

**THE STANDARD FOR BREACH OF A LIABILITY INSURER'S
DUTY TO MAKE REASONABLE SETTLEMENT DECISIONS:
EXPLORING THE ALTERNATIVES**

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This Article considers the standard to be applied to determine whether an insurer has breached its duty to make reasonable settlement decisions. It focuses primarily on two standards: the disregard the limits (“DTL”) standard endorsed by section 24 of the Restatement of the Law of Liability Insurance (hereinafter “Restatement” or “Discussion Draft”), and the equal consideration (“EC”) standard, which I consider to be the primary competitor to DTL. The DTL standard says an insurer’s behavior is evaluated from the standpoint of a person who faces the full exposure of potential liability from a claim; to do this, the insurer (and the court) must “disregard the limits” of the applicable insurance policy. The EC standard requires that in making settlement decisions, an insurer must give equal consideration to the interests of the insured as it gives to its own interests. This Article will analyze these two standards in light of the case law applying them, and how the standards are and might be used in section 24 of the Restatement.

By way of a roadmap, the Article begins with a description of the treatment of the two tests in section 24 of the Restatement. It then addresses the question of whether the two standards are the same. I contend that while they overlap, they are not the same. We then turn to an analysis of the current state of the case law regarding the standards being used by the courts to evaluate whether an insurer has breached its duty to make reasonable settlement decisions. That discussion will show that neither DTL nor EC in their “pure” forms are the majority rule, but

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that EC has a larger following than DTL and that a significant number of states take a blended approach using both DTL and EC. The Article then turns to the assessment of section 24 in light of the case law and makes a number of recommendations.

I. THE RESTATEMENT OF THE LAW OF LIABILITY INSURANCE ADOPTS DTL
AS THE STANDARD FOR BREACH

Section 24 of the Discussion Draft of the Restatement endorses and adopts the DTL standard as the primary method for determining whether an insurer has breached its duty to make reasonable settlement decisions. Section 24 contains the black-letter rules for the duty to make reasonable settlement decisions. Subsection 1 provides that “the insurer has a duty to the insured to make reasonable settlement decisions.”¹ Subsection 2 provides: “A reasonable settlement decision is one that would be made by a reasonable person who bears the sole financial responsibility for the full amount of the potential judgment.”² Although this statement does not use the terms “disregard the limits,” the reference to the “reasonable person who bears the sole financial responsibility for the full amount of the potential judgment” is functionally the same. As the definition of what constitutes a reasonable settlement decision, and as part of the black-letter rule, DTL has a place of prominence in section 24 of the Restatement. No hedging, an “all in” commitment.

As one would expect, this black-letter law treatment is supported by extensive treatment in the Comment and Reporters’ Note. In comment c of section 24, the Restatement explains that while the black-letter rule does not use the term “disregard the limits,” that is what is intended.³ Comment d provides a little more detail about the standard, providing that the perspective to be used is “at the time the settlement decision was made,” and that it should “take into account the realistically possible outcomes of a trial and, to the extent possible, . . . weigh those outcomes according to their likelihood.”⁴ It notes that such judgments “are difficult” but “cannot be avoided.”⁵ While these difficulties could be avoided by a “strict liability standard,” section 24 rejects strict liability for reasons

1. RESTATEMENT OF THE LAW OF LIAB. INS. § 24(1) (AM. LAW INST., Discussion Draft 2015).

2. *Id.* § 24(2).

3. *Id.* § 24 cmt. c.

4. *Id.* § 24 cmt. d.

5. *Id.*

stated in comment a.⁶ Making this difficult decision of whether the settlement offer was objectively reasonable may be aided by expert testimony and testimony from those involved in the case.⁷

Consistent with the difficulty of assessing a reasonable settlement offer, comment d recognizes that reasonableness is not a fixed point but a range, and that “there is no formula that can provide a definitive guide to what constitutes a reasonable settlement value.”⁸ Nevertheless, a liability insurer’s decision to reject a settlement demand that is within the range of reasonableness makes the insurer liable for any excess judgment in the underlying litigation.⁹ The comment then provides an illustration: where the policy limit is \$75,000 and likely damages are \$150,000 with a 30% chance of plaintiff’s success, an insurer will be liable for the full verdict if it rejects a settlement offer for \$45,000 (the expected value of .3 probability x \$150,000 damages) or less.¹⁰

Comments e and f address issues more at the margins of the duty to settle: whether an insurer has a duty “to make settlement offers and counteroffers,”¹¹ and “[t]he difference between rejecting a reasonable settlement demand and [an insurer] failing to make a reasonable offer.”¹² In comment f, section 24 of the Restatement provides three more illustrations using DTL.

The Reporters’ Note, while identifying EC as the rule in “the majority of jurisdictions,” suggests that DTL is “[t]he most straightforward and utilized application of [EC].”¹³ It notes that DTL “was first articulated by Professor Keeton in 1954.”¹⁴ The test was then “adopted” by the California Supreme Court in *Crisci v. Security Insurance Co. of New Haven*,¹⁵ and the Reporters submit that it “has since become the most common test . . . in duty-to-settle cases.”¹⁶ The note cites to a number of eminent insurance law scholars in support of its conclusion,¹⁷ and also cites to cases that have adopted DTL.¹⁸

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* § 24 cmt. d, illus. 1.

11. *Id.* § 24 cmt. e.

12. *Id.* § 24 cmt. f.

13. *Id.* § 24 reporters’ note c.

14. *Id.* (citing Robert E. Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1147 (1954)).

15. 426 P.2d 173 (Cal. 1967) (in bank).

16. RESTATEMENT OF THE LAW OF LIAB. INS. § 24 reporters’ note c (AM. LAW INST., Discussion Draft 2015) (citing cases and secondary authorities).

17. See *id.* (citing Paul E.B. Glad, William T. Barker & Michael Barnes, *Introduction to Liability Insurance*, in 3 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 16.06[4][a]

In contrast to the DTL test, the EC test has almost no role in the Restatement. The concept of equal consideration (as contrasted with the EC test) receives greater recognition in the Discussion Draft than it did in an earlier draft,¹⁹ but is included only by association with DTL, not as a separate or competing test. Comment c says that the requirement that an insurer accept a settlement that would be accepted “by a reasonable person who bears the sole financial responsibility for the full amount of the potential judgment . . . requires an insurer to give *equal consideration* to its insured’s pecuniary interests when a claim potentially exceeds the policy limits.”²⁰ Thus, equal consideration is a rationale for DTL. The Reporters’ Note goes further by conceding that “[i]n the majority of

(Jeffrey E. Thomas & Francis J. Mootz III eds., 2015) (“The most widely used test is typically formulated as ‘whether a prudent insurer without policy limits would have accepted the settlement offer.’”); KENNETH S. ABRAHAM, *INSURANCE LAW AND REGULATION* 664–65 (5th ed. 2010) (“The *Crisci* rule is standard law in most jurisdictions . . .”); Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1122 n.23 (1990) (“*Crisci* so dominates case law on duty-to-settle doctrine that some commentators tacitly assume the ‘disregard the limits’ standard is universally accepted” but noting that in 1990 only sixteen states had adopted Keeton’s standard); David R. Anderson & John W. Dunfee, *No Harm, No Foul: Why a Bad Faith Claim Should Fail When an Insurer Pays the Excess Verdict*, 33 TORT & INS. L.J. 1001, 1004 (1998) (writing that, in most jurisdictions, “an insurer should accept a below-limits settlement demand only if the circumstances are such that a reasonably prudent insurer would settle, or if failure to settle would unreasonably risk a judgment in excess of the policy limits”); 1 JEFFREY W. STEMPEL, *STEMPEL ON INSURANCE CONTRACTS*, § 9.05[B], at 9-153 (3d ed. Supp. 2014) (“Many courts require the insurer to behave as if it had no policy limits when making settlement determinations.”); ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, *UNDERSTANDING INSURANCE LAW* 869–70 (4th ed. 2007) (“[I]f one agrees that the differences among these tests . . . are subtle, it is fair to describe all of these assorted tests under the label of the ‘reasonable-offer’ test. Under this test, the issue is simply whether an insurer under a policy with no limits would accept the offer; in fact, a number of courts have articulated the insurer’s duty to settle in virtually identical language.” (footnote omitted)).

18. See *id.* (citing *Herges v. W. Cas. & Sur. Co.*, 408 F.2d 1157, 1163–64 (8th Cir. 1969) (using Keeton’s “no policy limits approach” to determine if the insurer had given equal consideration to the insured’s interests, as required by Minnesota law); *Koppie v. Allied Mut. Ins. Co.*, 210 N.W.2d 844, 848 (Iowa 1973) (“Modern decisions require the insurer . . . to view the settlement situation as if there were no policy limit applicable to the claim.”); *Bowers v. Camden Fire Ins. Ass’n*, 237 A.2d 857, 862 (N.J. 1968) (holding that the insurer acts in good faith “only if the insurer treats any settlement offer as if it had full coverage for whatever verdict might be recovered, regardless of policy limits”).

19. Before the change to the Restatement and the Discussion Draft, the Tentative Draft of the Principles did not include any reference to EC in the Comment. See *PRINCIPLES OF THE LAW OF LIAB. INS.* § 27 cmts. a–o (AM. LAW INST., Tentative Draft No. 2, 2014). In the Reporters’ Note, EC is simply equated with DTL, although the note recognized that two authors suggested that the two standards “may function differently.” *Id.* § 27 reporters’ note b.

20. *RESTATEMENT OF THE LAW OF LIAB. INS.* § 24 cmt. c (AM. LAW INST., Discussion Draft 2015) (emphasis added).

jurisdictions, an insurer's refusal of a settlement demand is reasonable only if the insurer gave 'equal consideration' to the interest of its insured when evaluating the demand."²¹ However, the note equates the EC test with DTL by suggesting that "[t]he most straightforward and utilized application of the 'equal consideration' standard is the disregard-the-limits test."²² While this statement implies that there are other applications of the EC test, those are not disclosed or discussed. The Reporters do point out that some authors may conclude that DTL and EC "function differently."²³

Although it does not contain any reference to EC, comment i to section 24, which identifies "[o]ther factors to be considered," includes factors that can be part of equal consideration. That comment notes that

[b]ecause of the difficulty of determining, in hindsight, whether a settlement demand or offer was reasonable, it is appropriate for the trier of fact to consider procedural factors that affected the quality of the insurer's decisionmaking or that deprived the insured of evidence that would have been available if the insurer had behaved reasonably.²⁴

Examples of such factors are "failure to conduct a reasonable investigation," failure "to follow the recommendation of [an insurer's] adjuster or chosen defense lawyer," and "failure to keep the insured informed" of settlement offers.²⁵ These factors have been associated with the equal consideration test. An early and influential²⁶ duty to settle case

21. *Id.* § 24 reporters' note c (first citing Syverud, *supra* note 17, at 1122; and then citing Cowden v. Aetna Cas. & Sur. Co., 134 A.2d 223, 228 (Pa. 1957) ("The requirement is that the insurer consider in good faith the interest of the insured as a factor in coming to a decision as to whether to settle or litigate a claim against the insured. . . . [T]he predominant majority rule is that the insurer must accord the interest of its insured the same faithful consideration it gives its own interest.")).

22. *Id.*

23. *Id.* (first citing ABRAHAM, *supra* note 17, at 665 ("Under the reasonable offer test, however, truly equal consideration is not the norm. Rather, in certain cases . . . the insured's interests carry more weight."); and then citing Michael Sean Quinn, *The Defending Liability Insurer's Duty to Settle: A Mediation upon Some First Principles*, 35 TORT & INS. L.J. 929, 960-63 (2000)).

24. *Id.* § 24 cmt. i.

25. *Id.*

26. As of March 5, 2015, Shepard's showed that *Brown v. Guarantee Insurance Co.*, 319 P.2d 69 (Cal. Dist. Ct. App. 1957) had been cited 154 times by courts in 28 states, 7 federal circuits, and Puerto Rico. Shepard's Report of *Brown v. Guarantee Insurance Co.*, 319 P.2d 69 (Cal. Dist. Ct. App. 1957), LEXIS ADVANCE, <https://advance.lexis.com/api/permalink/66d48155-c4a5-4dbb-9383-ca7f6186b120/?context=1000516> (last visited Mar. 5, 2015).

from the Court of Appeal of California, *Brown v. Guarantee Insurance Co.*,²⁷ puts it this way:

In resolving the question of settlement the insurer must take into account, and give fair and objective consideration to, the insured's interests. In deciding whether the insurer's refusal to settle constitutes a breach of its duty to exercise good faith, the following factors should be considered: the strength of the injured claimant's case on the issues of liability and damages; attempts by the insurer to induce the insured to contribute to a settlement; *failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured; the insurer's rejection of advice of its own attorney or agent; failure of the insurer to inform the insured of a compromise offer*; the amount of financial risk to which each party is exposed in the event of a refusal to settle; the fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and any other factors tending to establish or negate bad faith on the part of the insurer.²⁸

Even though these "other factors" have been associated with EC, it may be possible to associate them with DTL as well. The first two identified factors from the Restatement (investigation and following advice) are quite easily associated with DTL. An insurer that has disregarded the policy limits will have a stronger incentive to conduct a thorough investigation and to follow the advice of its adjuster and attorney. The third factor, communication with the insured, is more difficult to reconcile with DTL. An insurer who bears the full risk of a claim would probably have less incentive to communicate with the insured, not more. We will consider these procedural factors at greater length below.

27. 319 P.2d 69.

28. *Id.* at 75 (emphasis added). Six of the factors identified by the *Brown* court have been incorporated into an approved jury instruction in California for the duty to settle. See CALIFORNIA JURY INSTRUCTIONS: CIVIL (BAJI) § 12.98 (2015). Courts in Arizona, Kansas, and South Dakota have relied on factors from *Brown* to determine whether an insurer breached its duty to settle. See *Gen. Accident Fire & Life Assurance Corp. v. Little*, 443 P.2d 690, 694 (Ariz. 1968) (in banc) (quoting *Brown*, 319 P.2d at 75); *Bollinger v. Nuss*, 449 P.2d 502, 512 (Kan. 1969) (quoting *Brown*, 319 P.2d at 75); *Kunkel v. United Sec. Ins. Co. of N.J.*, 168 N.W.2d 723, 727 (S.D. 1969) (citing *Brown*, 319 P.2d at 75). In Arizona, the eight factors from *Brown* have been approved for use in jury instructions for failure to settle cases. See *Clearwater v. State Farm Mut. Auto. Ins. Co.*, 792 P.2d 719, 722 (Ariz. 1990) (in banc).

It is notable that two of the *Brown* factors are closely related to DTL: the strength of the claimant's case (on both liability and damages), and the amount of financial risk. These factors encompass the same considerations as DTL, but just do not use them with the kind of precision of the DTL test where a risk calculation is made to determine the expected value of a case to be compared to the settlement offer.

II. DIFFERENCES BETWEEN DTL AND EC

By "equating" DTL and EC, section 24 of the Restatement raises the issue of whether DTL is substantially the same as EC, or whether there are significant differences. In this section, I will illustrate three principle differences between the tests: a) EC gives greater protection to insureds than DTL in some scenarios; b) EC considers insurer settlement-related behavior toward the insured; and c) EC more readily accommodates multiple claimant situations.

A. *EC Provides Greater Protection for Policyholders than DTL*

The EC test provides greater protection for policyholders because it recognizes that the insurer is obligated to pay the "first dollar" of a claim, up to the limits (after the deductible or self-insured retention). The DTL test collapses the insurer's interest and the insured's interest into a single interest: that of a reasonable person or insurer facing the case without limits. This hypothetical person without limits does not distinguish between the "first dollar" and the "last dollar" because it is all money of that same person. This is the point of the DTL test. But when an insured buys insurance, he or she expects that the insurer will pay up to the limits to settle the case or to satisfy a judgment. By not buying more insurance, the insured knows (or should know) that he or she has some excess exposure, but that exposure is *after* the insurer pays its share.

To illustrate the role of the "first dollar" protection provided by EC, I turn to the first illustration from the Comment to the predecessor to section 24 of the Restatement, section 27 of the Principles of the Law of Liability Insurance, Tentative Draft No. 2 (revised) (hereinafter "Principles" or "Tentative Draft").²⁹ Illustration 1 to comment d of section 27 of the Tentative Draft provides:

29. PRINCIPLES OF THE LAW OF LIAB. INS. § 27 (AM. LAW INST., Tentative Draft No. 2, 2014).

A claimant files a personal-injury lawsuit against the insured seeking damages of \$150,000. The insured has a duty-to-defend liability insurance policy that assigns settlement discretion to the insurer. The policy contains a policy limit of \$100,000 and no deductible. There is evidence supporting the conclusion that, at the time of the settlement negotiations, (a) if the jury were to decide for the plaintiff, it would issue an award of \$150,000 against the defendant, producing an excess judgment of \$50,000 and (b) the likelihood of a plaintiff's verdict ranges between 20 percent and 30 percent. Therefore, at the time of the settlement negotiations, the expected value of the overall claim falls somewhere between \$30,000 and \$45,000. [20% x 150,000 = \$30,000; whereas, 30% x 150,000 = \$45,000].³⁰

Although this illustration was removed from the Discussion Draft of the Restatement, it still represents an example of an unreasonable settlement offer under section 24 of the Restatement. A “reasonable settlement decision” is defined as “one that would be made by a reasonable person who bears the sole financial responsibility for the full amount of the potential judgment.”³¹ Where, as in illustration 1 of the Principles, the expected value of a case is between \$30,000 and \$45,000, a reasonable person bearing the sole financial responsibility for the full amount of the potential judgment (as much as \$150,000), would not pay \$100,000 to settle the claim. The settlement amount is far in excess of the expected value of the case by at least two times.

Comment d to section 27 of the Principles provides additional reasoning. It points out that, under this scenario, a policy limits settlement offer would result in a conflict of interest between insurer and insured because the insured would prefer settlement in which it would pay nothing and face no risk, whereas the insurer would prefer not to settle a case for \$100,000 when its expected exposure is only \$30,000–\$45,000 (the probability of plaintiff winning multiplied by the expected damages).³² Using DTL, under these facts the insurer could reject the settlement offer of \$100,000 (policy limits) without breaching the duty to make reasonable settlement decisions because “a reasonable person that

30. *Id.* § 27 cmt. d, illus. 1.

31. RESTATEMENT OF THE LAW OF LIAB. INS. § 24(2) (AM. LAW INST., Discussion Draft 2015).

32. PRINCIPLES OF THE LAW OF LIAB. INS. § 27 cmt. d, illus. 1 (AM. LAW INST., Tentative Draft No. 2, 2014).

bore the sole financial responsibility for the full amount of the potential judgment (\$150,000) would be inclined to reject [the] settlement.”³³

Recognizing that there is some fuzziness at the margins, the DTL test is basically captured by these formulae where EV is the expected value of the case (probability x damages) and SO is the settlement offer:

$$\begin{aligned} EV &\geq SO = \text{duty to settle} \\ EV &< SO = \text{no duty to settle} \end{aligned}$$

Because in illustration 1 of the Principles EV is \$30,000–\$45,000, which is less than SO of \$100,000, under DTL the insurer has no duty to accept the settlement offer.

To show how EC provides protection for the “first dollars,” I need to adjust the amount of the plaintiff’s damages in illustration 1.³⁴ Suppose that plaintiff’s claimed damages were \$200,000 rather than \$150,000. Although this would change the EV of the case, it would not change the outcome under DTL. The EV for illustration 1_a would be \$40,000–\$60,000 (20% x \$200,000 and 30% x \$200,000), well below the SO of \$100,000, so there would be no breach of the duty to settle.

To compare EC to DTL for this scenario, I use a similar type of quantitative approach for the EC test. The insurer’s interest is represented by the difference between the settlement offer and the expected value because that is what the insurer seeks to save by rejecting the settlement. The expected value of the case is a baseline for the insurer, and it is motivated to reject the settlement because it would be required to pay the difference between this baseline and the settlement. The insured’s interest, on the other hand, is avoiding the risk of an excess judgment for which it would be obligated. If the settlement is accepted, the insured would pay nothing. If the settlement is rejected, the insured’s interest is the difference between the policy limits (PL) and the excess exposure (EE).³⁵ If the insured’s interest is greater than or equal to the

33. *Id.*

34. Using illustration 1 the Principles without change does not result in any different result under EC. The insurer’s interest is \$55,000–\$70,000 (SO - EV), which is greater than the insured’s interest of \$50,000 (Damages - Policy Limits; \$150,000 - \$100,000).

35. Assuming risk neutrality, the exposure of the insured should be discounted by the probability of the plaintiff winning. However, as the Comment to Restatement § 24 recognizes, “insureds generally are more risk averse than insurers.” RESTATEMENT OF THE LAW OF LIAB. INS. § 24 cmt. a (AM. LAW INST., Discussion Draft 2015). Because of that risk aversion, I have chosen not to discount the exposure faced by the insured, which I believe captures the attitude of most insureds facing excess exposure when they receive a policy limits offer. I also believe that this is consistent with the case law. For example, one of the factors for equal consideration in *Brown* is “the amount of financial risk to which each party

interest of the insurer, then there is a duty to settle. Here are the formulae:

Insurer's interest:

$SO - EV > EE - PL$ (insured's interest) = no duty to settle

Insurer's interest:

$SO - EV \leq EE - PL$ (insured's interest) = duty to settle

Applying the formulae to illustration 1a shows that, by accounting for the "first-dollar" interest of the insured, EC is more protective than DTL. Because the EV of \$40,000–\$60,000 is less than the SO of \$100,000, under DTL the insurer has no duty to accept the settlement. In contrast, under EC the insurer would have a duty to accept the settlement. The insured's interest is \$100,000 (\$200,000 excess exposure - \$100,000 policy limit), which is greater than the insurer's interest of \$40,000–\$60,000 (\$100,000 SO - EV of \$40,000–\$60,000).

Illustration 1a shows that, by recognizing the "first-dollar" interest of the insured, EC provides greater protection for insureds at higher levels of excess exposure. It is worth noting that many cases finding a breach of the duty to settle involve very high levels of exposure, multiples of the coverage provided. In *Crisci*, for example, the ultimate exposure was \$100,000, which was ten times the policy limits of \$10,000.³⁶ While *Crisci* is a good example of the application of the DTL test because the EV was much greater than the \$10,000 settlement offer, if we were to assume a probability of just 5%, the EV would be only \$5000, so that an insurer would be permitted to reject the policy limits settlement offer of \$10,000.

is exposed." *Brown v. Guarantee Ins. Co.*, 319 P.2d 69, 75 (Cal. Dist. Ct. App. 1957). The court does not discount this risk by the probability of it occurring.

I recognize that this could result in some inefficiency by creating an incentive for insurers to pay settlements that are not optimal under an assumption of risk neutrality. I expect that most insureds would be willing to pay a little higher premium to cover such inefficiency. However, I do not expect that there would be very much inefficiency. Insurers are archetypal rational actors. Even if they face excess exposure, because they are likely to be risk neutral (or at least much closer to it), they are not likely to settle above a case's true expected value. They will choose to litigate. Over a large number of cases, assuming that the insurer has made the correct assessment of the probability, the insurer will end up paying the same amount as if it settled at the expected value. For example, using Tentative Draft No. 2 illustration 1 and the lower probability of 20%, the EV is \$30,000. If the insurer had one hundred such cases, and settled them all for the EV, it would pay \$3,000,000 (\$30,000 x 100). On the other hand, if the insurer litigated all one hundred cases, it would win eighty and pay nothing for those. It would lose twenty of the cases and for those would pay a total of \$3,000,000 (20 x \$150,000).

There is a scenario under which EC would protect the insured more than DTL even if the probability of the loss is factored in. See *infra* text accompanying note 37.

36. *Crisci v. Sec. Ins. Co. of New Haven*, 426 P.2d 173, 176 (Cal. 1967) (in bank).

Using EC, an insurer that rejected the settlement offer based on a 5% probability of a plaintiff's verdict would be liable for the full amount. The insured's interest of \$90,000 (EE \$100,000 - PL \$10,000) would far outweigh the insurer's interest in saving \$5000 (SO-EV).

EC also provides greater protection for insureds when the probability of a plaintiff's verdict is high, but the amount of damages creates a relatively small excess exposure. These would be cases where liability is fairly strong, but where there is a good chance that the damages will not be much more than policy limits. Another change to illustration 1, to create illustration 1_b, will demonstrate this kind of case. Suppose that instead of plaintiff's probability of winning being 20%–30%, it was 50%. This raises the EV to \$75,000 (50% x \$150,000), which is lower than the settlement offer of \$100,000. Under DTL, it would be reasonable to reject a \$100,000 offer for a case worth only \$75,000. Under EC, however, the insurer would be liable for the excess if it were to reject the settlement offer. The insurer's interest to reject the settlement to save \$25,000 (SO-EV) is much less than the insured's interest of avoiding the \$50,000 excess exposure (EE-PL).³⁷

The difference between EC and DTL is illustrated by the case of *General Accident Fire & Life Assurance Corp. v. Little*.³⁸ That case concerned an accident between a car and a motorcycle.³⁹ The rider of the motorcycle, a seventeen-year-old, was killed.⁴⁰ The driver of the car had \$5000 of liability insurance.⁴¹ The plaintiff offered to settle the case for \$4000, but the insurer rejected this offer.⁴² The jury returned a verdict for the plaintiff in the amount of \$17,500.⁴³

The primary defense of the driver was contributory negligence.⁴⁴ The driver had stopped at an intersection because gridlock prevented her from crossing.⁴⁵ A truck blocking the way let her car through, and when she passed into the open lane in the intersection, she pulled in front of

37. I have chosen not to discount the insured's interest by the probability of an adverse verdict because of the general risk aversion of insureds. *See supra* note 35. However, with this example, the EC test would result in liability for the insurer *even if the insured is assumed to be risk-neutral*. The probability of an adverse result is 50%, and if the insured's interest is discounted to account for that probability, the insured's interest will be \$25,000 (\$50,000 excess x 50%). This is the same as the insurer's interest in saving \$25,000, and when the interests are equal, most courts would require the insurer to protect the insured.

38. 443 P.2d 690 (Ariz. 1968) (in banc).

39. *Id.* at 696.

40. *Id.* at 691.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 695.

45. *Id.*

the motorcycle that was traveling approximately fifty-five to sixty miles per hour.⁴⁶ The driver “was lying down on the motorcycle, bent forward from the waist.”⁴⁷ The motorcycle did not slow down; there were no skid marks from the motorcycle.⁴⁸ Both the attorney for the insureds and for the claimant recognized that contributory negligence was an issue in the case.⁴⁹ Because of this defense, the defense attorney felt there was a good chance of winning the case.⁵⁰ He put the probability of a defense verdict at 60%.⁵¹ The claims manager thought that the odds of winning were slightly better; he evaluated the case as 75% likely to result in a defense verdict.⁵²

The case also raised an issue about the scope of the damages. The decedent earned \$25–\$30 per week when he was killed and left no dependents.⁵³ The defense counsel believed that under the Arizona wrongful death statute, the jury might mitigate damages because of the way he was riding the motorcycle at the time of the accident.⁵⁴ Although the complaint sought \$100,000 in damages, the defense counsel projected that if the plaintiff were to recover, the verdict would be somewhere between \$3000 and \$7500.⁵⁵ The claims manager thought that the verdict might be as high as \$10,000.⁵⁶ Thus, the insurance company thought it was likely to win the case outright, and, even if it lost, the verdict would be somewhere between \$3000 and \$10,000.⁵⁷

Using DTL, the settlement offer of \$4000 would be unreasonable and the insurer would not be liable for the excess verdict. The attorney estimated maximum damages at \$7500 with a probability of 40%, leading to an expected value at the high end of \$3000 (the low end was \$1200). The claims manager projected a higher damages award, \$10,000 maximum, but a lower probability of 25%, resulting in an expected value of \$2500. This is consistent with the insurer’s offer to settle the case for \$2500.⁵⁸ A reasonable person with sole responsibility for the full amount

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 695–96.

51. *Id.* at 696.

52. *Id.* at 695–96.

53. *Id.* at 696.

54. *Id.*

55. *Id.* at 696–97.

56. *Id.* at 696.

57. *Id.*

58. *Id.* at 698.

of the potential judgment (\$7500 or \$10,000) would not agree to settle for \$4000 where the probability was only 25–40%.

