



Summer 2005

## A Third-Party Claimant Becomes an Insured: *Hovet v. Allstate* and the Expanding Right to Sue under New Mexico's Insurance Code

Thomas Giordano-Lascari

### Recommended Citation

Thomas Giordano-Lascari, *A Third-Party Claimant Becomes an Insured: Hovet v. Allstate and the Expanding Right to Sue under New Mexico's Insurance Code*, 35 N.M. L. Rev. 651 (2005).  
Available at: <https://digitalrepository.unm.edu/nmlr/vol35/iss3/9>

# A THIRD-PARTY CLAIMANT BECOMES AN INSURED: *HOVET V. ALLSTATE* AND THE EXPANDING RIGHT TO SUE UNDER NEW MEXICO'S INSURANCE CODE

THOMAS GIORDANO-LASCARI\*

## I. INTRODUCTION

*Hovet v. Allstate Insurance Co.*<sup>1</sup> came before the New Mexico Supreme Court as a result of two different automobile accidents involving different parties.<sup>2</sup> In each of these cases, Allstate, the defendants' insurance company, failed to offer an adequate settlement amount despite admissions of guilt by their clients.<sup>3</sup> As a result, the plaintiffs filed an action against Allstate alleging a violation of the unfair claims practices provision of the New Mexico Insurance Code. While New Mexico courts had held, prior to *Hovet*, that insurance providers could be joined as a party to an action,<sup>4</sup> the courts had not held that third-party claimants had a private cause of action against an insurer.

The court in *Hovet* ultimately decided to extend the right to bring a private cause of action for a violation of the unfair claims practices section of the Insurance Code to third-party claimants.<sup>5</sup> Prior to *Hovet*, it was believed that an unfair claims action could only be brought by a first-party policyholder.<sup>6</sup> While allowing for *any* private cause of action under the unfair claims practices section of the Insurance Code already made New Mexico different from most other states, the *Hovet* opinion further separated New Mexico from the majority of jurisdictions that have dealt with this issue.<sup>7</sup>

This Note analyzes the reasoning behind the *Hovet* opinion<sup>8</sup> as well as the case law that led to the holding.<sup>9</sup> Further, this Note analyzes California's attempt at instituting a similar cause of action and the effects that holding had on California.<sup>10</sup> This Note concludes with possible implications that may arise in the wake of the *Hovet* ruling.<sup>11</sup>

## II. HISTORICAL BACKGROUND

Since 1868, the insurance industry has been exclusively within the province of state regulation.<sup>12</sup> However, in 1944, the U.S. Supreme Court held that the insurance

---

\* Class of 2006, University of New Mexico School of Law. I want to thank my faculty advisor, Maureen Sanders, for all her help and encouragement, Professor Ted Occhialino and Michael Wilson for their insightful suggestions, and my family for their love and support.

1. 2004-NMSC-010, 89 P.3d 69.

2. *Id.* ¶¶ 2–8, 89 P.3d at 71–72.

3. *See id.* ¶¶ 2, 5, 89 P.3d at 71.

4. *See infra* notes 67–78 and accompanying text.

5. *Hovet*, 2004-NMSC-010, ¶ 1, 89 P.3d at 71.

6. *See, e.g., Hovet v. Lujan*, 2003-NMCA-061, ¶ 6, 66 P.3d 980, 982 (demonstrating the district court's belief that a private cause of action by a third party did not exist in New Mexico).

7. *See Hovet*, 2004-NMSC-010, ¶ 12, 89 P.3d at 73.

8. *See infra* Part IV.

9. *See infra* Part II.B–D.

10. *See infra* Part V.B.

11. *See infra* Part VI.

12. *See Paul v. Virginia*, 75 U.S. 168, 183 (1868) (holding that insurance is not “commerce” within the meaning of the Commerce Clause), *overruled in part by* *United States v. South-Eastern Underwriters Ass'n*, 322

industry was subject to the application of antitrust statutes, thus opening the door for potential federal regulation.<sup>13</sup> This prompted the insurance industry to lobby Congress to pass the McCarran-Ferguson Act.<sup>14</sup> The federal statute “provided a three-year moratorium on federal regulation of the insurance industry [and] [a]t the end of the moratorium the federal regulators could then assert their authority only over those aspects of the insurance industry not regulated by the states.”<sup>15</sup>

During this moratorium, the National Association of Insurance Commissioners (NAIC) drafted a model act that delegated broad power to state insurance commissioners in an attempt to preempt future federal regulation (Model Act).<sup>16</sup> The Model Act also defined and prohibited unfair and deceptive practices in the insurance industry.<sup>17</sup> Subsequent amendments to the Model Act broadened the scope of its unfair and deceptive practices section.<sup>18</sup> Most states eventually adopted a version of the NAIC’s Model Act and codified, within their insurance code, an unfair and deceptive practices provision.<sup>19</sup>

However, the Model Act promulgated by the NAIC and adopted by a majority of the states did not grant a private cause of action to an insured or third-party claimant for violations of the unfair and deceptive practices provision.<sup>20</sup> For those states wishing to extend a private right of action, the drafting note to the Model Act states, “A jurisdiction choosing to provide for a private cause of action should consider a different statutory scheme. This Act is inherently inconsistent with a private cause of action. This is merely a clarification of original intent and not indicative of any change of position.”<sup>21</sup> Thus, the NAIC, in drafting the Model Act, intended an exclusive grant of power to state insurance commissioners to investigate violations of the unfair and deceptive practices section of the insurance code and to impose penalties accordingly.<sup>22</sup> Therefore, the issue of whether or not a private cause of action exists turns on the particular state’s insurance code and an interpretation of the state’s unfair and deceptive practices provision.

The majority of jurisdictions that have adopted the NAIC’s Model Act have declined to extend a private cause of action to insureds or to third-party claimants.<sup>23</sup> The insurance codes in those jurisdictions are similar to the Model Act in that they vest exclusive power to the state insurance commissioner to investigate and impose penalties for violations of unfair claims practices.<sup>24</sup> However, a minority of jurisdictions has found a right to a private cause of action either by an explicit

---

U.S. 533 (1944); *see also* STEPHEN S. ASHLEY, *BAD FAITH ACTIONS: LIABILITY & DAMAGES* § 9:02, at 9-3 (2d ed. 1997).

13. *South-Eastern Underwriters Ass’n*, 322 U.S. at 560–61 (1944); *see also* ASHLEY, *supra* note 12, § 9:02, at 9-3.

14. 15 U.S.C. §§ 1011–1015 (2000); *see* ASHLEY, *supra* note 12, § 9:02, at 9-3 to 9-4.

15. ASHLEY, *supra* note 12, § 9:02, at 9-4 (citing 15 U.S.C. §§ 1012(b), 1013(a) (2000)).

16. *Id.*

17. *Id.* (citing NAIC MODEL UNFAIR CLAIMS SETTLEMENT ACT § 4(9) (1991) [hereinafter NAIC MODEL ACT]).

18. *Id.*

19. *See id.*

20. *Id.* § 9:03, at 9-8.

21. NAIC MODEL ACT, *supra* note 17, § 1.

22. *See* ASHLEY, *supra* note 12, § 9:03, at 9-8.

23. *See id.* § 9:03, at 9-10 n.39 (enumerating jurisdictions and relevant citations).

24. *See id.* (citing states that have rejected a private cause of action).

enactment by the state legislature<sup>25</sup> or by inferring such from legislative silence.<sup>26</sup> Of these minority jurisdictions, only a few have extended a private cause of action to a third-party claimant,<sup>27</sup> while most only allow the policyholder to bring an unfair claims action against the insurer.<sup>28</sup> The State of New Mexico had not decided this issue until it was presented to the New Mexico Supreme Court in *Hovet*.

#### A. The New Mexico Insurance Code

In 1984, the New Mexico Legislature enacted the current Insurance Code.<sup>29</sup> Article 16 of the Insurance Code contains a section on unfair and deceptive claims practices.<sup>30</sup> The legislature modeled this section of the Insurance Code after the NAIC's Model Act.<sup>31</sup> Although based on the Model Act, various changes and additions make New Mexico's code different from the Model Act, as well as from most other jurisdictions.<sup>32</sup>

The purpose of the unfair claims practices section of the New Mexico Insurance Code is to regulate certain practices in the insurance industry by defining actions or practices that are considered unfair or deceptive acts or practices.<sup>33</sup> In order to achieve this purpose, New Mexico chose to enact certain sections of its Insurance Code that differed substantially from the Model Act.<sup>34</sup> The most notable addition was section 59A-16-30, which grants a cause of action to "[a]ny person covered by Chapter 59A, Article 16 NMSA 1978 who has suffered damages as a result of a violation of that article."<sup>35</sup> While the Model Act contemplated that state insurance commissioners would have the exclusive power to investigate and proscribe penalties for unfair claims practices, New Mexico explicitly granted a private cause of action through the codification of section 59A-16-30.

New Mexico also changed the wording in certain subsections of its unfair claims practices section. The Model Act uses the words "claims" and "claimants"

---

25. See *id.* § 9:03, at 9-10 n.38 (enumerating jurisdictions and relevant citations).

26. See, e.g., *Hovet*, 2004-NMSC-010, ¶ 11, 89 P.3d at 72.

27. See, e.g., *Klaude v. State Farm Mut. Auto. Ins. Co.*, 658 P.2d 1065, 1067 (Mont. 1983) (holding that a cause of action for failure to settle exists to a third-party claimant under the unfair trade practices section of the insurance code); *Jenkins v. J.C. Penny Cas. Ins. Co.*, 280 S.E.2d 252, 256-58 (W. Va. 1981) (holding that there exists a cause of action to a third-party claimant for a defendant's insurance company's violation of unfair trade practices)) *overruled on other grounds by State ex rel. State Farm Fire & Cas. Co. v. Madden*, 451 S.E.2d 721 (W. Va. 1994).

28. See, e.g., *Wilson v. Wilson*, 468 S.E.2d 495, 497 (N.C. Ct. App. 1996) (holding that only an insured, or one in privity with the insured, may bring a cause of action for unfair trade practices); *Allstate Ins. Co. v. Watson*, 876 S.W.2d 145, 147 (Tex. 1994) (declining to recognize a third-party claimant's right to bring a cause of action against a defendant's insurer for violation of unfair trade practices).

29. Insurance Code, ch. 127, §§ 1-988, 1984 N.M. Laws.

30. NMSA 1978, § 59A-16-20 (1997).

31. *Hovet*, 2004-NMSC-010, ¶ 11, 89 P.3d at 72; see also NAIC Model Act, *supra* note 17, § 4.

32. See, e.g., *Scroggins v. Allstate Ins. Co.*, 393 N.E.2d 718, 721-23 (Ill. App. Ct. 1979) (refusing to recognize a third-party claimant's standing to sue for violation of unfair trade practices); *Herrig v. Herrig*, 844 P.2d 487, 493-94 (Wyo. 1992) (refusing to extend a private action to a third-party claimant). Compare NMSA 1978, § 59A-16-30 (1990) with 215 ILL. COMP. STAT. 5/154.6 (1997), and WYO. STAT. ANN. § 26-13-124 (1986).

