of employees. *Crawford*, 87 N.M. at 377, 533 P.2d at 1205. Crawford engaged a Mr. Woolett's services for a business venture. *Id.* Woolett sued Crawford for injuries he sustained while a passenger in a car driven by Crawford's partner. *Id.* The insurance company brought a separate

regarding the duties between insurer and insured. The negligence theory was not a point of contention in *Crawford;* however, the supreme court determined that although the *Crawford* court did not reach the question of whether New Mexico recognizes negligent failure to settle, it did, in dicta, discuss the concept of bad faith, indicating that New Mexico interprets the duties between insurer and insured as based in contract rather than tort.[33]

The *Ambassador* court stated that since the relationship between the insurer and the insured is based in contract, it would impose no duty upon the insurer that was not actually imposed by the terms of the contract.[34] The liability insurance contract provides only that the insurer will defend the insured; it leaves the decision of whether to settle to the judgment of the insurer. Therefore, the court held that because there is no contractual obligation regarding settlement, it would not impose a duty of due care regarding settlement offers.[35]

B. The Court's Conclusion that the Negligence Standard Would Result in Automatic Settlement

The supreme court also rejected the negligence standard because it reasoned that, as a practical matter, the theory of negligent failure to settle forces an insurer to accept any settlement offer it receives.[36] Relying on a definition of negligence as: "a probability of harm sufficiently serious that ordinary men would take precautions to avoid it,"[37] the court reasoned that since the harm to be avoided was an excess judgment, the only precaution an ordinary man could take would be to settle.[38] Therefore, because any case, no matter how sound, has a chance of failing in court,[39] the court reasoned that under a negligence theory, the risk of losing would always be serious enough to merit automatic settlement within policy

action seeking a declaratory judgment as to whether Woolett was Crawford's employee. *Id.* at 378, 533 P.2d at 1206. The insurer, however, continued to defend Crawford in the suit brought by Woolett. *Id.* Woolett offered to settle, but Crawford refused to contribute any money toward settlement and the offer was turned down. *Id.* The declaratory judgment held that Woolett was Crawford's employee. *Id.* Woolett won his case against Crawford. *Id.* Crawford then sued his insurer for negligence and bad faith in its handling of the claim, alleging among other things that he was damaged because the insurer did not decide or inform Crawford in a timely manner that he was not covered. *Id.* The New Mexico Supreme Court determined that the insurer could not have been negligent or acted in bad faith because it owed no duty to Crawford since Woolett was not covered by the policy. *Id.* at 381, 533 P.2d at 1209.

33. *Ambassador,* 102 N.M. at 29, 690 P.2d at 1023.

34. *Id.* at 30, 690 P.2d at 1024.

35. *Id.*

36. *Id.* at 29, 690 P.2d at 1023.

37. *Id.* (quoting Dumas v. Hartford Accident and Indemnity Co., 94 N.H. 484, 489, 56 A.2d 57, 60 (1947)).

38. *Id.* at 30, 690 P.2d at 1024.

39. *Id.*

limits.[40] Thus, the supreme court refused to impose a negligence standard, reasoning that recognition could be read as requiring the insurer to settle every case despite an honest belief that the settlement offer was greater than the amount that would be awarded as damages.[41]

C. *An Insurer Will Be Held to a Standard of Due Care in the Investigation of the Claim*

Having rejected negligent failure to settle as a cause of action, the court next considered what duty an insurer would be held to in this jurisdiction. Notwithstanding its holding that there is no contractual duty regarding settlement, the supreme court reasoned that the insurer must act with good faith toward its insured.[42] Moreover, because the insurance contract prohibits the insured from making or accepting offers of settlement the insurer's decision regarding settlement must be honest and intelligent.[43] An honest and intelligent decision is one which is based on a knowledge of all the facts and circumstances regarding the insured's liability and of the nature and extent of the claimant's injuries.[44] Therefore, where failure to settle is due to inadequate investigation, this is negligence in the *defense* of the suit and is strong evidence of bad faith.[45] Because investigation is tied to the defense of the claim and because defense of the claim is a duty imposed by the contract, a standard of due care can be imposed on the investigation of the claim.[46] Thus, negligence in investigation is an *element* which tends to prove bad faith.[47]