One could work to alter these numbers to justify ruling for the insureds under the DTL test. For example, one could use the lawyer's estimate of probability (40%) and the claims manager's estimate of exposure (\$10,000) to arrive at an expected value of \$4000, which would make the offer of \$4000 reasonable. Alternatively, one could challenge the estimated exposure as unduly optimistic, which in light of the \$17,500 judgment is pretty easy to do in hindsight.⁵⁹

However, these arguments are not very convincing in light of the factual record developed in the case and the court's reasoning. The defense counsel testified that in making his evaluation of the settlement offer the policy limits had no role.⁶⁰ In other words, in evaluating the settlement, defense counsel literally disregarded the limits.⁶¹ In so doing,

59. The court noted that the insurer "and its attorney were being less than realistic when they estimated a potential verdict at a low of \$3,000 and a high of \$10,000." *Id.* at 697. The court noted that there was no "statutory ceiling" on wrongful death damages in Arizona, and that the plaintiff's lawyer testified that his estimate of the value of the case was between \$10,000 and \$30,000. *Id.*

60. *Id.* at 696. The court noted:

This testimony in substance had the effect of showing that neither the claims manager nor the attorney took into consideration the policy limits in evaluating the claim, e.g.:

Q "Then you are saying that it didn't make any difference to your company that these people had only a \$5,000 policy in determining what this case should be settled for, is that right?"

A [Claims Manager] "That is right." * * *, and also

* * *

A "We don't believe that limits are a factor in determining the value of a file. A broken leg is worth the same to me whether I have a \$5,000 or a \$100,000 policy."

* * *

Q "I ask you whether or not the policy limits of the Allens played any part in your evaluation of the value of the case?["]

A [Attorney] "You mean the amount of the policy?"

Q "Yes."

A [Attorney] "No."

Q "Has it ever?"

A "No."

Id. (alterations in original).

61. Of course, a trier of fact could conclude that the defense counsel was not credible or was not representative of a reasonably prudent person or a reasonably prudent insurer. However, there was no discussion of credibility or representativeness in the case. Although noting that the estimates were "conservative and self-serving," the court noted that "the competency of defense counsel w[as] not challenged by" the insured. *Id.* at 698. A reasonable person or reasonable insurer faced with this case would very likely seek and follow the advice of competent defense counsel. The court also "agree[d] with the courts and legal writers who have noted that even with the expertise and experience afforded liability

however, the court found that the insurer and the defense counsel had failed to give equal consideration to the interests of the insureds.⁶² The court focused on the excess exposure of the insured, noting that the insurer “recognized and told their insureds that in the event [of] a verdict . . . it could be greatly in excess of \$5,000.”⁶³ This excess exposure of the insureds was compared to the modest benefit to be gained by the insurer in rejecting the settlement. The court noted “that in accepting the settlement offer of \$4,000 [the insurer] would be paying only \$1500 more than its \$2500 offer of settlement.”⁶⁴ In light of this comparison, the court did “not find it difficult to sustain the jury’s finding,” and concluded that the insurer failed to “give equal consideration to its own and the insured’s comparative hazards.”⁶⁵

The *Little* court’s analysis shows the application of the EC test in accord with the formula articulated above:

Insurer’s interest:

$$SO-EV \leq EE-PL \text{ (insured’s interest) = duty to settle}$$

Here, the insurer’s interest was only \$1500 because the SO was \$4000 and the insurer had already offered \$2500, which is consistent with the EV from the claims manager (25% of \$10,000). Although the precise figure is not given for the damages part of the formula, it was characterized as “greatly in excess of \$5,000,” and was identified by the lawyer as \$7500 and by the claims manager as \$10,000.⁶⁶ Using the lawyer’s figure (which is more beneficial to the insurer), the insureds’ interest was \$2500 (\$7500 - \$5000 policy limits), which is \$1000 more than the insurer’s interest of \$1500. Using the claims manager’s figure, the insureds’ interest was \$5000 (\$10,000 - \$5000), which is more than three times the insurer’s interest of \$1500. The actual damages were even higher, \$17,500. If that figure is used, the insureds’ interest was \$12,500 (\$17,500 - \$5000), which is more than eight times the insurer’s interest of \$1500.

carriers and competent trial lawyers they yet are not endowed with the gift of being able to accurately prophecy a jury verdict.” *Id.* at 697.

62. *Id.* at 698.

63. *Id.* at 697.

64. *Id.* at 698.

65. *Id.*

66. *Id.* at 696–97.

B. EC Considers Insurer Behavior Toward the Insured

A second way that EC differs from DTL is that it explicitly recognizes the insurer-insured relationship and that the insurer has duties to perform in ways that protect the insured's interest. The DTL test, by collapsing the interests of the insurer and the insured into a unitary reasonable person or reasonable insurer, does not account for the duties owed by the insurer to the insured. For example, an insurer owes a duty to reasonably communicate settlement offers to the insured. This duty only makes sense in the context of an insurer-insured relationship. Under DTL, where there is a single reasonable person or reasonable insurer, there is no one with whom to communicate. It may be that this duty can simply be tacked on to the DTL test, as section 24 of the Restatement seems to do in comment i,⁶⁷ but it is unclear how that factor is justified under a DTL paradigm. In addition, it is unclear how the failure to communicate would affect the DTL calculation. Suppose an insurer fails to communicate an unreasonable offer; does that breach override the DTL test and result in liability?⁶⁸

1. The Insurer's Duty to Communicate Settlement Offers

The EC test more easily incorporates the duty of the insurer to communicate settlement offers to the insured. The insurer's failure to communicate shows a failure to give equal consideration to the interests of the insured,⁶⁹ where, for example, the insurer wants to retain greater control than the insured over the litigation. Admittedly, a single instance of a failure to communicate, on its own, may not be enough to result in a finding of a breach of the duty to settle,⁷⁰ but when combined with other

67. See RESTATEMENT OF THE LAW OF LIAB. INS. § 24 cmt. i (AM. LAW INST., Discussion Draft 2015).

68. Illustration 5 suggests that it would not override a rejection of an unreasonable settlement offer, at least where "there is conclusive evidence that the . . . demand was outside the range of reasonableness." *Id.* § 24 cmt. i, illus. 5. The breach of the duty to communicate therefore creates a kind of rebuttable presumption in favor of a duty to settle, which may have some bearing at the margins, but does not impose liability if an insurer can show that the settlement offer was unreasonable. This subordinates the duty to communicate to the duty to accept reasonable settlements.

69. See Douglas R. Richmond, *Insurance Bad Faith and Insurers' Duty to Communicate with Insureds Regarding Settlement*, 49 TORT TRIAL & INS. PRAC. L.J. 499, 510 (2014) ("As a general rule, an insurer's failure to inform its insured of a policy limits settlement offer will perhaps be some evidence that the insurer was not considering the insured's interests equally with its own."); see also *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 325–26 (Nev. 2009).

70. See, e.g., *Northfield Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 545 N.W.2d 57, 62 (Minn. Ct. App. 1996) ("While the failure to communicate a settlement offer may be one

evidence tending to show that the insurer was acting in its own interest, a factfinder could find a breach of the duty to settle even if the settlement offer appears unreasonable under the DTL test.

The difference between the DTL and EC tests when applied to a failure to communicate a settlement offer is illustrated by *Northfield Insurance Co. v. St. Paul Surplus Lines Insurance Co.*⁷¹ In that case, the claimant suffered a severe and permanent brain injury while hospitalized.⁷² She alleged that her injury was caused by hospital personnel failing to administer a scheduled dose of a prescribed drug and by the failure of insured's product that was used to resuscitate the claimant.⁷³ The claimant alleged that a part of the insured's product fell to the floor during the emergency and that the insured failed to warn the users of the product about its proper use.⁷⁴ The insured had \$1,000,000 of liability coverage. The insurer initially valued the claim at \$150,000, and rejected a \$1,000,000 settlement offer.⁷⁵ The insurer and the defense counsel estimated that there was a 75–90% chance of the insured prevailing at trial.⁷⁶ During the trial, the claim against the hospital was settled for \$2,600,000.⁷⁷ Thereafter, claimant's counsel offered to settle with the physician and the insured for \$50,000 each.⁷⁸ Defense counsel conveyed the settlement offer to the insurer, which refused to offer any amount in settlement at that point, but did not convey the offer to the insured or to the excess insurer.⁷⁹ The claimant obtained a \$2,700,000 verdict against the insured, of which \$1,000,000 was paid by the insurer and the remaining \$1,700,000 was paid by the excess insurer.⁸⁰

The Court of Appeals of Minnesota applied a version of DTL⁸¹ to reverse the trial court's finding that the insurer had breached its duty to

factor in determining whether an insurer has breached its duty of good faith, it may not constitute a breach in itself."); see also Richmond, *supra* note 69, at 501 n.9 ("The majority rule holds that an insurer's failure to communicate with an insured regarding settlement in a case resulting in an excess verdict is but one factor to consider in deciding whether the insurer should be liable for bad faith.").

71. 545 N.W.2d 57.

72. *Id.* at 58.

73. *Id.*

74. *Id.* at 58–59.

75. *Id.* at 58.

76. *Id.* at 59.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Minnesota is a jurisdiction consistently associated with the DTL test. See RESTATEMENT OF THE LAW OF LIAB. INS. § 24 reporters' note c (AM. LAW INST., Discussion Draft 2015) (citing *Herges v. W. Cas. & Sur. Co.*, 408 F.2d 1157, 1164 (8th Cir. 1969) (applying Minnesota law)).

settle. The trial court found that the failure to inform the insured (and excess insurer) of the \$50,000 settlement offer was a breach of the insurer's duty and showed that the insurer failed "to give equal consideration to the interests of" the insured (and its subrogees), and was based on the adjuster's dislike of the claimant's attorney, the insurer's \$150,000 reserve, and the insurer's failure to advise the insured and the excess insurer of the settlement with the hospital.⁸² The court of appeals found that under Minnesota law an insurer is not liable for failure to accept a settlement "if it in good faith believed that its insured was not liable," or "if it believed in good faith that a settlement at the proposed figure which it was required to contribute was greater than the amount the jury would award as damages."⁸³ Even though the court found it "troubling" that the amount of the liability (\$2,700,000) was so much greater than the settlement offer (\$50,000), it deferred to the Minnesota Supreme Court to make any changes to the rules for the duty to settle.⁸⁴ Because there was no dispute that the insured was not clearly liable, which was supported by a specific finding by the trial court,⁸⁵ the court of appeals, in applying the rule, held that the trial court erred in finding the insurer liable.⁸⁶

82. *Northfield Ins. Co.*, 545 N.W.2d at 60.

83. *Id.* at 61 (emphasis omitted) (quoting *Boerger v. Am. Gen. Ins. Co. of Minn.*, 100 N.W.2d 133, 135 (Minn. 1959)). Although this is not literally the DTL test, it is similar. The consideration of whether the insured is liable is consistent with the probability of winning or losing, and the comparison of the settlement amount with the expected damages is consistent with consideration of potential liability. This articulation of the test is more simplistic than the one used by the Restatement; it does not calculate the expected value of the case by multiplying the likely damage by probability of a plaintiff's verdict. However, an insurer that in good faith believes the insured is not liable is similar to a reasonable person that disregards the policy limits and rejects a settlement offer because she thinks that the insured is not liable.

It is noteworthy that Judge Mansur filed a dissenting opinion which rejected the majority's characterization of Minnesota law. He argued for the EC test: "The prevailing concern should be whether the insurer gave 'equal consideration' to the interests of the insured (or any subrogee) in rejecting a settlement offer within the policy limits." *Id.* at 63 (Mansur, J., dissenting). Concerning the "clearly liable" standard, Judge Mansur suggested that

any language purporting to require the insured's clear liability could almost be considered dicta, because in no case has such a standard been necessary to the outcome—i.e., in no Minnesota case, has an insurer acted in bad faith in considering a settlement, yet been relieved of liability to the insured or an excess insurer because the insured was not clearly liable in the underlying suit.

Id.

84. *Id.* at 61–62.

85. *Id.* at 61.

86. *Id.*

Because of the large difference between the proposed settlement (\$50,000) and the ultimate judgment (\$2,700,000), it can be argued that the DTL rule as articulated in section 24 of the Restatement would have resulted in a different outcome. The ultimate judgment was fifty-four times greater than the settlement. Consequently, if we assume that damages of \$2,700,000 were expected, the likelihood of prevailing would have to have been greater than 98% to justify rejection of such a low settlement. It is hard to imagine such a strong case.⁸⁷

On the other hand, we do not have information about the expected damages so we cannot calculate the expected value of the claim. All we know is that one defendant settled during trial for \$2,600,000 and that the claimant was willing, at that point, to settle for \$50,000 from each of the two remaining defendants. Such an offer suggests that most, if not all, of the expected damages had been recovered by the first settlement. If we assume that the expected remaining damages were \$150,000 from the insured, and that the insured only had a 10–25% chance of losing, the expected value would have been between \$15,000 and \$37,500, which would have made the \$50,000 settlement offer unreasonable. Alternatively, the \$2,600,000 settlement could be used to support an inference that there was a very low probability of recovery. If we assume that the claimant had expected additional damages of \$2,700,000 from the insured, the offer of \$50,000 represents less than a 2% probability of recovery. If the true expected damages were anything less than \$2,700,000 (without hindsight bias), the offer of \$50,000 would have been unreasonable.⁸⁸

The point of my analysis is not to determine whether the DTL test would necessarily result in a finding of breach of the duty to settle, but rather how the DTL test is different from the EC test. In order to do a DTL analysis, we really need to know the probability of losing and the

87. If the assumption about the expected damages is correct, then the failure to communicate the settlement offer would create a presumption of breach of the duty to settle that would be virtually impossible to rebut. As noted above, *see supra* note 68, comment i creates a kind of rebuttable presumption of unreasonableness when the insurer fails to communicate a settlement offer. *See* RESTATEMENT OF THE LAW OF LIAB. INS. § 24 cmt. i (AM. LAW INST., Discussion Draft 2015).

88. This analysis shows that an insurer might be able to overcome the presumption of unreasonableness suggested by the Restatement for the failure to communicate a settlement offer. *See* RESTATEMENT OF THE LAW OF LIAB. INS. § 24 cmt. i (AM. LAW INST., Discussion Draft 2015). The insurer could argue that both the probability of losing and/or the expected damages were so low that its rejection of the settlement offer was reasonable. Because we cannot determine expected value of the case at the time of the settlement offer, it is impossible to know whether the insurer would be successful.

expected damages at the time of the settlement offer.⁸⁹ The analysis must focus on these factors. The EC analysis, in contrast, focuses on the relationship between the insurer and the insured, whether the insurer fulfilled its duty to communicate, and the consequences of a failure of the duty to communicate. Using that approach, the trial court in *Northfield Insurance Co.* found that the insurer had breached the duty to settle. The insurer failed to communicate the \$2,600,000 settlement with the hospital, which shows the hospital conceded a significant risk of a substantial damages award. In addition, the insurer failed to communicate a settlement offer of \$50,000, which was only 5% of the applicable primary liability limits. Under such circumstances, it is very reasonable to conclude that the insured, especially with the help of the excess insurer, would have agreed to the settlement or perhaps would have convinced the primary insurer to accept. But the insured and the excess insurer never got this chance.

The DTL standard also differs from EC in those cases where a settlement does not turn on the amount of the offer. *Allstate Insurance Co. v. Miller* provides an example of such a case.⁹⁰ The claim arose out of an automobile accident.⁹¹ Shortly after receiving a letter from the claimant's attorney, the insurer offered to settle the case for the \$25,000 policy limits as claimant's damages had already exceeded that amount.⁹² After claimant replaced his counsel and received substantial medical treatment, the claim was subject to a \$8325 attorney fee lien and a \$67,564.84 hospital lien.⁹³ Although claimant's counsel declined an offer of a check for policy limits made jointly payable to claimant, his lawyer, and the two lienholders, Allstate prepared such a check and sent it to claimant's counsel.⁹⁴ The claimant rejected the check, but offered to release the insured from all liability if Allstate would agree to file an interpleader action with the \$25,000.⁹⁵ Allstate initially declined, but after suit was filed reconsidered.⁹⁶ By then the claimant was no longer

89. Even though this information was not available, the court of appeals concluded that the insurer did not breach because the insured was not clearly liable. *Northfield Ins. Co.*, 545 N.W.2d at 61. The court considered probability of recovery in the abstract without regard to the amount of damages. Because it was not probable that the insured would be liable, the court held that the insurer did not have a duty to settle. *Id.* at 63.

90. 212 P.3d 318 (Nev. 2009).

91. *Id.* at 323.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

willing to agree to such a settlement.⁹⁷ Claimant obtained a favorable verdict for \$703,619.88.⁹⁸

One of the insured's theories for recovery for the excess beyond his policy limits was that the insurer had breached its duty to communicate the settlement offer.⁹⁹ The Nevada Supreme Court endorsed this theory, finding that "[t]he right to control settlement discussions creates the duty of good faith and fair dealing during negotiations."¹⁰⁰ The court "conclude[d] that an insurer's failure to adequately inform an insured of a settlement offer is a factor for the trier of fact to consider when evaluating a bad-faith claim."¹⁰¹ "This duty to adequately inform an insured arises from the special relationship between the insured and the insurer" and "at a minimum, an insurer must equally consider the insured's interests and its own."¹⁰²

On the facts of the case, the failure-to-inform theory created a question of fact for the jury.¹⁰³ The insured testified that Allstate had misinformed him about the settlement.¹⁰⁴ He was told that the claimant "had not rejected" the policy-limits offer, but *was not told* that the claimant "had conditionally rejected" the offer unless Allstate agreed to file an interpleader" action.¹⁰⁵ In addition, the insured "testified that he would have paid [the] costs [of the interpleader action] and that he had the financial capability to do so."¹⁰⁶ Consequently, the insured's "failure-to-inform theory [was] a viable basis for a bad-faith claim against Allstate. Allstate was required to give the [insured]'s interest equal consideration, which required Allstate to adequately inform [the insured] of [claimant]'s interpleader settlement offer."¹⁰⁷

This kind of factual scenario is not very well suited to the DTL standard. Because the insurer had already offered policy limits, it had done all that was really required under the test. Although this case is somewhat analogous to a case in which the settlement offer was more than policy limits, for which the Restatement's version of the DTL

97. *Id.*

98. *Id.*

99. *Id.* at 324.

100. *Id.* at 324-25 (citing Steven Plitt et al., *Insurer's Duty to Defend: Nature, Commencement, and Termination*, in 14 COUCH ON INSURANCE §§ 200:1, 203:1 (3d ed. 2005)).

101. *Id.* at 325.

102. *Id.* (citing *Ainsworth v. Combined Ins. Co. of Am.*, 763 P.2d 673, 676 (Nev. 1988); *Love v. Fire Ins. Exch.*, 271 Cal. Rptr. 246, 253 (Ct. App. 1990)).

103. *Id.* at 327.

104. *Id.* at 325.

105. *Id.* (emphasis added).

106. *Id.* at 328.

107. *Id.* at 333.

standard recognizes a duty to contribute,¹⁰⁸ the DTL test cannot accommodate the additional dimension of the settlement beyond the amount to be paid, the request for the initiation of an interpleader action. Under the DTL test, the insurer's duty is the same as a reasonable person or an insurer without limits. But if there were no applicable limits, the interpleader action, which is designed to address multiple claims on a limited fund,¹⁰⁹ would make no sense. In addition, even if the particular request beyond policy limits could be accommodated under the hypothetical DTL scenario, section 24 notes that for excess of limits cases, "the insurer may satisfy the duty by offering the policy limits" and that an "insurer may also make the insured aware of the option to pay the amount of the settlement in excess of the policy limits and explain why the insurer has concluded that settlement would be reasonable."¹¹⁰ This seems to suggest that an insurer has fulfilled its obligations by paying settlement limits; although an insurer may inform the insured of the option to pay an additional amount, the Comment does not provide that an insurer has a duty to inform the insured of that option.

2. The Insurer's Duty to Investigate

A second example of a duty that arises out of the insurer-insured relationship is the duty to investigate. This example does not illustrate the difference between DTL and EC as clearly as the duty to communicate, but there are some circumstances under which an insurer's duty to investigate may be different when viewed in light of EC when compared with DTL. Suppose, for example, that the available evidence provides a strong defense. A reasonable person without liability limits may choose to rely on that evidence and not undertake extensive discovery concerning that evidence in order to avoid the expense and the risk of weakening the defense. But the considerations may be different when one is undertaking an investigation for the benefit of another. Insurers' duty to investigate has been described as a quasi-fiduciary

108. RESTATEMENT OF THE LAW OF LIAB. INS. § 24 cmt. j (AM. LAW INST., Discussion Draft 2015).

109. See generally Richard D. Freer, *Interpleader*, in 4 MOORE'S FEDERAL PRACTICE § 22:02 (Daniel R. Coquillette et al. eds., 3d ed. 2015); see also 28 U.S.C. § 1335 (2012).

110. RESTATEMENT OF THE LAW OF LIAB. INS. § 24 cmt. j (AM. LAW INST., Discussion Draft 2015). It may be that this will be addressed in the bad faith chapter that has not yet been drafted. The presumption of a reasonable settlement offer when an insurer fails to communicate, see *id.* § 24 cmt. i, illus. 5, would not apply to this situation because the duty is limited "to keep[ing] the insured informed of *within-limits* offers." *Id.* § 24 cmt. i (emphasis added).

duty,¹¹¹ and insureds may rely on their insurers' litigation expertise and comparative advantage.

This example is illustrated by *Betts v. Allstate Insurance Co.*,¹¹² a case concerning a traffic accident at 1:30 AM, which left the claimant incompetent due to severe brain injuries.¹¹³ The insured, a seventeen-year-old, claimed that she was driving the speed limit and had a green light at the time of the accident, and that the claimant had run a red light, causing the accident.¹¹⁴ This was initially confirmed by a witness in her statement to the police, but in a subsequent interview the witness gave a contradictory statement causing the insurer to conclude that she was unreliable.¹¹⁵ Nevertheless, the insurer relied on the defense that the insured was not liable, and rejected a \$100,000 policy limits offer made during the trial and again during jury deliberations.¹¹⁶ The jury returned a net verdict of \$450,000 in favor of the claimant.¹¹⁷ In the subsequent bad faith action against the insurer, the trial court ruled in favor of the insured and awarded compensatory and punitive damages.¹¹⁸ The California Court of Appeals affirmed.¹¹⁹

The insurer's investigation aggressively sought to support the insured's claim that she was not at fault. When the accident reconstruction report concluded that the insured was driving 5–10 miles per hour over the forty miles per hour speed limit, and that the claimant was only traveling 15–20 miles per hour, the claims supervisor urged the expert to change the report. A second report reached the similar conclusion that the claimant was traveling at a lesser rate of speed than the insured.¹²⁰ The insurer then ordered a third report which concluded that the insured's speed may have been as low as thirty miles per hour (ten miles per hour under the speed limit), but the author of this report admitted to defense counsel "*that a scientifically acceptable basis for the calculation was not possible.*"¹²¹ After the defense counsel brought this to

111. See, e.g., *Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 414–15 (Colo. 2004) (en banc); *Powers v. United Servs. Auto. Ass'n*, 962 P.2d 596, 602 (Nev. 1998); *Indus. Indem. Co. of the Nw. v. Kallevig*, 792 P.2d 520, 526 (Wash. 1990) (en banc).

112. 201 Cal. Rptr. 528 (Ct. App. 1984).

113. *Id.* at 532.

114. *Id.* at 533.

115. *Id.*

116. *Id.* at 537.

117. *Id.* The verdict was for \$600,000, but was reduced to \$450,000 because of claimant's comparative fault. *Id.* at 532 n.1.

118. *Id.* at 532. The insured also sued defense counsel for malpractice. *Id.* She prevailed on that claim as well, although the court reduced the damages on remittitur. *Id.*

119. *Id.* at 546.

120. *Id.* at 533–34.

121. *Id.* at 534.

the insurer's attention, the insurer tried to hide the report by returning it to the expert, asking that the insurer's name be removed from the report, and by placing it in the hands of a law firm so that it could be characterized as work product.¹²²

This kind of behavior is archetypal bad faith. While it is clearly unreasonable, this behavior shows the difference in perspective between the DTL and EC standards. The DTL test collapses the separate interests of the insurer and insured into a single interest—that of a reasonable person or insurer. This kind of alignment of interests can be a problem. A person or insurer who truly disregards the policy limits and faces the full exposure of a claim will have even more incentive to use aggressive tactics than a person or insurer whose interests are limited. The EC test, in contrast, keeps the interests of the insured and insurer separate from one another. In doing so, it allows a court to determine that overly aggressive tactics are inappropriate because they do not protect the interests of the insured. The insurer, which controls the defense of the case, has an obligation to protect the interests of the insured even if the insured claims that she did not cause the accident.

On the other hand, under the particular facts of *Betts*, the DTL test could be used to justify the result. At one point the claims manager estimated that there was only a 20% chance of losing, but after hearing the testimony of the plaintiff's expert, that estimate was changed to 50%.¹²³ If we use those probabilities and the upward end of the range of possible damages, \$1,000,000, the case had an expected value between \$200,000 and \$500,000, well above the \$100,000 policy limits offer.

However, some estimates of the risk of losing were as low as 0–5%.¹²⁴ If those lower probabilities are applied to the amount of damages determined by the jury, \$600,000,¹²⁵ the expected value of the case was somewhere between \$0–\$30,000, well below the settlement offer of \$100,000. Consequently, it is still possible that the DTL test may not

122. *Id.* This was not the only misbehavior of the insurer. Instead of obtaining medical information from the claimant's counsel, the insurer, which also provided medical coverage through the claimant's own policy, used a "back door" technique to get access to the claimant's medical records over her husband's objections, and then altered the file documents to try to cover-up. *Id.* at 534–35. Furthermore, this case also involved the failure to communicate settlement offers to the insured, including one during trial that defense counsel and the regional claims representative realized should be accepted. *Id.* at 537.

123. *Id.* at 535.

124. *Id.* at 532.

125. *Id.* at 532 n.1.

result in a verdict for the insured notwithstanding the bad behavior of the insurer.¹²⁶

The EC test more easily justifies the holding in favor of the insured. The insurer had a duty to protect the insured even though she claimed that she was not at fault. Its overly aggressive tactics did not protect the interests of the insured. This can be shown quantitatively by using the same formula as in the previous section. Even if we assume a very low probability of 0–5%, the insurer's interest in winning the case was the difference between the policy limits and the expected value, so somewhere between \$70,000 and \$100,000 (PL of \$100,000 - EV of \$0 = \$100,000; PL of \$100,000 - EV of \$30,000 ($\$600,000 \times .05$) = \$70,000). In contrast, the insured's interest was the difference between the limits and any excess verdict, so between \$500,000 and \$900,000, assuming damages of \$600,000 to \$1,000,000 (EE of \$600,000 - PL of \$100,000 = \$500,000; EE of \$1,000,000 - PL of \$100,000 = \$900,000).¹²⁷ When this quantitative perspective on EC is added to the failure to properly investigate, it is easy to see how the court would hold in favor of the insured.

C. *EC More Readily Accommodates Multiple Claimant Situations*

A third way that EC differs from DTL is in the potential for handling the difficult situation where there are multiple claimants. Suppose, for example, that there are two claimants each making claims for \$150,000 with 80% probability of recovering. Further, suppose that the policy limits are \$100,000 and that each claimant has offered to settle for the full policy limits. The expected value for each claim would be \$120,000, so under the DTL test, both offers are reasonable (EV>SO). But this would obligate the insurer to pay \$200,000 in contradiction to the express policy limits of \$100,000. Of course, the duty of good faith does not require such an outcome.¹²⁸ Alternatively, an insurer might accept the first reasonable

126. This could be true even with the presumption of breach of the duty to settle based on a procedurally improper investigation. The presumption can be rebutted by conclusive evidence that the settlement offer was unreasonable. See *supra* note 68. A jury might find that conclusive evidence showed that the expected value was below the settlement offer.

127. The result is further supported by the EC test because of the insurer's failure to communicate the settlement offer and the recommendations of defense counsel and the claims adjuster who both believed that she should have accepted the \$100,000 offer during trial. See *Betts*, 201 Cal. Rptr. at 537.

128. See Douglas R. Richmond, *Too Many Claimants or Insureds and Too Little Money: Insurers' Good Faith Dilemmas*, 44 TORT TRIAL & INS. PRAC. L.J. 871, 877 (2009) ("Insurers have no duty to pay more than the applicable liability limits of their policies to settle claims or suits against their insureds.").

offer it receives, and then argue that the second claim is the responsibility of the insured because the policy has been exhausted. While this approach may be easy to apply, it would allow the insurer to protect its own interest of getting out of a case at the expense of the insured's interest in a global settlement.¹²⁹

EC has the flexibility to be adapted to the multiple claimant situation.¹³⁰ The insured has an interest in settling both claims within policy limits, if possible. An insurer, seeking to protect that interest, perhaps should not accept the first reasonable settlement that exhausts the policy and thereby puts the insured at risk for the second claim.¹³¹ Faced with multiple claims, the insurer could seek a global settlement within policy limits,¹³² could counteroffer a portion of limits to each claimant,¹³³ or could reach an agreement with the insured as to the best strategy to protect both the insurer's and insured's interests,¹³⁴ such as to focus on the strongest claim first,¹³⁵ or to share with the insured in the funding of the settlements.