33. NMSA 1978, § 59A-16-2 (1984). Such unfair or deceptive acts are defined in NMSA 1978, § 59A-16-20 (1997).

34. See *Hovet*, 2004-NMSC-010, ¶ 11, 89 P.3d at 72.

35. NMSA 1978, § 59A-16-30 (1990).

throughout its definition of unfair claims practices.<sup>36</sup> The New Mexico Legislature, however, inserted the word "insured" before the word "claims" in defining certain unfair claims practices within section 59A-16-20.<sup>37</sup> Thus, the interpretation of the New Mexico Insurance Code becomes more difficult; New Mexico courts cannot rely completely on the guidelines set forth by the NAIC because the affirmative changes by the New Mexico Legislature show an intent to depart from certain provisions of the Model Act. Therefore, the courts are left to speculate as to why certain provisions of the New Mexico Insurance Code were altered or included and are forced to interpret these clauses with little guidance.

### B. Russell's Intended Beneficiary Analysis

*Russell v. Protective Insurance Co.*<sup>38</sup> was a case decided shortly after the codification of the new Insurance Code in New Mexico where the court interpreted the new additions of the Insurance Code in relation to the Workers' Compensation Act.<sup>39</sup> There, Russell alleged "that respondent, Protective Insurance Company..., had refused 'to attempt in good faith to effectuate a prompt, fair and equitable settlement of [his workers' compensation] claim.'"<sup>40</sup> The court was forced to decide the applicability of the unfair claims and practices section of the Insurance Code to the Workers' Compensation Act.<sup>41</sup> Two cases decided prior to the codification of the Insurance Code, *Dickson v. Mountain States Mutual Casualty Co.*<sup>42</sup> and *Gonzalez v. United States Fidelity & Guaranty Co.*,<sup>43</sup> denied workers the right to bring a private cause of action against their companies' insurers for bad-faith dealings with workers.<sup>44</sup> However, in light of the codification of the new Insurance Code in 1984, the court was asked to decide if the new enactment extended a private right of action to workers against their employer's compensation insurers.<sup>45</sup>

36. See, e.g., NAIC MODEL ACT, *supra* note 17, § 4(D) (defining unfair claims practices as "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear") (emphasis added).

37. See NMSA 1978, § 59A-16-20(E) (1997) ("not attempting in good faith to effectuate prompt, fair and equitable settlements of an insured's claims in which liability has become reasonably clear") (emphasis added); *id.* § 59A-16-20(G) (1997) ("compelling insureds to institute litigation to recover amounts due under policy by offering substantially less than the amounts ultimately recovered") (emphasis added); *id.* § 59A-16-20(K) (1997) ("making known to insureds or claimants a practice of insurer of appealing from arbitration awards in favor of insureds or claimants") (emphasis added); *id.* § 59A-16-20(L) (1997) ("delaying the investigation or payment of claims by requiring an insured, claimant or the physician of either to submit a preliminary claim report") (emphasis added).

38. 107 N.M. 9, 751 P.2d 693 (1988).

39. *Id.*

40. *Id.* at 10, 751 P.2d at 694 (quoting NMSA 1978, § 59A-16-20(E) (1984) (alteration in original)).

41. NMSA 1978, §§ 52-1-1 to -70 (2003).

42. 98 N.M. 479, 650 P.2d 1 (1982).

43. 99 N.M. 432, 659 P.2d 318 (Ct. App. 1983).

44. See *Dickson*, 98 N.M. at 481, 650 P.2d at 3 ("[I]f the compensation act provides a remedy for the alleged wrong, then that remedy is exclusive." (citing *Russell*, 107 N.M. at 12, 751 P.2d at 696)); *Gonzales*, 99 N.M. at 434, 659 P.2d at 320 (holding that "a workman had no independent cause of action against an insurer who allegedly acted in bad faith by attempting to coerce the workman into accepting an unfavorable compensation settlement" (citing *Russell*, 107 N.M. at 12, 751 P.2d at 696)); see also *Russell*, 107 N.M. at 10-11, 751 P.2d at 694-95.

45. *Russell*, 107 N.M. at 11, 751 P.2d at 695.

Russell contended that the new unfair claims and practices provision "implicitly amended the Workers' Compensation Act by allowing a cause of action against compensation insurers for bad faith refusal to pay compensation benefits."<sup>46</sup> Protective argued that the legislature's use of the word "insured" in section 59A-16-20 manifested its intent to only extend a private cause of action to the policyholder and not the third-party claimant.<sup>47</sup> The court found Protective's interpretation of the code too narrow and turned its analysis on who was an intended beneficiary of the insurance policy:

It is clear that the law today has moved drastically away from the strict limitations of privity of contract which the respondents would impose in this case. The law has expanded on many fronts to the point where third-parties who have made no formal contractual obligation with either the promisor or promisee to a contract are nonetheless capable of asserting standing as beneficiaries to the contract.<sup>48</sup>

The court ultimately concluded that Russell was a third-party beneficiary of his employer's insurance policy and granted Russell a private right of action under the Insurance Code against his employer's insurer when the insurer intentionally refused to pay compensation benefits.<sup>49</sup>

*Russell* established precedent for the court to interpret the Insurance Code to extend a private right of action to third parties by looking to the intended beneficiaries under the Workers' Compensation Act. The court in *Hovet*, relying on *Russell* as precedent, then had to determine if the general public was an intended beneficiary of compulsory automobile insurance policies under the Mandatory Financial Responsibility Act.

### C. The New Mexico Mandatory Financial Responsibility Act

The Mandatory Financial Responsibility Act (MFRA),<sup>50</sup> passed by the New Mexico Legislature in 1978, is not part of the Insurance Code. The MFRA is a separate set of statutes requiring compulsory insurance for the operation of automobiles.<sup>51</sup> The purpose of the MFRA as defined in the statute states:

The legislature is aware that motor vehicle accidents in New Mexico can result in catastrophic financial hardship. The purpose of the Mandatory Financial Responsibility Act is to require residents of New Mexico who own and operate motor vehicles upon the highways of the state either to have the ability to respond in damages to accidents arising out of the use and operation of a motor vehicle or to obtain a motor vehicle insurance policy.<sup>52</sup>

---

46. *Id.*

47. *Id.* at 13, 751 P.2d at 697.

48. *Id.*

49. *Id.* at 12, 14, 751 P.2d at 696, 698. The court in *Russell* noted that the private cause of action did not extend to an "insurer's negligent or dilatory failure to pay benefits." *Id.* at 12, 751 P.2d at 696.

50. The Mandatory Financial Responsibility Act, ch. 35, § 277, 1978 N.M. Laws (codified at NMSA 1978, § 66-5-201 to -239 (2003)).

51. NMSA 1978, § 66-5-201 to -239 (2003).

52. NMSA 1978, § 66-5-201.1 (1998).

Thus, the MFRA enumerated certain statutory provisions to effectuate the purpose of making those who use automobiles financially able to deal with the damages arising from automobile accidents.<sup>53</sup> The most important provision of the MFRA is its requirement that an owner of an automobile be insured or otherwise demonstrate financial responsibility.<sup>54</sup> The statute further provides requirements for the insurance policy.<sup>55</sup> Specifically, the policy shall “insure the person named in the policy...against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of the motor vehicle within a jurisdiction.”<sup>56</sup>

Important to the New Mexico Supreme Court in *Hovet* was whether or not insurance policies under the MFRA were created for the benefit of the general public. Using the intended beneficiary analysis in *Russell*,<sup>57</sup> if a policy is found to be for the benefit of the public, then the traditional notions of privity of contract are negated,<sup>58</sup> and those who are intended beneficiaries of the insurance policy become “insureds” within the meaning of the unfair claims practices section of the Insurance Code.<sup>59</sup> Thus, the court in *Hovet* had to examine the MFRA and its progeny to determine if compulsory liability insurance contemplated the general public as intended beneficiaries of an insurance policy and, therefore, as an “insured” within the meaning of the Insurance Code.

#### D. The MFRA Case Law

Even prior to the enactment of the MFRA, the New Mexico Supreme Court in *Breeden v. Wilson*<sup>60</sup> held that “an insurance policy procured by force of legislative enactment inures to the benefit of any injured member of the public.”<sup>61</sup> This interpretation remained consistent in post-MFRA cases beginning with *Allstate Insurance Co. v. Jensen*.<sup>62</sup> The court in *Jensen* interpreted the omnibus clause of the MFRA.<sup>63</sup> The court concluded that “the omnibus clause of the Allstate liability policy must provide coverage to any person using the insured vehicle with the owner’s consent, without regard to any restrictions or understanding between the parties on the particular use for which the permission was given.”<sup>64</sup> In so finding, the court in *Jensen* looked to the MFRA and its policies. The court stated that the “legislative purpose [of the MFRA] reflects the view that the required automobile liability insurance is for the benefit of the public generally, innocent victims of

---

53. See NMSA 1978, § 66-5-205 (1998).

54. *Id.*

55. See *id.* § 66-5-205.3 (2003).

56. *Id.* § 66-5-205.3(A)(2) (2003).

57. 107 N.M. 9, 751 P.2d 693, 697 (1988).

58. See *Hovet*, 2004-NMSC-010, ¶ 17, 89 P.3d at 74.

59. See *id.*

60. 58 N.M. 517, 273 P.2d 376 (1954).

61. *Id.* at 524, 273 P.2d at 380.

62. 109 N.M. 584, 788 P.2d 340 (1990).

63. The omnibus clause of the MFRA extends the insurance policy mandated by the MFRA to cover drivers given permission by the policyholder to drive the automobile. See NMSA 1978, § 66-5-205.3 (2003) (providing that an insurance policy shall “insure the person named in the policy and a person using any such motor vehicle with the express or implied permission of the named insured”). The court in *Jensen* interpreted an essentially identical clause in the MFRA, which was later repealed. See *Jensen*, 109 N.M. at 585–86, 788 P.2d at 341–42.

64. *Jensen*, 109 N.M. at 587, 788 P.2d at 343.

automobile accidents, as well as the insured.”<sup>65</sup> Thus, *Jensen* declared that an insurer cannot rely on insurance policies with clauses inconsistent with those in the MFRA.<sup>66</sup> In doing so, *Jensen* further demonstrated the court’s understanding that insurance under the MFRA was for the public’s benefit and must be given broad interpretation to effectuate the purpose of the MFRA.

Based on the perception of the MFRA as a public benefit, the court in *Raskob v. Sanchez*<sup>67</sup> allowed an injured party to join the tortfeasor’s insurance company in a negligence action arising out of an automobile accident where mandatory liability insurance was required. Raskob sued the tortfeasors and joined the insurer in the same action, arguing that the MFRA allowed this direct claim against the insurer.<sup>68</sup> The New Mexico Supreme Court reviewed the MFRA and its purpose, specifically quoting *Jensen*.<sup>69</sup> While the court noted that the insurance company generally is only in privity with an injured party by a contract or statute,<sup>70</sup> the court found that when an insurance policy is mandated by law for the protection of the public, the insurer is a proper party to a claim for damages by an injured third party so long as no law prohibits the joinder.<sup>71</sup>

The court in *Raskob* further found that there was no express language in the MFRA negating a joinder of an insurer to a claim for damages by an injured third party.<sup>72</sup> Allstate, however, had argued that the MFRA implicitly prohibited joinder of an insurer because the legislature intended the insurance policy mandated by the MFRA to be for indemnification, which can only occur after a final judgment of liability.<sup>73</sup> Under this reasoning, liability would first have to be decided at trial before Allstate could become a party.<sup>74</sup>

The court disagreed with Allstate’s reasoning, finding that compulsory liability insurance differs from an indemnification policy in that compulsory insurance is intended to benefit the general public, while indemnification is solely for the benefit of the insured.<sup>75</sup> Thus, the court distinguished an insurer’s liability to pay, which occurs after a judgment, with a plaintiff’s right to bring suit against an insurer.<sup>76</sup> In conclusion, the court stated, “plaintiff’s right to sue Allstate became absolute when the accident occurred and the Plaintiff was injured.”<sup>77</sup>

Thus, the court in *Raskob* further defined the MFRA and its purpose. The decision allowed for joinder of an insurer in a negligence claim when the insurance

---

65. *Id.*

66. *Id.*

67. 1998-NMSC-045, 970 P.2d 580.

