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NOTES


In Kranzush v. Badger State Mutual Casualty Co.¹ the Wisconsin Supreme Court addressed the issue of whether a tort victim has a right to bring an action directly against the tortfeasor’s insurer for bad faith failure to settle the victim’s claim. The court expressly held that a third-party claimant has no right, either common law or statutory, to assert a bad faith claim against an insurer. The basic rationale for this decision was that a liability insurer owes no duty to act in good faith and to deal fairly to a claimant who is a stranger to the insurance contract.

Kranzush arose out of an automobile accident in which Mrs. Gerlikovski, the plaintiff’s decedent, was injured when she was a passenger in the auto being driven by her husband. Mrs. Gerlikovski subsequently commenced an action in the circuit court for Brown County against her husband and his insurer, Badger State Mutual Casualty Co. (Badger).²

Following Mrs. Gerlikovski’s death, the administrator of her estate commenced an action against Badger alleging that the insurer acted intentionally, arbitrarily and in bad faith in an attempt to prolong the litigation.³ The complaint further alleged that the defendant knew of her weakened condition and that she was going to die within a short period.⁴ The gra-

1. 103 Wis. 2d 56, 307 N.W.2d 256 (1981).
2. The action, involving allegations of negligence and damages arising out of the accident, was still pending at the time of the Wisconsin Supreme Court decision. The court concluded that the outcome of the underlying action was unimportant since the issue in Kranzush did not involve an excess judgment.
3. Plaintiff maintained that the acts of constant delay and harassment were intended to cause Mrs. Gerlikovski to give up her claim and to minimize the amount of Badger’s liability for her injuries. It was further alleged that this conduct was engaged in for the purpose of saving Badger money.
4. 103 Wis. 2d at 58, 307 N.W.2d at 258. Mrs. Gerlikovski was suffering from cancer and recently had a mastectomy.
vamen of the complaint was that the insurer engaged in bad
faith conduct in refusing to settle the plaintiff's decedent's
claim.5

Badger moved to dismiss the complaint for failure to state
a claim upon which relief can be granted. The circuit court for
Brown County granted the motion to dismiss on the ground
that no duty is owed by an insurer to a third-party claimant
in relation to the settlement of a claim. Plaintiff appealed
and, in an unpublished opinion, the court of appeals affirmed
the circuit court decision on the same ground advanced by the
circuit court.6 The Wisconsin Supreme Court affirmed the de-
cision of the court of appeals.

I. THE DEVELOPMENT OF THE TORT OF BAD FAITH

Recognition of the intentional tort of bad faith is a rela-
tively new concept in the area of tort law. One of the earliest
cases to sanction a cause of action for bad faith conduct on
the part of an insurer was Hilker v. Western Automobile In-
surance Co.7 The theory of recovery alleged was that the in-
surer engaged in bad faith conduct in failing to settle the per-
sonal injury claim of the claimant thereby exposing the
insured to a judgment in excess of the policy limits. The Wis-
consin Supreme Court concluded that a liability insurer would
be held liable for bad faith for refusing to settle and ade-
quately investigate such claims against its insureds.

The Hilker court found that the duty of the insurer was
analogous to that of a fiduciary.8 The court stated that the
duty to act in good faith could not be predicated upon any
express language contained in the insurance contract. Instead,
the duty was to be "implied as a correlative duty growing out
of certain rights and privileges which the contract confers

5. A claim for intentional infliction of emotional distress was also presented in the
complaint. Prior to granting the motion to dismiss, the circuit court judge examined
the complaint to see if there were sufficient allegations to sustain a claim for inten-
tional infliction of emotional distress. Judge Duffy found that it did not, but gave the
plaintiff ten days to reframe the complaint to state such a cause of action. However,
plaintiff did not do so.
6. Kranzush v. Badger State Mut. Casualty Co., 98 Wis. 2d 748, 297 N.W.2d 515
(Ct. App. 1980).
7. 204 Wis. 1, 231 N.W. 257 (1930), aff'd on rehearing, 204 Wis. 1, 12, 235 N.W.
413 (1931).
8. Id. at 6, 231 N.W. at 259.
upon the insurer." In reaching the conclusion that the relationship between insured and insurer gives rise to a duty to act in good faith and to deal fairly, the court was persuaded by principles of agency law since the insurer had absolute control over the handling of the claim.\textsuperscript{10}

Although Wisconsin was one of the first states to impose the implied covenant of good faith and fair dealing, the tort of bad faith did not gain full recognition until the courts of California began to use it extensively.\textsuperscript{11} It is a well-settled principle in California tort law that there is an implied covenant, implicit in every insurance contract, which imposes upon an insurer a duty to conduct itself in good faith and to deal fairly.\textsuperscript{12} The duty arises by reason of the contractual relationship between the insured and the insurer, but the cause of action sounds in tort. Prior to 1979, California courts viewed the duty of good faith and fair dealing as an obligation owed to the \textit{insured} by reason of the contractual relationship and its attendant duties of a fiduciary nature.\textsuperscript{13} Thus, the benefit to be derived from the imposition of this duty is one running to the insured.