A good illustration of the multiple claimant problem is seen in *Peckham v. Continental Casualty Insurance Co.*¹³⁶ In that case, the two claimants were a man, who was seriously injured as a passenger in the insured's car, and his wife, whose claim was for loss of consortium.¹³⁷ The policy limits in the case were \$10,000 per person and \$20,000 per

129. See, e.g., *Brown v. U.S. Fid. & Guar. Co.*, 314 F.2d 675, 681–82 (2d Cir. 1963) (holding that whether an “over-eager settlement” with two of four claimants was bad faith was a question for the jury).

130. Because of the wide variety of circumstances in which multiple claimant cases could arise, “there is no one ‘right way’” to address such cases. Richmond, *supra* note 128, at 892.

131. A scenario can be imagined where it would be in the interests of both the insurer and the insured to fully settle one claim and then to litigate the second, or to have the insured settle with its own resources. For example, if the first claim is much stronger on the facts or has a much more sympathetic plaintiff, the insured may want to use the limited funds available to settle that claim and then focus its own efforts and resources on the weaker second claim.

132. See Richmond, *supra* note 128, at 886 (stating that *Farmers Insurance Exchange v. Schropp*, 567 P.2d 1359 (Kan. 1977) “is generally understood to stand for the principle that in a multiple claimant case where the insurer knows all claimants and their representatives, the duty of good faith ought to compel it to attempt to facilitate a global resolution of the competing claims before settling with individual claimants or filing an interpleader action”).

133. *Voccio v. Reliance Ins. Cos.*, 703 F.2d 1, 3 (1st Cir. 1983) (finding that a proposed fifty-fifty allocation of policy limits was not bad faith); see also Richmond, *supra* note 128, at 881–82 (“Some courts go so far as to suggest that insurers must attempt to settle as many claims as possible within policy limits.”).

134. See Richmond, *supra* note 128, at 894.

135. *Id.* at 884 (discussing a “comparative seriousness rule”).

136. 895 F.2d 830 (1st Cir. 1990).

137. *Id.* at 832.

accident, with an additional \$10,000 per person for underinsured motorist coverage, \$5000 for medical coverage, and \$2000 for no-fault protection.¹³⁸ The insurer promptly offered to settle for “full policy limits,” but understood that to be \$27,000 because the wife’s loss of consortium claim was derivative of the husband’s claim and was not a separate claim.¹³⁹ The plaintiffs’ counsel offered to settle for \$47,000, treating the loss of consortium claim as a separate injury.¹⁴⁰ Plaintiffs’ counsel rejected the \$27,000 offer, but proposed to settle just the husband’s claims for \$27,000, or to settle both for \$47,000.¹⁴¹ Upon learning that the issue of whether the consortium claim constituted a separate injury was before the Massachusetts Supreme Judicial Court, the insurer proposed to pay the husband \$27,000, and to pay an additional \$20,000 to the wife if the supreme judicial court ruled that the consortium claim was a separate claim.¹⁴² Plaintiffs’ counsel did not respond to this proposal (and may not have communicated it to his clients), but he initiated a lawsuit against the insured seeking \$8,000,000 in damages for the husband and \$3,000,000 for the wife.¹⁴³

When the insurer learned of the lawsuit, it inquired about the status of settlement discussion, and learned that plaintiffs’ offer “was no longer open and that [they were] now seeking payment in excess of the policy limits because of” the insurer’s failure to settle earlier.¹⁴⁴ After learning that the supreme judicial court had ruled that a consortium claim would be treated as a separate claim, the insurer offered to settle both claims for \$47,000, which plaintiffs rejected.¹⁴⁵ Although the insurer continued to provide a defense, it failed to inform the insured about the status of settlement negotiations or the dispute regarding coverage.¹⁴⁶ Ultimately, the claimants agreed to hold the insured harmless in exchange for an assignment of his rights against the insurer.¹⁴⁷ The case went to trial and the jury returned a verdict of \$3,000,000 for the husband and \$75,000 for the wife.¹⁴⁸

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 833.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 834.

148. *Id.*

When the bad faith case went to trial, the court bifurcated the claims.¹⁴⁹ On the third party bad faith claim, the jury, in response to special interrogatories from the court, found that the insurer breached its duty to settle by failing to settle the husband's claim within policy limits, but that this breach did not cause the excess judgment.¹⁵⁰ On the statutory claim for unfair settlement practices,¹⁵¹ the trial court in a bench trial concluded that the insurer "did not act in bad faith in managing [the policy] proceeds in the face of two liability claims, each of which was likely to exceed the insured's coverage."¹⁵² However, the court found that the insurer "was guilty of bad faith in only a single respect: not 'keeping its insured . . . fully informed of settlement offers and . . . failing to advise him of the pendency and implications'" of the case pending before the supreme judicial court concerning whether a consortium claim was a separate claim.¹⁵³ The First Circuit affirmed.¹⁵⁴

Before analyzing whether the insurer breached its duty, the First Circuit set forth its understanding of the applicable legal standards under Massachusetts law:

Where, as here, the policy limits are much lower than the insured's potential exposure, the insurer cannot put its own interests first, but must negotiate as it would if its liability limits were unbounded. As we have phrased it, "the duty to negotiate in good faith would require the carrier to give 'the interest of the insured' consideration 'equal to that consideration given its own interest,' or 'to treat the claim as if it were alone liable for the entire amount.'" Moreover, in such straitened circumstances, the insurer must inform the insured of its conflicting interests, advise him of his rights, and keep him abreast of settlement offers and meaningful developments.¹⁵⁵

149. *Id.*

150. *Id.*

151. "The applicable Massachusetts consumer protection statute prohibits 'unfair or deceptive acts or practices' That prohibition extends to 'unfair claim settlement practices,' which the statute defines as including '[f]ail[ure] to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear.'" *Id.* at 839 (alterations in original) (citations omitted). Insureds are entitled to sue under these provisions. *Id.*

152. *Id.* at 840 (alteration in original) (quoting trial court's opinion).

153. *Id.* (alterations in original) (quoting trial court's opinion).

154. *Id.* at 843. The court vacated the trial court opinion regarding the award of attorneys' fees and remanded for further proceedings. *Id.*

155. *Id.* at 834 (citations omitted).

This statement includes both DTL and EC. The references to “unbounded” liability and acting “as if it were alone liable for the entire amount” are common DTL statements.¹⁵⁶ But the court also stated that “the insurer cannot put its own interests first” and that it must give “equal . . . consideration” to the interests of the insured.¹⁵⁷ In addition, the court referenced duties of the insurer to inform and advise the insured which are more consistent with EC than DTL.¹⁵⁸

These statements were general statements of law followed by more specific statements concerning the insurer’s duties when there are multiple claimants:

The thorny problem faced by an insurer in an excess-limits case is complicated logarithmically when multiple claims exist, each likely to outstrip the coverage. Apprising the insured becomes even more important in that circumstance, for payment to one claimant, exhausting or unreasonably depleting the available fund, may leave the insured unprotected—or nearly so—in respect to other claimants. The insurer has both the right and the duty to exercise its professional judgment in settling, or refusing to settle, such claims—but it must do so mindful of the insured’s best interests and in good faith. The insurer’s goal should be to try to effect settlement of all or some of the multiple claims so as to relieve its insured of so much of his potential liability as is reasonably possible, considering the paucity of the policy limits.¹⁵⁹

This statement of the standards for multiple claimants does not reference DTL, but is focused on the interests of the insured consistent with EC. The greater importance of “apprising the insured” and the requirement to be “mindful of insured’s best interests” are to protect the insured, which is consistent with the objective of trying to “relieve” the insured “of so much of his potential liability as is reasonably possible.”

When the court applied the standards, it continued its reliance on EC. For example, in considering various explanations for the jury verdict, the court explained that an insurer would not agree to a settlement offer to cover one claimant but not the other “without the insured’s assent.”¹⁶⁰ This is because the insurer has a duty to protect the interests of the

156. *Id.* (quoting *Voccio v. Reliance Ins. Cos.*, 703 F.2d 1, 2 (5th Cir. 1983)).

157. *Id.*

158. *Id.*

159. *Id.* at 835.

160. *Id.* at 838.

insured, and settling with one claimant would still leave the insured exposed to substantial liability. Similarly, when considering the trial court's decision on the statutory claim, the court applied EC. The court found that the insurer "ignored" its insured "during the embryonic stages of negotiation[, and that] . . . [t]he steps which it took to enlighten and inform [its insured] were well short of a textbook model."¹⁶¹ Thus, the insurer's bad faith behavior was not its failure to ignore its policy limits, but the failure to protect the insured's interests.¹⁶²

III. CURRENT STATE OF THE LAW

Having shown differences between DTL and EC, we now turn to the question of which test represents the "majority view." Although some commentators suggest that EC is the majority view,¹⁶³ the state of the law is considerably more complicated than that. For example, several states that have been identified as DTL jurisdictions also continue to use EC as well.¹⁶⁴ Are these jurisdictions to be counted for DTL, EC, both, or

161. *Id.* at 840.

162. Ultimately, even though the insurer failed to protect the interests of the insured by failing to sufficiently communicate with the insured, the trial court found that this behavior was not the cause of the excess judgment, which was affirmed by the court of appeals. *See id.* at 840–41.

163. *See* STEPHEN S. ASHLEY, BAD FAITH ACTIONS: LIABILITY AND DAMAGES § 3:18 (2d ed. 1997) (noting that equal consideration "has garnered by far the largest share of support among the states"); WILLIAM T. BARKER & RONALD D. KENT, 1 NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 2.03[2][b] (2d ed. 2015) ("One of the most common formulations of the duty [to act in good faith] is as one to give equal consideration to the insured's interests with the insurer's own interests."); Syverud, *supra* note 17, at 1122 ("The majority of states today require the insurance company to give 'equal consideration' to the interests of the insured . . .").

164. *See, e.g.*, *Clearwater v. State Farm Mut. Auto. Ins. Co.*, 792 P.2d 719, 722–23 (Ariz. 1990) (in banc) (although quoting *Crisci's* statement that "the test is whether a prudent insurer without policy limits would have accepted" when considering the applicability of the "fairly debatable" standard, when describing the standard applied by the trial court, the Arizona Supreme Court said: "[W]e have held that the duty of good faith and fair dealing requires that an insurer give 'equal consideration' to the interests of its insured," and then with approval noted that equal consideration was measured by reference to eight factors, including proper investigation, "rejection of advice of its own attorney or agent," failure to communicate with the insured, and the fault of the insured in misleading the insurer about the facts of the case (first quoting *Crisci v. Sec. Ins. Co. of New Haven*, 426 P.2d 173, 176 (Cal. 1967) (in banc); then citing *Farmers Ins. Exch. v. Henderson*, 313 P.2d 404, 406 (Ariz. 1957); and then citing *Gen. Accident Fire & Life Assurance Co. v. Little*, 443 P.2d 690, 694 (Ariz. 1968) (in banc)); *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387–88 (Minn. 1983) ("This duty to exercise 'good faith' includes an obligation to view the situation as if there were no policy limits applicable to the claim, and to give equal consideration to the financial exposure of the insured." (emphasis added) (citing *Cont'l Cas. Co. v. Reserve Ins. Co.*, 238 N.W.2d 862 (Minn. 1976)); *Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080, 1093 (Okla.

neither? Other states use tests that are not explicitly DTL or EC, but might be close enough to be considered one or the other. Several states have adopted a negligence standard for the duty to settle.¹⁶⁵ Although a negligence standard may not require one to disregard the policy limits, a court or jury might evaluate the reasonableness of the rejection of a settlement without regard to the limits.¹⁶⁶ On the other hand, if the reference point is a reasonable insurer,¹⁶⁷ that might suggest that the policy limit could be taken into account, and may actually support EC to the extent that reasonableness is considered in light of the protection of

2005) (“[T]he insured’s interests must be given faithful consideration *and* the insurer must treat a claim being made by a third party against its insured’s liability policy ‘as if the insurer alone were liable for the entire amount’ of the claim.” (emphasis added) (quoting *Am. Fidelity & Cas. Co. v. L. C. Jones Trucking Co.*, 321 P.2d 685, 687 (Okla. 1957), *overruled by Badillo*, 121 P.3d 1080)).

165. See, e.g., *Goodson v. Am. Standard Ins. Co. of Wis.*, 89 P.3d 409, 415 (Colo. 2004) (en banc) (“To establish that the insurer breached its duties of good faith and fair dealing, the insured must show that a reasonable insurer under the circumstances would have paid or otherwise settled the third-party claim.” (citing *Farmers Grp., Inc. v. Trimble*, 691 P.2d 1138, 1142 (Colo. 1984) (en banc)); *Gelinas v. Metro. Prop. & Liab. Ins. Co.*, 551 A.2d 962, 966 (N.H. 1988) (providing that “New Hampshire . . . has specifically adopted a negligence standard” for the liability of an insurer for failing to settle and that “[t]he negligence standard is defined as how ‘a reasonable man might act under the same circumstances’” (quoting *Dumas v. Hartford Accident & Indem. Co.*, 56 A.2d 57, 59 (N.H. 1947)); *Phillips v. Bramlett*, 288 S.W.3d 876, 879 (Tex. 2009) (explaining that a reasonable settlement is “such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured’s potential exposure to an excess judgment” (quoting *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994)); *Prosser v. Leuck*, 592 N.W.2d 178, 182–83 (Wis. 1999) (stating the insurer must “exercise the same standard of care that the insurance company would exercise were it exercising ordinary diligence in respect to its own business” (quoting *Alt v. Am. Family Mut. Ins. Co.*, 237 N.W.2d 706, 712 (Wis. 1976))).

166. This seems likely under the rule in New Hampshire that explicitly references “how ‘a reasonable man might act under the same circumstances.’” *Gelinas*, 551 A.2d at 966 (quoting *Dumas*, 56 A.2d at 59). A reasonable person facing the settlement offer would be unlikely to take insurance policy limits into account. The initial statement of the negligence test in New Hampshire included a reference to DTL: “In other words, in deciding whether or not to settle[,] the insurer must be as quick to compromise and dispose of the claim as if it itself were liable for any excess verdict.” *Dumas*, 56 A.2d at 60. However, that standard is not reiterated in subsequent cases and is not applied in determining whether the duty to settle has been breached. See *Gelinas*, 551 A.2d at 966; see also *Dumas v. State Farm Mut. Auto. Ins. Co.*, 274 A.2d 781, 783–84 (N.H. 1971) (rejecting the strict liability rule in upholding negligence; only statement close to DTL is “that the insurer cannot be too venturesome . . . at the risk of the insured” (quoting *Dumas*, 56 A.2d at 60)).

167. See, e.g., *Goodson*, 89 P.3d at 415 (“To establish that the insurer breached its duties of good faith and fair dealing, the insured must show that a reasonable insurer under the circumstances would have paid or otherwise settled the third-party claim.” (citing *Trimble*, 691 P.2d at 1142)); *Bramlett*, 288 S.W.3d at 879 (finding that a reasonable settlement is “such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured’s potential exposure to an excess judgment” (quoting *Garcia*, 876 S.W.2d at 849)).

the interests of the insured.¹⁶⁸ Other states have adopted tests that allow the trier of fact to weigh various factors.¹⁶⁹ Michigan uses a twelve-factor test.¹⁷⁰ Some of those factors, such as “failure to accept a reasonable compromise offer of settlement when the facts of the case or claim indicate obvious liability and serious injury,” “rejection of a reasonable offer of settlement within the policy limits,” and “failure to take an appeal following a verdict in excess of the policy limits where there are reasonable grounds for such an appeal,”¹⁷¹ are consistent with the DTL approach. Other factors, such as “failure to keep the insured fully informed of all developments in the claim or suit that could reasonably affect the interests of the insured,” “failure to inform the insured of all

168. In Wisconsin, “[b]y entering into an insurance contract and taking control of settlement or litigation the insurer assumes a fiduciary duty on behalf of the insured.” *Prosser*, 592 N.W.2d at 182. It is this fiduciary relationship that “carries with it the duty to act on behalf of the insured and to exercise the same standard of care that the insurance company would exercise were it exercising ordinary diligence in respect to its own business.” *Id.* (quoting *Alt*, 237 N.W.2d at 712).

169. See, e.g., *Motorists Mut. Ins. Co. v. Glass*, 996 S.W.2d 437, 451 (Ky. 1997) (citing *Manchester Ins. & Indem. Co. v. Grundy*, 531 S.W.2d 493, 500 (Ky. Ct. App. 1975)). The *Grundy* case relied upon by *Glass* recognized “that there may be other factors peculiar to a set of facts that should also be weighed and evaluated together with those enumerated above.” *Grundy*, 531 S.W.2d at 500.

170. *Commercial Union Ins. Co. v. Liberty Mut. Ins. Co.*, 393 N.W.2d 161, 165–66 (Mich. 1986). The twelve factors are:

- 1) failure to keep the insured fully informed of all developments in the claim or suit that could reasonably affect the interests of the insured,
- 2) failure to inform the insured of all settlement offers that do not fall within the policy limits,
- 3) failure to solicit a settlement offer or initiate settlement negotiations when warranted under the circumstances,
- 4) failure to accept a reasonable compromise offer of settlement when the facts of the case or claim indicate obvious liability and serious injury,
- 5) rejection of a reasonable offer of settlement within the policy limits,
- 6) undue delay in accepting a reasonable offer to settle a potentially dangerous case within the policy limits where the verdict potential is high,
- 7) an attempt by the insurer to coerce or obtain an involuntary contribution from the insured in order to settle within the policy limits,
- 8) failure to make a proper investigation of the claim prior to refusing an offer of settlement within the policy limits,
- 9) disregarding the advice or recommendations of an adjuster or attorney,
- 10) serious and recurrent negligence by the insurer,
- 11) refusal to settle a case within the policy limits following an excessive verdict when the chances of reversal on appeal are slight or doubtful, and
- 12) failure to take an appeal following a verdict in excess of the policy limits where there are reasonable grounds for such an appeal, especially where trial counsel so recommended.

Id. (footnotes omitted).

171. *Id.* (factors 4, 5, and 12).

settlement offers that do not fall within the policy limits,” and “failure to make a proper investigation of the claim prior to refusing an offer of settlement within the policy limits,”¹⁷² are consistent with EC.

Because this Article is focused on DTL and EC, we will put aside these jurisdictions and consider the thirty jurisdictions that consider DTL or EC. The jurisdictions that directly address DTL and EC will be divided into three groups: 1) those which have adopted the DTL test, 2) those which have not adopted DTL but use EC, and 3) those which use both, which I will refer to as “blended” jurisdictions. After some discussion of which test is the “majority” view, the next section will turn to an assessment of the two tests in light of section 24 of the Restatement.

A. *Jurisdictions that Have Adopted the DTL Test*

Identifying those jurisdictions that have adopted the DTL test separate from the EC test is quite difficult because DTL derives from EC. As Professor Keeton put it, “[t]he test of equality [in consideration] is much more aptly and clearly stated in terms of a hypothetical person concerned with the whole risk as a unit.”¹⁷³ The California Supreme Court is even more explicit about the connection: “In determining whether an insurer has given [equal] consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer.”¹⁷⁴ Thus, in a certain sense, all DTL jurisdictions are also EC jurisdictions. For purposes of categorizing jurisdictions, I have tried to determine which jurisdictions are doing what *Crisci* suggested; that is, which jurisdictions use DTL as *the test* for whether an insurer has breached its duty to settle. Mere statement of the DTL rule, or citation to the passages from *Crisci*, or Professor Keeton’s article, is not enough. I want to see whether DTL is being used to the exclusion of other variations on EC. To the extent that DTL is used along with other EC variations (construed as something different than DTL), I have put those jurisdictions in the “blended” category.

172. *Id.* (factors 1, 2, and 8).

173. Keeton, *supra* note 14, at 1146. Professor Keeton continues by suggesting this test for equal consideration can be combined with negligence to avoid some objections raised to the negligence standard. *Id.* at 1146–47. That combination is what gives rise to a more explicit articulation of the DTL test: “With respect to the decision whether to settle or try the case, the insurer, acting through its representatives, must use such care as would have been used by an ordinarily prudent insurer with no policy limit applicable to the claim.” *Id.* at 1147.

174. *Crisci v. Sec. Ins. Co. of New Haven*, 426 P.2d 173, 176 (Cal. 1967) (in bank).

Although some commentators suggest that the DTL test is the majority rule, or one that is emerging as the majority rule,¹⁷⁵ by my count only eight states follow the “pure” DTL test: Delaware,¹⁷⁶ Iowa,¹⁷⁷

175. See ABRAHAM, *supra* note 17, at 664 (“The *Crisci* rule is standard law now in most jurisdictions.”); ASHLEY, *supra* note 163, § 3.19 (contending that Keeton’s DTL test “has become the dominant standard for determining when an insurer must accept a settlement offer”); BARKER & KENT, *supra* note 163, § 2.03[2][d] (stating that the disregard the limits test has been “widely adopted”); Syverud, *supra* note 17, at 1122 & n.23 (“[C]ourts in sixteen states profess to accept Robert Keeton’s 1954 suggestion that the insurance company should disregard the policy limits in evaluating settlement demands . . .” (citing the Stephen S. Ashley’s authority from courts in Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, and Washington)). My list of states includes six of those identified by Ashley, and to that group I have added Delaware and Maine. See *infra* notes 176–83 and accompanying text. Six of Ashley’s sixteen I have categorized as blended because they use dimensions of EC in addition to DTL. See *infra* notes 257–65 and accompanying text. Three states on Ashley’s list are not DTL states even under a broader definition. Ashley relied upon federal court authority for Illinois, New York, and Rhode Island. See ASHLEY *supra* note 163, § 3.19 (citing *Voccio v. Reliance Ins. Cos.*, 703 F.2d 1 (1st Cir. 1983); *Bailey v. Prudence Mut. Cas. Co.*, 429 F.2d 1388 (7th Cir. 1970); *Brockstein v. Nationwide Mut. Ins. Co.*, 417 F.2d 703 (2d Cir. 1969); *Brown v. U.S. Fid. & Guar. Co.*, 314 F.2d 675 (2d Cir. 1963)). The federal courts’ predictions were wrong for those states. For Illinois and New York, see *infra* notes 221 and 227 and accompanying text. Rhode Island adopted a text that is close to strict liability:

We shall take this opportunity to promulgate a new rule . . . [a]n insurance company’s fiduciary obligations include a duty to consider seriously a plaintiff’s reasonable offer to settle within the policy limits. Accordingly, if it has been afforded reasonable notice and if a plaintiff has made a reasonable written offer to a defendant’s insurer to settle within the policy limits, the insurer is obligated to seriously consider such an offer. If the insurer declines to settle the case within the policy limits, it does so at its peril in the event that a trial results in a judgment that exceeds the policy limits, including interest. If such a judgment is sustained on appeal or is unappealed, the insurer is liable for the amount that exceeds the policy limits, unless it can show that the insured was unwilling to accept the offer of settlement.

Asermely v. Allstate Ins. Co., 728 A.2d 461, 464 (R.I. 1999).

176. There is scant authority from the state courts in Delaware. The Third Circuit, applying Delaware law, noted that the Delaware Supreme Court has endorsed a standard of “good faith or due care in settlement negotiations,” *McNally v. Nationwide Ins. Co.*, 815 F.2d 254, 259 (3d Cir. 1987) (quoting *Stilwell v. Parsons*, 145 A.2d 397, 402 (Del. 1958)), and then, citing John Allen Appleman, stated that “the good faith standard is satisfied only if the insurer acts in the same way as would a reasonable and prudent man with the obligation to pay all of the recoverable damages.” *Id.* (quoting 7C JOHN ALLEN APPLEMAN, INSURANCE LAW AND PRACTICE § 4711, at 395 (Berdal ed. 1979)). The case held that Nationwide was liable for failing to accept a policy limits offer of \$200,000, or to interplead its policy limits, in a case involving a catastrophic injury resulting in a \$3,150,000 verdict against the insured, who was intoxicated and speeding at the time of the accident. See *id.* at 257–58. The DTL test was not at issue in the case; the insurer argued that it did not have a duty to accept the settlement offer because it was conditional, that it did not have a duty to interplead, that the non-participation of another insurer broke the causal chain, and that

Kansas,¹⁷⁸ Maine,¹⁷⁹ Massachusetts,¹⁸⁰ New Jersey,¹⁸¹ Oregon,¹⁸² and Pennsylvania.¹⁸³

its insured had consented to or ratified the insurer's decision to not accept. *Id.* at 259–60. The court rejected these arguments and affirmed a judgment for the insured. *Id.* at 260, 270. Although the Delaware Supreme Court has not addressed the standard for the duty to settle, a superior court has endorsed the reasoning of *McNally* as stating “good law in Delaware” with respect to the duty of an insurer to interplead in some circumstances. *Gruwell v. Allstate Ins. Co.*, 988 A.2d 945, 949 (Del. Super. Ct. 2009).

177. *See, e.g.*, *Wierck v. Grinnell Mut. Reinsurance Co.*, 456 N.W.2d 191, 195 (Iowa 1990) (“The best standard for good faith in a specific negotiation is to ignore the policy limits. If, but for the policy limits, the insurer would settle for an offered amount, it is obliged to do so (and pay toward settlement up to the policy limits).”). The holding in *Wierck* was that the insurer did not breach the duty to settle because the only offer that claimant ever made to settle was for \$300,000, three times the policy limits, and there was “nothing in the record to suggest Grinnell would have settled for that [policy limit] amount if the policy had provided coverage to that extent.” *Id.* The amount of the judgment was \$237,208 plus interest. *See id.* at 193 n.2. “A bad faith claim cannot be based on settlements never presented to the liability insurance carrier.” *Id.* at 195.

178. *Bollinger v. Nuss*, 449 P.2d 502, 511 (Kan. 1969) (citing *Keeton* for proposition that “equal consideration . . . means consideration of the risk as a unit without regard to who is bearing each portion of the risk” and suggesting that this is what courts mean when they require “the insurer to treat the claim as if it alone were liable for the entire amount”). The court in *Bollinger* held that the insurer did not breach the duty to settle in rejecting a settlement offer that was \$1500 less than policy limits because both the defense counsel “and the insured were of the opinion that plaintiff could not recover \$23,500 if the case were tried.” *Id.* at 513–14. Consequently, the case involved “at most, an error of judgment on the part of the insurer.” *Id.* at 514.

179. *Wilson v. Aetna Cas. & Sur. Co.*, 76 A.2d 111, 115 (Me. 1950) (finding that it could not be said that a reasonably prudent man “holden personally for the full recovery, whatever it might prove to be, would not have proceeded to trial . . . as an alternative to the acceptance of the settlement offer” and that this “perhaps, should be the true test”). The court held that rejection of a \$10,000 settlement offer was not a breach of the duty to settle where the insurer had offered to settle for \$6600 and the insured's own counsel urged settlement within the policy limits even though the judgment was for \$12,100. *See id.* at 112, 115.

180. *Murach v. Mass. Bonding & Ins. Co.*, 158 N.E.2d 338, 341 (Mass. 1959) (stating that “good faith requires that [an insurer] make the decision (whether to settle a claim within the limits of the policy or to try the case) as it would if no policy limit were applicable to the claim” (citing *Keeton*, *supra* note 14, at 1148)). The *Murach* court held that the trial court was not “plainly wrong in concluding that the counter offer of \$7,500 was made in good faith.” *Id.* at 342. The policy limits were \$10,000, the first trial resulted in a verdict of \$4900 with a proposed additur of \$7500, the claimant offered to settle for \$15,000 and then before the second trial offered to settle for \$9300, and the verdict in the second trial was \$29,887.07. *Id.* at 340. The experienced defense counsel “defended on the grounds that the accident was unavoidable because of the icy condition of the road and that the claim was exaggerated” and testified that the \$7500 “figure was the insurer's best estimate of the settlement value of the case.” *Id.* In the later case of *Hartford Casualty Insurance Co. v. New Hampshire Insurance Co.*, the court adopted a negligence standard for the duty to settle, and articulated the test in this way: “This test requires the insured (or its excess insurer) to prove that the plaintiff in the underlying action would have settled the claim within the policy limits and that, assuming the insurer's unlimited exposure (that is,

viewing the question from the point of view of the insured), no reasonable insurer would have refused the settlement offer or would have refused to respond to the offer.” 628 N.E.2d 14, 18 (Mass. 1994). The *Hartford* court held that there was sufficient evidence to uphold the jury’s verdict that the insurer had not breached its duty to settle, but did not summarize the evidence other than “to say that the evidence presented a case for the jury on New Hampshire’s liability to Hartford.” *Id.* at 16.