68. *Id.* ¶ 1, 970 P.2d at 580. The version of the MFRA interpreted in this case was prior to the 1998 amendments. The pre-1998 purpose was very similar to the purpose statement quoted above with the addition of the sentence: “It is the intent that the risks and financial burdens of motor vehicle accidents be equitably distributed among all owners and operators of motor vehicles within the state.” See *id.* ¶ 2, 970 P.2d at 580–81 (quoting NMSA 1978, § 66-5-201.1 (1983) (amended 1998)).

69. 109 N.M. 584, 788 P.2d 340 (1990); see *infra* notes 62–66 and accompanying text.

70. *Raskob*, 1998-NMSC-045, ¶ 3, 970 P.2d at 581.

71. *Id.*

72. *Id.* ¶ 4, 970 P.2d at 581.

73. *Id.* ¶ 5, 970 P.2d at 581.

74. *Id.*

75. *Id.* ¶ 6, 970 P.2d at 581–82.

76. *Id.* (citing *Lopez v. Townsend*, 37 N.M. 574, 583–84, 25 P.2d 809, 813–14 (1933)).

77. *Id.*



is mandated by law and defined the insurance policy as for the benefit of the public rather than an indemnification policy between the insurer and the policyholder.<sup>78</sup> Thus, the MFRA has been broadly interpreted to benefit the public in general, rather than the specific policyholder.

### III. STATEMENT OF THE CASE

*Hovet v. Allstate Insurance Co.*<sup>79</sup> arose from two petitions for certiorari by Allstate after the New Mexico Court of Appeals ruled that third-party claimants could maintain an action against Allstate under section 59A-16-30 for violations of section 59A-16-20 of the Insurance Code.<sup>80</sup>

#### A. First Petition

Jane Hovet brought the first of these cases against Steven Lujan, Arthur Lujan, and their insurer, Allstate, in a negligence action that stemmed from an automobile accident in March of 1995.<sup>81</sup> Hovet was injured and incurred medical expenses in excess of \$11,000.<sup>82</sup> The Lujans "conceded liability for all of Hovet's damages proximately caused by the collision, [yet] Allstate's highest settlement offer before trial was only \$7,200."<sup>83</sup> After the Lujans' admission of liability at a hearing for summary judgment, Hovet added another claim against Allstate for failure to make a good faith effort in settling her claims.<sup>84</sup> Hovet relied on section 59A-16-20(E) of the Trade Practices and Fraud Article of the Insurance Code.<sup>85</sup> At trial, the district court bifurcated Hovet's negligence claim against the Lujans from her unfair practices claim against Allstate.<sup>86</sup> At the conclusion of the negligence action in July 2000, the jury returned a verdict in favor of Hovet for \$62,050.<sup>87</sup> However, at the later trial for the unfair practices claim, the district court dismissed Hovet's claim with prejudice stating that the Insurance Code does not grant relief to a third-party claimant of an automobile liability insurance policy.<sup>88</sup> Hovet appealed to the New Mexico Court of Appeals, which held that a third-party claimant has "a claim...under the unfair claims practices provisions of the Insurance Code."<sup>89</sup>

#### B. Second Petition

The second petition for certiorari presented to the New Mexico Supreme Court in *Hovet* arose from another automobile accident. There, Maritza Reynoso and her son

---

78. *Id.*

79. 2004-NMSC-010, 89 P.3d 69.

80. *Id.* ¶¶ 1-8, 89 P.3d at 70-72.

81. *Id.* ¶ 2, 89 P.3d at 71. Hovet initially brought the negligence action against the Lujans but later amended her complaint to include Allstate as a co-defendant. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. See *id.* ¶¶ 1-2, 89 P.3d at 70-71; see also NMSA 1978, § 59A-16-20(E) (1997) (providing that it is an unfair and deceptive practice to "not attempt[] in good faith to effectuate prompt, fair and equitable settlements of an insured's claims in which liability has become reasonably clear").

86. *Hovet*, 2004-NMSC-010, ¶ 3, 89 P.3d at 71.

87. *Id.*

88. *Id.*

89. *Hovet v. Lujan*, 2003-NMCA-061, ¶ 1, 66 P.3d 980, 981.

were involved in an automobile collision with Laura Waller.<sup>90</sup> Allstate, Waller's insurer, offered to settle Reynoso's medical claims for \$3,000.<sup>91</sup> Reynoso and her son's combined medical expenses were \$5,410.<sup>92</sup> After Allstate refused to increase its settlement offer, Reynoso brought a negligence claim against Waller, and an unfair practices claim against Allstate.<sup>93</sup> Similar to the district court's hearing of Hovet's claims, the court bifurcated the negligence claim from the unfair practices claim.<sup>94</sup> Waller conceded liability but denied that she proximately caused all of the damages.<sup>95</sup> The jury eventually returned a verdict for Reynoso in the amount of \$7,180 and for her son in the amount of \$1,520.<sup>96</sup> However, in March of 2002, the district court dismissed the claims against Allstate, again reasoning that a third-party claimant did not have a private cause of action under the Insurance Code.<sup>97</sup> Reynoso appealed this decision to the court of appeals, which reversed relying on its holding in *Lujan*, and a private cause of action under the Insurance Code was extended to Reynoso.<sup>98</sup>

### C. *Hovet v. Lujan*

Of the two petitions, *Hovet v. Lujan*<sup>99</sup> was the first case to come before the New Mexico Court of Appeals. There, Judge Alarid, writing for a unanimous majority, held that the Insurance Code extended a private cause of action to a third-party claimant for unfair claims practices.<sup>100</sup> In so holding, the court of appeals refused to extend a third-party claimant's right to sue under the MFRA and its progeny, but rather held that such a right existed under the Insurance Code.<sup>101</sup>

The court concluded that an insurer and a third party are not required to settle under the MFRA, despite the plaintiff's argument to the contrary.<sup>102</sup> The court found no suggestion that "the Legislature intended the [MFRA] to alter the adversarial, fault-based system of recovery."<sup>103</sup> Therefore, Allstate only had a common law duty to settle, in good faith, a claim made by an insured and not the adversary of the policyholder.<sup>104</sup> Hovet, however, argued that *Raskob v. Sanchez*<sup>105</sup> recognized a third-party beneficiary relationship between an insurer and a claimant under the

---

90. *Hovet*, 2004-NMSC-010, ¶ 5, 89 P.3d at 71.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* ¶ 6, 89 P.3d at 71.

95. *Id.*

96. *Id.*

97. *Id.* ¶ 7, 89 P.3d at 72.

98. *Id.*

99. 2003-NMCA-061, 66 P.3d 980.

100. *Id.* ¶¶ 1, 26, 66 P.3d at 981, 986.

101. *See id.* ¶ 27, 66 P.3d at 986.

102. *Id.* ¶¶ 15–18, 66 P.3d at 983–84.

103. *Id.* ¶ 15, 66 P.3d at 983 (citing *Kranzush v. Badger State Mut. Cas. Co.*, 307 N.W.2d 256, 261 (Wis. 1981) (noting that, absent a contractual relationship, there exists no cause of action for a tort victim for bad faith settlement)).

104. *Id.* ¶ 16, 66 P.3d at 983 (citing *Dairyland Ins. Co. v. Herman*, 1998-NMSC-005, ¶¶ 12–15, 954 P.2d 56, 61 (discussing the duty to settle in good faith and its rationale); *O.K. Lumber Co. v. Providence Wash. Ins. Co.*, 759 P.2d 523, 526 (Alaska 1998) (holding an insurer has an obligation only to the insured to settle in good faith)).

105. 1998-NMSC-045, 970 P.2d 580.

MFRA, thus making Hovet, in essence, an “insured” entitled to protection under the policy.<sup>106</sup>

The court of appeals in *Lujan*, however, noted that *Raskob* specifically distinguished between liability to pay and the right to bring suit.<sup>107</sup> Along the *Raskob* line of cases, the MFRA allows a plaintiff to secure a judgment against the insurer for payment in the underlying negligence action.<sup>108</sup> However, neither *Raskob* nor the MFRA intended to allow a private right of action to a third-party claimant against the insurer for not effectuating a good faith settlement.<sup>109</sup>

After rejecting that a third-party cause of action existed under the MFRA, the court looked to the Insurance Code.<sup>110</sup> Allstate pointed out that subsections 59A-16-20(K) and (L) of the Insurance Code specifically refer to “claimants,”<sup>111</sup> while subsection 59A-16-20(E) only refers to “insured.”<sup>112</sup> Thus, Allstate argued, the legislature intended “insured” to mean a first-party policyholder.<sup>113</sup> Further, Amicus New Mexico Defense Lawyers’ Association argued that the legislature

was fully aware of the problem of the use of abusive claims settlement practices against third-party claimants, but that the Legislature’s answer to this public policy question was to authorize the Superintendent to “strip an abusive insurer of the right to do business in New Mexico” rather than to create a private cause of action in favor of third-party claimants.<sup>114</sup>

However, the court was ultimately persuaded by Hovet’s counterargument that *Russell v. Protective Insurance Co.* should govern the case.<sup>115</sup>

The New Mexico Court of Appeals noted that *Russell* was decided in the context of workers’ compensation insurance rather than automobile insurance;<sup>116</sup> however, the court found that

the absence of any discussion of the unique character of the workers’ compensation system, coupled with the emphasis given Article Sixteen of the Insurance Code, indicates to us that our Supreme Court’s third-party beneficiary analysis

---

106. *Lujan*, 2003-NMCA-061, ¶ 17, 66 P.3d at 984.

107. *Id.*

108. *Id.* (analogizing *Raskob* to Rule 1-014(A) NMRA, “which authorizes a defendant to join as a third-party defendant a person ‘who is or may be liable to him for all or part of the plaintiff’s claim against him’”).

109. *Id.* ¶¶ 17–18, 66 P.3d at 984.

110. *Id.* ¶¶ 20–26, 66 P.3d at 984–85.

111. See NMSA 1978, § 59A-16-20(K) (1997) (defining an unfair claims practice as “making known to insureds or claimants” a practice of appealing arbitration awards favorable to the insured or claimant); *id.* § 59A-16-20(L) (1997) (defining an unfair claims practice as “delaying the investigation or payment of claims by requiring an insured, claimant or the physician of either to submit” duplicative proof of lost forms).