V. ANALYSIS AND IMPLICATIONS

Underlying the New Mexico Supreme Court's rejection of the negligent failure to settle as a cause of action were two concerns: (1) traditional contract law forbids imposing obligations for which the parties did not contract, and (2) allowing an insurer to be held to a standard of due care would be tantamount to imposing a standard of strict liability. Due to its first concern, the *Ambassador* court ignored the fact that an insurance

40. *Id.*

41. *Id.*

42. *Id.* The court stated that in every contract there is an implied covenant of fair dealing which obligates the parties to act in good faith. *Id.* (citing 17 AM. JUR. 2d Contracts § 255 (1964)). New Mexico recognizes this implied covenant which is an exception to the general rule that only those obligations explicitly provided for in the contract are imposed. *Id.*

43. *Ambassador,* 102 N.M. at 31, 690 P.2d at 1025, (quoting Radcliffe v. Franklin National Insurance Company, 28 Or. 1, 33, 298 P.2d 1002, 1017 (1956)).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id. See infra* text at notes 51-53.

contract is an adhesion contract. The court's second concern was erroneous, because it equated negligence to strict liability.

A. By Adhering Strictly to Traditional Contract Law, the Court Failed to Recognize that An Insurance Contract is a Contract of Adhesion

The court's first concern stemmed from traditional notions of contract law. In following these traditional principles, the court ignored a major attribute of the liability insurance contract: it is a contract of adhesion.[48] The primary reason for the supreme court's rejection of the negligence standard is that the insurance contract expressly provides that the decision to settle is solely the insurer's.[49] The insured agreed to this provision, reasoned the court; therefore, the insured cannot later insist that the insurer be held to a standard of due care in its decision whether to accept a settlement offer. The court ignored the fact that the insured has no choice but to accept this provision or go without insurance, courting possible financial disaster and in some cases breaking the law.[50]

Because the insured has no choice but to accept an insurance contract as it is written, the insured should at a minimum be able to require that the insurer will handle any claims against him without negligence.[51] This

48. An adhesion contract is a standardized contract form offered to consumers of goods and services on a "take it or leave it" basis without affording the consumer a realistic opportunity to bargain, so that the consumer cannot obtain the goods or services except by accepting the form contract. BLACK'S LAW DICTIONARY 38 (5th ed. 1979).

The failure by the New Mexico court as well as a majority of jurisdictions to recognize openly that the insurance contract is a contract of adhesion may be one reason for the different standards of liability imposed on insurers. The split in the jurisdictions may be due to the fact that the courts do not agree on the method of redressing the imbalance between the contracting parties while maintaining an appearance of staying within the limited role permitted by orthodox contract theory. Sackville, *infra* note 56, at 95.

49. *See supra* text at notes 53-55.

50. New Mexico requires that all nonexempt cars must be insured or the owner must be able to prove financial responsibility to respond in damages up to $50,000. N.M. STAT. ANN. § 66-5-205 (1978).

51. As Appleman notes in his authoritative treatise on insurance law:

> The insurer has more than the duty of due care of an ordinary man unskilled in litigation; it must exercise more than mere good faith. It is a professional which advertises, by all media of mass communication, its skill in the investigation, settlement, and litigation of liability cases. It then becomes chargeable with a greater duty—even as the brain surgeon must exercise greater knowledge, judgment, and skill in a brain operation than a general practitioner of medicine.

7A APPLEMAN, INSURANCE LAW AND PRACTICE, § 4681 (Rev. ed. 1942).