181. *Bowers v. Camden Fire Ins. Ass’n*, 237 A.2d 857, 862 (N.J. 1968) (reasoning that “both [insurer’s and insured’s] interests can be served justly only if the insurer treats any settlement offer as if it had full coverage for whatever verdict might be recovered, regardless of policy limits, and makes its decision to settle or to go to trial on that basis”). The claimant was successful at trial and the jury awarded \$29,000 in damages. *Id.* at 860. The claimant offered to settle for \$20,000 if the insurer would not appeal. *Id.* The insurer chose to appeal anyway, arguing that the verdict was against the weight of the evidence. *Id.* The court found “it difficult to believe that if the policy had been for an unlimited amount defendant [insurer] would have acted the way it did.” *Id.* at 865.

182. *Kuzmanich v. United Fire & Cas. Co.*, 410 P.2d 812, 813 (Or. 1966) (“In determining whether to settle claims against the insured, the insurer must act as if it were liable for the entire judgment that might eventually be entered against the insured.”). The court held that the trial court had sufficient evidence to find that the failure to settle for policy limits was neither negligent nor in bad faith. *Id.* at 814. The claim arose from a one-car accident where there was a factual dispute as to whether the insured or his guest was driving. *Id.* at 812–13. The policy provided \$10,000 liability limits per person, but excluded coverage if the driver was under twenty-five years of age. *Id.* at 812. The guest was twenty-one, so if he was driving, there was no coverage under the policy. *Id.* The insurer rejected a \$10,000 policy limits offer on the substantial evidence that the guest was driving. *Id.* at 813. Although the court did not explicitly apply the DTL test, it did so implicitly, finding that “there was sufficient substantial evidence to sustain the findings of the trial court to the effect that defendant was not negligent and did not exercise bad faith.” *Id.* at 814. This substantial evidence justified rejecting the settlement offer, *see id.*, regardless of whether the expected judgment would exceed the policy limits. For additional information on Oregon law see *infra* Appendix.

183. *Cowden v. Aetna Cas. & Sur. Co.*, 134 A.2d 223, 228 (Pa. 1957) (“The predominant majority rule is that the insurer must accord the interest of its insured the same faithful consideration it gives its own interest. Since it is obvious that the interest of one or the other party may be imperiled at the instant of decision, the fairest method of balancing the interests is for the insurer to treat the claim as if it were alone liable for the entire amount.” (citation omitted)). The court upheld the trial court’s judgment for the insurer notwithstanding the contrary jury verdict. *Id.* at 231. Even though it was “recognized by everyone in the case that any recovery that would be had would greatly exceed the maximum limit of the insurance,” the insurer was entitled to not respond to settlement offers because of “an honest and bona fide belief that [the insured] would be held not to be liable.” *Id.* On one hand, this could be considered a classic DTL determination; the insurer acted the same as it would have regardless of the policy limits. On the other hand, the court may be recognizing the insurer’s right to protect its own interests. After making its DTL statement, the court seemed to emphasize that DTL “does not mean that the insurer is bound to submerge its own interest in order that the insured’s interest may be made paramount.” *Id.* at 228. The holding in favor of the insurer may reflect the right of the insurer to protect its own interests more than the notion that an insurer without limits would have rejected the settlement offer. See *infra* Appendix for further discussion of Pennsylvania law.

A good example of the reasoning to support the DTL test can be seen in *Bowers v. Camden Fire Insurance Ass'n*.¹⁸⁴ That case concerned the excess liability for an insured who accidentally struck a twenty-one-month old infant with his car.¹⁸⁵ The insured thought that the accident was not his fault.¹⁸⁶ He had a good view of the accident scene and was attentive as he approached the infant's home.¹⁸⁷ "[T]he evidence of . . . negligence was purely circumstantial."¹⁸⁸ The injuries to the child were sufficiently serious that the insured's lawyer warned him that a verdict for the plaintiff would likely exceed the \$20,000 policy limit.¹⁸⁹ The case proceeded to trial and the jury awarded damages of \$20,000 for the child and \$9000 to his father.¹⁹⁰ Defense counsel discussed the verdict with the insured, who still believed he was not responsible for the accident, and they agreed to appeal, arguing that the verdict was against the weight of the evidence.¹⁹¹

In advance of the appeal, a motion for a new trial was made and denied.¹⁹² At that time, the claimant's counsel suggested that if the insurer would offer its \$20,000 policy limits, he would recommend that his client accept that offer.¹⁹³ Defense counsel informed the insured of this offer in a letter, but stated that insurer had refused to make a policy limits offer "because 'it feels as I do, and also as you have indicated to me you felt, that there was no evidence from which the jury could have found negligence on your part, and the reasonable course is to appeal on that ground.'"¹⁹⁴ The insured engaged a personal attorney at this point, who advised him that success on appeal was unlikely, and who wrote a letter to the insurer withdrawing the insured's consent to appeal and requesting that the insurer settle with the claimant for its policy limits.¹⁹⁵ The insurer did not offer to settle the case, but instead proceeded with the appeal.¹⁹⁶ The \$29,000 judgment was affirmed in a short per curiam opinion finding that the circumstantial evidence was "sufficient to submit the issue of such alleged negligence to the jury."¹⁹⁷

184. 237 A.2d at 861-63.

185. *Id.* at 859.

186. *Id.*

187. *Id.*

188. *Id.* at 860.

189. *Id.* at 859-60.

190. *Id.* at 860.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 860-61.

196. *Id.* at 861.

197. *Id.*

The insurer then paid its policy limits, and the insured initiated an action to recover the excess \$9000 he paid to satisfy the judgment, plus interest.¹⁹⁸

The New Jersey Supreme Court explicitly adopted the DTL test in this case. It started from the premise that where an insurer reserves to itself the right to control settlement of a claim, that reservation combined with the obligation to pay up to policy limits to settle the claim, creates a “duty to exercise good faith in settling claims.”¹⁹⁹ Good faith requires “that a decision not to settle must result from weighing, in a fair manner, the probabilities of a favorable or adverse verdict in the trial of a covered damage suit against the insured.”²⁰⁰ An insurer is not permitted “to frustrate that purpose [to protect insureds] by a selfish decision as to settlement.”²⁰¹ “A decision not to settle must be a thoroughly honest, intelligent and objective one. It must be a realistic one when tested by the necessarily assumed expertise of the company.”²⁰² In a case where the insured may be exposed to a judgment in excess of the policy limits, “the interests of the insurer and the insured come into conflict whenever a settlement demand is presented which is within the limit of the coverage.”²⁰³ In light of that conflict, “both interests can be served justly only if the insurer treats any settlement offer as if it had full coverage for whatever verdict might be recovered, regardless of policy limits, and makes its decision to settle or to go to trial on that basis.”²⁰⁴ The court cited to a number of cases in support of this position.²⁰⁵

Applying this test, the court concluded that it was “difficult to believe that if the policy had been for an unlimited amount defendant [insurer] would have acted the way it did.”²⁰⁶ Prospects for a successful appeal were not good: “[I]nstances are rare in negligence cases when an appellate tribunal reverses a trial court’s finding that the evidence was sufficient to support a jury verdict,” a fact “well known to the trial bar” and reinforced by insured’s personal counsel.²⁰⁷ Consequently, a strong

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 862.

204. *Id.*

205. *Id.* Cases cited included *Kaudern v. Allstate Insurance Co.*, 277 F. Supp. 83 (D.N.J. 1967); *Crisci v. Security Insurance Co. of New Haven*, 426 P.2d 173 (Cal. 1967) (in bank); *Murach v. Massachusetts Bonding & Insurance Co.*, 158 N.E.2d 338 (Mass. 1959); and *Am. Fid. & Cas. Co. v. L. C. Jones Trucking Co.*, 321 P.2d 685 (Okla. 1957), overruled by *Badillo v. Mid Century Insurance Co.*, 121 P.3d 1080 (Okla. 2005).

206. *Bowers*, 237 A.2d at 865.

207. *Id.* at 863.

inference could be drawn that the insurer “was partial to its own interests” in making the decision to appeal.²⁰⁸ Likewise, the circumstances strongly suggested the insurer’s “willingness to gamble with the insured’s money in an attempt to save its own.”²⁰⁹

While *Bowers* represents a very “clean” DTL case, other cases from jurisdictions that I have counted in the “pure” DTL camp are not so clean. For example, the DTL test was approved by the Oregon Supreme Court in *Radcliffe v. Franklin National Insurance Co. of New York*,²¹⁰ but in reversing the trial court, the Oregon Supreme Court relied on the failure of the insurer to conduct a thorough investigation and the failure to inform the insured of the settlement offer.²¹¹ The claimant had offered to settle the case for the \$10,000 policy limit, considerably less than the \$32,000 sought for damages.²¹² The insurer, however, valued the case at \$7500 or \$8000, and rejected the offer.²¹³ The problem with the insurer’s action was not that it failed to disregard the policy limits, but that its valuation of the claim was based on incomplete information.²¹⁴ In particular, the doctor of one of the claimants was prepared to testify that the injury was permanent, which considerably increased the value of the claim, and the claimants had additional evidence that the insured was at fault.²¹⁵ The court reasoned that there was “no reason for believing that the evidence . . . could not have been discovered by the insurer through the exercise of reasonable diligence.”²¹⁶ Furthermore, the court noted that the insurer had failed to fulfill its “duty to inform the insured [of the settlement offer] so that the latter may take whatever course may be necessary for the protection of his own interests in the event the insurer rejects the offer.”²¹⁷ Thus, while on one hand the case supports the DTL standard, on the other hand some of the court’s analysis tends to support the EC standard.

208. *Id.* at 865.

209. *Id.*

210. 298 P.2d 1002 (Or. 1956). The court stated: “Keeton, in his aforementioned treatise suggests that the controlling rule should balance the risks involved and thereby cause the insurer in settlement matters to behave as if it were liable for the entire judgment that may eventually be entered. There is manifest merit in the suggestion.” *Id.* at 1023 (citation omitted).

211. *Id.* at 1024.

212. *Id.* at 1008.

213. *Id.* at 1009.

214. *Id.* at 1023–24.

215. *Id.* at 1023.

216. *Id.* at 1024.

217. *Id.*

B. Jurisdictions Using EC that Have Not Adopted the DTL Test

By my count, there are thirteen jurisdictions that use EC without using DTL: Alaska,²¹⁸ Connecticut,²¹⁹ Georgia,²²⁰ Illinois,²²¹ Louisiana,²²²

218. Alaska does not use the language of “equal consideration,” but has adopted a duty to settle that is designed to protect the insureds’ interests in a way that is somewhat more protective than EC. The test was first articulated in *Schultz v. Travelers Indemnity Co.*:

If a plaintiff makes a policy limits demand and there exists a substantial likelihood that a verdict will be rendered against the insured in excess of the coverage provided by the policy of insurance, the insurer has a duty to tender as settlement of the claim the maximum limits of insurance coverage.

754 P.2d 265, 266–67 (Alaska 1988). For additional analysis of Alaska law, see *infra* Appendix.

219. Although the Connecticut Supreme Court has not addressed the standard to be applied for the duty to settle, the federal district courts, applying Connecticut law, have predicted that Connecticut law requires that, “[i]n determining whether to accept or reject an offer of compromise, the insurer not only may consider its own interests but also must equally respect the insured’s interests.” *Windmill Distrib. Co. v. Hartford Fire Ins. Co.*, 742 F. Supp. 2d 247, 263 (D. Conn. 2010) (alteration in original) (quoting *United Servs. Auto. Ass’n v. Glens Falls Ins. Co.*, 350 F. Supp. 869, 871 (D. Conn. 1972)). This prediction has been approved. See MICHAEL S. TAYLOR ET AL., CONNECTICUT INSURANCE LAW § 4-10:1 (2015). For additional analysis of Connecticut law, see *infra* Appendix.

220. *S. Gen. Ins. Co. v. Holt*, 416 S.E.2d 274, 276 (Ga. 1992) (“In deciding whether to settle a claim within the policy limits, the insurance company must give equal consideration to the interests of the insured.” (citing *Great Am. Ins. Co. v. Exum*, 181 S.E.2d 704, 708 (Ga. Ct. App. 1971))). The Georgia Supreme Court held that the insurer was not entitled to a directed verdict where the claimant had offered to settle twice for policy limits, the settlement offers were time-limited to ten days and fifteen days, the insured’s liability was uncontested, the claimant’s special damages exceeded the policy limits, and the insurer did not respond by asking for more information or time to evaluate. *Id.* at 275–76. Under these circumstances, “a jury question was presented” on whether the insurer had negligently or in bad faith breached its duty to settle. *Id.* at 276.

221. *Haddick v. Valor Ins.*, 763 N.E.2d 299, 304 (Ill. 2001) (finding that when “there is a reasonable probability . . . [of] an excess judgment . . . the insurer must take the insured’s settlement interests into consideration”). The Illinois Supreme Court held that the plaintiff’s bad faith claim was sufficient to withstand a motion to dismiss where the insurer was aware that the medical bills were four times the liability limits, that the insured had reported that he was driving at the time of the accident, and that the insured owned the automobile, which created a presumption that he was in control of the vehicle because such allegations alleged “a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured.” *Id.* at 301, 304. For additional analysis of Illinois law, see *infra* Appendix.

222. *Smith v. Audubon Ins. Co.*, 679 So. 2d 372, 376 (La. 1996) (stating that “a liability insurer generally is free to settle or to litigate at its own discretion, without liability to its insured for a judgment in excess of the policy limits,” but that “the insurer, when handling claims, must carefully consider not only its own self-interest, but also its insured’s interest so as to protect the insured from exposure to excess liability”). The court held that the insurer was not liable for the excess judgment because the insurer had credible evidence that the claimant, not the insured, was responsible for the accident, and because the trial

Mississippi,²²³ Missouri,²²⁴ Montana,²²⁵ Nevada,²²⁶ New York,²²⁷ Tennessee,²²⁸ Utah,²²⁹ and Virginia.²³⁰

court, which was entitled to great deference, had determined that the insurer was entitled to proceed to trial. *Id.* at 377.

223. Hartford Accident & Indem. Co. v. Foster, 528 So. 2d 255, 265 (Miss. 1988) (“We adopt the prevailing view . . . that when suit covered by a liability insurance policy is for a sum in excess of the policy limits, and an offer of settlement is made within the policy limits, the insurer has a fiduciary duty to look after the insured’s interest at least to the same extent as its own, and also to make a knowledgeable, honest and intelligent evaluation of the claim commensurate with its ability to do so.”). The court held that the insurer had not breached the duty to settle because it had made a realistic evaluation and had “every reason to believe its insured was not at fault.” *Id.* at 266. In the course of its discussion of the duty to settle, the Mississippi Supreme Court quoted a DTL statement from *Crisci. Id.* at 264 (“One test for determining whether the carrier has given good faith consideration to the interests of the assured, ‘. . . is whether a prudent carrier on a policy of unlimited liability would have accepted the settlement offer.” (alteration in original) (quoting Merritt v. Reserve Ins. Co., 110 Cal. Rptr. 511, 520 (Ct. App. 1963) (citing *Crisci v. Sec. Ins. Co. of New Haven*, 426 P.2d 173, 176 (Cal. 1967) (in bank))). However, that statement is not included in the test identified by the court, and the DTL test was not used in reaching the holding.

224. *Zumwalt v. Utils. Ins. Co.*, 228 S.W.2d 750, 754 (Mo. 1950) (finding that the insurer breached the duty to settle because of “the intentional disregard of the financial interests of the plaintiff in the hope of escaping the full responsibility imposed upon it by its policy” (quoting *Johnson v. Hardware Mut. Cas. Co.*, 1 A.2d 817, 820 (Vt. 1938))). For additional analysis of Missouri law, see *infra* Appendix.

225. *Fowler v. State Farm Mut. Auto. Ins. Co.*, 454 P.2d 76, 78 (Mont. 1969) (stating that the insurer has “a fiduciary duty . . . to look after the interests of the insured as well as its own, thus requiring it to consider fairly the insured’s liability for the excess when evaluating an offer of settlement within the policy limits”). For additional analysis of Montana law, see *infra* Appendix.

226. *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 326 (Nev. 2009) (“Although this court has refused to adopt a standard where an insurance company must place the insured’s interests over the company’s interests, the nature of the relationship requires that the insurer adequately protect the insured’s interest. Thus, at a minimum, an insurer must equally consider the insured’s interests and its own.” (citations omitted)). The Nevada Supreme Court held that the trial court had properly submitted a bad faith claim to the jury where the insurer had failed to inform the insured of the settlement offer that included a request for interpleader. *Id.* at 327. The court noted that one factor considered by the California Court of Appeal was whether an insurer “act[ed] as ‘a prudent insurer *without policy limits.*’” *Id.* at 326 (quoting *Archdale v. Am. Int’l Specialty Lines Ins. Co.*, 64 Cal. Rptr. 3d 632, 645 (Ct. App. 2007)). However, it did not adopt or use this factor in its analysis, which focused on the insurer’s failure to inform the insured of the settlement offer.

227. *Pavia v. State Farm Mut. Auto. Ins. Co.*, 626 N.E.2d 24, 27 (N.Y. 1993) (“[I]n order to establish a prima facie case of bad faith, the plaintiff must establish that the insurer’s conduct constituted a ‘gross disregard’ of the insured’s interests—that is, a deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer.”). The New York Court of Appeals held that the insurer was not liable for failure to settle when it took time beyond the thirty days in the settlement offer to investigate and determine that a policy limits settlement was appropriate. *Id.* at 28–29. Although the use of the “gross disregard” standard for culpability sets New York apart from other jurisdictions, the standard is applied to EC.

Although each jurisdiction may not use the precise “equal consideration” terminology, where the test is designed to protect the interests of the insured (and does not use DTL), I have included such jurisdictions in this category. Alaska, for example, uses this test:

If a plaintiff makes a policy limits demand and there exists a substantial likelihood that a verdict will be rendered against the insured in excess of the coverage provided by the policy of

228. *Johnson v. Tenn. Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 370 (Tenn. 2006) (stating that “[i]t is well established that an insurer . . . may be held liable to its insured for an amount in excess of its policy limits if as a result of bad faith it fails to effect a settlement within the policy limits” and that bad faith “is defined, in part, as an insurer’s disregard or demonstrable indifference toward the interests of its insured” (first quoting *State Auto. Ins. Co. of Columbus v. Rowland*, 427 S.W.2d 30, 33 (Tenn. 1968); and then citing *S. Fire & Cas. Co. v. Norris*, 250 S.W.2d 785, 790–91 (Tenn. Ct. App. 1952)). The Tennessee Supreme Court held that the jury had sufficient evidence to support a finding of bad faith where the claims adjuster failed to read deposition summaries in detail and conceded that had he had a better understanding of the facts, he would have been concerned about the liability of the insured. *See id.* at 371–72.

229. The Utah Supreme Court has not addressed the standard to be applied for the duty to settle. However, an EC standard was adopted in the thoroughly litigated case of *Campbell v. State Farm Mutual Automobile Insurance Co.*:

Part of the insurer’s implied duty to its insured is to zealously guard the insured’s interests when deciding whether to accept an offer of settlement of the third-party’s claim or to take the case to trial. Stated generally, an insurer owes its insured a duty to accept an offer of settlement within the policy limits when there is a substantial likelihood of a judgment being rendered against the insured in excess of those limits. The test of the insurer’s conduct is one of reasonableness. As regards offers of settlement, the insurer must give the insured’s interests at least as much consideration as it gives its own.

840 P.2d 130, 138–39 (Utah Ct. App. 1992), *rev’d on other grounds*, 538 U.S. 408 (2003) (footnotes and citations omitted). The reader may recall that in this case, the Supreme Court struck down the punitive damages award against the insurer for \$145,000,000. *Campbell*, 538 U.S. at 429. On remand, the Utah Supreme Court imposed a punitive damages award of \$9,018,780.75. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 420 (Utah 2004).

230. *State Farm Mut. Auto. Ins. Co. v. Floyd*, 366 S.E.2d 93, 97 (Va. 1988) (“We conclude that an insured, in order to recover for an excess judgment on the ground that the insurer failed to take advantage of an opportunity to settle within the policy limits, is required to show that the insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured.”). The court imposed a standard of proof of clear and convincing evidence for such a claim. *Id.* at 98. While noting that attorneys have a duty to convey settlement offers, the Virginia Supreme Court held as a matter of law, in light of the circumstances of the case, that the insurer’s failure to communicate settlement offers by itself did not demonstrate intentional disregard for the insured’s interests. *Id.* at 97. The insured was adamant that he was not responsible for the accident, and his independent counsel opined that the case was unlikely to exceed policy limits. *Id.* at 94. In addition, the insured testified that he would not have wanted to accept a settlement had he known of the offers “because he was opposed to any settlement.” *Id.* at 95.

insurance, the insurer has a duty to tender as settlement of the claim the maximum limits of insurance coverage.²³¹

This actually gives the insured greater protection than EC because “the insurer has a duty to tender . . . the maximum limits” where there is a “substantial likelihood” of an excess verdict.²³²

Several states impose a duty on the insurer to protect the interests of the insured without explicitly requiring “equal” consideration. Under Illinois law, an “insurer must take the insured’s settlement interests into consideration” when there is a “reasonable probability” of an excess judgment.²³³ Under Louisiana law, an insurer “must carefully consider not only its own self-interest, but also its insured’s interest so as to protect the insured from exposure to excess liability.”²³⁴ Under Missouri law,²³⁵ Tennessee law,²³⁶ and Virginia law,²³⁷ the insurer must not disregard the interests of the insured.

Jurisdictions also use different state of mind requirements for their individual versions of EC. In Missouri and Virginia, for example, the insurer must intentionally disregard the financial interest of the insured.²³⁸ At the other end of the spectrum, Georgia and Utah use an

231. *Schultz v. Travelers Indem. Co.*, 754 P.2d 265, 266–67 (Alaska 1988).

232. *Id.* For additional explanation and analysis, see *supra* note 218.

233. *Haddick v. Valor Ins. Co.*, 763 N.E.2d 299, 304 (Ill. 2001). For additional analysis of Illinois law, see *supra* note 221.

234. *Smith v. Audubon Ins. Co.*, 679 So. 2d 372, 376 (La. 1996). For additional analysis of Louisiana law, see *supra* note 222.

235. *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 828 (Mo. 2014) (en banc) (quoting *Zumwalt v. Utils. Ins. Co.*, 228 S.W.2d 750, 754 (Mo. 1950)). For additional analysis of Missouri law, see *supra* note 224.

236. *Johnson v. Tenn. Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 370 (Tenn. 2006) (stating that it is “well established” that an insurer “may be held liable to its insured for an amount in excess of its policy limits if as a result of bad faith it fails to effect a settlement within the policy limits” and that bad faith “is defined, in part, as an insurer’s disregard or demonstrable indifference toward the interests of its insured” (first quoting *State Auto. Ins. Co. of Columbus v. Rowland*, 427 S.W.2d 30, 33 (Tenn. 1968); and then citing *S. Fire & Cas. Co. v. Norris*, 250 S.W.2d 785, 790–91 (Tenn. Ct. App. 1952)). For the holding of *Johnson*, see *supra* note 228.

237. *State Farm Mut. Auto. Ins. Co. v. Floyd*, 366 S.E.2d 93, 97 (Va. 1988) (“We conclude that an insured, in order to recover for an excess judgment on the ground that the insurer failed to take advantage of an opportunity to settle within the policy limits, is required to show that the insurer acted in furtherance of its own interest, with intentional disregard of the financial interest of the insured.”). For additional detail about Virginia law, see *supra* note 230.

238. *Scottsdale*, 448 S.W.3d at 828 (describing the Missouri rule “as the intentional disregard of the financial interest of [the] insured” (alteration in original) (emphasis omitted) (quoting *Zumwalt*, 228 S.W.2d at 754)); see also *Floyd*, 366 S.E.2d at 97.

objective test of negligence.²³⁹ New York is somewhere in between, requiring evidence that the insurer acted with “gross disregard” for the interests of the insured, thereby allowing liability based on “reckless” failure to give equal consideration to the interests of the insured.²⁴⁰

A good example of the EC test can be seen in *Southern General Insurance Co. v. Holt*,²⁴¹ decided by the Georgia Supreme Court. In that case, the claimant had twice offered to settle for policy limits with time-limited offers (ten days and fifteen days).²⁴² The policy limits were \$15,000, the liability of the insured was not contested, and the claimant’s attorney provided proof of medical expenses in excess of \$10,000 and represented that claimant’s lost wages exceeded \$5000.²⁴³ Three days after the offer expired, the insurer offered policy limits, and two weeks later repeated that offer.²⁴⁴ The claimant rejected those offers and obtained a jury verdict for \$82,000.²⁴⁵

The insurer argued that it was entitled to a directed verdict because it had no duty to settle within the time required by claimant’s counsel.²⁴⁶ The Georgia Supreme Court rejected this argument “*when the [insurance] company has knowledge of clear liability and special damages exceeding the policy limits.*”²⁴⁷ It noted, “[i]n deciding whether to settle a claim[,] . . . the insurance company must give equal consideration to the interests of the insured,” and that “[t]he jury generally must decide whether the insurer, in view of the existing circumstances, has accorded the insured ‘the same faithful consideration it gives its own interest.’”²⁴⁸ The insurer’s “claims manager testified that the claims representative should have concluded [claimant]’s claim was a policy limits case” before the claimant’s settlement offer expired.²⁴⁹ Under the standard applicable to the denial of a directed verdict, and “keeping in mind the duty of insurance companies to give equal consideration to the interests of their policy holders,” the Georgia Supreme Court concluded that “both the trial

239. Georgia allows liability against an insurer for an excess judgment based on “negligence, fraud, or bad faith.” *S. Gen. Ins. Co. v. Holt*, 416 S.E.2d 274, 276 (Ga. 1992) (citing *McCall v. Allstate Ins. Co.*, 310 S.E.2d 513, 514 (Ga. 1984)). Utah uses a rule of reasonableness. See *Campbell v. State Farm Mut. Auto. Ins. Co.*, 840 P.2d 130, 138 (Utah Ct. App. 1992), *rev’d on other grounds*, 538 U.S. 408 (2003).

240. *Pavia v. State Farm Mut. Auto. Ins. Co.*, 626 N.E.2d 24, 27 (N.Y. 1993).

241. 416 S.E.2d 274.

242. *Id.* at 275.

243. *Id.* at 275–76.

244. *Id.* at 275.

245. *Id.*

246. *Id.* at 276.

247. *Id.*

248. *Id.* (quoting *Great Am. Ins. Co. v. Exum*, 181 S.E.2d 704, 707 (Ga. Ct. App. 1971)).

249. *Id.*

court and Court of Appeals correctly found that a jury question was presented on” the insurer’s refusal to settle.²⁵⁰

Although *Southern General Insurance Co. v. Holt* would likely have reached the same conclusion had the court applied the DTL test,²⁵¹ other cases illustrate the use of EC in a context where DTL would not reach the same result. A good example of such a case is *Allstate Insurance Co. v. Miller*.²⁵² That case is discussed above in connection with the failure to communicate.²⁵³ One of the settlement offers from the claimant requested that the insurer deposit the \$25,000 policy limits with the court through an interpleader action.²⁵⁴ The claimant was concerned about an attorney lien and a hospital lien that would erode or entirely eliminate any recovery from the policy limits.²⁵⁵ Although the Nevada Supreme Court concluded that the insurer was not under a contractual obligation to file an interpleader action, it held that the “insurer’s refusal to file an interpleader action on behalf of an insured may be a factor to consider” as part of a claim for breach of the duty to settle.²⁵⁶ This holding only makes sense under the EC test. The insurer, in giving equal consideration to the insured’s interest in settlement, should comply with the request to achieve the settlement and avoid excess exposure. Under the DTL test a settlement offer requesting an interpleader makes no sense because the only reason for the interpleader is the limited resources available due to the policy limits. If one assumes no policy limits, there would be no reason or justification for the interpleader.