California continued to view the duty of good faith as running only to the insured until the 1979 California Supreme Court case of \textit{Royal Globe Insurance Co. v. Superior Court}.\textsuperscript{14}

\textsuperscript{9} Id. at 13, 235 N.W. at 414.
\textsuperscript{10} The court described the procedure involved to be as follows:
As a condition of affording [the insured] that protection [of indemnification], the company assumed absolute control of the adjustment of all claims and of all litigation arising out of such claims. Under such a contract there is no escape from the conclusion that the insurance company became the agent of the insured for the purpose of handling such claims and of conducting such litigation.
\textit{Id.} at 5, 231 N.W. at 259.
\textsuperscript{11} For an excellent discussion of the development of the tort of insurer bad faith in California, see Kircher, \textit{Insurer's Mistaken Judgment — A New Tort?}, 59 MARQ. L. REV. 775 (1976).
\textsuperscript{13} Id.
\textsuperscript{14} 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979). \textit{Royal Globe} reversed the position that the California Supreme Court had taken three years earlier in Murphy v. Allstate Ins. Co., 17 Cal. 3d 937, 553 P.2d 584, 132 Cal. Rptr. 424 (1976). The court did not overrule \textit{Murphy}, but rather found a distinguishing feature. In \textit{Murphy}, the claimant alleged that the insurer violated its duty to its insured in failing to settle the tort victim's claim, whereas in \textit{Royal Globe}, the claimant relied upon the insurer's
Royal Globe will be discussed in depth in the next section. However, what the court ultimately held was that a claimant had a right to hold an insurer directly liable for a bad faith refusal to settle a reasonably clear claim. The California Supreme Court, in the 4-3 decision, relied upon the Unfair Claims Settlement Practices Act and found that the regulatory scheme afforded a private civil litigant, either an insured or a claimant, a vested right to bring a cause of action for violation of the Act.

The evolution of the tort of bad faith in Wisconsin, as previously noted, had its origin in Hilker. Since 1931, Wisconsin has recognized three separate and distinct areas of recovery for insurer bad faith.

In Hilker the court stated that when an injured tort victim makes a claim against the tortfeasor’s liability insurer, the insurer owes a duty to its insured to exercise good faith conduct in the investigation and settlement of the claim against its insured. In this area of bad faith recovery, three duties have evolved which are owed by an insurer: the duty to make an adequate investigation, the duty to inform the insured of the chance of recovery in excess of policy limits and the duty to keep the insured timely and adequately informed of all settle-
ment offers. The Wisconsin Supreme Court summarized this aspect of the tort of bad faith in *Alt v. American Family Mutual Insurance Co.* wherein it stated that bad faith stems from the breach of a known fiduciary duty which arises from the exclusive control of the claim being vested in the insurer.

A second area in which the Wisconsin Supreme Court has recognized recovery for insurer bad faith was announced in *Anderson v. Continental Insurance Co.* This case involved a claim by an insured against his insurer for an unreasonable failure to settle the insured's first-party claim. The court allowed the claim based upon the fiduciary duty between the insurer and the insured which was first mentioned in *Hilker.* The court, in embracing this new cause of action, adopted the language of the California Supreme Court in *Gruenberg v. Aetna Insurance Co.* in finding that a breach of the implied duty to deal fairly and in good faith is a separate intentional wrong which is imposed as a result of the contractual relationship. Therefore, *Anderson* is also important for the proposition that insurer bad faith is not the same as a tortious breach

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22. The *Alt* court stated:

> [W]hat we speak of when referring to bad faith is the breach of a known fiduciary duty. This 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. . . . [A]n insurance company, in which is vested the exclusive control of the management of a case, breaches its duty when it has the opportunity to settle an excess liability case within policy limits and it fails to do so.

23. 85 Wis. 2d 675, 271 N.W.2d 368 (1978).
24. 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973). The primary reason the Wisconsin Supreme Court found the rationale of *Gruenberg* to be persuasive is that the California Supreme Court based its decision in that case on the language set forth in *Hilker v. Western Auto. Ins. Co.,* 204 Wis. 1, 231 N.W. 257 (1930), aff'd on rehearing, 204 Wis. 1, 12, 235 N.W. 413 (1931).
25. 85 Wis. 2d at 689, 271 N.W.2d at 375. See *supra* notes 11-13 and accompanying text.
of contract.\textsuperscript{26} The court expressly found that the basis for imposing insurer responsibility for fair dealing toward the insured was equally as compelling when the insurer was dealing with a claim by its insured as when it was dealing with a claim by a third-party against its insured.\textsuperscript{27} The test for determining whether there was bad faith conduct on the part of an insurer is an objective one employing a reasonable person standard: would a reasonable insurer under the circumstances have denied or delayed payment of the claim.\textsuperscript{28} Although this test appears to employ a negligence standard, the court characterized the tort of bad faith as an intentional tort. As an intentional tort, not only are compensatory damages recoverable, but punitive damages may also be awarded under the proper circumstances.\textsuperscript{29}

