AN APPRECIATION OF PRACTITIONER KIM MARRKAND'S THOUGHTFUL ARTICLE,[1] AND A GENTLE FORENSIC SUGGESTION TO PROFESSORS ABRAHAM,[2] HAY,[3] MARTINEZ,[4] AND THOMAS[5] REGARDING THE RLLI'S SECTION 24 AND A LIABILITY INSURER'S EXPOSURE TO EXTRACONTRACTUAL, BAD FAITH LIABILITY

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Kim Marrkand's article on section 24 of the Restatement of the Law of Liability Insurance's ("RLLI"), entitled, *Duty to Make Reasonable Settlement Decisions,*[6] brings the refreshing perspective of a practicing lawyer to the subject. The title of Ms. Marrkand's article says it all so far as I am concerned, and I agree with her perspective entirely: *Duty to Settle: Why Proposed Sections 24 and 27 Have No Place in a Restatement of the*

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1. Kim V. Marrkand, *Duty to Settle: Why Proposed Sections 24 and 27 Have No Place in a Restatement of the Law of Liability Insurance*, 68 RUTGERS U. L. REV. 201 (2015).

2. Kenneth S. Abraham, *The Liability Insurer's Duty to Settle Uncertain and Mixed Claims*, 68 RUTGERS U. L. REV. 337 (2015).

3. Bruce L. Hay, *A No-Fault Approach to the Duty to Settle*, 68 RUTGERS U. L. REV. 321 (2015).

4. Leo P. Martinez, *The Restatement of the Law of Liability Insurance and the Duty to Settle*, 68 RUTGERS U. L. REV. 155 (2015).

5. Jeffrey E. Thomas, *The Standard for Breach of a Liability Insurer's Duty to Make Reasonable Settlement Decisions: Exploring the Alternatives*, 68 RUTGERS U. L. REV. 229 (2015).

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6. *See generally* Marrkand, *supra* note 1.

Law of Liability Insurance. To her credit, Ms. Marrkand puts her article's text at the service of her article's title, starting with her overall observation that the RLLI's "duty to make reasonable settlement decisions" is known to practicing lawyers as the liability carrier's "duty to settle."[7] She fleshes out her very welcome article with a fine sense of accuracy, except perhaps in one particular. There is so much good in her article that I hesitate to point out the inaccuracy, except that it is an important one.

In the course of critiquing the Restatement's treatment of situations where the claimant does not make a settlement demand, Ms. Marrkand goes off the rails a little with a suggestion that "[t]he argument that insurers have a duty to initiate settlement offers has been rejected by courts."[8] Actually, judicial recognition of a duty to initiate settlement offers under certain circumstances, even where the claimant has not made a settlement demand, is a well-documented *majority view*.

In an article in the *Insurance Litigation Reporter*, I have provided the results of a forensic examination of every jurisdiction I found in which the issue has arisen of whether a liability carrier either has an affirmative legal duty to initiate settlement negotiations in the absence of a settlement demand from the claimant, or in which the issue of extracontractual or "bad faith" liability is a jury issue even though the claimant has not made a settlement demand.[9]

The results are clear. When the additional factors are also present in any case that the insured's liability is probable and that the damages likely to be recovered by the claimant are "great" in the sense that they exceed the liability insurance policy limit, sixteen courts are in favor of submitting the issue to a jury of whether a liability carrier should be held liable in any given case for "bad faith" on account of the carrier's failure even to initiate settlement negotiations, and even though the claimant did not make a settlement demand.[10]

It probably bears repeating that, depending on the facts of each case, the issue of extracontractual exposure which can present a jury question in this context includes facts which show that the liability carrier did not initiate settlement negotiations in the absence of a settlement demand. The question of extracontractual exposure can be a jury question in this context, even if initiating settlement negotiations when there is no

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7. *Id.* at 202–03, 207.

8. Marrkand, *supra* note 1, at 216 n.74.

9. Dennis J. Wall, *The American Law Institute and Good Faith Settlement Duties of Liability Carriers: The Scope of a Duty to Initiate Settlement Negotiations, What the ALI Restatement of the Law of Liability Insurance Has to Say About It, and the ALI Reporters' Notes*, 37 INS. LITIG. REP. 597 (2015).

10. *Id.* at 601-04.

settlement demand may not be conceptualized by lawyers of a given jurisdiction as a "legal duty." Recently decided cases add numbers and strength to this majority rule.[11]

These cases represent the decided majority view on the subject. The courts have made clear that the issue of a liability carrier's extracontractual, "bad faith" liability is a jury question under such circumstances even though the claimant never made a settlement demand.[12] It is also important to the outcomes in these cases that the carrier must have had a "reasonable opportunity to settle" the underlying claim before the carrier can be exposed to bad faith liability.[13]

Three other jurisdictions have been identified on the basis of cases apparently holding to the contrary,[14] but these authorities are what may be described as "soft" on the issue, each for its own reasons. Out of all the authorities found representing a total of over nineteen jurisdictions, then, at least sixteen rather "hard" authorities support the idea of a liability carrier affirmatively initiating settlement negotiations even in the absence of a settlement demand from the claimant, while only the remaining three rather "soft" authorities would not support the idea.[15]