C. Jurisdictions that Blend EC and DTL

We now turn to the third category, those jurisdictions that use both EC and DTL. Because DTL essentially derives from EC, in a sense all states that use DTL are using both tests. My definition of this “blended” category is a jurisdiction that uses EC to supplement DTL. In particular, EC is used to allow the trier of fact to take the insurer’s conduct toward the insured, such as an inadequate investigation or failure to communicate, into the consideration of whether there was a breach. By

250. *Id.*

251. Because the insurer should have known that it was a policy-limits case before the settlement offer had expired, *see id.*, one could argue that an insurer who disregarded the policy limits would have settled for the policy limits.

252. 212 P.3d 318 (Nev. 2009).

253. *See supra* text accompanying notes 90–107.

254. *Miller*, 212 P.3d at 323.

255. *Id.*

256. *Id.* at 330.

my count, nine states use this blended approach: Arizona,²⁵⁷ California,²⁵⁸ Florida,²⁵⁹ Idaho,²⁶⁰ Minnesota,²⁶¹ New Mexico,²⁶² Oklahoma,²⁶³ South Dakota,²⁶⁴ and Washington.²⁶⁵

257. Although the Arizona courts have quoted the DTL passage from *Crisci*, see, e.g., *Clearwater v. State Farm Mut. Auto. Ins. Co.*, 792 P.2d 719, 723 (Ariz. 1990) (in banc) (quoting *Crisci v. Sec. Ins. Co. of New Haven*, 426 P.2d 173, 176 (Cal. 1967) (in banc)), they continue to use an EC jury instruction. See *id.* at 721. The Arizona Supreme Court's use of EC in addition to, or perhaps instead of, DTL is illustrated by *General Accident Fire & Life Assurance Corp. v. Little*, where the Arizona Supreme Court held that an insurer that had disregarded the policy limits was liable for breach of the duty to settle. 443 P.2d 690, 696–97 (Ariz. 1968). For a discussion of *Little*, see *supra* notes 38–66 and accompanying text.

258. While the California Supreme Court's language in *Crisci v. Security Insurance Co. of New Haven*, suggested that "the test is whether a prudent insurer without policy limits would have accepted the settlement offer," 426 P.2d at 176, this "test" has not been adopted to the exclusion of other forms of EC. Later California Supreme Court cases do not use DTL language in connection with the duty to settle test. See, e.g., *Kransco v. Am. Empire Surplus Lines Ins. Co.*, 2 P.3d 1, 9 (Cal. 2000); *Commercial Union Assurance Cos. v. Safeway Stores, Inc.*, 610 P.2d 1038, 1041 (Cal. 1980). Witkin's Summary of California Law, considered authoritative by California courts and practitioners, uses both EC and DTL. See 2 B.E. WITKIN & MEMBERS OF THE WITKIN LEGAL INST., SUMMARY OF CALIFORNIA LAW § 258 (10th ed. Supp. 2012). California jury instructions take a similar approach. See CALIFORNIA JURY INSTRUCTIONS: CIVIL (BAJI), *supra* note 28, §§ 12.96, 12.98. For additional analysis of California law, see *infra* Appendix.

259. The Florida Supreme Court has endorsed the DTL test, see *Bos. Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980) (per curiam), but it also recognizes that the duty to settle extends to obligations associated with EC: the duty to communicate settlement offers, to advise the insured of the probable outcome, to warn the insured of an excess judgment, to advise the insured how to avoid the excess judgment, and to undertake an appropriate investigation. *Id.* In applying the standards, the *Gutierrez* court held that the insurer had not breached the duty to settle because the insured "at all times contested liability" and did not want the insurer to settle "because he was pursuing a counterclaim against" the claimant. *Id.* Once the counterclaim was settled, the insurer "offered to settle for policy limits." *Id.* at 786. Even though a prudent person would have settled for policy limits, the insurer did not breach the duty to settle because it acted to protect the insured's interest in pursuing a counterclaim. *Id.* Thus, while the court includes DTL in its recitation of the standard, its holding applied EC. The standardized jury instruction for bad faith approved by the Florida Supreme Court is consistent with EC and does not reference DTL. See *In re Standard Jury Instructions in Civil Cases—Report No. 09-01* (Reorganization of the Civil Jury Instructions), 35 So. 3d 666, 720–21 (Fla. 2010) (mem.) (per curiam). For additional analysis of Florida law, see *infra* Appendix.

260. The Idaho Supreme Court adopted equal consideration for failure to settle based on a version of the factor analysis used in Arizona. See *Truck Ins. Exch. v. Bishara*, 916 P.2d 1275, 1279–80 (Idaho 1996) (first citing *Rawlings v. Apodaca*, 726 P.2d 565, 571–72 (Ariz. 1986) (in banc); then citing *Clearwater*, 792 P.2d at 722–23; and then quoting *Little*, 443 P.2d at 694). For additional analysis of Idaho law, see *infra* Appendix.

261. *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387–88 (Minn. 1983) ("This duty to exercise 'good faith' includes an obligation to view the situation as if there were no policy limits applicable to the claim, and to give equal consideration to the financial exposure of the insured." (emphasis added) (citing *Cont'l Cas. Co. v. Reserve Ins. Co.*, 238 N.W.2d 862, 864 (Minn. 1976))). Both parts of this test came into play for the court's holding. There was

little doubt that the insured was liable and that the amount of damages would exceed the \$25,000 policy limit. *Id.* at 388. Thus, if there were no policy limits applicable, an insurer would accept the offer to settle for \$25,000. In addition, however, the court noted that the insurer acted in bad faith by threatening that proceeding with the suit would result in a reduction of the plaintiff's recovery due to the subrogation rights of the no-fault insurer and by failing to inform the insured of the claimant's settlement offer and the insurer's counteroffer. *Id.* at 388–89. These facts show that the insurer did not give equal consideration to the interests of the insured.

262. Although the New Mexico Supreme Court has cited the DTL test with approval, see *Dairyland Ins. Co. v. Herman*, 954 P.2d 56, 61 (N.M. 1997), this test has not displaced EC. In response to a certified question from the Tenth Circuit, the *Herman* court held that an insurer could be liable for failure to settle even though the reason for not settling was that the claimant refused to give a full release. *Id.* at 65. Where “extinguishing the insured's liability is a practical impossibility[,] . . . what is required is a balancing of the interests of [the insurer] and its insured.” *Id.* at 64. A person who would disregard the limits would hold out for a full release, but where the limits are too low to cover much of the losses, a trier of fact could find that “the insurer showed mistaken judgement [sic] in appraising its own interest and also demonstrated a bad-faith disregard for the interests of its insured.” *Id.* at 65. For more detailed analysis, see *infra* Appendix.

263. *Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080, 1093 (Okla. 2005) (“In dealing with third parties, however, the insured's interest must be given faithful consideration *and* the insurer must treat a claim being made by a third party against its insured's liability policy ‘as if the insurer alone were liable for the entire amount’ of the claim.” (emphasis added) (quoting *Am. Fid. & Cas. Co. v. L. C. Jones Trucking Co.*, 321 P.2d 685, 687 (Okla. 1957), *overruled by Badillo*, 121 P.3d 1080)).

264. The South Dakota Supreme Court noted that there is “no single satisfactory test,” but that it “appears to have been most frequently held the insured's interests must be given ‘equal consideration,’” which sometimes “is expressed by telling the jury that in making the decision whether to settle or try a case, the insurer must in good faith view the situation as it would if there were no policy limits applicable to the claim.” *Kunkel v. United Sec. Ins. Co. of N.J.*, 168 N.W.2d 723, 726 (S.D. 1969). While this is an endorsement of DTL, the court continued by setting out and applying the eight factors from *Brown v. Guarantee Insurance Co.*, which include “failure of the insurer to properly investigate” and “failure of the insurer to inform the insured of a compromise offer,” 319 P.2d 69, 75 (Cal. Dist. Ct. App. 1957), that are associated with EC. *Kunkel*, 168 N.W.2d at 727 (citing *Brown*, 319 P.2d at 75). In affirming the jury verdict, the court found that while there had been an adequate investigation, the insurer failed to inform the insured of “the great probability of the verdict exceeding policy limits” and of subsequent settlement offers to settle for policy limits. *Id.* at 729–30. The court also found that the jury was entitled to find bad faith where the insurer “recognized [the] great danger of a verdict exceeding policy limits” and had the opportunity to settle for policy limits. *Id.* at 731. For additional analysis, see *infra* Appendix.

265. Although the Washington Supreme Court has not addressed the standard to be applied for a breach of an insurer's duty to settle, the Washington Court of Appeals has addressed the issue and uses the blended approach. See *Tyler v. Grange Ins. Ass'n*, 473 P.2d 193, 199–201 (Wash. Ct. App. 1970). After noting that the insurer must give equal consideration to the interests of the insured, and that it “adopt[ed] the ‘no limit’ test as the best means of determining whether the interests of the insurer and the insured have been given equal consideration,” the court included “[t]he failure . . . to properly investigate the evidence.” *Id.* at 200–01. Similarly, in *Moratti v. Farmers Insurance Co. of Washington*, the court approved of jury instructions that included duties to conduct a reasonable investigation, to communicate investigations and evaluations, and to communicate

A good example of the blended approach can be seen in the Arizona Supreme Court opinion in *Clearwater v. State Farm Mutual Automobile Insurance Co.*²⁶⁶ Even though that case is cited to support DTL,²⁶⁷ the court (admittedly in dicta) actually endorsed a version of EC that goes beyond DTL. The case concerned whether the jury should have been instructed that the insurer had a defense to bad faith based on having a right to challenge “fairly debatable” claims.²⁶⁸ The court rejected this defense on the ground that it is applicable to first-party insurance cases rather than third-party cases.²⁶⁹

In the course of the opinion, the court set out the standard for bad faith. The court is quite clear that the standard is “equal consideration.” It refers to the jury instruction as the “equal consideration” instruction,²⁷⁰ which concludes that the “duty of good faith and fair dealing requires the insurance company to give equal consideration to the interests of its insured as it gives its own interests.”²⁷¹ The court noted: “[W]e have held that the duty of good faith and fair dealing requires that an insurer give ‘equal consideration’ to the interests of its insured in deciding whether to accept an offer of settlement.”²⁷²

At the same time, however, *Clearwater* quoted the DTL statement from *Crisci*: “In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer.”²⁷³ This is the classic judicial statement of the DTL test. While this statement seemed to be approved, DTL was not part of the jury instruction given and approved in *Clearwater*.²⁷⁴ To be fair, two of the factors in the jury instruction—the “financial risk to which each party is exposed” and “[t]he strength of the injured claimants’ case”²⁷⁵—are consistent with DTL.²⁷⁶

settlement offers as part of the insurer’s duty to respond to reasonable settlement offers. 254 P.3d 939, 944 (Wash. Ct. App. 2011). For additional analysis, see *infra* Appendix.

266. 792 P.2d 719 (Ariz. 1990) (in banc).

267. See, e.g., BARKER & KENT, *supra* note 163, § 2.03[2][d] n.38.

268. *Clearwater*, 792 P.2d at 721.

269. *Id.* at 724.

270. *Id.* at 721.

271. *Id.*

272. *Id.* at 722 (citing *Farmers Ins. Exch. v. Henderson*, 313 P.2d 404, 406 (Ariz. 1957)).

273. *Id.* at 723 (quoting *Crisci v. Sec. Ins. Co. of New Haven*, 426 P.2d 173, 176 (Cal. 1967) (in banc)).

274. *Id.* at 721.

275. *Id.*

276. The first factor, financial risk, may also be used to support EC rather than DTL. Financial risk might take into account the financial strength of the insured compared to the insurer, allowing a jury to take that relative strength into consideration as part of the balancing of interests. In other words, if the insured is financially vulnerable, that financial

But the jury instruction includes two other factors, “[t]he failure of the insurance company to inform the insured of offers of settlement” and “[t]he failure of the insurance company to properly investigate,”²⁷⁷ which are consistent with EC. Furthermore, these four factors of the jury instruction were taken from a longer list of factors from the California Court of Appeal opinion in *Brown v. Guarantee Insurance Co.*,²⁷⁸ identified by the Arizona court as relevant to bad faith: strength of the claimant’s case; “attempts by the insurer to induce the insured to contribute to a settlement”; “failure of the insurer to properly investigate”; “the insurer’s rejection of advice of its own attorney or agent”; the failure to inform the insured of an offer; “the amount of financial risk to which each party is exposed”; “the fault of the insured in inducing the insurer’s rejection of the . . . offer”; and “any other factors tending to establish or negate bad faith.”²⁷⁹

The factors endorsed by the Arizona Supreme Court show an approach that blends DTL and EC. Two of the factors—the strength of the claimant’s claim and the financial risks to which each party is exposed—are factors that can be used for the DTL test. The reasonableness of a policy limits settlement offer may be evaluated in light of the strength of the claimant’s case and the amount of financial risk for each party. But these are just two of the factors to be considered, not a test to be applied. Consequently, the trier of fact retains considerable latitude to still find that the rejection of the settlement offer amounts to bad faith. Moreover, the other factors reflect EC rather than DTL. Attempts by the insurer to induce the insured to contribute to the settlement is a classic example of bad faith because it puts the insurer’s interests ahead of the insured’s. Similarly, the failure to inform the insured of a settlement offer is evidence of bad faith because it fails to protect the insured’s interests. This duty to inform the insured makes no sense if one disregards the policy limits.²⁸⁰ Furthermore, the last factor identified is any other factors that could establish or negate bad faith. This kind of catchall category gives broad discretion to the trier of fact that undermines the simplicity of the DTL test.

risk might justify a finding of breach of the duty to settle although a financially strong entity or insurer without limits would have rejected the settlement.

277. *Id.*

278. 319 P.2d 69, 75 (Cal. Dist. Ct. App. 1957). For the influence of *Brown* on other jurisdictions, see *supra* note 26. For courts that have relied on factors from *Brown*’s list, see *supra* note 28.

279. *Clearwater*, 792 P.2d at 722 (quoting *Gen. Accident Fire & Life Assurance Corp. v. Little*, 443 P.2d 690, 694 (Ariz. 1968) (in banc) (quoting *Brown*, 319 P.2d at 75)).

280. If an insurer does not reserve its rights and its limits are well above the exposure, the insurer has broad unilateral rights to control and settle the case.

This approach is not unique to Arizona. Idaho²⁸¹ and South Dakota²⁸² have followed Arizona's factor analysis. The Arizona factors originated with the California Court of Appeal in *Brown v. Guarantee Insurance Co.*,²⁸³ and California continues to recognize those factors for juries to assess bad faith.²⁸⁴ Although not using all of the same factors, New Mexico recognizes the duty to investigate as part of the insurer's duty to consider reasonable settlement offers.²⁸⁵

The other blended approach does not use factors, but simply uses the DTL and EC tests simultaneously. For example, in *Short v. Dairyland Insurance Co.*,²⁸⁶ the Minnesota Supreme Court articulated the test this way: "This duty to exercise 'good faith' includes an obligation to view the situation as if there were no policy limits applicable to the claim, and to give equal consideration to the financial exposure of the insured."²⁸⁷

In applying the test, the *Short* court made findings that supported both DTL and EC. The case arose out of a traffic accident causing the death of a forty-year-old husband and father of five who earned \$30,000 per year.²⁸⁸ The insured had policy limits of \$25,000 and had a blood/alcohol concentration of more than 0.10 at the time of the accident.²⁸⁹ Reports of the accident indicated that the insured had crossed the center line and hit the decedent's car.²⁹⁰ The insured could not recall anything about the accident, but admitted that he had been drinking and that he failed to take his prescribed anti-blackout medication that day.²⁹¹

281. See *Truck Ins. Exch. v. Bishara*, 916 P.2d 1275, 1279–80 (Idaho 1996) (first citing *Rawlings v. Apodaca*, 726 P.2d 565, 571–72 (Ariz. 1986) (in banc); then citing *Clearwater*, 792 P.2d at 722–23; and then quoting *Gen. Accident Fire & Life Assurance Corp. v. Little*, 443 P.2d 690, 694 (Ariz. 1968) (in banc)).

282. *Kunkel v. United Sec. Ins. Co. of N.J.*, 168 N.W.2d 723, 727 (S.D. 1969) (citing *Brown*, 319 P.2d at 75).

283. 319 P.2d at 75. For the reliance on *Brown*, see *Clearwater*, 792 P.2d at 722 (quoting *Little*, 443 P.2d at 694 (quoting *Brown*, 319 P.2d at 75)).

284. See CALIFORNIA JURY INSTRUCTIONS: CIVIL (BAJI), *supra* note 28, § 12.98; see also WITKIN & MEMBERS OF THE WITKIN LEGAL INST., *supra* note 258, § 258 (explaining that due consideration of the insured's interest is to be evaluated by consideration of the eight factors from *Brown*).

285. See MICHIE'S ANNOTATED RULES OF NEW MEXICO § 13-1704 (2015) (jury instruction for failure to settle). Similar jury instructions were approved by the New Mexico Supreme Court in *Ambassador Insurance Co. v. St. Paul Fire & Marine Insurance Co.*, 690 P.2d 1022, 1026 (N.M. 1984).

286. 334 N.W.2d 384 (Minn. 1983).

287. *Id.* at 387–88 (emphasis added) (citing *Cont'l Cas. Co. v. Reserve Ins. Co.*, 238 N.W.2d 862, 864 (Minn. 1976)).

288. *Id.* at 385.

289. *Id.* at 385–86.

290. *Id.*

291. *Id.*

He was charged with criminal negligence because of his drinking and driving.²⁹² About a month after the accident, the plaintiff's counsel informed the claims adjuster that he wanted the \$25,000 policy limits to settle the case.²⁹³ Settlement was discussed a few days later, and the adjuster "requested a discount to be deducted from the policy limit."²⁹⁴ The adjuster allegedly told plaintiff's counsel that if they commenced suit, the no-fault insurer's subrogation rights would reduce "the 'money anyway so [the adjuster's company] should get the benefit of it.'"²⁹⁵ The adjuster offered to settle for policy limits so long as the no-fault insurer was listed on the check, or, alternatively, offered to settle for \$24,000 if the no-fault insurer was not included.²⁹⁶ Plaintiff's counsel refused.²⁹⁷ A year later, plaintiff's counsel again offered to settle for policy limits without the no-fault insurer being included with an explanation as to why the subrogation interest was not valid.²⁹⁸ The insurer did not respond, but instead moved to deposit its limits with the court, to which the plaintiff objected based on the insurer's previous intransigence.²⁹⁹ The motion was denied, and eleven months later, two weeks before trial, the insurer offered policy limits without including the no-fault insurer on the check.³⁰⁰ The plaintiff refused, and the case proceeded to judgment for \$745,000.³⁰¹

The Minnesota Supreme Court affirmed the trial court's entry of summary judgment for the insured and adopted the trial court's opinion as its own.³⁰² The court found that the insurer did not deny that its insured was liable or that the judgment was likely to exceed the policy limits.³⁰³ The insurer contended that it was entitled to "explore" a lower settlement, but the court found that the "brazen attempts to obtain a discount" and the effort "to coerce [plaintiff's] attorney into submission by raising the spectre of [the no-fault insurer's] subrogation rights" were "all in dereliction of its fiduciary duty to" the insured.³⁰⁴ Moreover, the court found "[f]urther evidence of [insurer's] lack of good faith" by its "failure to

292. *Id.* at 386.

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 387.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* at 385.

303. *Id.*

304. *Id.* at 388–89.

ever apprise its insured of [plaintiff]’s settlement offer or their ‘counter-offer,’”³⁰⁵ an “important question” for determining good faith.³⁰⁶

This analysis reflects both EC and DTL. The insurer’s effort to get a settlement lower than its policy limits was certainly in its own interest at the expense of the insured, and therefore did not give equal consideration. The court’s conclusion that such efforts were “in dereliction” of the insurer’s duty to its insured is consistent with EC. At the same time, however, the fact that the insurer did not dispute that its insured was liable and that a judgment was likely to exceed policy limits supports DTL. A reasonable person facing such exposure would likely accept the policy limits settlement rather than try to negotiate. The insurer’s failure to communicate shows the use of EC separate from DTL. Failure to communicate with the insured is a failure to give equal consideration to the insured’s interest in knowing about the settlement discussions. The DTL standard does not address this kind of communication problem. In fact, if one assumes that the policy has no limits, the insured’s interest in knowing about the settlement is significantly lessened by the insurer’s liability for the full amount.

This form of blending, where both EC and DTL are used at the same time, is also the approach taken in Oklahoma.³⁰⁷ Similarly, although not as explicit as Oklahoma or Minnesota, New Mexico³⁰⁸ and Washington³⁰⁹ use both DTL and EC insofar as they include the insurer’s duty to investigate, which is more consistent with EC than with DTL.

305. *Id.* at 389.

306. *Id.* (quoting *New Amsterdam Cas. Co. v. Lundquist*, 198 N.W.2d 543, 551 (Minn. 1972)).

307. *Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080, 1093 (Okla. 2005) (“[T]he insured’s interests must be given faithful consideration *and* the insurer must treat a claim being made by a third party against its insured’s liability policy ‘as if the insurer alone were liable for the entire amount’ of the claim.” (emphasis added) (quoting *Am. Fid. & Cas. Co. v. L. C. Jones Trucking Co.*, 321 P.2d 685, 687 (Okla. 1957), *overruled by Badillo*, 121 P.3d 1080)). For additional analysis of the law in Oklahoma, see *infra* Appendix.

308. *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 690 P.2d 1022, 1025 (N.M. 1984) (noting that “when failure to settle the claim stems from a failure to properly *investigate* the claim[,] . . . this . . . negligence . . . is strong evidence of bad faith in failing to settle”). For additional analysis of New Mexico law, see *infra* Appendix.

309. *Tyler v. Grange Ins. Ass’n*, 473 P.2d 193, 200–01 (Wash. Ct. App. 1970). In *Moratti v. Farmers Insurance Co. of Washington*, the court also endorsed a duty to communicate investigations, evaluations, and settlement offers to insureds as part of an insurer’s duty to respond to reasonable settlement offers. 254 P.3d 939, 944 (Wash. Ct. App. 2011). For additional analysis, see *infra* Appendix.

D. Pure DTL as Minority Rule

Having looked at the way that the DTL and EC tests are used in some thirty jurisdictions, it seems clear that, numerically speaking, EC is the majority rule. Thirteen states use EC without reference to DTL,³¹⁰ In addition, another nine states continue to use EC along with DTL,³¹¹ bringing the total number of EC jurisdictions to twenty-two out of the thirty analyzed, or 73.33%. These twenty-two jurisdictions include four of the top five most populous states: California,³¹² Florida,³¹³ New York,³¹⁴ and Illinois.³¹⁵

On the other hand, if the nine states that use the blended approach are added to the eight jurisdictions that use the pure DTL approach,³¹⁶ one could conclude that DTL is the majority rule, because the total jurisdictions using DTL is seventeen out of thirty, or 56.66%. While this combined group does not have quite as many large states as the combined EC group, it still includes a significant number of large states: California,³¹⁷ Florida,³¹⁸ Pennsylvania,³¹⁹ and New Jersey.³²⁰ In addition, one could argue that at least two jurisdictions should be added to this total from the EC group: Mississippi³²¹ and Nevada³²² were classified as EC jurisdictions even though they cited to the DTL standard, because the courts in those jurisdictions have not applied it. Thus, if the majority rule is to be determined by the number of states that have cited the DTL standard approvingly, the total by my count would be nineteen out of thirty, or a respectable 63.33%.

However, stating a rule with approval is much different than applying that rule. Courts often make statements in dicta or for rhetorical purposes without those statements having much bearing on

310. Those states are Alaska, Connecticut, Georgia, Illinois, Louisiana, Mississippi, Missouri, Montana, Nevada, New York, Tennessee, Utah, and Virginia. *See supra* notes 218–30 and accompanying text.

311. Those states are Arizona, California, Florida, Idaho, Minnesota, New Mexico, Oklahoma, South Dakota, and Washington. *See supra* notes 257–65 and accompanying text.

312. California uses a blended approach. *See supra* note 258; *see also infra* Appendix.

313. Florida uses a blended approach. *See supra* note 259; *see also infra* Appendix.

314. New York uses EC without DTL. *See supra* note 227.

315. Illinois uses EC without DTL. *See supra* note 221.

316. Those states are Delaware, Iowa, Kansas, Maine, Massachusetts, New Jersey, Oregon, and Pennsylvania. *See supra* notes 176–83 and accompanying text.

317. *See supra* note 258.

318. *See supra* note 259.

319. Pennsylvania uses a pure DTL approach. *See supra* note 183.

320. New Jersey uses a pure DTL approach. *See supra* note 181.

321. *See supra* note 223.

322. *See supra* note 226.

the outcome of the case. Sometimes those statements are picked up by later cases and become the law, but sometimes those statements are ignored and have no precedential impact. Moreover, when a court endorses the DTL standard, it does not necessarily preclude the use of the EC test. After all, DTL was a test designed to determine whether the insurer had given equal consideration to the interests of the insured.³²³ It may be that the failure to disregard the limits is just one way that an insurer may breach the duty to settle. Or it may be that acting as if there were no policy limits is necessary, but not sufficient to comply with the duty to settle. The insurer may also have a duty to act to protect the interests of the insured through, for example, conducting a thorough investigation, communicating settlement offers to the insured, etc. The jurisdictions using the blended approach show that both tests may be used at the same time. Those states categorized as “pure” DTL jurisdictions simply may not have addressed whether the EC test also applies, or perhaps more exhaustive research would show that more states are blended than are pure DTL states.³²⁴

Although the question of what rule is the “majority” rule can be framed in various ways, for the purposes of this Article, the question is framed by the use of the DTL test in section 24 of the Restatement. In other words, the question to be addressed here is whether the DTL rule

323. In the words of Professor Keeton, “[t]his test of equality [in consideration] is much more aptly and clearly stated in terms of a hypothetical person concerned with the whole risk as a unit.” Keeton, *supra* note 14, at 1146.

324. Because of limited time, I did not review the case law as thoroughly in pure DTL jurisdictions as I did for EC and blended jurisdictions. If the highest court applied the DTL test to reach its holding without additional EC factors, I put those states in the DTL category. It may be that other cases within those jurisdictions have used EC (or EC factors) without, or in addition to, DTL. Although I have not looked for such authority, one example of such a case is *Peckham v. Continental Casualty Insurance Co.*, 895 F.2d 830 (1st Cir. 1990), discussed earlier in the text accompanying notes 136–62. I use that case as an example of EC, but it was applying Massachusetts law, which I categorized as a DTL state. See *supra* note 180 and accompanying text. While the First Circuit is not the same as a Massachusetts court applying Massachusetts law, the First Circuit relied on Massachusetts law for the proposition that “the insurer must inform the insured of its conflicting interests, advise him of his rights, and keep him abreast of settlement offers and meaningful developments.” *Peckham*, 895 F.2d at 834 (citing *Murach v. Mass. Bonding & Ins. Co.*, 158 N.E.2d 338, 342 (Mass. 1959)). Thus, there is some indication that Massachusetts may use factors consistent with EC. Another example is Kansas. Although I categorize it as a “pure” DTL state, see *supra* note 178 and accompanying text, a Kansas case is cited to support the proposition that “[t]he majority rule holds that an insurer’s failure to communicate with an insured regarding settlement in a case which results in a verdict in excess of policy limits is one factor to consider in deciding whether the insurer should be liable for bad faith.” *Richmond*, *supra* note 69, at 517 & n.120 (citing *Wiebe v. Hicks*, No. 98,900, 2008 WL 4291641, at *4–5 (Kan. Ct. App. Sept. 19, 2008)). The duty to communicate settlement offers is more consistent with EC than DTL. See *supra* Section II.B.1.

as articulated by section 24 of the Restatement represents a majority or minority view. As explained above, section 24 fully embraces DTL with just a passing reference to EC.³²⁵ It makes DTL the test for a reasonable settlement in the black letter.³²⁶ EC is relegated to a single sentence in the Comment that equates it to DTL,³²⁷ and DTL is advanced as the most “utilized” and “most common” test for EC in the Reporters’ Note.³²⁸ Thus, the Restatement uses a relatively “pure” form of DTL. Because the “pure” form of DTL is used in only eight states, it represents a minority view.

IV. ASSESSMENT AND RECOMMENDATIONS

Having summarized the current state of the case law on the standard to be applied for the duty to settle, we now turn to an assessment of section 24 of the Restatement and related recommendations in light of the case law. This section will focus on two areas: a) the relationship between EC and DTL and b) the treatment of insurer behavior toward the insured in connection with settlement discussions.