The third set of circumstances in which the Wisconsin Supreme Court has recognized a cause of action for bad faith is in the area of worker's compensation.\textsuperscript{30} In Coleman v. American Universal Insurance Co.\textsuperscript{31} the court recognized that an injured worker is not barred by the exclusivity provision of

\textsuperscript{26} The court had previously described the cause of action as "tortious breach of contract" in Drake v. Milwaukee Mut. Ins. Co., 70 Wis. 2d 977, 983, 236 N.W.2d 204, 208 (1975).
\textsuperscript{27} 85 Wis. 2d at 689, 271 N.W.2d at 375.
\textsuperscript{28} Id. at 692, 271 N.W.2d at 377. The court further stated that although there must be knowledge or reckless disregard of a reasonable basis for a denial, implicit in that test is [the] conclusion that the knowledge of the lack of a reasonable basis may be inferred and imputed to an insurance company where there is a reckless disregard of a lack of a reasonable basis for denial or a reckless indifference to facts or to proofs submitted by the insured.
\textsuperscript{29} The Anderson court held that the proof of bad faith conduct by an insurer does not necessarily signify that there will also be an award of punitive damages. The underlying purposes sought to be achieved by the imposition of punitive damages are punishment of the wrongdoer and to serve as a deterrent. Mid-Continent Refrigerator Co. v. Straka, 47 Wis. 2d 739, 746, 178 N.W.2d 28, 32 (1970). As the court stated in Anderson, "[f]or punitive damages to be awarded, a defendant must not only intentionally have breached his duty of good faith, but in addition must have been guilty of oppression, fraud, or malice in the special sense defined by Mid-Continent v. Straka." 85 Wis. 2d at 697, 271 N.W.2d at 379. See also Davis v. Allstate Ins. Co., 101 Wis. 2d 1, 303 N.W.2d 596 (1981).
\textsuperscript{30} See supra note 17 and accompanying text.
\textsuperscript{31} 86 Wis. 2d 615, 273 N.W.2d 220 (1979).
the Worker's Compensation Act\textsuperscript{32} and, therefore, may bring a claim against the insurer for bad faith in the handling of a claim for benefits under a worker's compensation policy. The court stated that the primary rationale underlying the worker's compensation provisions was that the injured worker gives up his common-law right to sue his employer in exchange for coverage of all work-related injuries no matter who is at fault.\textsuperscript{33} The court further reasoned that the goal of the statutory provisions would be defeated if insurers were permitted to conduct themselves in bad faith. By allowing a worker to bring a cause of action for bad faith, the worker has some security in knowing "that his exclusive remedy will not be denied through the intentional wrongdoings of the insurer."\textsuperscript{34}

II. The \textit{Kranzush} Decision

At issue in \textit{Kranzush} was whether a person injured by the alleged negligence of an insured can bring an action against the tortfeasor's insurer for failing to settle the victim's claim in good faith.\textsuperscript{35} \textit{Kranzush} addressed five separate questions in order to resolve the main issue of whether to permit this right of action. First, can the principle set forth in \textit{Hilker} and \textit{Alt}, involving excess judgment-bad faith actions, be extended to support a claim by a third-party claimant?\textsuperscript{36} Second, can the \textit{Anderson} ruling be extended to support this type of claim?\textsuperscript{37} Third, can the holding in \textit{Coleman} be read to offer a basis for this type of third-party claim?\textsuperscript{38} Fourth, if the aforementioned cases do not support this theory of recovery, should the Wisconsin Supreme Court nonetheless recognize this new right of action?\textsuperscript{39} Fifth, does the direct action statute,\textsuperscript{40} section 601.01(2),\textsuperscript{41} which sets forth one of the purposes of the insur-