112. *Lujan*, 2003-NMCA-061, ¶ 22, 66 P.3d at 985; see NMSA 1978, § 59A-16-20(E) (1997) (prohibiting an insurer from “not attempting in good faith to effectuate prompt, fair and equitable settlements of an insured’s claims”); see also *supra* note 37 and accompanying text.

113. *Lujan*, 2003-NMCA-061, ¶ 22, 66 P.3d at 985.

114. *Id.* ¶ 23, 66 P.3d at 985; see NMSA 1978, § 59A-5-26(C)(2) (1997) (authorizing superintendent to suspend or revoke an insurer’s certificate of authority for failing to pay or delay paying claims in favor of an insured or a third party).

115. *Lujan*, 2003-NMCA-061, ¶¶ 24–26, 66 P.3d at 985–86; see also *Russell*, 107 N.M. 9, 751 P.2d 693 (1988).

116. *Lujan*, 2003-NMCA-061, ¶ 25, 66 P.3d at 986.

was not dependent on the plaintiff's status as a workers' compensation claimant.<sup>117</sup>

Therefore, the court of appeals found the interpretation of the Insurance Code in *Russell* controlling and declined to adopt Allstate's argument.<sup>118</sup> Thus, the court held that Hovet did not have a claim for unfair trade practices against Allstate under the MFRA; however, she did have a claim under the Insurance Code.<sup>119</sup>

Following the New Mexico Court of Appeal's decision in *Lujan*, Allstate filed an appeal to the New Mexico Supreme Court. While this appeal was pending, Reynoso brought her claim to the court of appeals on the same issue.<sup>120</sup> Relying on their opinion in *Lujan*, the court of appeals, in a memorandum opinion, also extended a private cause of action to Reynoso.<sup>121</sup> Again, Allstate appealed this judgment, which the supreme court consolidated with Allstate's appeal from the *Lujan* ruling.<sup>122</sup>

#### IV. RATIONALE

The issue presented to the New Mexico Supreme Court in *Hovet v. Allstate Insurance Co.*<sup>123</sup> was "whether third-party claimants of automobile liability insurance policies have a statutory cause of action under the Insurance Code when the liability insurer fails to make good-faith efforts to settle the underlying claim."<sup>124</sup> In a 4-1 decision, the New Mexico Supreme Court answered the question affirmatively.

##### A. The Majority's Position

The majority opinion in *Hovet*, authored by Justice Bosson, based its analysis on the statutory interpretation of sections 59A-16-20 and 59A-16-30 of the Trade Practices and Frauds Article of the Insurance Code.<sup>125</sup> The court applied "the guiding principle of statutory construction...that a statute should be interpreted in a manner consistent with legislative intent."<sup>126</sup> In order to discern the legislative intent, the court "look[ed] not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied."<sup>127</sup>

##### 1. Legislative Intent

The majority began its analysis by noting the minority view the New Mexico Insurance Code adopted and the legislature's partial departure from the National

---

117. *Id.*

118. *See id.* ¶ 26, 66 P.3d at 986.

119. *Id.* ¶ 27, 66 P.3d at 986.

120. *See Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶ 7, 89 P.3d 69, 72.

121. *Id.*

122. *Id.* ¶ 8, 89 P.3d at 72.

123. 2004-NMSC-010, 89 P.3d 69.

124. *Id.* ¶ 8, 89 P.3d at 72.

125. *See id.* ¶ 9, 89 P.3d at 72.

126. *Id.* ¶ 10, 89 P.3d at 72 (citing *State ex rel. Newsome v. Alarid*, 90 N.M. 790, 794, 568 P.2d 1236, 1240 (1977)).

127. *Id.* (citing *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994); *Miller v. N.M. Dep't of Transp.*, 106 N.M. 253, 254, 741 P.2d 1374, 1375 (1987)).

Association of Insurance Commissioners' Model Act.<sup>128</sup> Specifically, the court recognized New Mexico's addition of a private right of action against insurers.<sup>129</sup> Thus, from the language of the statutes, the court tried to discern the legislature's intent when it enacted sections 59A-16-20 and 59A-16-30.<sup>130</sup> To do so, the court looked at *Russell* and the interpretation provided with respect to the legislative intent of those sections.<sup>131</sup>

The court in *Hovet* was particularly interested in the third-party beneficiary analysis found in *Russell*.<sup>132</sup> *Russell* held that

the Legislature "intended to expand" the "traditional notion of 'insured'" to include employees who were intended beneficiaries of the insurance policy. By virtue of being an intended beneficiary, the employee...became a statutory "insured," to whom the insurer owed a duty of fair settlement practices as described in the Insurance Code.<sup>133</sup>

Based on the holding in *Russell*, the majority concluded that the legislature intended to extend a private cause of action under section 59A-16-30 to third-party claimants.<sup>134</sup> The court gave particular significance to the words "any person" used in section 59A-16-30.<sup>135</sup> These words led the court to infer that the legislature meant to extend recovery to third-party claimants and first-party policyholders equally.<sup>136</sup> In creating a separate statutory action, the legislature had the remedial purpose of encouraging ethical claims practices within the insurance industry in mind.<sup>137</sup> The private right of action was one means toward that end.<sup>138</sup> Thus, the court felt that "if a third-party is injured by one of the enumerated unfair claims practices, that party is no less a 'person' falling within the ambit of legislative protection, as defined by the remedial purposes the legislature envisioned."<sup>139</sup>

However, Allstate emphasized that the Model Act used the words "claims" and "claimants" throughout the definition of unfair claims practices, while the New Mexico Legislature inserted the word "insured" before the word "claims" in section 59A-16-20(E).<sup>140</sup> Therefore, Allstate argued, the deliberate change "indicate[d] that the Legislature only intended to provide 'insureds' with a private right of action for violations of the unfair claims practices section, at least with respect to reasonable

---

128. *Id.* ¶ 11, 89 P.3d at 72; see *supra* Part II.A.

129. *Hovet*, 2004-NMSC-010, ¶ 11, 89 P.3d at 72.

130. See *id.* ¶¶ 13-14, 89 P.3d at 73.

131. See *supra* Part II.B.

132. *Hovet*, 2004-NMSC-010, ¶ 13, 89 P.3d at 73; see *supra* Part II.B.

133. *Hovet*, 2004-NMSC-010, ¶ 16, 89 P.3d at 74 (quoting *Russell v. Protective Ins. Co.*, 107 N.M. 9, 13, 751 P.2d 693, 697 (1988)) (citation omitted).

134. *Id.* ¶ 13, 89 P.3d at 73.

135. "Any person covered by [article 16] who has suffered damages as a result of a violation of that article by an insurer or agent is granted a right to bring an action in district court to recover actual damages." NMSA 1978, § 59A-16-30 (1990).

136. *Hovet*, 2004-NMSC-010, ¶ 14, 89 P.3d at 73.

137. *Id.*

138. *Id.*

139. *Id.*

140. See *id.* ¶ 15, 89 P.3d at 73-74; see also NMSA 1978, § 59A-16-20(E) (1997) (defining an unfair claim practice as "not attempting in good faith to effectuate prompt, fair and equitable settlements of an insured's claims in which liability has become reasonably clear") (emphasis added).

efforts to settle 'an insured's claims.'"<sup>141</sup> According to Allstate, under this more narrow interpretation, the phrase "any person" used under section 59A-16-30 references the "insured" under section 59A-16-20.<sup>142</sup> The court was not persuaded by this argument because it was the same argument that had previously been rejected in *Russell*.<sup>143</sup>

## 2. Public Policy

The court instead looked to who the intended beneficiaries of automobile liability insurance were, as well as the public policy behind the MFRA.<sup>144</sup> In examining public policy, the court noted that, in the majority of claims made under an automobile liability policy, the insurer would be settling the claims of a third-party claimant.<sup>145</sup> Therefore, these policies often incorporate more than just the policyholder and the insurer, differentiating them from an indemnity policy that is usually in the context of solely the insured and the insurer.<sup>146</sup> The court found it to be

illogical to conclude that a third-party claimant with a *direct* interest in fair settlement practices may *not* sue under the Insurance Code, while only the insured, who may have little or no direct interest in settlement practices up to policy limits, could sue. For most automobile liability policies, such an interpretation would render unenforceable the fair and equitable settlement practices mandated by the Code.<sup>147</sup>

The court further found that its holding was "consistent with the specific policy of the New Mexico Mandatory Financial Responsibility Act," which mandates liability insurance on those operating motor vehicles for the protection of the public.<sup>148</sup> The court stated that "an insurance policy procured by force of legislative enactment inures to the benefit of any injured member of the public."<sup>149</sup> Accordingly, the court in *Hovet* reasoned that the public policy behind compulsory automobile liability insurance supported the conclusion that third parties are intended beneficiaries of the insurance policies just as much as the policyholder.<sup>150</sup> Thus, the court held that section 59A-16-30 extended to third parties a private cause of action against an insurer.<sup>151</sup>

---

141. *Hovet*, 2004-NMSC-010, ¶ 15, 89 P.3d at 73-74.

142. *See id.*

143. *See id.* ¶ 16, 89 P.3d at 74; *see also supra* Part II.B. (discussing the trend toward moving away from traditional notions of privity of contract and instead adopting an intended beneficiary analysis).

144. *See Hovet*, 2004-NMSC-010, ¶¶ 17-19, 89 P.3d at 74-75; *see also supra* notes 72-78.

145. *Hovet*, 2004-NMSC-010, ¶ 18, 89 P.3d at 74-75.

146. *Id.*

147. *Id.*

148. *Id.* ¶ 19, 89 P.3d at 75 (citing NMSA 1978, § 66-5-201 to -239).

149. *Id.* (quoting *Breeden v. Wilson*, 58 N.M. 517, 524, 273 P.2d 376, 380 (1954)); *see also Allstate Ins. Co. v. Jensen*, 109 N.M. 584, 587, 788 P.2d 340, 343 (1990) (stating that compulsory automobile liability insurance "is for the benefit of the public generally, innocent victims of automobile accidents, as well as the insured").

150. *Hovet*, 2004-NMSC-010, ¶ 20, 89 P.3d at 75.

151. *Id.* ¶ 21, 89 P.3d at 75.

### 3. Limitations

The court next used public policy considerations, as well as the text of the Insurance Code, to impose several limitations on its holding.<sup>152</sup> First, the court only extended its holding to compulsory liability insurance mandated by the MFRA.<sup>153</sup> Thus, the question is still unanswered as to other types of compulsory insurance.<sup>154</sup> Second, the court "require[d] that any such action for unfair claims practices based on failure to settle may only be filed *after* the conclusion of the underlying negligence litigation, and *after* there has been a judicial determination of fault in favor of the third party and against the insured."<sup>155</sup> The court's imposition of this limitation served to solve the potential confusion of the negligence action pending simultaneously with the unfair claims practices action.<sup>156</sup> The court reasoned that this limitation would encourage settlement because it would bar any unfair claims practices actions from being brought against the insurer if the parties settled.<sup>157</sup>

Also, in its discussion of limitations, the court declined to decide the issue of whether punitive damages may be recovered from an unfair claims practices action due to a lack of briefing on the issue.<sup>158</sup> While not necessarily a limitation on the holding, the court's refusal to address this issue leaves room for a potential limitation or expansion to be later formulated. The primary reason for the court's hesitancy to decide this issue was that the unfair claims practices action is a statutory cause of action as opposed to a common law cause of action and thus is governed by the remedy provided for in the statute.<sup>159</sup>

With the imposition of these limitations, the court found that its holding was in harmony with the legislature's intent by encouraging fair dealing with claimants and insureds, as well as encouraging settlements so as to avoid potential litigation.<sup>160</sup> Thus, following *Hovet*, the New Mexico Insurance Code extends a private right of action by a third-party claimant against an insurer for violation of the Trade Practices and Frauds Article in MFRA compulsory insurance cases.