A. *Relationship Between DTL and EC*

In light of the case law, section 24 of the Restatement overstates the role and significance of DTL. While there is substantial support for the use of DTL, only eight states use it without any reference to EC or factors related to EC. On the other hand, thirteen states use EC but have not endorsed the use of DTL, and another nine states use EC blended with DTL, making a total of twenty-two EC states. There are two ways this might be resolved. First, section 24 of the Restatement could recognize DTL as a minority approach and endorse it. Alternatively, section 24 could embrace EC and endorse DTL as one test used to determine whether equal consideration has been given. We will consider these options in turn.

1. Recognize DTL as the Minority Rule, with EC as the Majority

The Restatement may choose to endorse DTL as a minority approach, but in doing so, it should be more explicit that DTL is the minority rule.

325. See *supra* Part I.

326. See *supra* text accompanying notes 1–2.

327. RESTATEMENT OF THE LAW OF LIAB. INS. § 24 cmt. c (AM. LAW INST., Discussion Draft 2015); see *supra* text accompanying note 20.

328. RESTATEMENT OF THE LAW OF LIAB. INS. § 24 reporters’ note c (AM. LAW INST., Discussion Draft 2015); see *supra* text accompanying notes 13, 16.

Only eight states have embraced the “pure” DTL standard,³²⁹ the standard suggested by section 24.

To endorse the minority rule, the Restatement should compare it to the majority rule and provide an explanation for the choice. Although the Restatement recognizes EC as the majority approach,³³⁰ which is consistent with the twenty-two states that use EC (including the nine states that also use DTL),³³¹ it does not contrast EC to the minority approach of DTL. This comparison of EC and DTL could be included in comment c, where DTL is introduced and equated to EC.³³² The commentary could be amended to explain that DTL evolved from EC, and that EC is used by a majority of courts (some without DTL and some in addition to DTL). This might be a suitable place to explain the rationale for choosing DTL over EC. Although the Reporters’ Note suggests that DTL is the “most straightforward . . . application” of EC, this suggestion is not explained.³³³ One additional rationale might be that DTL balances the need to protect the insured with the consequences of being underinsured.³³⁴ However, adoption of DTL to the exclusion of EC would come at the cost of providing less protection to the interests of the insured,³³⁵ which would be appropriate for the commentary or notes to address.

The Reporters’ Note should also be amended to provide more detail about EC and the selection of DTL. After introducing EC, the current Reporters’ Note dismisses EC by finding that DTL has “become the most common test for determining whether an insurer gave ‘equal consideration’ to its insured’s interests in duty-to-settle cases.”³³⁶ Although it is true that eight states (a minority of jurisdictions) use DTL alone as the test for EC,³³⁷ no court has explicitly rejected or replaced EC when adopting DTL. Moreover, nine states, which is one jurisdiction more and which represents a considerably larger population, expressly

329. Those states are Delaware, Iowa, Kansas, Maine, Massachusetts, New Jersey, Oregon, and Pennsylvania. *See supra* notes 176–83 and accompanying text.

330. *See* RESTATEMENT OF THE LAW OF LIAB. INS. § 24 reporters’ note c (AM. LAW INST., Discussion Draft 2015).

331. *See supra* notes 310–11.

332. *See* RESTATEMENT OF THE LAW OF LIAB. INS. § 24 cmt. c (AM. LAW INST., Discussion Draft 2015).

333. *See id.* § 24 reporters’ note c.

334. *Cf.* ASHLEY, *supra* note 163, § 3:19 (explaining Keeton’s recommendation of DTL).

335. *See supra* Section II.A.

336. RESTATEMENT OF THE LAW OF LIAB. INS. § 24 reporters’ note c (AM. LAW INST., Discussion Draft 2015) (citing cases and secondary authority).

337. *See supra* Section III.A.

use both EC and DTL.³³⁸ In addition, the methodology for what constitutes “the most common test” is unclear. Even though the California Supreme Court was the court that most explicitly “adopted” DTL as “the test” in *Crisci*,³³⁹ later California Supreme Court cases do not use the DTL language. For example, in *Commercial Union Assurance Cos. v. Safeway Stores Inc.*,³⁴⁰ decided in 1980, the California Supreme Court put the test this way:

It is now well established that an insurer may be held liable for a judgment against the insured in excess of its policy limits where it has breached its implied covenant of good faith and fair dealing by unreasonably refusing to accept a settlement offer within the policy limits. The insurer’s duty of good faith requires it to “settle within policy limits when there is substantial likelihood of recovery in excess of those limits.”

....

“The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured’s interest requires the insurer to settle the claim. Its unwarranted refusal to do so

338. See *supra* Section III.C.; see, e.g., *Clearwater v. State Farm Mut. Auto. Ins. Co.*, 792 P.2d 719, 721–23 (Ariz. 1990) (in banc) (using EC for jury instructions while also quoting *Crisci*); *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387–88 (Minn. 1983) (“This duty to exercise ‘good faith’ includes an obligation to view the situation as if there were no policy limits applicable to the claim, and to give equal consideration to the financial exposure of the insured.” (citing *Cont’l Cas. Co. v. Reserve Ins. Co.*, 238 N.W.2d 862 (Minn. 1976))); *Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080, 1093 (Okla. 2005) (“In dealing with third parties, however, the insured’s interest must be given faithful consideration and the insurer must treat a claim being made by a third party against its insured’s liability policy ‘as if the insurer alone were liable for the entire amount’ of the claim.” (quoting *Am. Fid. & Cas. Co. v. L. C. Jones Trucking Co.*, 321 P.2d 685, 687 (Okla. 1957), *overruled by Badillo*, 121 P.3d 1080)). Some jurisdictions continue to recognize insurer duties that are consistent with EC, such as the duty to investigate and the duty to inform the insured of settlement offers, while recognizing DTL explicitly or with factors consistent with that standard.

339. See *Crisci v. Sec. Ins. Co. of New Haven*, 426 P.2d 173, 176 (Cal. 1967) (in banc).

340. 610 P.2d 1038 (Cal. 1980).

constitutes a breach of the implied covenant of good faith and fair dealing.”³⁴¹

This Article has argued that California added DTL to EC and uses both. In light of the case law that shows courts using DTL, EC, and a combination of the two, the notes should be amended to reflect those practices.

The notes should also be amended regarding the differences between EC and DTL. Currently, the notes recognize that “two authors” suggest that EC and DTL function differently,³⁴² but imply that, in fact, EC and DTL are not different. At a minimum, the notes should be amended to reflect that a third author has taken this view, but perhaps this Article is persuasive enough that the Reporters will concede that the tests are different. If the tests are different and the Reporters, with input through the usual ALI mechanisms, decide to endorse DTL over EC, this would be a good place to provide citations to the authorities relied upon in making that judgment.

2. Recognize DTL as a Test for EC

An alternative approach to recognition of a minority rule would be to recognize the majority rule, EC, and to endorse DTL as an important, though not exclusive, test for EC. In my judgment, this approach would be the most consistent with the case law. By my count, twenty-two jurisdictions are using EC, including nine jurisdictions that also use DTL. Thus, the largest number of states are using EC, with some forty percent of those states already using DTL in conjunction with EC. In addition, by using DTL as one, but not the exclusive, test for EC, the other case law can be substantially harmonized.

First, let us consider the thirteen states that have not endorsed DTL. The case law in these states can be harmonized with DTL to the extent that the courts are reaching the same results under EC. It bears repeating that DTL was first articulated as the test for EC. An insurer that refuses to settle where a prudent insurer without limits would have

341. *Id.* at 1040–41 (citations omitted); *see also* *Hamilton v. Md. Cas. Co.*, 41 P.3d 128, 132 (Cal. 2002) (“[I]n deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured’s interests may require the insurer to settle the claim within the policy limits.”).

342. RESTATEMENT OF THE LAW OF LIAB. INS. § 24 reporters’ note c (AM. LAW INST., Discussion Draft 2015) (citing ABRAHAM, *supra* note 17, at 665; Quinn, *supra* note 23, at 960–63).

has failed to give equal consideration to the interests of its insured. Thus, on the same facts an insurer can be found to be in breach under either DTL or EC. For example, in *Southern General Insurance Co. v. Holt*,³⁴³ the Georgia Supreme Court held that an insurer was not entitled to a directed verdict on the failure to settle claim where the claimant had offered to settle for policy limits, the insured's liability was uncontested, the special damages exceeded policy limits, and the insurer did not respond by asking for more information or time to evaluate.³⁴⁴ Although the court used EC,³⁴⁵ the same result could be justified under DTL. A prudent insurer without policy limits would have accepted the settlement offer, or at least would have asked for more information or time to evaluate.

Now let us consider the eight jurisdictions which I have categorized as using a "pure" DTL standard.³⁴⁶ Because many cases will have the same result under either EC or DTL, the fact that those jurisdictions resolve the cases based on DTL does not make them inconsistent with EC. DTL was developed as a test for EC, so most cases that are resolved using DTL will be consistent with EC. For example, in *Bowers v. Camden Fire Insurance Ass'n*,³⁴⁷ the claimant, who had obtained a \$29,000 verdict, offered to settle the case for the \$20,000 policy limits if the insurer would not appeal.³⁴⁸ The Supreme Court of New Jersey, in one of the most explicit applications of DTL, found "it difficult to believe that if the policy had been for an unlimited amount[,] defendant [insurer] would have acted the way it did."³⁴⁹ This outcome is not inconsistent with EC; by insisting on an appeal, the insurer did not give equal consideration to its insured's interest in avoiding the excess judgment.³⁵⁰

343. 416 S.E.2d 274 (Ga. 1992).

344. *Id.* at 275-76.

345. *Id.* at 276.

346. See *supra* note 316 and accompanying text.

347. 237 A.2d 857 (N.J. 1968).

348. *Id.* at 860.

349. *Id.* at 865.

350. The insurer's interest was to try to avoid the entire judgment on appeal. However, the basis for appeal was not very strong; the argument advanced by the insurer was that the verdict was against the weight of the evidence. *Id.* at 860. To look at this more quantitatively, the insurer's interest was some chance to avoid paying \$20,000. Since the jury had already awarded \$29,000, the odds of recovering were maybe 10-20%, putting the insurer's expected value at \$2000-\$4000 (\$20,000 x .1 or .2). The insured's interest was the excess exposure of \$9000, which is greater than the expected value of the insurer's interest (\$2000-\$4000). Moreover, in this case, even discounting the insured's interest to its expected value based on the possibility of winning on appeal, the insured's interest still outweighs. If there is a 10-20% chance of success on appeal, the chances of losing are 80-90%. Therefore, the insured's expected value is \$7200-\$8100 (\$9000 x .8 or .9), which is greater than the insurer's expected value of \$2000-\$4000.

Although the cases harmonize to the extent that the two tests reach the same outcomes, we also need to consider those cases which would have divergent results under the two tests. Let us start with those cases for which an insurer would be liable under DTL but would not be liable under EC. This is likely to be a small set of cases. Based on my review of the case law and the analysis above, the EC standard generally is more protective of insureds than DTL. It is hard to imagine a case in which a prudent insurer without limits would have accepted the settlement offer but a jury applying the EC test would find that the insurer was not liable. Nearly always, if a prudent insurer without limits would have accepted the settlement, a jury will find that the insurer who rejects the settlement did not give equal consideration to the insured's interests.

The only possible example I can imagine where an insurer would be liable under DTL but not under EC involves misconduct by the insured. An insurer might refuse to settle for policy limits because the insured has misrepresented the facts in the case. For example, the insured could represent that he was not responsible for the accident, when in fact he was. With this misrepresentation, the insurer might evaluate the case as having a 20% probability of a plaintiff's verdict. Assuming policy limits of \$100,000 and exposure of \$150,000, the insurer relying on the misrepresentation would conclude that the expected value of the case was only \$30,000, well below the policy-limits offer of \$100,000, and would reject the settlement offer. While this might appear to be justified, the DTL test could lead to liability for the insurer in two ways. First, it appears that the DTL test endorsed by section 24 of the Restatement uses an "objective" probability for making the expected value calculation. Although the test is to be applied "from the perspective of the parties at the time the settlement decision was made," the "reasonable insurer is expected, at the time of the settlement negotiations, to take into account the *realistically possible* outcomes of a trial and, to the extent possible, to weigh those outcomes according to their likelihood."³⁵¹ The insured may argue that, notwithstanding his misrepresentation, a reasonable insurer would have recognized that the defense, while perhaps appealing, was not "realistically possible" and that the true probability of a plaintiff's verdict was 80% not 20%. Thus, the realistic expected value of the case was \$120,000, which exceeds the policy limits offer of \$100,000 so the insurer would be liable.

Although this is a possible outcome and interpretation of the DTL rule, I recognize that a jury might nonetheless find in favor of the

351. RESTATEMENT OF THE LAW OF LIAB. INS. § 24 cmt. d (AM. LAW INST., Discussion Draft 2015) (emphasis added).

insurer. The test might be considered subjective rather than objective; that is, the settlement decision might be evaluated in light of the information available to the insurer at the time of the offer. Even though the insurer is “to take into account the realistically possible outcomes of a trial,” that duty is modified by the limitation that it need only be “to the extent possible.”³⁵² Where the insured has misrepresented his role in the accident, it may not be possible, at the time of the settlement decision, for the insurer to know that the case has an 80% probability of a plaintiff’s verdict.

Whether the insurer knows of that higher probability, or should know, may depend on the extent of the insurer’s investigation, which leads me to the second way that DTL could result in a judgment of liability for the insurer. The duty to conduct a thorough investigation in connection with settlement offers is handled in comment i of section 24 as another factor to be considered.³⁵³ Under the approach of comment i, as outlined in illustration 5, the failure to conduct a reasonable investigation that would have revealed the 80% probability may be the basis for insurer’s liability unless there is “conclusive evidence” that the settlement offer was unreasonable.³⁵⁴ Of course, the jury may choose not to impose liability for the insurer if it concludes that the insurer conducted a reasonable investigation, or perhaps if it concludes that the insured’s misrepresentation under the circumstances at the time of the settlement decision amounted to “conclusive evidence” that the settlement offer was unreasonable.

This analysis shows the possibility that DTL could lead to liability for the insurer where the insured has misrepresented his role in the accident, though it is by no means certain. The EC approach allows a somewhat easier method for finding in favor of the insurer. In one early and fairly widely used articulation of the EC test, “the fault of the insured in inducing the insurer’s rejection of the compromise offer by misleading it as to the facts” is the seventh of eight factors to be considered.³⁵⁵ Even without being a recognized factor, the misconduct of the insured is more easily considered under the EC test. The equal

352. *Id.*

353. “[I]t is appropriate for the trier of fact to consider procedural factors that affected the quality of the insurer’s decisionmaking . . . includ[ing] a failure to conduct a reasonable investigation.” *Id.* § 24 cmt. i.

354. *Id.* § 24 cmt. i, illus. 5.

355. *Brown v. Guarantee Ins. Co.*, 319 P.2d 69, 75 (Cal. Dist. Ct. App. 1957). For the influence of this case, see *supra* notes 26 and 28 and accompanying text. This factor has been endorsed by the Arizona Supreme Court as part of the jury instructions for breach of the duty to settle. See *Clearwater v. State Farm Mut. Auto. Ins. Co.*, 792 P.2d 719, 722 (Ariz. 1990) (in banc).

consideration to be afforded by the insurer uses the insured's interest as a reference point, and where the insured has represented that he was not responsible for the accident, he has an interest in not implicitly conceding liability by settling the case for policy limits. At a minimum, even if the insured demands that the insurer accept the policy limits demand, the insured bears some responsibility for the insurer's evaluation of the case and a jury could rely on the misrepresentation as a basis for finding that the insurer has afforded equal consideration to the interests of the insured. On the other hand, the EC test is flexible enough that a jury could determine that the insurer relied too much on the misrepresentation so as to not offer policy limits, and that had it done a more thorough investigation or made a more neutral evaluation of the case, it would have accepted the settlement offer and therefore should be liable.³⁵⁶

The second set of cases in which there may be divergent results under EC and DTL are those cases in which an insurer may be found liable under EC but not under DTL. These cases are discussed in substantial detail above and are of three basic types: 1) very high excess exposure cases where the exposure of the insured is so great that it outweighs the insurer's interest in taking the low probability case to trial; 2) high probability of liability cases where the expected value is still less than settlement-limits offer, but the insurer's additional exposure (beyond expected value) is less than the insured's; and 3) cases concerning the insurer's behavior toward the insured, such as the failure to investigate or failure to communicate.³⁵⁷

The first two types of cases cannot be reconciled with DTL and so raise the normative question of whether those cases should be recognized. I will not address the normative question here, but my own position is that these types of cases should be recognized based on the state of the law. The largest number of states recognize the EC test,³⁵⁸ which is the test from which DTL derived. Only a minority of eight states recognize

356. Although it also involved more serious misconduct by the insurer, *Betts v. Allstate Insurance Co.*, is an example of such a case. 201 Cal. Rptr. 528 (Ct. App. 1984). There, the insured misrepresented that the light was green when she entered the intersection and the insurer relied too heavily on that fact in refusing a policy limits offer. *Id.* at 539. Another example of such a case is *Lozier v. Auto Owners Insurance Co.*, where the insurer was held liable under the factor analysis from *Brown* because the misrepresentation by the insured, while one factor in favor of the insured, was outweighed by other factors that suggested the case should be settled. 951 F.2d 251, 254–56 (9th Cir. 1991). It should be noted that *Lozier* also references DTL, *see id.* at 256, so I would consider this a blended EC and DTL case.

357. A fourth type of case concerns multiple claimants, which time does not permit me to consider in this Article.

358. *See supra* notes 310–15 and accompanying text.

the pure DTL test,³⁵⁹ which would allow a court to rule for an insurer in these two types of cases.³⁶⁰

Recognizing DTL as a test for EC could accommodate this divergence between the two tests in two ways. First, if the DTL test is one, but not the exclusive, test for EC, courts would be free to use EC without DTL in cases involving very high exposure or high probability of liability. Alternatively, one could harmonize these cases by using the DTL test in

359. See *supra* note 316 and accompanying text.

360. Two cases from the highest state courts support a verdict for the insurer in very high exposure cases: *Kuzmanich v. United Fire & Casualty Co.*, 410 P.2d 812 (Or. 1966) and *Cowden v. Aetna Casualty & Surety Co.*, 134 A.2d 223 (Pa. 1957). *Cowden* is more than half a century old, and *Kuzmanich* is nearly that old. Both cases are normatively troubling to me and seem more likely to be harmonized with the good faith state of mind of the insurers than with the notion that a reasonable insurer without limits would have rejected the settlement offers. In *Kuzmanich*, the plaintiff was seeking \$150,000 in damages and the case went to judgment for \$25,000. 410 P.2d at 812–13. The policy limits were \$10,000. *Id.* at 812. The court did not address the probability of a verdict for the plaintiff, but using the \$150,000 figure, under the Restatement's version of DTL, the probability of a defense verdict would have to have been in excess of 93%. Even using the \$25,000 figure (the actual judgment), the probability of a defense verdict would have to have been more than 60%. The critical issue in the case concerned whether the insured, aged sixty-seven or sixty-eight, or his twenty-one-year-old nephew was driving at the time of the accident. *Id.* 812–14. The claimant was the nephew, who was unconscious at the time of the trial. *Id.* at 812. The insured died in the accident. *Id.* Evidence was conflicting as to who was driving. *Id.* at 812–13. Consequently, 93% probability seems very unlikely and even a 60% probability is a bit of a stretch. It seems clear that under EC the insurer would be liable. At best, the insurer's interest was to save \$9300 (93% of the \$10,000 policy limits), which is less than the insured's interest in avoiding the excess of \$15,000–\$140,000.

In *Cowden*, the claim was for \$75,000, the insured had policy limits of \$25,000, and the driver of the vehicle in which the claimant was riding had another \$10,000 of insurance. 134 A.2d at 225. The claimant offered to settle for \$45,000, of which the insured offered to pay \$10,000 and the driver's insurer offered another \$10,000, leaving the policy limits for the defendant. *Id.* at 226–27. The defense was premised on the absence of liability. *Id.* at 227. The insured had stopped his vehicle on the side of the highway, though partially in the driving lane, to attend to a fire under the vehicle. *Id.* at 225. The case was tried three times. *Id.* The first time resulted in a mistrial. *Id.* The second trial resulted in a verdict for the claimant for \$100,000, but the trial court granted a new trial on the ground that it was against the weight of the evidence. *Id.* In the third trial the jury awarded plaintiff \$90,000. *Id.* at 226–27. Using the Restatement's version of DTL, the probability of a defense verdict would have had to have been in excess of 72%, which seems unlikely in light of the second trial resulting in a plaintiff's verdict. While the defense might hope for the judge to intervene again, it seems imprudent to assume that a judge would be more than 70% likely to do so. Under EC, where the insured and another insurer are willing to contribute \$20,000 to the settlement, it seems very likely that a jury would find the insurer liable. The insurer's interest of saving \$25,000 is outweighed by the \$45,000 exposure to the insured. Moreover, where the insured has agreed to contribute \$10,000 to the settlement, EC would require that the insurer contribute at least that much, which brings the insurer's interest in trying the case down to \$15,000. I am not aware of any cases that specifically address the high probability of liability scenario.

one direction only—in the direction of liability. In other words, an insurer who would have settled if it faced the settlement decision without limits would be liable, but the fact that an insurer would not have settled if limits did not apply would not conclusively establish that an insurer was not liable. If a jury were to determine that the insurer failed to give equal consideration to the interests of the insured, for example where the excess exposure to the insured is so great that it would be unreasonable to decline the offer, the insurer could still be liable.

To address the third type of case, those involving insurer behavior toward the insured, we turn to the next section.

B. Treatment of Insurer Behavior Toward the Insured

Although the “pure” DTL cases do not consider the behavior of the insurer toward the insured, which would result in divergent results from EC cases, section 24 of the Restatement includes commentary meant to address this problem. Comment i addresses insurer behavior toward the insured in connection with settlement decisions. It provides that “it is appropriate for the trier of fact to consider procedural factors that affected the quality of the insurer’s decisionmaking or that deprived the insured of evidence that would have been available if the insurer had behaved reasonably.”³⁶¹ These procedural factors include “failure to conduct a reasonable investigation,” “failure to conduct negotiations in a reasonable manner or to follow the recommendation of its adjuster or chosen defense lawyer (including not seeking the defense lawyer’s recommendation),” “failure to follow the insurer’s claims-handling procedures, a failure to keep the insured informed of within-limits offers or the risk of excess judgment, and the provision of misleading information to the insured.”³⁶²

It is not entirely clear how these factors are to be used. They “are not enough to transform a plainly unreasonable settlement demand into a reasonable demand, but they can make the difference in a close case by allowing the jury to draw a negative inference from the lack of information.”³⁶³ The question is, a negative inference of what? From the illustration, it appears that the negative inference is “that the insurer’s

361. RESTATEMENT OF THE LAW OF LIAB. INS. § 24 cmt. i (AM. LAW INST., Discussion Draft 2015).

362. *Id.* The comment separates factors that may affect the insurer from those that may deprive the insured of evidence that would have been available to the insured, but I have combined them for simplicity. *See id.*

363. *Id.*

settlement decisions were unreasonable.”³⁶⁴ But on what basis? The fact that an insurer has failed to conduct a reasonable investigation does not generate an inference that a settlement offer was reasonable. The insurer’s investigation is independent of the claimant’s settlement offer. A poor investigation only affects the ability of the insurer to know whether the offer is reasonable or not, and that ability is relevant only because the insurer has an obligation to protect its insured. A reasonable insurer without policy limits might for economic or strategic reasons choose to conduct little or no investigation before addressing a settlement offer.

The justification for considering the insurer’s failure to inform the insured of the policy limits demand is even more problematic within a DTL paradigm. According to comment i, this omission is relevant to the reasonableness of a settlement decision because without disclosure it would “deprive[] the insured of evidence that would have been available.”³⁶⁵ However, evidence available to the insured, especially evidence that there was a policy limits demand, has no bearing whatsoever on whether the policy limits demand was reasonable or whether an insurer without limits would have accepted the settlement offer.

The EC approach provides a much better justification for these procedural factors. The insurer’s failure to behave properly toward its insured is evidence of a failure to give equal consideration to the interests of the insured. The failure to investigate deprives the insured of one of the benefits of the defense to be provided under the policy. The failure to inform the insured of a policy limits offer deprives the insured of the opportunity to take actions to encourage the insurer to accept the offer so as to protect the interests of the insured.

Because section 24 of the Restatement uses DTL *instead* of EC, it does not provide a satisfactory framework for these procedural factors. If it were to embrace EC as its analytical framework, it would provide a more satisfactory justification for consideration of these procedural factors. This approach is justified by the case law which recognizes these factors as part of EC.³⁶⁶ To the extent that the Restatement wants to promote or endorse DTL, it may do so while still allowing EC to justify the procedural factors, which is the approach taken in states that use a blended approach.

364. *Id.* § 24 cmt. i, illus. 5.

365. *Id.* § 24 cmt. i.

366. *See, e.g.,* *Brown v. Guarantee Ins. Co.*, 319 P.2d 69, 75 (Cal. Dist. Ct. App. 1957). For the influence of this case, see *supra* note 26. For jurisdictions that have relied on factors from *Brown*, see *supra* note 28.

For section 24 of the Restatement to embrace the EC framework, it probably requires that EC be substituted for DTL in the black letter. This would signal the endorsement of an EC paradigm in which DTL could be endorsed as the primary test. Alternatively, DTL could be left in the black letter with EC provided as a justification for DTL in the commentary. The procedural factors could then be included as part of the EC commentary. The problem with this approach is that it makes the procedural factors a side note, as they are presently, with DTL being the main consideration for a reasonable settlement resulting in the continuation of dissonance between DTL and the procedural factors as described above.

Comment i provides an interesting innovation from the case law by explicitly making the procedural factors secondary to DTL. The procedural factors only “make the difference in a close case” or in “cases in which the facts do not make clear that the insurer’s settlement decision was substantively reasonable.”³⁶⁷ This emphasis on DTL is not supported by the case law. The cases take one of two approaches. Either they identify the behavior as a factor to be considered in evaluating whether the insurer has given equal consideration to the interest of the insured,³⁶⁸ or they allow the insurer behavior to be considered under a general EC standard as evidence of the insurer’s failure to give equal consideration to the interest of the insured.³⁶⁹

Because of the lack of case law to support it, this innovation raises another normative question: should the objective reasonableness of the settlement offer override the insurer’s failure to fulfill its settlement-related obligations to the insured? I will not take a normative position in this Article, but simply point out the relative absence of case law. In light of the absence of case law,³⁷⁰ perhaps it would be appropriate for some

367. RESTATEMENT OF THE LAW OF LIAB. INS. § 24 cmt. i (AM. LAW INST., Discussion Draft 2015).

368. See *supra* note 367 and accompanying text.

369. See, e.g., *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 325 (Nev. 2009); see also *Richmond*, *supra* note 69, at 510 (“As a general rule, an insurer’s failure to inform its insured of a policy limits settlement offer will perhaps be some evidence that the insurer was not considering the insured’s interests equally with its own.”) For additional details about *Miller*, see *supra* text accompanying notes 90–107.

370. My focus has been on understanding the state of the law with regard to DTL versus EC. In doing that work I have not found any cases that make these procedural factors secondary to whether the settlement offer was objectively reasonable, but I have not specifically searched to verify that there are no cases whatsoever to support this approach. The approach taken in the State of Washington might be a useful analogy for this innovation. Under Washington law, an insurer “has ‘an enhanced obligation of fairness toward its insured’ because of the ‘[p]otential conflicts between the interests of insurer and insured.’” *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 169 P.3d 1, 8 (Wash.

discussion of the normative justifications for this innovation. Alternatively, section 24 could step back from the innovation and simply

2007) (en banc) (alteration in original) (quoting *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133, 1135 (Wash. 1986) (en banc)). This obligation includes the obligation to thoroughly investigate, to inform the insured of all developments in the lawsuit, and to otherwise refrain from actions that demonstrate a greater concern for the interests of the insurer than those of the insured. *Id.* (quoting *Tank*, 715 P.2d at 1137). If an insurer breaches these duties, it has acted in bad faith and “there is a presumption of harm.” *Id.* at 10 (quoting *Safeco Ins. Co. of Am. v. Butler*, 823 P.2d 499, 506 (Wash. 1992) (en banc)). However, an “insurer can rebut the presumption by showing by a preponderance of the evidence its acts did not harm or prejudice the insured.” *Id.* (quoting *Butler*, 823 P.2d at 506). Although this does not explicitly give greater weight to the objective reasonableness of the settlement offer than the procedural factors, it would allow the insurer to show that an insured was not prejudiced because the settlement offer was not objectively reasonable, and therefore it had the obligation to accept the offer even if it had complied with its procedural duties.