In the context of this special issue of the *Rutgers University Law Review* devoted to the RLLI, Ms. Marrkand is not alone in her erroneous alignment of case law on the issue of a liability carrier's exposure to bad faith liability when a claimant does not make a settlement demand. She

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11. *See, e.g.*, Stalley v. Allstate Ins. Co., No. 6:14-cv-1074-Orl-28DAB, 2016 WL 1752764, at *8–9 (M.D. Fla. Apr. 29, 2016) (denying liability insurer's motion for summary judgment because fact issues remained including whether carrier "should have resolved issues of damages and coverage" and whether it should have offered to settle claim within policy limits before it ultimately offered to do so, under Florida law which follows rule, quoted by the court, that "[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"); Kleinsasser v. Progressive N. Ins. Co., No. CIV-16-102-M, 2016 WL 1583664, at *2–3 (W.D. Okla. Apr. 19, 2016) (denying liability insurer's motion for judgment on the pleadings as to plaintiff automobile driver's bad faith claim based on the carrier's settlement of the automobile passenger's claim under Oklahoma law, including quotation by the Court that Oklahoma law imposes "an affirmative duty to initiate settlement negotiations if an insured's liability is clear and injuries of a claimant are so severe that a judgment in excess of policy limits is likely").

12. Ever since it was first propounded, the rule has gained increasing judicial acceptance until it is now clearly the majority rule based on the decided cases: A liability carrier has "an affirmative duty to explore settlement possibilities." *E.g.*, Self v. Allstate Ins. Co., 345 F. Supp. 191, 197 (M.D. Fla. 1972) (involving Florida substantive law); Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 323 A.2d 495, 505 (N.J. 1974).

13. *See* Wall, *supra* note 9, at 603–04.

14. *Id.* at 603.

15. *See id.* at 601–04.

quickly accepted the notion in one case in a 5-to-4 decision, which treated the courts' imposition of an affirmative legal duty to initiate settlement negotiations more or less as the equivalent of a summary judgment or a directed verdict determining the carrier's exposure when it is really a jury issue under the circumstances outlined above.[16]

Ms. Marrkand's article, however, ultimately does not go any farther down this rabbit trail. To her credit, she addresses the gist of the settlement issue in her 28 pages, whereas the four professors collectively spent 200 pages in their descriptions of it. Ms. Marrkand's article focuses attention on the central question of the reason for existence of section 24 in the RLLI: How does the four-factor test in section 24, even when buttressed by its numerous supporting comments offered by the reporters, improve upon the one-factor test employed by the vast majority of courts called upon to determine the appropriate measure of bad faith liability for a liability carrier's failure to settle the underlying case against its insured.[17] To wit: "A liability insurer must give at least equal consideration to the insured's interests as to its own in determining whether and how to settle the underlying claim against its insureds."[18]

This is the test which is most often employed by the courts. To the degree that it is not the test employed in the Restatement—and it pretty clearly is not the same test as things stand now—the Restatement is not a restatement of the law at all but, as Ms. Marrkand so eloquently suggests, it is instead an unauthorized revision of the law and a "Restatement" in name only.[19]

Given the design and structure of section 24, a possible solution for improvement probably will not lie in proposed edits or revisions here and there. Instead, as the author has suggested elsewhere,[20] one solution may be to add two new subsections to the existing four subsections of RLLI section 24 in order to clarify the text and conform Section 24 more closely to the prevailing law:

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16. Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 843 (Tex. 1994). Without stating or implying any unintended disrespect for either the person or the institution, neither the author of the opinion in that 5-to-4 case nor the court that rendered that decision have made their mark on the world by demonstrating superior legal scholarship. In addition, the cited decision was rendered only after a previous decision to the contrary in the same case was withdrawn; this 5-to-4 opinion was substituted for it on rehearing.

17. Marrkand, *supra* note 1, at 206–12.

18. 1 DENNIS J. WALL, LITIGATION AND PREVENTION OF INSURER BAD FAITH § 3:1 (3d ed. Supp. 2016).

19. *See* Marrkand, *supra* note 1, at 201–05.

20. Wall, *supra* note 9, at 607.

(5) Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances, it could[21] and should have done so, had it acted fairly and honestly toward its insured and with at least equal consideration[22] for her, his, its, or their interests.

(6) The lack of a formal settlement demand is only one factor to be considered in determining bad faith. Where 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. Whether and how a liability insurer initiates settlement negotiations, if at all, depends on the facts of each particular case.

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21. Explicitly inserting the concept that, in order to be liable for "bad faith" in settlement, it is necessary for the trier of fact to find first that the liability carrier "could" have settled the case against the insured, addresses the issue of the liability carrier confronting a "reasonable opportunity to settle within policy limits" without taking sides from among the competing cases as to which party has the burden of proof on this issue.

22. "Expressly injecting the 'at least equal consideration' wording into the 'without policy limits' notion already expressed in Restatement Section 24 strengthens the section's position as a Restatement of the law, and not as an advocate for what the law has never been, but what it might be in the future." Wall, *supra* note 9, at 607 n.48.