#### B. The Dissent's Position

In her dissent in *Hovet*, Judge Fry, sitting by designation, argued that the legislature intended to treat claimants and insureds differently under the Insurance Code.<sup>161</sup> The dissent noted that the majority's holding was contrary to the common law and thus required extra scrutiny in the interpretation of legislative intent.<sup>162</sup> Judge Fry's position was similar to that of Allstate in that, by looking at article 16 as a whole, she found that the legislature used the words "claimants" or

---

152. *See id.* ¶¶ 23–29, 89 P.3d at 76–78.

153. *Id.* ¶ 24, 89 P.3d at 76.

154. *See id.* ¶ 24 n.4, 89 P.3d at 76 n.4.

155. *Id.* ¶ 25, 89 P.3d at 76.

156. *See id.*

157. *Id.* ¶ 26, 89 P.3d at 76–77.

158. *Id.* ¶ 28, 89 P.3d at 77.

159. *See id.* (noting a federal court determined that section 59A-16-30 only provides for recovery of actual damages, costs, and attorney fees yet offering no opinion as to the weight of that decision).

160. *See id.* ¶ 30, 89 P.3d at 78.

161. *See id.* ¶¶ 33–41, 89 P.3d at 78–80.

162. *Id.* ¶ 34, 89 P.3d at 78.

“beneficiaries” in only three of the subsections.<sup>163</sup> Judge Fry’s concern with the lack of significance given to these distinctions by the majority was not alleviated by the majority’s justification that the “nature of automobile liability insurance, the Court’s decision in *Russell*, and the policy underlying the MFRA” indicated a private cause of action for third-party claimants.<sup>164</sup>

The dissent recognized the interest a third party has in an insurer’s settlement practices, but did not believe that translated to a legally enforceable right.<sup>165</sup> On the contrary, Judge Fry found that the insured has a more significant role in the settlement practices than the majority believed, thus negating the idea that the unfair claims practices action would have little meaning if it did not extend to third-party claimants.<sup>166</sup>

Judge Fry was also skeptical of the majority’s interpretation of *Russell*.<sup>167</sup> She contended that while the court’s language in *Russell* was broad, the facts were narrow and the holding should not be viewed outside of the Workers’ Compensation Act or extended to automobile liability insurance.<sup>168</sup> Therefore, she felt the majority’s reliance on *Russell* was misguided.<sup>169</sup>

Lastly, Judge Fry did not see the need to go beyond the scope of the Insurance Code to look at the MFRA.<sup>170</sup> In her view, the legislature’s language made it clear that there was to be a distinction between claimants and insureds, and therefore the analysis of the MFRA was not needed.<sup>171</sup> Thus, the dissent believed that section 59A-16-20(E) gave only an insured a cause of action against an insurer.<sup>172</sup> Furthermore, Judge Fry noted that there were already other safeguards adequately protecting the interests of third-party claimants and, thus, it was unnecessary to extend a private cause of action to these third-party claimants.<sup>173</sup>

## V. ANALYSIS

Without specific legislative statements regarding the legislative intent in enacting the unfair claims section of the Insurance Code, it is difficult to know whether the legislature envisioned third-party claimants bringing a private cause of action against insurers. While the court in *Hovet* did a thorough analysis of the public policy behind compulsory automobile insurance to support its holding,<sup>174</sup> there exist other valuable sources of possible legislative intent that were not addressed in the

---

163. *Id.* ¶ 35, 89 P.3d at 78–79 (citing NMSA 1978, § 59A-16-20(J)–(L) (1997)).

164. *Id.* ¶ 36, 89 P.3d at 79.

165. *Id.* ¶ 37, 89 P.3d at 79.

166. *See id.* (stating that the “insured’s interest in avoiding protracted litigation and the stress of trial is as tangible as the personal interest a claimant has in obtaining compensation”); *see also id.* ¶ 38, 89 P.3d at 79 (interpreting section 59A-16-20(E) as applying to more than liability insurance, thus resulting in a closer relationship between the insured and the insurer).

167. *See id.* ¶ 39, 89 P.3d at 79.

168. *Id.*

169. *Id.*

170. *Id.* ¶ 40, 89 P.3d at 80.

171. *Id.*

172. *Id.* ¶ 41, 89 P.3d at 80.

173. *Id.* (noting the possibility of insurers having to pay a claimant’s costs under Rule 1-068 NMRA, prejudgment interest under NMSA 1978, § 56-8-4(B) (1993), and being subject to discipline by the superintendent of insurance under § 59A-5-26(C)(2)(a) (1997)).

174. *See supra* Part IV.A.2.



opinion—a proposed amendment to the unfair claims practices section of the insurance code,<sup>175</sup> as well as an amendment to the Workers' Compensation Act that legislatively overruled *Russell*.<sup>176</sup> Purporting to be bound by stare decisis, the court in *Hovet* relied on the *Russell* opinion to bolster its holding.<sup>177</sup> However, the stare decisis concerns of the court do not alleviate the relevance of these omitted sources of legislative intent.<sup>178</sup> By addressing the possible importance of these sources, the court in *Hovet* could have either reinforced its holding or possibly come out on the opposite side of the argument. These sources are discussed below.

Further, whether or not the decision is a prudent one, it took many liberties with precedent and legislative interpretation to support the policy behind it. The fact remains that the court in *Hovet* extended a private right of action to a party that was never explicitly recognized as possessing such a right.<sup>179</sup> The decision to extend a private cause of action to a third-party claimant was not merely an interpretation of an ambiguous clause, but a departure from almost every other jurisdiction that has dealt with the question. Whether this is the interpretation the legislature originally envisioned is speculation. However, assuming the decision was a proper interpretation of the Insurance Code, the supreme court did craft its decision to avoid many of the potential negative impacts that were seen in California's recent attempt to extend a cause of action under its Insurance Code, which alleviates some of the concerns over this departure.

#### A. Statutory Interpretation in *Hovet*

The court in *Hovet* used the precedent of *Russell* and the policy of the MFRA to support its statutory analysis of the unfair trade practices section of the New Mexico Insurance Code.<sup>180</sup> However, there are some omissions from the opinion that may be valuable in further considering the legislature's intent to allow a third-party claimant to bring a cause of action for violations of section 59A-16-20.

The first omission relates to a proposed amendment to the unfair trade practices section of the Insurance Code. In 1999, the legislature proposed House Bill 314.<sup>181</sup> The proposed act began with the title: "An Act Relating To Insurance; Extending Coverage of Unfair Claims Practices by Insurance Companies to Third Party Claimants; Increasing Damages; Providing for Attorney Fees and Costs."<sup>182</sup> The amendment would have modified the unfair trade practices section of the insurance code by deleting the words "insured" from the subsections and inserting the words "claimants" or "claims."<sup>183</sup> The title, along with the change in language, may support an inference that the current unfair claims practices section of the Insurance Code does not extend a private cause of action to a third-party claimant. It is difficult to assume that the legislature would need to amend the Insurance Code to

---

175. See *infra* notes 181–188 and accompanying text.

176. See *infra* notes 189–192 and accompanying text.

177. See *Hovet*, 2004-NMSC-010, ¶¶ 13–17, 89 P.3d at 73–74.

178. See *infra* Part V.A.

179. See *supra* Part IV.

180. See *Hovet*, 2004-NMSC-010, ¶¶ 13–22, 89 P.3d at 73–76.

181. H.R. 314, 44th Leg., 1st Sess. (N.M. 1999).

182. *Id.* at 1.

183. *Id.* at 2–4.

extend coverage to a third-party claimant if it already existed. In a 53-13 vote, the act failed to pass.<sup>184</sup>

While no conclusive effect can be given to the proposed amendment and the reason it did not pass New Mexico's House of Representatives, there is a valid argument that the legislature was aware of the inability of a third-party claimant to bring a cause of action against an insurer for unfair claims practices, but was not prepared to extend the right to third-party claimants under the Insurance Code. However, it is also possible that the legislators who voted against the amendment already assumed the current statute extended to third-party claimants.

Under traditional methods of statutory construction, if a statute would be unreasonable or inappropriate upon a literal reading, "not only do[es] [the court] look to the language of the statute at hand, [it] also consider[s] the history and background of the statute."<sup>185</sup> To effectuate a strong rule of law consistent with the actual legislative intent, it would have been prudent for the court to look at this piece of legislative history. Although the court chose not to use the proposed amendment in its statutory interpretation of the Insurance Code, it did use many policy considerations of the MFRA to help structure its holding.<sup>186</sup> While it is proper for the court to consider the policy implications of a statute when the statute is ambiguous,<sup>187</sup> it must be careful "not to sculpt the most just law possible out of the words used by the Legislature or to attribute the meaning to a statute that contemporary ideals would deem preferable."<sup>188</sup>

Another interesting omission from the *Hovet* opinion was that *Russell* had been legislatively overruled.<sup>189</sup> Subsequent to *Russell*, the legislature amended the Workers' Compensation Act to add a remedy for bad-faith claims, thus taking that remedy out of section 59A-16-30.<sup>190</sup> Therefore, a worker who wants to bring a claim for bad faith against an employer's insurer must now go through the Workers' Compensation Act and is not permitted to bring a private cause of action through the Insurance Code.

This legislative action, taken subsequent to *Russell*, may indicate that the legislature did not intend to grant a private right of action to third-party claimants under the Insurance Code. The legislature moved the remedy provided by *Russell* out of the Insurance Code and exclusively within the Workers' Compensation Act.<sup>191</sup> This action may demonstrate that the legislature was aware of the need for third-party claimants to bring a cause of action against insurers for bad faith, but only in certain limited circumstance that they exclusively provided. The counter-argument is that the legislature did this for administrative simplicity. It is quite possible that the legislature thought it prudent to have all of the remedies for a

---

184. H.R. 44-RCS No. 71, 1st Sess. (N.M. 1999).

185. *State v. Rivera*, 2004-NMSC-001, ¶ 13, 82 P.3d 939, 942. The plain meaning rule "is a tool used by courts during the course of seeking and effectuating the legislative intent underlying the statute." *Id.* ¶ 12, 82 P.3d at 942.

186. See *supra* Part IV.A.2.

187. *Rivera*, 2004-NMSC-001, ¶ 14, 82 P.3d at 942.

188. *State v. Cleve*, 1999-NMSC-017, ¶ 15, 980 P.2d 23, 29.

189. See *Cruz v. Liberty Mut. Ins. Co.*, 119 N.M. 301, 303, 889 P.2d 1223, 1225 (1995).

190. *Id.*; see NMSA 1978, § 52-1-28.1 (1990).

191. See *Cruz*, 119 N.M. at 303, 889 P.2d at 1225.

violation of the Workers' Compensation Act provided for under that statute. Moreover, this legislative action did not overrule *Russell's* intended beneficiary analysis, which was key to the *Hovet* opinion.<sup>192</sup>

New Mexico does not have any conclusive legislative history and, thus, the reasons for the legislature's actions are only speculative. However, these two actions certainly allow an argument to be made that the legislature's intent was not to grant a private cause of action to third-party claimants under the Insurance Code.