One drawback of this approach is that it may provide more protection for an insured for an insurer’s breach of its procedural duties than for breach of the duty to settle itself. This approach would essentially create a presumption of an unreasonable settlement decision where the insurer breaches its procedural obligations, yet such a presumption is not endorsed by section 24 for an insurer’s rejection of a policy limits demand. Although section 24 does not explicitly address who has the burden of proof, it appears that the burden lies with the insured to show that the settlement offer was objectively reasonable. This, I believe, is in accord with the majority rule in the case law. However, this presumption approach was alluded to by the California Supreme Court in *Crisci v. Security Insurance Co. of New Haven*, where the court stated:

The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim. 426 P.2d 173, 177 (Cal. 1967) (in bank). The Supreme Court of Appeals of West Virginia has explicitly adopted this kind of presumption for failure to settle cases:

We believe that wherever there is a failure on the part of an insurer to settle within policy limits where there exists the opportunity to so settle and where such settlement within policy limits would release the insured from any and all personal liability, that the insurer has prima facie failed to act in its insured’s best interest and that such failure to so settle prima facie constitutes bad faith towards its insured.

Shamblin v. Nationwide Mut. Ins. Co., 396 S.E.2d 766, 776 (W. Va. 1990). The court characterized this test as “a hybrid negligence-strict liability standard.” *Id.* (footnote omitted). Rhode Island has gone a little further, endorsing what appears to be strict liability:

If the insurer declines to settle the case within the policy limits, it does so at its peril in the event that a trial results in a judgment that exceeds the policy limits, including interest. If such a judgment is sustained on appeal or is unappealed, the insurer is liable for the amount that exceeds the policy limits, unless it can show that the insured was unwilling to accept the offer of settlement.

Asermely v. Allstate Ins. Co., 728 A.2d 461, 464 (R.I. 1999). In comment d to section 24, the Restatement rejects the strict liability standard, but one of the bases for doing so is that such a rule has not been adopted in the courts. RESTATEMENT OF THE LAW OF LIAB. INS. § 24 cmt. d (AM. LAW INST., Discussion Draft 2015).

allow an insurer's failure to comply with the procedural duties in connection with settlement decisions to be considered along with the objective reasonableness of the settlement offer, which would be consistent with the case law.

V. CONCLUSION

This Article has shown that EC and DTL are not the same test. Though closely related, the two standards can lead to different results where the insured faces very high excess exposure, or where the insured faces a relatively small exposure but where the probability of loss is just short of making the expected value the same or more than the settlement offer. In addition, EC is more suitable as a basis for explaining case holdings where the insurer's conduct toward the insured, such as an incomplete investigation or the failure to inform the insured of a settlement offer, is an important part of the reason for finding a breach of the duty to settle. Similarly, EC provides a more suitable basis for understanding the holdings in cases dealing with multiple claimants.

The review of the case law shows that eight states follow a "pure" DTL test, thirteen states follow EC without using DTL, and nine states use a blended approach that combines DTL and EC in some fashion. Which test is in the "majority" depends on how one categorizes the blended jurisdictions. If those nine blended states are added to the eight pure DTL states, the total is seventeen, which constitutes a majority of these thirty states (the other twenty states use a variety of different rules that cannot be categorized as either DTL or EC). On the other hand, if the nine blended states are added to the thirteen pure EC states, the total is twenty-two out of thirty, a majority in the other direction.

For purposes of assessing section 24 of the Restatement, however, only the pure DTL states can be counted because section 24 endorses a pure form of DTL (albeit one that tries to address insurer behavior in a comment that may or may not represent a pure form of DTL). Thus, to be consistent with the case law, section 24 should recognize that the pure version of DTL is a minority rule. In addition, because EC is a different test than DTL and is used by some twenty-two jurisdictions, section 24 should give a greater role to EC in the commentary and perhaps in the black letter. To harmonize with the case law, section 24 may endorse DTL as a superior minority rule or could identify DTL simply as one important, but not exclusive, test to determine whether the insurer has given equal consideration to the interests of the insured. Either way would require some amending of the commentary and perhaps of the black letter law.

Section 24 should also provide better justification for its treatment of insurers' settlement-related behavior toward the insured in comment i. While it is consistent with the case law that such behavior may be relevant to the determination of whether the insurer has breached its duty to settle, the consideration of these factors is more easily justified and supported by the EC test. Comment i introduces a novel preference for objectively reasonable settlement offers as more important than the procedural factors when determining whether an insurer has breached the duty to settle, but this preference is not justified by current case law and therefore could use additional normative support or perhaps should be modified to be more consistent with the law.

APPENDIX: ADDITIONAL ANALYSIS OF SELECTED STATES' CASE LAW
REGARDING THE DUTY TO SETTLE STANDARD**Alaska**

The test articulated by the Alaska Supreme Court in *Schultz v. Travelers Indemnity Co.*³⁷¹ that “[i]f a plaintiff makes a policy limits demand and there exists a substantial likelihood that a verdict will be rendered against the insured in excess of the coverage[,] . . . the insurer has a duty to tender as settlement of the claim the maximum limits of insurance coverage”³⁷² was dictum. The case held that policy limits for purposes of assessing a policy limits demand “include[d] the amount of attorney’s fees which would have been awarded [under Alaska Rule of Civil Procedure 82] had [the] case gone to trial.”³⁷³ This test from *Schultz*, however, has been reaffirmed in later cases.³⁷⁴ In *Jackson v. American Equity Insurance Co.*,³⁷⁵ the Alaska Supreme Court approved of jury instructions based on the dictum in *Schultz*.³⁷⁶

One might argue that this test is consistent with the DTL standard because it applies when there is a substantial risk of an excess verdict, which seems like the kind of scenario in which an insurer would have a duty to settle under the DTL standard. When an insured faces a substantial risk of an excess verdict, an insurer who disregards the limits might settle the case. The problem with this argument is that it fails to consider the *probability* of the excess verdict. Even if we assume that “substantial risk” means more than 50% or even 70%, there are many scenarios when the insurer would not have a duty to settle. For example, assume \$100,000 of policy limits and an excess exposure of \$20,000 (for a total exposure of \$120,000). The expected value of that case, assuming a 70% probability, would be \$84,000, well below the policy limits of \$100,000. Moreover, the Alaska rule creates an affirmative obligation to offer policy limits, which is intended to protect the insured from excess

371. 754 P.2d 265 (Alaska 1988).

372. *Id.* at 266–67.

373. *Id.* at 267.

374. See *Williams v. GEICO Cas. Co.*, 301 P.3d 1220, 1225 (Alaska 2013) (“It is well settled that an insurer has a duty to offer a full policy settlement where there is a substantial likelihood of an adverse verdict in excess of policy limits.”); *Jackson v. Am. Equity Ins. Co.*, 90 P.3d 136, 142 (Alaska 2004) (“When a plaintiff makes a policy limits demand, the covenant of good faith and fair dealing places a duty on an insurer to tender maximum policy limits to settle a plaintiff’s demand when there is a substantial likelihood of an excess verdict against the insured.” (citing *Schultz*, 754 P.2d at 266–67); *Tucker v. United Servs. Auto. Ass’n*, 827 P.2d 440, 441 (Alaska 1992).

375. 90 P.3d 136 (Alaska 2004).

376. See *id.* at 143.

exposure. Section 24 allows an insurer to fulfill its duty “by making an offer at the low end of the reasonableness range.”³⁷⁷ In addition, section 24 does not require that an insurer affirmatively make a reasonable settlement offer, although it allows a jury to consider the absence of such an offer.³⁷⁸ Consistent with the objective of protecting the insured, the “policy limit” under Alaska law has been construed to include attorneys’ fees to the prevailing party available according to a formula contained in Alaska Rule of Civil Procedure 82.³⁷⁹

Arizona

In *Clearwater v. State Farm Mutual Automobile Insurance Co.*,³⁸⁰ the Arizona Supreme Court quoted the DTL language from *Crisci*: “In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer.”³⁸¹ However, the court also used a jury instruction designated as an “equal consideration” instruction that identified eight factors to consider, including the failure to inform the insured of settlement offers and the failure to investigate.³⁸² The Arizona Supreme Court’s reliance on equal consideration is illustrated by *General Accident Fire & Life Assurance Corp. v. Little*,³⁸³ where the Arizona Supreme Court held that an insurer that had in fact disregarded the policy limits was liable for breach of the duty to settle because of failure to give the insured’s interest in settlement equal consideration.³⁸⁴ That case is discussed in the Article.³⁸⁵

California

Although the California Supreme Court used DTL language in *Crisci v. Security Insurance Co. of New Haven*,³⁸⁶ the court’s holding can be read as having applied EC. The court affirmed the trial court’s finding of breach of the duty to settle because the insured “did not give as much

377. RESTATEMENT OF THE LAW OF LIAB. INS. § 24 cmt. e (AM. LAW INST., Discussion Draft 2015).

378. *See id.* § 24 cmt. f (“[A] trier of fact may conclude that an insurer’s decision not to make a settlement offer or counteroffer constitutes a reasonable settlement decision.”).

379. *See Schultz*, 754 P.2d at 267.

380. 792 P.2d 719 (Ariz. 1990) (in banc).

381. *Id.* at 723 (quoting *Crisci v. Sec. Ins. Co. of New Haven*, 426 P.2d 173, 176 (Cal. 1967) (in banc)).

382. *See id.* at 721.

383. 443 P.2d 690 (Ariz. 1968) (in banc).

384. *Id.* at 698–99.

385. *See supra* notes 38–66 and accompanying text.

386. 426 P.2d at 176.

consideration to the financial interests of its said insured as it gave to its own interests.”³⁸⁷ While *Crisci* was subsequently cited by the California Supreme Court in support of a DTL statement,³⁸⁸ the “test” being cited and applied morphed into “whenever it is likely that the judgment against the insured will exceed policy limits . . . ‘a consideration in good faith of the insured’s interest requires the insurer to settle the claim.’”³⁸⁹ This is more the language of EC than DTL, though, to be fair, it can be used in support of both. Later California Supreme Court cases tend to use language more oriented to EC than DTL. For example, in *Commercial Union Assurance Cos. v. Safeway Stores, Inc.*,³⁹⁰ the court stated:

It is now well established that an insurer may be held liable . . . where it has breached its implied covenant of good faith and fair dealing by unreasonably refusing to accept a settlement offer within the policy limits.

. . . .

“The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits . . . a consideration in good faith of the insured’s interest requires the insurer to settle the claim.”³⁹¹

Similarly, in a more recent California Supreme Court case, *Kransco v. American Empire Surplus Lines Insurance Co.*,³⁹² the court stated the test this way:

“[T]he insurer must settle within policy limits when there is substantial likelihood of recovery in excess of those limits. The duty to settle is implied in law to protect the insured from exposure to liability in excess of coverage” An insurer . . .

387. *Id.* at 178.

388. *Johansen v. Cal. State Auto. Ass’n Inter-Ins. Bureau*, 538 P.2d 744, 748 (Cal. 1975) (in bank) (“[T]he insurer must conduct itself as though it alone were liable for the entire amount of the judgment.” (citing *Crisci*, 426 P.2d at 176)).

389. *Id.* (quoting *Comunale v. Traders & Gen. Ins. Co.*, 328 P.2d 198, 201 (Cal. 1958) (in bank)).

390. 610 P.2d 1038 (Cal. 1980).

391. *Id.* at 1040–41 (citations omitted).

392. 2 P.3d 1 (Cal. 2000).

breaches its implied duty . . . by unreasonably refusing to accept a settlement offer within policy limits³⁹³

B.E. Witkin and the Witkin Legal Institute, widely cited and followed commentators on California law, give homage to the DTL test of *Crisci* as part of EC, but also recognize other ways to demonstrate a breach. They note that insurers “must appraise offers of settlement with due consideration to the interest of the insured as well as its own interest,”³⁹⁴ and that deciding whether due consideration was given requires evaluation of the eight factors outlined in *Brown v. Guarantee Insurance Co.*³⁹⁵: 1) the strength of the claimant’s case; 2) “attempts by the insurer to induce the insured to contribute”; 3) failure to conduct a proper investigation; 4) insurer’s rejection of the advice of its own counsel; 5) “failure of the insurer to inform the insured of” the settlement offer; 6) the amount of financial risk for insurer and insured; 7) the role of the insured in inducing the insurer to reject the settlement; and 8) any other factor tending to establish bad faith.³⁹⁶ They identify the “test” as “whether the refusal to settle is unreasonable or without probable cause.”³⁹⁷ However, the “governing standard” is “whether a prudent insurer would have accepted the settlement offer if it alone were to be liable for the entire judgment.”³⁹⁸ Thus, Witkin endorses a combination of EC (via the *Brown* factors) and DTL.

California jury instructions take a similar approach. The Judicial Council of California Civil Jury Instructions do not use DTL language, but like the later California Supreme Court cases, focus on the potential for an excess verdict. An insurer will be found to breach the duty to settle if it “failed to accept a reasonable settlement demand for an amount within policy limits.”³⁹⁹ “A settlement demand is reasonable if [the insurer] knew or should have known at the time the settlement demand was rejected that the potential judgment was likely to exceed the amount of the settlement demand based on [the claimant]’s injuries or loss and [the insured’s] probable liability.”⁴⁰⁰ The Judicial Council instructions also allow a jury to consider other factors in determining whether an

393. *Id.* at 9 (citations omitted).

394. WITKIN & MEMBERS OF THE WITKIN LEGAL INST., *supra* note 258, § 258.

395. 319 P.2d 69 (Cal. Dist. Ct. App. 1957).

396. WITKIN & MEMBERS OF THE WITKIN LEGAL INST., *supra* note 258, § 258.

397. *Id.*

398. *Id.*

399. JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTION § 2334 (2014).

400. *Id.*

insurer acted unreasonably.⁴⁰¹ The California BAJI instructions are only slightly different. One instruction addresses the duty of an insurer to “give at least as much consideration to the interests of the person insured as it gives to its own interest,” and identifies the *Crisci* test (“a prudent insurance company under the same facts with unlimited liability”) as one “that *may* be used.”⁴⁰² Moreover, a second instruction allows the court to instruct the jury to consider the *Brown* factors (omitting numbers two, “attempts . . . to induce the insured to contribute to a settlement,” and eight, “any other factor”) in “considering whether defendant insurance company acted in good faith or in bad faith in rejecting an offer of settlement.”⁴⁰³

Holdings of the California Court of Appeal show the use of EC without DTL. For example, in one case the claimant offered to settle for policy limits in exchange for a covenant not to execute, but with the condition that the insurer would continue to provide a defense to the insured as the case was litigated to judgment against multiple defendants.⁴⁰⁴ The court held that this settlement offer was more than policy limits so that rejection of it could not be breach of the duty to settle, but nevertheless held that the insured could maintain a claim against the insurer for its failure to inform it of the settlement, for rejecting the settlement offer without giving it the opportunity to contribute, and by failing to inform the claimant that this offer exceeded policy limits.⁴⁰⁵ In another case, the court found a breach of the duty of good faith from an insurer’s “failure to properly investigate the claim.”⁴⁰⁶ The court noted that “[a]mong the most critical factors bearing on the insurer’s good faith is the adequacy of its investigation of the claim.”⁴⁰⁷

Connecticut

The only reference to the standard to be applied for the duty to settle from the Connecticut Supreme Court is a dictum in which it states: “When a liability insurer undertakes to defend its insured, it ‘has a

401. See *id.* § 2337 (identifying sixteen factors based on CAL. INS. CODE § 790.03(h), including inadequate investigation, failing to settle promptly, and failing to provide a reasonable explanation “of its reasons for denying the claim or offering a compromise settlement”).

402. CALIFORNIA JURY INSTRUCTIONS: CIVIL (BAJI), *supra* note 28, § 12.96 (emphasis added).

403. *Id.* § 12.98.

404. See *Heredia v. Farmers Ins. Exch.*, 279 Cal. Rptr. 511, 513 (Ct. App. 1991).

405. See *id.* at 519–20.

406. *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 93 Cal. Rptr. 2d 364, 389 (Ct. App. 2000); *accord Betts v. Allstate Ins. Co.*, 201 Cal. Rptr. 528, 539 (Ct. App. 1984).

407. *Shade Foods, Inc.*, 93 Cal. Rptr. 2d at 386.

continuing duty to use the degree of care and diligence a person would exercise in the management of his or her own business.”⁴⁰⁸ The case held that the exception to attorney-client privilege for criminal or civil fraud could be extended to insurer bad faith where the requirements for the exception are met.⁴⁰⁹ The federal district court, applying Connecticut law, has predicted that Connecticut law requires that, “[i]n determining whether to accept or reject an offer of compromise, the insurer not only may consider its own interests but also must equally respect the insured’s interests.”⁴¹⁰ The district court held that the insurer’s decision to settle the case was reasonable because the defense counsel had opined that the plaintiff would be a sympathetic witness, there was conflicting evidence regarding the cause of the accident, an arbitrator had determined that the insured was likely to be fifty percent responsible, a complete defense verdict was unlikely, and the settlement was for fifty percent of the low end of the expected value for damages.⁴¹¹ The Second Circuit has approved the federal district court’s prediction,⁴¹² as has the Superior Court of Connecticut,⁴¹³ and commentators.⁴¹⁴

Florida

The way that *Boston Old Colony Insurance Co. v. Gutierrez*⁴¹⁵ has been applied by the Florida District Court of Appeal shows that Florida uses a blended approach. In *Farinas v. Florida Farm Bureau General Insurance Co.*,⁴¹⁶ for example, after quoting the “ordinary care and prudence . . . in the management of his own business” standard from *Gutierrez*, the court noted that this standard requires “the insurer to act ‘in good faith and with due regard for the interests of the insured.’”⁴¹⁷ Such good faith conduct includes the duties “to advise the insured of

408. *Hutchinson v. Farm Family Cas. Ins. Co.*, 867 A.2d 1, 10 (Conn. 2005) (quoting *Liberty Mut. Fire Ins. Co. v. Kaufman*, 885 So. 2d 905, 908 (Fla. Dist. Ct. App. 2004)).

409. *Id.* (quoting *Kaufman*, 885 So. 2d at 908).

410. *Windmill Distrib. Co. v. Hartford Fire Ins. Co.*, 742 F. Supp. 2d 247, 263 (D. Conn. 2010) (alteration in original) (quoting *United Servs. Auto. Ass’n v. Glens Falls Ins. Co.*, 350 F. Supp. 869, 871 (D. Conn. 1972)), *aff’d*, 449 F. App’x 81 (2d Cir. 2012).

411. *Id.* at 264.

412. *Windmill Distrib. Co.*, 449 F. App’x at 82 (affirming the district court and reiterating that “Connecticut law” requires the insurer to “equally respect the insured’s interests”).

413. *Carford v. Empire Fire & Marine Ins. Co.*, No. CV065001946, 2012 WL 4040337, at *7 (Conn. Super. Ct. Aug. 21, 2012) (holding that the insurer exercised due care and fairly considered the insured’s interests).

414. See TAYLOR, *supra* note 219, § 4-10:1.

415. 386 So. 2d 783 (Fla. 1980) (per curiam).

416. 850 So. 2d 555 (Fla. Dist. Ct. App. 2003) (per curiam).

417. *Id.* at 559 (quoting *Gutierrez*, 386 So. 2d at 785).

settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid the same.”⁴¹⁸ The insurer also “must investigate the facts.”⁴¹⁹ These duties are consistent with EC. The insurer also has duties consistent with DTL: it must “give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.”⁴²⁰ The court, in applying this standard, relied more on the EC aspects than the DTL. The insurer in *Farinas* was facing five death claims and seven significant injury claims on a policy that provided limits of \$100,000 per person and \$300,000 per accident.⁴²¹ The insurer settled with three of the twelve claimants and moved for summary judgment on its declaratory relief claim that the policy limits were exhausted.⁴²² Although it paid its full limits as to three claimants (thus arguably complying with the DTL standard), the district court of appeal held that it was not entitled to summary judgment.⁴²³ There were factual issues for the jury to determine: whether the insurer had fulfilled its duties to fully investigate, to keep the insured informed, and to minimize the magnitude of excess judgments.⁴²⁴

In *Goheagan v. American Vehicle Insurance Co.*,⁴²⁵ the district court of appeal faced the question of whether an insurer was entitled to summary judgment because it could not determine to whom to give a policy limits offer.⁴²⁶ The insured had rear-ended the claimant’s vehicle, causing her to go into a coma for a period of time before she died.⁴²⁷ The policy limits were \$10,000 per person, \$20,000 per accident.⁴²⁸ The adjuster immediately realized that this was a policy limits case but did not make a policy limits offer.⁴²⁹ The insurer argued that it was relieved of its duty under Florida law to initiate settlement discussions because the claimant was in a coma and because it became aware that a lawyer was involved, so under the administrative rules in Florida, it was

418. *Id.* (quoting *Gutierrez*, 386 So. 2d at 785).

419. *Id.* (quoting *Gutierrez*, 386 So. 2d at 785).

420. *Id.* (quoting *Gutierrez*, 386 So. 2d at 785).

421. *Id.* at 557.

422. *Id.* at 557–58.

423. *Id.* at 561.

424. *Id.*

425. 107 So. 3d 433 (Fla. Dist. Ct. App. 2012).

426. *Id.* at 436.

427. *Id.* at 434–35.

428. *Id.* at 435.

429. *Id.*

prohibited from contacting the claimant or her mother.⁴³⁰ The district court of appeal rejected these arguments. After noting that under Florida law, “[w]here liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations,” the insurer should have done more to try to obtain a settlement.⁴³¹ The insurer could “have at least made a written offer and/or tender” to the claimant or her mother, and involvement of a lawyer would not have precluded such an offer.⁴³² This holding is justified by EC, but not by DTL. The only reason an insurer would have to initiate settlement offers is to protect the interest of the insured to try to avoid the excess verdict. While a prudent insurer without limits may choose to initiate settlement discussions, it also may for strategic reasons wait for the claimant to make a settlement demand.

In *Cotton States Mutual Insurance Co. v. Trevethan*,⁴³³ the district court of appeal applied the EC part of the *Gutierrez* test. In that case, the insured was in a collision with the claimant, who was riding a motorcycle, on a curve in the road.⁴³⁴ There was a dispute of fact as to whether the accident occurred on the claimant’s or insured’s side of the road.⁴³⁵ The defense counsel was adamant that the evidence for the insured’s position was so strong “that the ‘sheer weight of the defense evidence w[ould] overwhelm any sympathy’ for claimant and that the case had at most only nuisance value.”⁴³⁶ Although the claimant twice offered to settle for the \$100,000 policy limits, the defense counsel summarily rejected the offer.⁴³⁷ Although the insured was aware of the settlement offer, the insurer and the defense counsel never disclosed any risk of excess verdict even though defense counsel had evaluated the claim as worth \$200,000 to \$225,000 if the insured was one hundred percent responsible.⁴³⁸ Even though the court noted that part of the rule most consistent with DTL—that an insurer has an obligation to settle “[i]f the circumstances are such that a reasonably prudent insurer with the obligation to pay all of the recoverable expenses would settle for an amount within the policy limits”⁴³⁹—it did not rely on that part of the

430. *Id.* at 436.

431. *Id.* at 438–39 (quoting *Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. Dist. Ct. App. 1991)).

432. *Id.* at 439.

433. 390 So. 2d 724 (Fla. Dist. Ct. App. 1980).

434. *Id.* at 724–25.

435. *Id.* at 725.

436. *Id.* at 726 (quoting trial counsel’s testimony).

437. *Id.* at 725.

438. *Id.* at 727.

439. *Id.* (citing *Baxter v. Royal Indem. Co.*, 285 So. 2d 652 (Fla. Dist. Ct. App. 1973)).

test. Instead, the court relied on the EC portion of the test. The court found that where the insurer “never offered to settle” and had “never disclosed to its insureds their own potential exposure,” there was sufficient evidence that “the jury could have concluded that the insurer was acting upon what it considered to be its interest alone.”⁴⁴⁰

Idaho

When applying the EC factors, the Idaho Supreme Court approved of a passage associated with DTL: “[A]n insurer gives equal consideration to the interests of its insured by evaluating a claim ‘as though it alone would be responsible for the payment of any judgment rendered on that claim’ without regard to policy limits”⁴⁴¹ This was not the adoption of the DTL test, however, because the Idaho Supreme Court expressly used the factor analysis that goes beyond DTL, with particular emphasis on “whether the insurer ha[d] failed to communicate with the insured, including particularly informing the insured of any compromise offers” and on “the amount of financial risk to which each of the parties will be exposed.”⁴⁴² Both of those factors tend to be more consistent with EC than DTL. The issue faced by the court was whether the insurer had breached its duty to settle by insisting on a certain provision in the settlement agreement to protect its insured against a contribution claim.⁴⁴³ The Idaho Supreme Court held that the insurer was not entitled to summary judgment with respect to the reasonableness of its demands for the settlement agreement because, in significant part, the insurer had failure to communicate the settlement offer to the insured so the insured did not have the opportunity to take the risk that the insurer was trying to avoid, or to seek another solution to the impasse.⁴⁴⁴

Illinois

The Illinois Appellate Court has endorsed the consideration of factors that are consistent with EC: “[T]he court will consider factors such as the existence of an offer by the plaintiff to settle within the policy limits, a refusal to negotiate, the advice of defense counsel, the prospect of an

440. *Id.*

441. *Truck Ins. Exch. v. Bishara*, 916 P.2d 1275, 1283 (Idaho 1996) (quoting *Gen. Accident Fire & Life Assurance Corp. v. Little*, 443 P.2d 690, 697 (Ariz. 1968) (in banc)).

442. *Id.* at 1280.

443. *Id.*

444. *See id.* at 1282–83.

adverse verdict, and the potential for damages in excess of the policy limits.”⁴⁴⁵

A statement that shows up in Illinois cases might be used to argue that Illinois has adopted the DTL test: “It is beyond question that an insurance company, although it acts under a policy which contains limits as to its liability, may so conduct itself as to be liable for the entire judgment recovered against its insured irrespective of its policy limits.”⁴⁴⁶ However, this statement is permissive, not mandatory. It comes from the Seventh Circuit where it was stated as a truism, and is not considered a statement of Illinois law. After saying that “[i]t is well settled that an insurance company, which has issued a policy containing limits on its liability, may so conduct itself as to be liable for the entire judgment recovered against the insured, regardless of the policy limits,” the Seventh Circuit noted that the parties disagreed “as to the standard of conduct which [the] plaintiff must engage in to be liable beyond the policy limits.”⁴⁴⁷ The court “conclude[d] that negligence or bad faith is the Illinois standard of conduct,” and that “[t]he test for negligence . . . is that conduct which an ordinary reasonable man would engage in, not when solely considering the interests of the insurer, but upon giving equal consideration to the interests of the insurer and the insured.”⁴⁴⁸

Missouri

There is some uncertainty as to whether *Zumwalt* applied a state-of-mind test or equal consideration.⁴⁴⁹ However, the Missouri Supreme Court has recently interpreted *Zumwalt* as consistent with EC: “This Court has described bad faith as ‘the intentional disregard of the *financial interest* of [the] insured in the hope of escaping the responsibility imposed upon [the insurer] by its policy.’”⁴⁵⁰

445. *SwedishAmerican Hosp. Ass’n of Rockford v. Ill. State Med. Inter-Ins. Exch.*, 916 N.E.2d 80, 99 (Ill. App. Ct. 2009) (citing *Cent. Ill. Pub. Serv. Co. v. Agric. Ins. Co.*, 880 N.E.2d 1172 (Ill. App. Ct. 2008)).

446. *Cernocky v. Indem. Ins. Co. of N. Am.*, 216 N.E.2d 198, 204 (Ill. App. Ct. 1966) (citing *Gen. Cas. Co. of Wis. v. Whipple*, 328 F.2d 353, 355 (7th Cir. 1964)).

447. *Whipple*, 328 F.2d at 355 (citing *Ballard v. Citizens Cas. Co. of N.Y.*, 196 F.2d 96, 99 (7th Cir. 1952)).

448. *Id.* at 355–56.

449. See Jeffrey E. Thomas, *A Case Study of Bad Faith Refusal to Settle: A Doctrinal, Normative and Practical Analysis of Missouri Law*, 64 UMKC L. REV. 695, 699–704 (1996).

450. *Scottsdale Ins. Co. v. Addison Ins. Co.*, 448 S.W.3d 818, 828 (Mo. 2014) (en banc) (alterations in original) (quoting *Zumwalt v. Utils. Ins. Co.*, 228 S.W.2d 750, 754 (Mo. 1950)).