And the court in Knudsen v. Hartford Accident and Indemnity Company, 28 Conn. Supp. 325, 222 A.2d 811 (1966), wryly noted: "The butcher, the baker and the candlestickmaker are all required to answer in a court of law to an aggrieved litigant for their tortious conduct in the marketplace. No compelling reasons have been advanced as to why the defendant's [insurer's] duty should be less." *Id.* at 812. The *Knudsen* court also quoted an Alabama decision: "We know of no other situation where a negligent act proximately resulting in damages to another requires that there must have been bad faith also in order to give rise to a cause of action. They constitute different concepts." *Id.* (quoting Waters v. American Casualty Company, 261 Ala. 252, 258, 73 So. 2d 524, 529. (1954)).

may be the underlying reason that the *Ambassador* court, although nominally confining itself to contract law, divided the conduct of the insurer into two aspects: the investigation of the claim and the decision regarding settlement.[52] Although the court felt constrained by contract law, it recognized that an insurer should be held responsible to investigate claims without negligence; therefore, the court construed investigation of the claim as a duty for which the parties had contracted.

The court rationalized that investigation is related to the defense of the claim, thus the insurer can be held to a standard of competence in the investigation but not the decision to settle, which has no corresponding contractual obligation.[53] This has been termed the "dual standard" of liability.[54] Under the dual standard, only good faith is required in the decision regarding settlement, but the insured is required to conduct without negligence the investigation which leads to that decision.[55]

B. The Court's Concern that Acceptance of the Negligence Standard Would Amount to a Standard of Strict Liability was Erroneous

The court was concerned that under the negligence standard juries would find the insurer negligent solely because an excess judgment was returned. This assumption is erroneous because it equates negligence to strict liability.[56] Physicians and attorneys, as well as other professionals, are held to standards of due care.[57] More is required to find them guilty of negligence than the fact that an operation was unsuccessful or that a lawsuit was lost. Thus, the mere fact that a suit could have been settled within policy limits but was not is insufficient to impose liability on the insurer. Before liability could be imposed on an insurer for refusing a

52. *Ambassador*, 102 N.M. at 31, 690 P.2d at 1025.

53. *Id.*

54. Keeton, *supra* note 1, at 1141.

55. *Id.* The insurer must investigate the claim to determine both the probability of liability and the probability that damages will exceed the policy limits; as each of these probabilities move toward certainty, the duty to settle increases. Leair, *supra* note 17, at 381.

56. Under the doctrine of strict liability an insurer is automatically held liable anytime it refuses a settlement offer below policy limits. No jurisdiction goes so far as to impose strict liability. Several commentators suggest that strict liability would be the most desirable standard because of the ease of application. *See, e.g.*, Sackville, *The Duty of the Insurer to Settle Within the Policy Limits—A Case of the Standard Contract of Adhesion*, 1968 UTAH L. REV. 72. However, the courts have consistently sidestepped the question. California came close to adopting strict liability in Crisci v. Security Insurance Co., 66 Cal. 2d 423, 58 Cal. Rptr. 13, 426 P.2d 173 (1967), but ultimately declined to because it was unnecessary to do so in that case. Nonetheless the court observed that the strict liability rule would be simple to apply because it avoids the burden of determining whether a settlement offer was reasonable. Moreover, stated the court, "there is more than a small amount of elementary justice" in requiring that the insurer suffer the detriments as well as reap the benefits of its decision not to settle. *Id.* at 177.

57. *See generally*, W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, THE LAW OF TORTS § 32 (5th ed. 1984).

settlement offer, a plaintiff must show that no prudent insurer would have rejected the offer and that the insurer did not have and use the "knowledge, skill and care ordinarily possessed and employed"[58] by insurers in good standing. Therefore, the *Ambassador* court was wrongly concerned that under a negligence standard juries could find an insurer negligent solely because it refused an offer of settlement.

C. Implications

There is very little difference today between the bad faith and the negligence standards because of the dual standard of liability actually imposed by many jurisdictions, including New Mexico, and because much the same factors which prove negligence also are used to prove bad faith.[59] Moreover, bad faith, while originally requiring a bad state of mind on the part of the insurer,[60] has been expanded in meaning to encompass situations where the insurer may be liable even though it was scrupulously honest.[61]