### *B. The California Experience*

New Mexico, although unique, is not the only state that has extended a private cause of action to a third-party claimant under the Insurance Code. The courts in California also implemented a holding that allowed a third-party claimant to bring a private right of action against an insurer for unfair claims practices under its Insurance Code.

#### 1. Extension of the Right

In *Royal Globe Insurance Co. v. Superior Court*,<sup>193</sup> the plaintiff in a slip and fall case, after suing the market, joined the store's insurance company claiming a violation of section 790.03(h)(5) of California's Insurance Code.<sup>194</sup> The defendant insurance company argued that only the California Insurance Commissioner had the power to enforce the unfair trade practices section of its Insurance Code,<sup>195</sup> and thus the plaintiff could not bring suit against the market's insurance company.<sup>196</sup> However, the court in *Royal Globe* disagreed, and held that the Unfair Practices Act "affords a private party, including a third party claimant, a right to sue an insurer for violating" the unfair trade practices section of the Insurance Code.<sup>197</sup>

The court in *Royal Globe* based its holding on section 790.09 of the California Insurance Code which "provides that a cease and desist order issued by the commissioner under the provisions of the act shall not absolve an insurer from 'civil liability or criminal penalty under the laws of this State arising out of the methods, acts or practices found unfair or deceptive.'"<sup>198</sup> The court determined that "[t]his provision appears to afford to private litigants a cause of action against insurers that commit the unfair acts or practices" as defined in the unfair trade practices section of the Insurance Code.<sup>199</sup>

---

192. See *supra* Part II.B.

193. 592 P.2d 329 (Cal. 1979) (en banc).

194. *Id.* (interpreting California Insurance Code). Compare CAL. INS. CODE 790.03(h)(5) (West 1993), with NMSA 1978, § 59A-16-20(E) (1997).

195. *Royal Globe*, 592 P.2d at 332.

196. *Id.*

197. *Id.* at 336. Unlike the New Mexico unfair trade practices section of the Insurance Code, California does not have a section specifically granting a private right of action against an insurer for violations of unfair trade practices. Compare CAL. INS. CODE §§ 790-790.10 (West 1993), with NMSA 1978, § 59A-16-30 (1990).

198. *Royal Globe*, 592 P.2d at 332 (quoting CAL. INS. CODE § 790.09 (West 1993)).

199. *Id.* Although the court did not have a provision akin to section 59A-16-30 of the New Mexico Insurance Code to interpret, and thus did not have a provision with the words "any person," the court still used a similar type of statutory interpretation in discerning their unfair trade practices statute, CAL. INS. CODE § 790.09 (West 1993). The court noticed that, throughout the statute, words such as "claimants" and "insured" were used in particular subdivisions. See CAL. INS. CODE § 790.03 (defining unfair and deceptive acts). The court found that subdivision

## 2. Revocation of the Right

In 1988, the California Supreme Court decided *Moradi-Shalal v. Fireman's Fund Insurance Cos.*,<sup>200</sup> overruling *Royal Globe*.<sup>201</sup> In its decision, the court illustrated a number of developments since the *Royal Globe* ruling and the negative impact of those developments.<sup>202</sup> Of these developments, the court was particularly concerned with the undesirable social and economic effects of the decision<sup>203</sup> and the analytical difficulties the lower courts found with respect to implementation.<sup>204</sup>

The court in *Moradi-Shalal* cited numerous scholarly articles that criticized the *Royal Globe* opinion.<sup>205</sup> The court found that these articles illustrated "both the erroneous nature of [its] holding... and the undesirable social and economic effects of the decision."<sup>206</sup> The court went on to analyze some of the adverse consequences that these commentators suggested in their academic criticisms.

The court in *Moradi-Shalal* noted these commentators' concern that "the rule in [*Royal Globe*] promotes multiple litigation, because its holding contemplates, indeed encourages, two lawsuits by the injured claimant."<sup>207</sup> Other consequences

---

(h) of that statute "by its own terms extends certain of its protections to claimants, some to insureds, and others to both claimants and insureds." *Id.* at 334; see *Royal Globe*, 592 P.2d at 334.

200. 758 P.2d 58 (Cal. 1988) (en banc).

201. *Id.* at 63.

202. See *id.* at 63–68. The court noted that, of the nineteen states which had considered the issue since *Royal Globe*, seventeen either implicitly or explicitly rejected its holding. *Id.* at 63 (citing *White v. Unigard Mut. Ins. Co.*, 730 P.2d 1014, 1020–21 (Idaho 1986); *Scroggins v. Allstate Ins. Co.*, 393 N.E.2d 718, 723–25 (Ill. App. Ct. 1979); *Seeman v. Liberty Mut. Ins. Co.*, 322 N.W.2d 35, 40–43 (Iowa 1982); *Earth Scientists v. U.S. Fid. & Guar.*, 619 F. Supp. 1465, 1470–71 (D. Kan. 1985); *Tweet v. Webster*, 610 F. Supp. 104, 105 (D. Nev. 1985); *Patterson v. Globe Am. Cas. Co.*, 101 N.M. 541, 685 P.2d 396, 397–98 (N.M. Ct. App. 1984); *A & E Supply Co. v. Nationwide Mut. Fire Ins. Co.*, 798 F.2d 669, 673–75 (4th Cir. 1986) (interpreting Virginia law); *Kranzush v. Badger State Mut. Cas. Co.*, 307 N.W.2d 256, 269 (Wis. 1981); *Young v. Mich. Mut. Ins. Co.*, 362 N.W.2d 844, 846–47 (Mich. Ct. App. 1984); *Morris v. Am. Family Mut. Ins. Co.*, 386 N.W.2d 233, 234–38 (Minn. 1986); *Lawton v. Great Sw. Fire Ins. Co.*, 392 A.2d 576, 581 (N.H. 1978); *Farris v. U.S. Fid. & Guar. Co.*, 587 P.2d 1015, 1018–23 (Or. 1978); *D'Ambrosio v. Pa. Nat. Mut. Cas. Ins. Co.*, 431 A.2d 966, 969–70 (Pa. 1981); *Swinton v. Chubb & Son, Inc.*, 320 S.E.2d 495, 496–97 (S.C. Ct. App. 1984); *Russell v. Hartford Cas. Ins. Co.*, 548 S.W.2d 737, 742 (Tex. App. 1977); *Wilder v. Aetna Life & Cas. Ins. Co.*, 433 A.2d 309, 310 (Vt. 1981); *Tank v. State Farm Fire & Cas. Co.*, 686 P.2d 1127, 1132 (Wash. Ct. App. 1984)). The two states that did recognize the right of a cause of action by a private individual did not endorse the view that liability could be established for a single violation of the act as the court in *Royal Globe* did. *Moradi-Shalal*, 758 P.2d at 63–64 (citing *Klaudt v. Flink*, 658 P.2d 1065, 1068 (Mont. 1983); *Jenkins v. J.C. Penney Cas. Ins. Co.*, 280 S.E.2d 252, 259–60 (W. Va. 1981)). While the court acknowledged that different states used different language in their statutes than that of California, they noted that the differences were slight and that "the clear consensus of these out-of-state cases strongly calls into question the validity of our statutory analysis in *Royal Globe*." *Moradi-Shalal*, 758 P.2d at 64.

203. See *Moradi-Shalal*, 758 P.2d at 66–67.

204. See *id.* at 67–68.

205. *Id.* at 64. (citing Glen L. Allen, *Insurance Bad Faith Law: The Need for Legislative Intervention*, 13 PAC. L.J. 833, 843 (1982); William J. Casey, Note, *Bad Faith: Defining Applicable Standards in the Aftermath of Royal Globe v. Superior Court*, 23 SANTA CLARA L. REV. 917 (1983); Diana C. White, Comment, *Liability Insurers and Third-Party Claimants: The Limits of Duty*, 48 U. CHI. L. REV. 125, 148–51 (1981); Mary Van Osdel Manning, Comment, *Liability to Third Parties for Economic Injury: Privy as a Useful Animal, or a Blind Imitation of the Past*, 12 SW. U. L. REV. 87, 111–18, 125–27 (1981); Joel W. Meskin, Note, *Rodriguez v. Fireman's Fund Insurance Companies, Inc.: An Illustration of the Problems Inherent in the Royal Globe Doctrine*, 15 SW. U. L. REV. 371 (1985); Joan Marion Price, Note, *Royal Globe Insurance Company v. Superior Court: Right to Direct Suit Against an Insurer by a Third-party Claimant*, 31 HASTINGS L.J. 1161, 1176–87 (1980); Michael Tencredi, Note, *Extending the Liability of Insurers for Bad Faith Acts: Royal Globe Insurance Company v. Superior Court*, 7 PEPP. L. REV. 777, 791–93 (1980)).

206. *Id.*

207. *Id.* at 66.

that commentators articulated and the court noted were coercion of higher settlements by plaintiffs,<sup>208</sup> the expenditure of judicial resources due to multiple litigation,<sup>209</sup> and higher insurance costs because of increased settlements.<sup>210</sup> Commentators were also concerned that there could become a conflict of interest between the insurer and the insured because of the insurer's new duty towards the third-party claimant: "This conflict disrupts the settlement process and may disadvantage the insured."<sup>211</sup>

The court also reviewed the analytical difficulties and confusion lower courts were having in implementing the *Royal Globe* holding.<sup>212</sup> Specifically, the court in *Moradi-Shalal* characterized the lower courts as having to make "quasi-legislative" decisions from the bench.<sup>213</sup> However, the biggest problem the court saw with the *Royal Globe* holding was that it failed to accurately "define the scope of the...cause of action."<sup>214</sup> For instance, the underlying case on appeal in *Moradi-Shalal* raised the question whether a judicial determination of liability is required or if a settlement is conclusive enough to bring an unfair trade practices suit against an insurer.<sup>215</sup> There appeared to be no clear answer to the question as lower courts had opposing views on the issue.<sup>216</sup> The plaintiff in the underlying action on appeal was also asking for punitive damages, which, while not clearly addressed, appeared to be appropriately sought.<sup>217</sup> These problems allowed for inconsistencies at the trial court level and little clarification as to the scope of the law.

These were not the only concerns commentators noted with the *Royal Globe* holding. As one commentator pointed out, the court's "failure to clarify such issues as 'the test of liability, standing to sue, the extent of recoverable damages, the extent to which *Royal Globe* applies to the various subsections of section 790.03, and other issues'" made the holding extremely difficult to implement consistently.<sup>218</sup> In light of these difficulties, the court decided to overrule *Royal Globe* and only allow administrative relief by the Insurance Commissioner for violations of the unfair trade practices section of California's Insurance Code.<sup>219</sup>

However, due to fairness concerns, the court in *Moradi-Shalal* only applied its holding prospectively.<sup>220</sup> The court determined that, for pending cases, there must be a judicial determination of liability on the part of the insured, and that

---

208. *Id.* (citing Allen, *supra* note 205, at 851; Price, *supra* note 205, at 1186–87; Tencredi, *supra* note 205, at 790–91).

209. *Id.* (citing Manning, *supra* note 205, at 125; Price, *supra* note 205, at 1186).