Montana

The test recognized by the Montana Supreme Court that the insurer has “a fiduciary duty . . . to look after the interests of the insured as well as its own, thus requiring it to consider fairly the insured’s liability for the excess when evaluating an offer of settlement within the policy limits,”⁴⁵¹ has been equated with EC by the Montana Supreme Court: “In determining whether to settle, the insurer must give the insured’s interest as much consideration as it gives its own interest.”⁴⁵²

In determining whether the insurer “fairly” considered the interests of the insured, the Montana courts consider six factors:

- (1) whether, by reason of the severity of the plaintiff’s injuries, any verdict is likely to be greatly in excess of the policy limits;
- (2) whether the facts in the case indicate that a defendant’s verdict on the issue of liability is doubtful;
- (3) whether the company has given due regard to the recommendations of its trial counsel;
- (4) whether the insured has been informed of all settlement demands and offers;
- (5) whether the insured has demanded that the insurer settle within the policy limits;
- (6) whether the company has given due consideration to any offer of contribution made by the insured.⁴⁵³

In *Fowler v. State Farm Mutual Automobile Insurance Co.*, the Montana Supreme Court held that the insurer was not liable for the excess because there was “no proof of a likelihood that a verdict greatly in excess of policy limits would occur,” little evidence of substantial damages, “[t]he issue of liability was doubtful,” the insurer “gave every regard to the recommendations of trial counsel,” “[t]he insured was informed of all settlement offers,” and “[t]here were never any offers of contribution” from the insured.⁴⁵⁴ The only factor in favor of liability was that the insured had demanded that the insurer settle within policy

451. *Fowler v. State Farm Mut. Auto. Ins. Co.*, 454 P.2d 76, 78 (Mont. 1969) (quoting *Nat’l Farmers Union Prop. & Cas. Co. v. O’Daniel*, 329 F.2d 60, 64–65 (9th Cir. 1964)); accord *Thompson v. State Farm Mut. Auto. Ins. Co.*, 505 P.2d 423, 428 (Mont. 1973) (quoting *Fowler*, 454 P.2d at 78), *overruled by* *Watters v. Guar. Nat’l Ins. Co.*, 3 P.3d 626 (Mont. 2000).

452. *Gibson v. W. Fire Ins. Co.*, 682 P.2d 725, 730 (Mont. 1984) (first citing *Crisci v. Sec. Ins. Co. of New Haven*, 426 P.2d 173 (Cal. 1967) (in bank); and then citing *O’Daniel*, 329 F.2d at 64–65).

453. *Fowler*, 454 P.2d at 79 (quoting *Jessen v. O’Daniel*, 210 F. Supp. 317, 326–27 (D. Mont. 1962)); accord *Thompson*, 505 P.2d at 427–28 (quoting *Jessen*, 210 F. Supp. at 326–27).

454. *Fowler*, 454 P.2d at 79–80.

limits, but that was not enough, and insured's justification was simply that he thought it was a "good idea."⁴⁵⁵

New Mexico

The New Mexico Supreme Court in *Dairyland Insurance Co. v. Herman*⁴⁵⁶ cites to both EC and DTL in its discussion of the duty to settle. It first notes "that 'an insurer cannot be partial to its own interests, but must give its interests and the interests of its insured equal consideration.'"⁴⁵⁷ But it also cites DTL: "[T]he insurer should place itself in the shoes of the insured and 'conduct itself as though it alone were liable for the entire amount of the judgment.'"⁴⁵⁸ However, it has not used the DTL test.

The holding in *Herman* was based on EC not DTL. In response to a certified question from the Tenth Circuit, the court held that an insurer's refusal to settle for policy limits because the claimant refused to give a full release could still be bad faith.⁴⁵⁹ Where "extinguishing the insured's liability is a practical impossibility" because the exposure was much greater than the policy limits, an insurer "is required [to conduct] a balancing of the interests of itself and its insured."⁴⁶⁰ If one were to disregard the policy limits one would hold out for a full release because the limits have been assumed away. However, when limits are much lower than the exposure, it might be "better to have the leverage of [the insured's] insurance money applied to at least some of the claims, to the end of reducing his ultimate judgment debt."⁴⁶¹ An insurer with an interest in finality may act in bad faith by rejecting a settlement that includes only a partial release. "The trial court may find that this case presents a circumstance in which the insurer showed mistaken judgement [sic] in appraising its own interest and also demonstrated a bad-faith disregard for the interests of its insured."⁴⁶²

EC rather than DTL is the basis for jury instructions in New Mexico. The Uniform Jury Instructions in New Mexico for bad faith failure to settle provide that an insurer "has a duty to timely investigate and fairly

455. *Id.* at 80.

456. 954 P.2d 56 (N.M. 1997).

457. *Id.* at 61 (quoting *Lujan v. Gonzales*, 501 P.2d 673, 680 (N.M. Ct. App. 1972)).

458. *Id.* (quoting *Johansen v. Cal. State Auto. Ass'n Inter-Ins. Bureau*, 538 P.2d 744, 748 (Cal. 1975) (in bank)).

459. *Id.* at 65.

460. *Id.* at 64.

461. *Id.* at 65 (quoting *Liberty Mut. Ins. Co. v. Davis*, 412 F.2d 475, 480–81 (5th Cir. 1969)).

462. *Id.* (citing *Lujan*, 501 P.2d at 681).

evaluate the claim against its insured, and to accept reasonable settlement offers.”⁴⁶³ An insurer’s “failure to conduct a competent investigation . . . and to honestly and fairly balance its own interests and the interests of the insured in rejecting a settlement offer within limits is bad faith.”⁴⁶⁴ If an insurer “gives equal consideration to its own interests and the interests of the insured and based on honest judgment and adequate information does not settle the claim and proceeds to trial, it has acted in good faith.”⁴⁶⁵ This instruction contains no language based on DTL. In addition, the references to the “timely” and “competent” investigation and “adequate information” are consistent with the insurer’s duty to protect the interests of the insured, which is consistent with EC.

Similar jury instructions were specifically approved by the New Mexico Supreme Court in *Ambassador Insurance Co. v. St. Paul Fire & Marine Insurance Co.*⁴⁶⁶ In that case the court responded to the question of “[w]hether the trial court correctly instructed the jury on the meaning of bad faith as a basis for failure to settle.”⁴⁶⁷ The instructions note that the “good faith duty included the duty to investigate,” that an “arbitrary and reprehensive” decision to refuse a settlement would “constitute bad faith,” and that “an insurer cannot be partial to its own interests, but must give its interests and the interests of its insured equal consideration.”⁴⁶⁸ The court found that these instructions required the jury to find that the insurer “was motivated by self-interest or ill will” and “may not prefer its own interest over those of its insured,” and were, on the whole, “correct.”⁴⁶⁹ These instructions contain no DTL language.

The other issue addressed by the court was whether there was a claim for negligent failure to settle.⁴⁷⁰ Although the court found “that New Mexico does not recognize the cause of action of negligent failure to settle,” it noted that “when failure to settle the claim stems from a failure to properly *investigate* the claim or to become familiar with the applicable law, etc., then this . . . negligence . . . is strong evidence of bad faith in failing to settle.”⁴⁷¹ Thus, the duty to investigation is explicitly part of the duty to settle, and as has been explained above, that duty is more consistent with EC than DTL.

463. MICHIE’S ANNOTATED RULES OF NEW MEXICO, *supra* note 285, § 13-1704.

464. *Id.*

465. *Id.*

466. 690 P.2d 1022 (N.M. 1984).

467. *Id.* at 1023.

468. *Id.* at 1026.

469. *Id.*

470. *Id.* at 1023.

471. *Id.* at 1023, 1025.

Oklahoma

Oklahoma is often cited as a state that has adopted the DTL test based on an early Oklahoma Supreme Court case, *American Fidelity & Casualty Co. v. L. C. Jones Trucking Co.*⁴⁷² where the court stated: “The predominant majority rule is that both parties’ interests must be given the same faithful consideration. The fairest method of balancing the interests is for the insurer to treat the claim as if the insurer alone were liable for the entire amount.”⁴⁷³ However, in a later case, *Badillo v. Mid Century Insurance Co.*,⁴⁷⁴ the Oklahoma Supreme Court articulated the test in a way that combines EC and DTL: “In dealing with third parties, however, the insured’s interests must be given faithful consideration *and* the insurer must treat a claim being made by a third party against its insured’s liability policy ‘as if the insurer alone were liable for the entire amount’ of the claim.”⁴⁷⁵ It should be noted that *Badillo* “expressly overruled” *American Fidelity* to the extent that it may have been understood to approve “a simple negligence standard” for “the level of culpability necessary . . . for breach of the duty of good faith and fair dealing.”⁴⁷⁶

The holding in *Badillo* involved both EC and DTL. The insured hit the claimant, a pedestrian, while he was making a right-hand turn.⁴⁷⁷ The claimant suffered hundreds of thousands of dollars in medical expenses.⁴⁷⁸ The insured’s coverage was only \$10,000.⁴⁷⁹ When the insurer offered to settle for policy limits, the claimant’s counsel requested as a condition of settlement that he be given an opportunity to examine the insured to determine whether there might be others involved in the accident who might be liable.⁴⁸⁰ The defense counsel declined without consulting with the insured.⁴⁸¹ In ruling on the case, the court found, consistent with DTL, that it was for the jury to decide if “someone whose own financial health or life was at stake [would] have acted in the manner that insurers did.”⁴⁸² However, consistent with EC, the court also found that “a rational jury could conclude based on the evidence that

472. 321 P.2d 685 (Okla. 1957), *overruled by* *Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080 (Okla. 2005).

473. *Id.* at 687.

474. 121 P.3d 1080.

475. *Id.* at 1093 (emphasis added) (quoting *Am. Fid.*, 321 P.2d at 687).

476. *Id.* at 1094.

477. *Id.* at 1088.

478. *Id.* at 1090.

479. *Id.*

480. *Id.* at 1089–90.

481. *Id.* at 1088–90.

482. *Id.* at 1094.

insurers failed in their communicative/consultative duty.”⁴⁸³ Thus, on both grounds, there were “jury questions as to the reasonableness of insurers’ conduct.”⁴⁸⁴

Oregon

Although the Oregon Supreme Court essentially adopted DTL in *Kuzmanich v. United Fire & Casualty Co.*,⁴⁸⁵ it illustrates the failure of DTL to account for the insured’s interest in the insurer paying “first dollar,” which under EC might justify a ruling in favor of the insured.⁴⁸⁶ In *Kuzmanich*, the claim was for special damages and \$150,000 in general damages, more than fifteen times the \$10,000 policy limits.⁴⁸⁷ The medical expenses alone were equal to the policy limits, and the verdict was for \$25,000, two-and-a-half-times the policy limit.⁴⁸⁸ Although the court did not consider the probability of the claimant prevailing, any probability short of zero would result in the insurer’s interest being less than the insured’s. The insurer’s interest was at most \$10,000 (the policy limits) compared to the insured’s interest of the \$15,000 excess of limits verdict (and \$140,000 excess exposure).

The *Kuzmanich* court relied on *Radcliffe v. Franklin National Insurance Co. of New York*,⁴⁸⁹ which includes a more comprehensive discussion of the standard for the duty to settle. After discussing cases and secondary authorities (including Keeton), the court concluded that “the minimum requirement is that the insurer must exercise good faith in disposing in settlement matters. We do not believe that an insurer displays good faith unless it gives consideration to the interests of the insured.”⁴⁹⁰ In considering the consideration to be given when a claimant makes a policy limits demand, the court undertook further analysis of the cases, and concluded that there was “manifest merit” in Keeton’s suggestion that the rule should “cause the insurer in settlement matters to behave as if it were liable for the entire judgment that may eventually be entered.”⁴⁹¹ However, the holding of the case turned on the insurer’s failure to investigate and its failure to communicate with the insured.⁴⁹² The insurer had valued the case at \$7500 or \$8000, below the \$10,000

483. *Id.* at 1095.

484. *Id.*

485. 410 P.2d 812 (Or. 1966).

486. *See supra* Part II.A.

487. *Kuzmanich*, 410 P.2d at 812.

488. *Id.* at 813.

489. 298 P.2d 1002 (Or. 1956).

490. *Id.* at 1020.

491. *Id.* at 1023.

492. *Id.* at 1024.

policy limits offer, but this valuation was flawed because the insurer's poor investigation failed to discover that the claimant's doctor would testify that her injuries were permanent.⁴⁹³ Moreover, the court noted that the insurer had "a duty to inform the insured [of the settlement offer] so that the latter may take whatever course may be necessary for the protection of his own interests in the event the insurer rejects the offer."⁴⁹⁴ Based on this analysis, I considered putting Oregon in the "blended" category, but because *Kuzmanich*, a later case, is a clean DTL case, I decided to leave Oregon in the pure DTL category.

Pennsylvania

The leading case in Pennsylvania is *Cowden v. Aetna Casualty & Surety Co.*⁴⁹⁵ It addressed the duty to settle as a matter of first impression, finding:

It is established by the greatly preponderant weight of authority in this country that an insurer against public liability for personal injury may be liable for the entire amount of a judgment secured by a third party against the insured, regardless of any limitation in the policy, if the insurer's handling of the claim, including a failure to accept a proffered settlement, was done in such a manner as to evidence bad faith on the part of the insurer in the discharge of its contractual duty.⁴⁹⁶

After noting "that there is no absolute duty on the insurer to settle a claim when a possible judgment against the insured may exceed the amount of the insurance coverage," the court concluded:

The predominant majority rule is that the insurer must accord the interest of its insured the same faithful consideration it gives its own interest. Since it is obvious that the interest of one or the other party may be imperiled at the instant of decision, the fairest method of balancing the interests is for the insurer to treat the claim as if it were alone liable for the entire amount.⁴⁹⁷

493. *Id.* at 1023–24.

494. *Id.* at 1024.

495. 134 A.2d 223 (Pa. 1957).

496. *Id.* at 227.

497. *Id.* at 228 (first citing *C. Schmidt & Sons Brewing Co. v. Travelers' Ins. Co.*, 90 A. 653 (Pa. 1914); and then citing *Keeton*, *supra* note 14, at 1143–45).

The court then proceeded to consider the issue of “whether the evidence in the case was sufficient to justify the jury’s finding that, in deciding to proceed with the trial to verdict, the defendant’s representat[ives] were guilty of bad faith in arriving at their decision.”⁴⁹⁸

The Pennsylvania Supreme Court found that there was insufficient evidence to support a jury verdict finding bad faith, and therefore it upheld the trial court’s judgment notwithstanding the verdict.⁴⁹⁹ Even though it was “recognized by everyone in the case that any recovery that would be had would greatly exceed the maximum limit of the insurance,” the insurer was entitled to not respond to settlement offers because of “an honest and bona fide belief that [the insured] would be held not to be liable.”⁵⁰⁰ The claimant was the passenger in a vehicle which ran into a truck stopped partially on the highway because of an apparent fire.⁵⁰¹ The insured was the driver of the truck, who at the time of the accident was under the truck using a fire extinguisher on a fire around the emergency brake.⁵⁰² The applicable liability policy had a limit of \$25,000.⁵⁰³ The case was tried three times.⁵⁰⁴ The first time resulted in a mistrial.⁵⁰⁵ The second time resulted in a verdict for the plaintiff of \$100,000, but the trial court granted a motion for a new trial on the ground that, among other things, “[t]he great weight of the evidence points to the conclusion that the driver of the Cowden truck was not negligent.”⁵⁰⁶ The order for the new trial was affirmed on appeal.⁵⁰⁷

During the third trial, the insured’s personal counsel determined that the case should be settled because the claimant was sympathetic and because the previous jury had reached a \$100,000 verdict on similar evidence.⁵⁰⁸ He contacted defense counsel, who contacted plaintiff’s counsel, who agreed to recommend a settlement for \$45,000, which included \$10,000 from the driver’s insurer (leaving \$35,000 for the insured and insurer).⁵⁰⁹ The insured agreed to contribute \$7500 of his own funds to the settlement so that with the policy limits, there was

498. *Id.* at 229.

499. *Id.*

500. *Id.* at 231.

501. *Id.* at 225.

502. *Id.*

503. *Id.*

504. *Id.*

505. *Id.*

506. *Id.* at 225–26. The other grounds included that there was a “serious” proximate cause issue and “that the amount of the verdict [was] excessive.” *Id.* at 226.

507. *Id.*

508. *Id.*

509. *Id.* at 226–27.

\$42,500 available for settlement, the amount that defense counsel believed would be sufficient to settle.⁵¹⁰ The insured's personal counsel requested that the insurer seek a settlement according to these terms, but the insurer ignored the request.⁵¹¹ The insurer's counsel felt that this made the relationship with the insured's personal counsel adversarial.⁵¹² The day before trial concluded, the claimant's counsel made an offer to settle for \$45,000, and the insured's counsel requested again that the insurer settle the case for policy limits (\$25,000) plus a personal contribution from the insured of \$10,000 and the \$10,000 held by the court from the insurer of the car's driver.⁵¹³ Although defense counsel relayed the settlement offer to the insurer, defense counsel "could see no reason to change his position, namely, that they had a good chance to win the case" and the insurer did not respond to the offer.⁵¹⁴ The Pennsylvania Supreme Court held that this was not bad faith because it "was the result of the honest, considered judgment of [the insurer's] trial lawyer, claims manager and associate counsel," and because it "coincided with the opinion of the trial court written after the second trial, in which the evidence was substantially the same" and had justified entering judgment notwithstanding the verdict.⁵¹⁵

On the one hand, this could be considered a classic DTL determination; the insurer acted the same as it would have regardless of the policy limits because it "honestly" believed that it could win the case. On the other hand, the court may be recognizing the insurer's right to protect its own interests. The court asked rhetorically: "Was the defendant required to pay out \$25,000 of its own money in order to compensate for [the insured's] failure to carry adequate insurance?"⁵¹⁶ In addition, after making its DTL statement, the court seemed to emphasize that DTL "does not mean that the insurer is bound to submerge its own interest in order that the insured's interest may be made paramount."⁵¹⁷ The holding in favor of the insurer may reflect the right of the insurer to protect its own interests when it honestly believes it can win rather than the notion that an insurer without limits would have rejected the settlement offer. The court's reasoning does not include the actual application of the DTL test to the case, and the facts could support the

510. *Id.* at 226.

511. *Id.*

512. *Id.*

513. *Id.* at 226–27.

514. *Id.* at 227.

515. *Id.* at 231.

516. *Id.* at 229.

517. *Id.* at 228.

opposite result under DTL. The jury in the second case awarded \$100,000,⁵¹⁸ which made the \$90,000 verdict in the second case foreseeable. A \$45,000 settlement near the end of the trial could easily be found to be a reasonable settlement for a \$90,000 case. The court does not consider the probability of liability, or the probability that the trial court would again overturn the jury's decision, which would have a bearing on the reasonableness of the offer and would bring the case closer to the approach in the Restatement.

South Dakota

The case law on the duty to settle is relatively thin in South Dakota. The leading Supreme Court case is *Kunkel v. United Security Insurance Co. of New Jersey*.⁵¹⁹ In that case, the South Dakota Supreme Court first recognized a tort claim for breach of the duty to settle.⁵²⁰ Regarding the test, the court said that there is "no single satisfactory test," but that "[i]t appears to have been most frequently held the insured's interests must be given 'equal consideration.'"⁵²¹ Further, the court noted:

Sometimes the duty to exercise good faith and give equal consideration is expressed by telling the jury that in making the decision whether to settle or try a case, the insurer must in good faith view the situation as it would if there were no policy limits applicable to the claim.⁵²²

Notwithstanding this endorsement of DTL, the court continued by endorsing the eight factors identified by *Brown v. Guarantee Insurance Co.*⁵²³:

518. *Id.* at 225.

519. 168 N.W.2d 723 (S.D. 1969).

520. *Id.* at 725 ("Although there has been no prior expression from this court on the subject, it is well established that an insurance company which has issued a liability insurance policy limited in the amount of its coverage may so conduct itself so as to be liable for the entire judgment recovered against its insured irrespective of policy limits."). Later in the opinion, the court noted that the trial court had "submitted the matter to the jury under the bad faith rule [rather than negligence] which we believe to be the better rule and the one prevailing in the majority of jurisdictions and we approve it." *Id.* at 726.

521. *Id.* (citing *Farmers Ins. Exch. v. Henderson*, 313 P.2d 404 (Ariz. 1957); *Brown v. Guarantee Ins. Co.*, 319 P.2d 69 (Cal. Dist. Ct. App. 1957)).

522. *Id.* (citing *Am. Fid. & Cas. Co. v. L. C. Jones Trucking Co.*, 321 P.2d 685 (Okla. 1957), *overruled by* *Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080 (Okla. 2005); *Cowden*, 134 A.2d 223; *Bowers v. Camden Fire Ins. Ass'n*, 237 A.2d 857 (N.J. 1968); *Murach v. Mass. Bonding & Ins. Co.*, 158 N.E.2d 338 (Mass. 1959)).

523. 319 P.2d at 75.

(1) the strength of the injured claimant's case on the issues of liability and damages; (2) attempts by the insurer to induce the insured to contribute to a settlement; (3) failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured; (4) the insurer's rejection of advice of its own attorney or agent; (5) failure of the insurer to inform the insured of a compromise offer; (6) the amount of financial risk to which each party is exposed in the event of a refusal to settle; (7) the fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and (8) any other factors tending to establish or negate bad faith on the part of the insurer.⁵²⁴

In analyzing the facts of the case, the *Kunkel* court applied the *Brown* factors. The court noted that "[s]everal of the factors mentioned by the California court are not in issue in the case at bar."⁵²⁵ But the court identified facts that supported other factors. The court found that the insurer knew of "the great probability of the verdict exceeding policy limits," but failed to inform the insured of that risk, which is similar to the failure to inform the insured of a settlement which "has sometimes been regarded as evidence of bad faith."⁵²⁶ In addition, the insurer failed to communicate an offer to settle the case for policy limits or \$25,000, whichever was less, during the jury deliberations.⁵²⁷

Although this analysis tends to support the use of the *Brown* factors that equate with EC, the court's holding could be interpreted as relying on DTL. The court does not explicitly apply the DTL test, but concluded:

The record establishes that [the insurer] recognized great danger of a verdict exceeding policy limits. It hardly allows any other reasonable analysis. When we consider the comparative hazards; that is, settling the case for \$25,000 within policy limits, or exposing the insured to a possible verdict nearly three times in excess of that amount, we believe a jury could find that [the insurer] did not exercise its duty of good faith and did not give

524. *Kunkel*, 168 N.W.2d at 727 (citing *Brown*, 319 P.2d at 75).

525. *Id.*

526. *Id.* at 730 (citing W. E. Shipley, Annotation, *Duty of Liability Insurer to Settle or Compromise*, 40 A.L.R.2d 168, 216 (1955)).

527. *Id.*

equal consideration to its own and [the insured]'s comparative hazards.⁵²⁸

Thus, the court seems to focus on the risk of the excess verdict compared to the policy limits, which, while ignoring the probability requirement, fits the DTL test. However, in reaching this conclusion, the court cites to *General Accident Fire & Life Assurance Corp. v. Little*,⁵²⁹ which is one of the cases used in this Article to illustrate the difference between DTL and EC.⁵³⁰

A later South Dakota Supreme Court decision, *Crabb v. National Indemnity Co.*,⁵³¹ does not add much to the analysis. In that case, the court considered whether an insurer could avoid bad faith liability by relying on advice of counsel.⁵³² The court held that reliance on advice of counsel was not “the sole decisive test of good faith in the present action.”⁵³³ The court explained the test for bad faith as follows:

This Court in harmony with the majority view, approved recovery under the bad faith rule in *Kunkel v. United Security Ins. Co. of New Jersey*, 84 S.D. 116, 168 N.W.2d 723. In an extensive opinion on the subject the Court pointed out that good faith is a broad and comprehensive term which has to be determined by the particular facts and circumstances in each case. In considering what constitutes good or bad faith the interests of the insured must be given ‘equal consideration’ with those of the insurer and in making a decision to settle or try a case ‘the insurer must in good faith view the situation as it would if there were no policy limits applicable to the claim.’ Various factors were then set forth which should be considered in determining the issue.⁵³⁴

This statement of the rule appears to be a blending of EC and DTL. Although the court references DTL, the “various factors” is a reference to the *Brown* factors that are consistent with EC.

The *Crabb* court’s holding can be construed to support both DTL and EC, but provides somewhat more support for EC. The court held that

528. *Id.* at 731 (citing *Gen. Accident Fire & Life Assurance Corp. v. Little*, 443 P.2d 690 (Ariz. 1968) (in banc); *Am. Fid. & Cas. Co. v. G. A. Nichols Co.*, 173 F.2d 830 (10th Cir. 1949)).

529. 443 P.2d 690.

530. *See supra* text accompanying notes 38–66.

531. 205 N.W.2d 633 (S.D. 1973).

532. *Id.* at 636.

533. *Id.*

534. *Id.* at 635.

there was “ample evidence in the record, viewed in a light most favorable to the verdict, to sustain the excess judgment rendered against the insurer.”⁵³⁵ The plaintiff was the estate of a pedestrian who had been hit by a drunk driver.⁵³⁶ The estate sued for \$30,000, but offered to settle for \$10,000 policy limits even after a verdict for \$20,000 and after the court rejected the judgment n.o.v. motion.⁵³⁷

Like *Kunkel*, these facts could support a finding of breach of the duty to settle based on the DTL test. A person without limits would likely accept the settlement offer of \$10,000 in face of an adverse judgment for \$20,000. But they could also reflect equal consideration. The court’s analysis did not consider the probability of the recovery (although it implies that the probability is high). The independent counsel retained by the insurer, however, was of the opinion that “plaintiff could not prevail” in the claim because of contributory negligence for “violat[ing] a statutory rule of safety by walking on the right-hand shoulder of the road instead of the left-hand side.”⁵³⁸ If the likelihood of success on appeal was greater than fifty percent, then the rejection of the settlement offer was reasonable under the DTL test. The verdict was for \$20,000, and the policy limits were \$10,000. If the chances of success on appeal were fifty-five percent, the chances of losing the appeal were only forty-five percent, making the expected value of the case only \$9000 ($\$20,000 \times .45$). This is \$1000 less than the policy limits offer, so rejecting the offer would be reasonable under DTL. But under the EC test (at least as used in this Article), the insurer’s interest is in saving \$1000 (PL of \$10,000 - EV of \$9000) while the insured’s interest was to avoid the \$10,000 excess verdict, so rejecting the settlement would not give equal consideration to the interest of the insured.

Washington

The Washington Supreme Court has not addressed the standard to be applied for a breach of an insurer’s duty to settle, although it has held that “[a]n insured can recover from his insurer the amount of a judgment rendered against him, including the amount in excess of the policy limits, when the insurer has been guilty of bad faith in failing to effect a settlement for a smaller sum.”⁵³⁹ The insurer had refused to participate in the settlement of a claim arising out of a traffic accident, so the

535. *Id.* at 635–36.

536. *Id.* at 634–35.

537. *Id.* at 635.

538. *Id.* at 636.

539. *Evans v. Cont’l Cas. Co.*, 245 P.2d 470, 478 (Wash. 1952).

insured settled with his own money and sought reimbursement.⁵⁴⁰ The trial court held that the insurer was liable for bad faith, and the Washington Supreme Court affirmed.⁵⁴¹

The Court of Appeals of Washington has addressed the issue and used the blended approach. After noting that the insurer must give equal consideration to the interests of the insured, and that it “adopt[ed] the ‘no limit’ test as the best means of determining whether the interests of the insurer and the insured have been given equal consideration,” the court included “[t]he failure . . . to properly investigate the evidence” factor.⁵⁴² Similarly, in *Moratti v. Farmers Insurance Co. of Washington*,⁵⁴³ the court approved of jury instructions that included duties to conduct a reasonable investigation, to communicate investigations and evaluations, and to communicate settlement offers as part of the insurer’s duty to respond to reasonable settlement offers.⁵⁴⁴ In *Hamilton v. State Farm Mutual Automobile Insurance Co.*,⁵⁴⁵ the court of appeals held that the insurer had breached the duty to settle because counsel retained to represent the insured had failed to communicate settlement offers from the claimant that were at and below the policy limits.⁵⁴⁶

540. *Id.* at 476–78.

541. *Id.* at 480.

542. *Tyler v. Grange Ins. Ass’n*, 473 P.2d 193, 199–200 (Wash. Ct. App. 1970).

543. 254 P.3d 939 (Wash. Ct. App. 2011).

544. *Id.* at 944.

545. 511 P.2d 1020 (Wash. Ct. App. 1973).

546. *Id.* at 1022–23.