Because the negligence and bad faith standards are now substantially the same, the actual issue on which liability turns is the amount of consideration which the insurer must give to the interests of the insured.[62] The *Ambassador* court indicated in dicta that the insurer must give equal consideration to the insured's interests as to its own interests.[63] However, the supreme court failed to indicate how the fact-finder is to determine whether equal consideration was given to the insured's interests. An instruction to the jury that to find that the insurer acted in good faith it must have given equal consideration to the insured's interests is per se confusing: the insured is in court because the insurer decided to litigate rather than accept a settlement offer (and lost); therefore (reasons the

58. *Id.*

59. It may be indicative of either bad faith or negligence that: evidence as to liability and damages was strongly against the insured in the action by the injured claimant; the insurer recognized the advisibility of settlement, but attempted to get the insured to contribute thereto; the insurer failed to properly investigate the claim; the insurer rejected advice of its own attorney or agent advocating settlement; failure to accept compromise continued after trial judgment against the insured was obtained; the insurer failed to inform insured of a settlement offer. Annotation, *supra* note 22 at 171. There are not sufficient failure-to-settle cases in New Mexico to indicate what factors New Mexico courts will consider in determining whether the insurer acted in bad faith. Bad faith, it seems, is to be determined on a case by case basis. However, in *Lujan v. Gonzales*, the supreme court cited the A.L.R. Annotation, listing as factors it would consider the ones given *supra*, except the first.

60. *See, e.g.*, City of Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N.W. 643 (1929).

61. R. KEETON, BASIC TEXT ON INSURANCE LAW § 7.8(b) (1971).

62. Keeton, *supra* note 1 at 1142.

63. *Ambassador*, 102 N.M. at 32, 690 P.2d at 1026 (citing with approval the jury instructions given in the trial). The degree of consideration required to be given to the insured's interest varies from some to equal to paramount. The majority of jurisdictions hold that equal consideration to the insured's interests is required. Keeton, *supra* note 1, at 1143-45.

jury), it must be that when the insurer made the decision to refuse the settlement offer, it gave more consideration to its own interests. It is virtually never in the insured's interest to go to trial rather than accept a settlement offer below policy limits. However, the equality which must be given is not equal weight in the actual determination whether to litigate, but equal weight in the consideration leading to that decision.[64]

Thus, the impact this decision will have on failure-to-settle claims should be negligible. *Ambassador* will not prevent an insured from suing its insurer for failure to settle. After *Ambassador,* however, the complaint must allege lack of equal consideration for the insured's interests rather than alleging negligence in the insurer's conduct.[65]

V. CONCLUSION

Although negligent failure to settle is not a valid cause of action in New Mexico, with "skillful advocacy for the insured"[66] legitimate claims for failure to settle are not precluded. What in a negligence jurisdiction would be a cause of action in itself, i.e., negligence in the decision not to settle, can be characterized as a lack of equal consideration in a bad faith jurisdiction such as New Mexico. Counsel for the insured must take care, however, to state the complaint in terms of bad faith rather than negligence to avoid being dismissed for failure to state a claim.

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64. Keeton, *supra* note 1, at 1146. The easiest way to conceive of this exercise of impartiality is to think of the two competing interests as being held by one individual. This proposition is expressed in a rule that can be used as a jury instruction: "With respect to the decision whether to settle or try the case, the insurance company must in good faith view the situation as it would if there were no policy limit applicable to the claim." *Id.* at 1148. This rule would indicate those situations where the insurer decided not to accept an offer of settlement solely because its liability was limited by the policy, whereas if there were no limit it would find it wiser to settle rather than chance a large judgment. New Mexico would do well to adopt this as a jury instruction in future failure-to-settle cases.

65. For example, consider a situation in which the insurer has fully and competently investigated the claim and found there was a 65% probability that the insured was at fault and also found that the claimant was severely injured and claiming damages far in excess of the policy limits. If the insurer decided on those facts to reject a settlement offer below the policy limits this can be characterized as not giving equal consideration to its insured's interests, because, with these facts, if there were no policy limits, the insurer would have decided to accept the settlement offer. On the other hand, it would be more difficult to find bad faith in a situation where the claimant was severely injured, but there was only a 30% probability that the insured was liable.

66. Keeton, *supra* note 1, at 1141.