210. *Id.* (citing Allen, *supra* note 205, at 851; Meskin, *supra* note 205, at 373; Tencredi, *supra* note 205, at 792–93).

211. *Id.* at 67.

212. *Id.* at 67–68.

213. *Id.* at 67.

214. *Id.*

215. *Id.* The court in *Royal Globe* limited the plaintiff to bringing the unfair trade practices claim until after the plaintiff brought the negligence claim. See *Royal Globe Ins. Co. v. Superior Court*, 592 P.2d 329, 336–37 (Cal. 1979) (en banc).

216. *Moradi-Shalal*, 758 P.2d at 67.

217. See *id.* at 60. The trial court never addressed the issue of whether punitive damages were recoverable because it dismissed the case due to the lack of a conclusion of the negligence action. *Id.* at 60–61.

218. See *id.* at 67 (quoting Allen, *supra* note 205, at 843).

219. See *id.* at 68.

220. See *id.* at 69.

settlements would not be sufficient to justify an action for unfair trade practices violations.<sup>221</sup> Thus, the court restricted the holding for pending cases, correcting some of the difficulties seen from the *Royal Globe* holding, albeit only after it revoked the right of private parties to bring a cause of action in the future.<sup>222</sup>

### C. New Mexico's Approach

Unlike the court in *Royal Globe*, the New Mexico Supreme Court drafted its opinion so as to avoid many of the negative consequences that led the court in *Moradi-Shalal* to almost apologetically overrule its holding in *Royal Globe*. While the *Royal Globe* holding was broad, the New Mexico Supreme Court's holding was limited in scope.<sup>223</sup> As discussed above, *Royal Globe* failed to implement any guiding principles on how to apply its holding.<sup>224</sup> The court in *Royal Globe* never clarified what the "conclusion" of the first case was; therefore, some courts interpreted "conclusion" as a judicial determination of liability, while others interpreted "conclusion" as including a settlement.<sup>225</sup> The holding was also not clear as to which sections of the unfair trade practices act were implicated.<sup>226</sup> The court never addressed the damages issue or any of the procedural intricacies that were sure to conflict with the rules of civil procedure. The absence of any of these guiding principles from the *Royal Globe* opinion made matters more difficult for a continued application of the new rule of law. However, the New Mexico Supreme Court in *Hovet* took great lengths to attempt to define the scope of a "*Hovet* claim."<sup>227</sup>

The court in *Hovet*, unlike the court in *Royal Globe*, has strictly limited the third-party cause of action to compulsory automobile insurance.<sup>228</sup> Therefore, only those claims arising from this specific type of insurance policy can lead to a potential "*Hovet* claim." Thus, the widespread economic consequences of this new right are bound to be far less drastic than those of the broad ruling in *Royal Globe* which did not restrict its holding to this particular type of insurance.<sup>229</sup> Further, the court in *Hovet* clearly indicated that there must be a judicial determination of fault, and, moreover, any type of settlement between the parties precludes an action for unfair trade practices violations.<sup>230</sup> This precondition alleviates the problem of conflicting rulings by lower courts as was seen in the aftermath of *Royal Globe*.<sup>231</sup>

Finally, the court in *Hovet* refused to allow punitive damages due to a lack of briefing.<sup>232</sup> The court stated in dicta that, with a statutory cause of action, the

---

221. See *id.* at 74–75.

222. *Id.* at 69.

223. See *supra* Part IV.A.3.

224. See *supra* notes 213–217 and accompanying text.

225. See *supra* notes 214–216 and accompanying text.

226. See *supra* note 217 and accompanying text.

227. See *supra* Part IV.A.3.

228. See *Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶ 24, 89 P.3d 69, 76.

229. See generally *Royal Globe Ins. Co. v. Super. Ct.*, 592 P.2d 329 (Cal. 1979) (en banc).

230. See *Hovet*, 2004-NMSC-010, ¶ 25, 89 P.3d at 76.

231. See *Moradi-Shalal v. Fireman's Fund Ins. Cos.*, 758 P.2d 58, 67 (Cal. 1988) (en banc).

232. See *Hovet*, 2004-NMSC-010, ¶ 28, 89 P.3d at 77.

remedy should be provided within the statute.<sup>233</sup> Looking at the statute, it appears that punitive damages are not contemplated, and only actual damages are recoverable.<sup>234</sup> Thus, with these preconditions, the court in *Hovet* significantly differentiated its holding from the holding in *Royal Globe* and much more acutely defined the third-party cause of action.

Furthermore, *Royal Globe* was taking a much larger step than the court in *Hovet* took, because, at the time, California did not allow any private right of action against an insurer for violations of the unfair trade practices act.<sup>235</sup> However, the New Mexico Legislature, in adopting the Insurance Code, already provided for a private cause of action in section 59A-16-30.<sup>236</sup> Thus, the legal community and the insurance companies doing business in New Mexico were already accustomed to a private right of action and had accordingly shaped their practices to anticipate such possibilities.

The court in *Hovet* did implement several preconditions before a "*Hovet* claim" could be brought that will eliminate many of the uncertainties presented by *Royal Globe*. However, there are still a host of procedural questions that remain unanswered.

## VI. IMPLICATIONS

### A. *The Raskob Conflict*

The procedure established in *Hovet*, allowing for an unfair practices claim to be brought only after a determination of liability, may raise procedural issues concerning res judicata and collateral estoppel. The doctrine of res judicata<sup>237</sup> allows a party to a lawsuit to preclude future suits.<sup>238</sup> While the court in *Martinez v. Reid*<sup>239</sup> required the suppression of the insurer's identity to avoid prejudice,<sup>240</sup> the court in *Raskob v. Sanchez*<sup>241</sup> provided that a plaintiff may join the defendant's insurance provider in the underlying negligence claim.<sup>242</sup> Thus, the insurer is still a party to the first lawsuit if properly joined pursuant to *Raskob*.<sup>243</sup> As a party to the

233. See *id.*

234. See NMSA 1978, § 59A-16-30 (1990) (providing for recovery of "actual damages"); see also *infra* Part VI.C.

235. Compare CAL. INS. CODE 790.03 (West 1993), with NMSA 1978, § 59A-16-30 (1990).

236. NMSA 1978, § 59-16-30 (1990) ("Any person...who has suffered damages as a result of a violation of [article 16 of the Insurance Code] by an insurer or agent is granted a right to bring an action in district court to recover actual damages.").

237. See *Aguilera v. Palm Harbor Homes, Inc.*, 2004-NMCA-120, ¶ 19, 99 P.3d 672, 678 ("Res judicata, or claim preclusion, bars subsequent claims where a previous claim involved (1) identical parties; (2) acting in an identical capacity; (3) litigating the identical cause of action; and (4) with respect to the same subject matter." (citing *Moffat v. Branch*, 2002-NMCA-067, ¶ 14, 49 P.3d 673, 677; *Bank of Santa Fe v. Marcy Plaza Assocs.*, 2002-NMCA-014, ¶ 13, 40 P.3d 442, 445)).

238. See *Aguilera* 2004-NMCA-120, ¶ 19, 99 P.3d at 678 (citing *Moffat*, 2002-NMCA-067, ¶ 14, 49 P.3d at 677; *Bank of Santa Fe*, 2002-NMCA-014, ¶ 13, 40 P.3d at 445)).

239. 2002-NMSC-015, 46 P.3d 1237.

240. *Id.* ¶ 26, 46 P.3d at 1244.

241. 1998-NMSC-045, 970 P.2d 580.

242. See *id.* ¶ 3, 970 P.2d at 581 (holding that "joinder will be permitted if 1) the coverage was mandated by law, 2) it benefits the public, and 3) no language of the law expresses an intent to deny joinder").

243. *Martinez*, 2002-NMSC-015, ¶ 29, 46 P.3d at 1244.

lawsuit, the insurer may attempt to use *res judicata* to prevent the plaintiff from bringing the claim of unfair trade practices. Thus, the benefit of joining a party pursuant to *Raskob* may be negated by the possibility of a *res judicata* attack by the insurer, now a party to the lawsuit.

"*Res judicata* bars not only claims that were raised in the prior proceeding, but also claims that could have been raised."<sup>244</sup> Thus, an insurer may try to argue that the "*Hovet* claim" and the negligence claim arose out of the same transaction, and thus should have been pled together in the original lawsuit.<sup>245</sup> However, this type of affirmative defense is unlikely to be successful. Since the court in *Hovet* specifically required that there be a judicial determination of liability before a "*Hovet* claim" can even be brought, it is unlikely that a court would fault the plaintiff for not bringing the claim in the negligence action, because the plaintiff would not be allowed to bring such a claim under the *Hovet* preconditions.

A more realistic concern may be the use of collateral estoppel by the plaintiff to prevent certain issues from being relitigated. If the insurer has been joined as a party to the lawsuit, the plaintiff may try to use collateral estoppel to prevent the insurer from arguing issues that were decided in the negligence action such as liability and damages.<sup>246</sup>

The doctrine of collateral estoppel requires the movant to prove that

- (1) the party to be estopped was a party or privity to the prior proceeding, (2) the cause of action in the present case is different from the cause of action in the prior proceeding, (3) the issue was actually litigated in the prior proceeding, and (4) the issue was necessarily determined in the prior proceeding.<sup>247</sup>

Based on the holding in *Hovet*, it is likely that the issue of liability would be estopped from being relitigated because the elements of collateral estoppel appear to be easily satisfied.<sup>248</sup> The insurer is a party to the first lawsuit, the two causes of action are different, and finally the issue would be actually litigated and necessarily determined in the first lawsuit. Based on the preconditions established in *Hovet*, these elements should typically be met when an unfair trade practices claim is

---

244. *City of Sunland Park v. Macias*, 2003-NMCA-098, ¶ 18, 75 P.3d 816, 821 (citing *State ex rel. Martinez v. Kerr-McGee Corp.*, 120 N.M. 118, 121, 898 P.2d 1256, 1259 (Ct. App. 1995)).

245. *See Three Rivers Land Co., v. Maddoux*, 98 N.M. 690, 652 P.2d 240 (1982), *overruled on other grounds by Universal Life Church v. Coxon*, 105 N.M. 57, 728 P.2d 467 (1986). The rule governing *res judicata* provides:

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar..., the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

(2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

*Id.* at 695, 652 P.2d at 245 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982)).

246. *See Silva v. State*, 106 N.M. 472, 474, 745 P.2d 380, 382 (1987) ("Collateral estoppel bars relitigation of ultimate facts or issues actually and necessarily decided in a prior suit. Under collateral estoppel, or 'issue preclusion,' the cause of action in the second suit need not be identical with the first suit.").

247. *Rex, Inc. v. Manufactured Hous. Comm.*, 2003-NMCA-134, ¶ 5, 80 P.3d 470, 473.

248. *See supra* note 230 and accompanying text.



raised. The plaintiff could not bring the "*Hovet* action" if the negligence action was not actually litigated.<sup>249</sup> Similarly, the fourth element is met because there must be a judicial determination of fault on the issue of negligence for the "*Hovet* action" to be brought. Therefore, the issue of liability is likely to be binding on the insurer in the "*Hovet* action."

However, the plaintiff may also want the jury award to be estopped from being relitigated and given conclusive effect in the "*Hovet* action" in order to prove a lack of good faith on the part of the insurer. In proving good faith, or lack thereof, it may be necessary to look at the settlement offers made by the insurance company. While the jury award may not seem relevant to this inquiry—as a good faith settlement offer would typically be less than that awarded at trial—it may provide a means of comparison. However, before it can be determined whether the jury award from the negligence action will be precluded from being relitigated in the "*Hovet* action," it must first be determined whether the damages are relevant and thus admissible.

The general rule is that "[r]elevant evidence means evidence having any tendency to make the existence of any fact of consequence to resolution of the action more probable or less probable than it would be without the evidence."<sup>250</sup> A good faith effort to settle would take place before the completion of the negligence action; thus, the ultimate jury verdict does not seem relevant. Due to the space in time between when a settlement would take place and when the jury verdict is announced, the evidence of the jury award "may relate to facts too remote in point of time or matters too far removed from the scene of the transaction to be admissible."<sup>251</sup> Moreover, the external factors, such as compassion or prejudice, which may shape the jury's verdict, are probably not determinative of what a good faith fair settlement would be before the negligence action commenced. Furthermore, part of the incentive for an insurer to settle is that it would cost less than a trial; thus, the jury verdict and a good-faith settlement *should* differ. Therefore, the dollar value of a good faith settlement prior to a lawsuit should not be ascertained from a subjective jury and its verdict. Perhaps it would be more appropriate to use expert testimony to establish what the insurer should have offered.<sup>252</sup>

---

249. See *supra* note 156 and accompanying text.

250. *In re Plains Elec. Generation & Transmission Coop., Inc.*, 106 N.M. 775, 778, 750 P.2d 475, 478 (Ct. App. 1988) (citing *Wilson v. Hayner*, 98 N.M. 514, 650 P.2d 36 (Ct. App. 1982)).

251. See *Williams v. Williams*, 71 N.M. 39, 62–63, 376 P.2d 3, 19 (1962).

252. The insurer may attempt to defend against estoppel by arguing that it did not have a full and fair opportunity to litigate the issue. See *Silva v. State*, 106 N.M. 472, 745 P.2d 380 (1987).

The trial court is in the best position to decide whether a party against whom estoppel is asserted has had a full and fair opportunity to litigate. Neither the offensive or defensive use of collateral estoppel is to be applied where the record is insufficient to determine what issues were actually and necessarily determined by prior litigation and it is the burden of the movant invoking the doctrine of collateral estoppel to introduce sufficient evidence for the court to rule whether the doctrine is applicable. When the movant has made a *prima facie* showing, the trial court must consider the countervailing equities including, but not limited to, prior incentive for vigorous defense, inconsistencies, procedural opportunities, and inconvenience of forum....

*Id.* at 476, 745 P.2d at 384 (citations omitted).

### B. Discovery Issues

Another procedural question that *Hovet* presents is what information parties will be allowed to discover in a “*Hovet* action.” The New Mexico Rules of Evidence and Civil Procedure prevent certain information from being discovered.<sup>253</sup> Most notably, the rules protect information that is privileged, such as that protected by the attorney-client privilege,<sup>254</sup> or work that was done in anticipation of litigation.<sup>255</sup> A plaintiff in a “*Hovet* action” will probably want to discover the insurer’s practices and efforts at settlement. However, this information may come under the protection of the trade secret privilege<sup>256</sup> or as work done in anticipation of litigation.<sup>257</sup> While insurers may waive these privileges if their settlement efforts show that they were done in good faith, the insurer has the option of keeping this information confidential.

If the insurer decides to keep the information confidential, asserting the trade secret privilege, the information will only be disclosed if concealment would tend to further a fraud or other injustice.<sup>258</sup> The settlement practices of the insurer are obviously quite important in proving a lack of good faith effort in settling, so the plaintiff could argue that concealment of the settlement practices would tend to further an injustice by preventing the plaintiff from discovering evidence necessary to prove liability.<sup>259</sup>

---

253. See Rules 11-501 to -514 NMRA (enumerating privileges); Rule 1-026(B) NMRA (providing for scope of discovery).

254. Rule 11-503 NMRA. Subsection (B) of that rule provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client and the client’s lawyer or his lawyer’s representative, or (2) between the client’s lawyer and the lawyer’s representative, or (3) by the client or client’s lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

Rule 11-503(B) NMRA.

255. See Rule 1-026(B)(4) NMRA.

256. See Rule 11-508 NMRA, which provides:

A person has a privilege, which may be claimed by the person or the person’s agent or employee, to refuse to disclose and to prevent others from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the court shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

257. See Rule 1-026(B)(4) NMRA, which provides:

Subject to the provisions of Subparagraph (5) of this paragraph [dealing with experts], a party may obtain discovery of documents and tangible things otherwise discoverable under Subparagraph (1) of this paragraph [dealing with privileged information] and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

258. See Rule 11-508 NMRA.

259. See *id.*

If, on the other hand, the insurer asserts that the settlement information consisted of materials done in preparation of litigation,<sup>260</sup> the plaintiff may have an easier time getting the settlement practices disclosed. Generally, “[t]he work product rule is not a privilege, but an immunity protecting from discovery documents and tangible things prepared by a party or its representative in anticipation of litigation.”<sup>261</sup> The first step in asserting this immunity is that the insurance company must establish that the material was done in anticipation of litigation. There is no neat formula to determine whether the material complies with this requirement, but generally the moving party must show “that litigation was ‘the driving force’ behind the preparation of” the materials.<sup>262</sup> This poses an interesting question: If the settlement practices were done in good faith, then wouldn’t avoiding litigation be the driving force behind the material? This will be an issue the trial court will have to address, and the resolution may implicate some fascinating appellate issues.

Assuming the trial court decides that the material was created in anticipation of litigation, the plaintiff may still be able to get the material disclosed.<sup>263</sup> The rule provides for nearly absolute immunity for work products that are characterized as “opinion,” while only allowing a qualified immunity for other material done in preparation of litigation.<sup>264</sup> It will be interesting to see how the courts characterize settlement practices. On the one hand, if the settlements were done systematically using empirical evidence, it would be hard to argue that this is an opinion of the insurer or its attorney. On the other hand, if the settlement practices were individualized depending on the facts of each case, it seems that the settlement practices may qualify as an opinion or legal theory. However, assuming that the settlement practices of the insurer are not considered to be an opinion or legal theory, the plaintiff would still have to show that there is a substantial need for the documents and that these documents cannot be obtained through other means without undue hardship to the plaintiff.<sup>265</sup> These tests will likely be met, as the settlement practices are the essential issue in the case, and the plaintiff will not have any other means of access to the settlement practices of the insurance company.

### C. Damages

One of the most intangible aspects of the *Hovet* opinion is that it declines to address the issue of damages.<sup>266</sup> As of now, the court has not extended punitive damages to a plaintiff in a “*Hovet* claim.”<sup>267</sup> Thus, the only damages that appear to

---

260. “The party asserting the work product immunity under NMRA 1-026(B)(4) bears the burden of establishing for each document that the rule applies.” *Hartman v. Texaco Inc.*, 1997-NMCA-032, ¶ 20, 937 P.2d 979, 984.

261. *Id.* ¶ 19, 937 P.2d at 984.

262. *Id.* ¶ 21, 937 P.2d at 984 (quoting *Diamond State Ins. Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 699 (D. Nev. 1994)).

263. See Rule 1-026(B)(4) NMRA.

264. *Hartman*, 1997-NMCA-032, ¶ 19, 937 P.2d at 984.

265. See Rule 1-026(B)(4) NMRA.

266. See *Hovet v. Allstate Ins. Co.*, 2004-NMSC-010, ¶ 28, 89 P.3d 69, 77–78; *supra* Part IV.A (discussing court’s refusal to address the issue of punitive damages due to lack of briefing).

267. See *supra* notes 159–160 and accompanying text.

be recoverable are actual damages. However, the term actual damages is vague and hard to define:

In New Mexico a party seeking to recover damages has the burden of proving the existence of injuries and resulting damage with reasonable certainty. However, the theory of damages is founded on the principle of making the injured party whole. In computing damages the fact finder is not held to an inflexible or precise standard; the object is to afford *just and reasonable compensation* for the injuries sustained.<sup>268</sup>

Thus, it will be the burden of the plaintiff to prove actual injuries and the damages resulting from those injuries.<sup>269</sup> However, it may be difficult to determine the types of injuries and the value of those injuries that are sustained due to an unfair trade practices violation.

The plaintiff will likely try to prove actual damages of costs incurred due to the delay in compensation, interest, and fees. First, as Judge Fry noted in her dissent to *Hovet*, the trial judge at the negligence action can impose pre-judgment interest on top of the jury verdict for delays in settlement pursuant to section 56-8-4(B) and the costs of the plaintiff pursuant to Rule 1-068.<sup>270</sup> If this pre-judgment interest is awarded, some of the damages flowing from delay will be recovered.

Second, section 59A-16-30 allows for attorney fees to be recovered in the “*Hovet* action” upon a showing of willfulness.<sup>271</sup> However, the attorney’s fees from the negligence action are not mentioned. Although it seems logical that the additional expense of hiring an attorney to go to trial would be an actual damage, the amount of the attorney’s fees would have to be divided at the point in time where the good faith settlement should have come. The time before that would not be an actual damage of the insurer’s failure to make a good faith settlement offer. This raises the additional issue of timing and the problem as to when a good faith settlement should have come. Again, this is the plaintiff’s burden of proof, and, while it does not have to be mathematically precise, it does have to be more than mere conjecture.<sup>272</sup> Whatever the plaintiff seeks as actual damages from the failure to effectuate a good faith settlement, there are bound to be many problems trying to prove the amount of these damages.

Until these questions are addressed, there does not appear to be much incentive to even bring a “*Hovet* action,” as the damages do not appear to be worth chasing. The problems in proving any damages that will result in a significant award will have to be considered by the plaintiff before filing a “*Hovet* action.” Furthermore, the unresolved problems with the scope of discovery may create a lack of incentive

---

268. *Abbinett v. Fox*, 103 N.M. 80, 86, 703 P.2d 177, 183 (Ct. App. 1985) (citation omitted) (emphasis added).

269. Damages has two aspects. There must be proof that damages resulted—the damage resulting from breach of contract must be of a kind and character susceptible of proof. There must be proof of the amount of damages—while uncertainty as to amount will not preclude recovery, still the amount allowed must be subject to reasonable ascertainment.

*Bank of N.M. v. Rice*, 78 N.M. 170, 177, 429 P.2d 368, 375 (1967) (citations omitted).

270. See *Hovet*, 2004-NMSC-010, ¶ 41, 89 P.3d at 80 (Fry, J., dissenting).

271. NMSA 1978, § 59A-16-30(B) (1990).

272. See *supra* note 270 and accompanying text.

to pursue what may be a small amount of damages. Even assuming that the issue of liability and the jury award are collaterally estopped from being relitigated, the concerns of damages and discovery still may tend to outweigh the benefit to plaintiffs of issue preclusion. The most realistic impact that the holding appears to have is that it may create an incentive for large insurance companies to offer a little more during settlement negotiations because of the possibility of litigating multiple suits—a commendable policy. However, at least until the holding in *Hovet* is further developed, the current state of the law appears to be similar to that prior to *Hovet* because of the limitations and disincentives of bringing suit.