\textsuperscript{32.} \textit{Wis. Stat.} § 102.03(2) (1981).
\textsuperscript{33.} 86 Wis. 2d at 621, 273 N.W.2d at 222.
\textsuperscript{34.} 103 Wis. 2d at 65, 307 N.W.2d at 261.
\textsuperscript{35.} \textit{Id.} at 57, 307 N.W.2d at 257.
\textsuperscript{36.} \textit{Id.} at 63-64, 307 N.W.2d at 260-61.
\textsuperscript{37.} \textit{Id.} at 64-65, 307 N.W.2d at 261.
\textsuperscript{38.} \textit{Id.} at 65-67, 307 N.W.2d at 261-62.
\textsuperscript{39.} \textit{Id.} at 67-74, 307 N.W.2d at 262-65.
\textsuperscript{40.} \textit{Wis. Stat.} § 632.24 (1981).
\textsuperscript{41.} \textit{Wis. Stat.} § 601.01(2) (1981), provides: "The purposes of chs. 600 to 646 are:
ance code, or does Wisconsin’s version of the Unfair Claims Settlement Practices Act\textsuperscript{42} create a duty to act fairly and in

\textsuperscript{42} Wis. Admin. Code § INS 6.11 provides:

\textbf{Ins. 6.11 Insurance claim settlement practices.} (1) PURPOSE. This rule is to promote the fair and equitable treatment of policyholders, claimants and insurers by defining certain claim adjustment practices which are considered to be unfair methods and practices in the business of insurance. The rule implements and interprets applicable statutes including but not limited to §§ 601.04, 601.01(3)(b), and 645.41(3), Stats.

(3) UNFAIR CLAIM SETTLEMENT PRACTICES. (a) Any of the following acts, if committed by any person without just cause and performed with such frequency as to indicate general business practice, shall constitute unfair methods and practices in the business of insurance:

1. Failure to promptly acknowledge pertinent communications with respect to claims arising under insurance policies.
2. Failure to initiate and conclude a claims investigation with all reasonable dispatch.
3. Failure to promptly provide necessary claims forms, instructions and reasonable assistance to insureds and claimants under its insurance policies.
4. Failure to attempt in good faith to effectuate fair and equitable settlement of claims submitted in which liability has become reasonably clear.
5. Failure upon request of a claimant, to promptly provide a reasonable explanation of the basis in the policy contract or applicable law for denial of a claim or for the offer of a compromise settlement.
6. Knowingly misrepresenting to claimants pertinent facts or policy provisions relating to coverages involved.
7. Failure to affirm or deny coverage of claims within a reasonable time after proof of loss has been completed.
8. Failure to settle a claim under one portion of the policy coverage in order to influence a settlement under another portion of the policy coverage.
9. Except as may be otherwise provided in the policy contract, the failure to offer settlement under applicable first party coverage on the basis that responsibility for payment should be assumed by other persons or insurers.
10. Compelling insureds and claimants to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them.
11. Refusing payment of claims solely on the basis of the insured’s request to do so without making an independent evaluation of the insured’s liability based upon all available information.
12. Failure, where appropriate, to make use of arbitration procedures authorized or permitted under any insurance policy.
13. Adopting or making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration.

\textsuperscript{42} (b) Any of the following acts committed by any person shall constitute unfair methods and practices in the business of insurance:

1. Knowingly misrepresenting to claimants pertinent facts or policy provisions relating to coverages involved.
good faith toward third-party claimants? The court ruled against the third-party claimant on all five questions.

Considered in the context of Wisconsin Supreme Court decisions in the area, Kranzush was a well-reasoned decision which halted the trend of allowing recovery for insurer bad faith in a variety of circumstances. Already, with the Coleman decision, the intentional tort of bad faith had been extended to encompass an area of the law that had previously been thought of as impenetrable because of the exclusive remedy provision of the Worker's Compensation Act. The Kranzush decision laid to rest any confusion stemming from dicta contained in Coleman to the effect that the rationale underlying the decision in Anderson was not only applicable to a first-party claim but was also applicable to third-party claims.

A. Excess Liability Cases

Justice Callow, writing for the majority, authored a decision that discussed almost every theory which could be found to be a valid basis for recognizing the cause of action at issue. The majority opinion began with an inquiry of whether

2. Failure to make provision for adequate claims handling personnel, systems and procedures to effectively service claims in this state incurred under insurance coverage issued or delivered in this state.

3. Failure to adopt reasonable standards for investigation of claims arising under its insurance policies.

4. PROMPT DEFINED. Except where a different period is specified by statute or rule and except for good cause shown, the terms “prompt” and “promptly” as used in this rule shall mean responsive action within 10 consecutive days from receipt of a communication concerning a claim.

5. PENALTY. The commission of any of the acts listed in subsections (3)(a) or (3)(b)2., or 3. shall subject the person to revocation of license to transact insurance in this state. Violations of this rule or any order issued thereunder shall subject the person violating the same to s. 601.64, Stats.

43. 103 Wis. 2d at 77-82, 307 N.W.2d at 267-69.

44. 86 Wis. 2d at 620, 273 N.W.2d at 221-22. The court simply limited Coleman and its attendant dicta to the worker's compensation situation involving insurer bad faith conduct.

45. The one theory which Justice Callow did not discuss is the third-party beneficiary theory expounded in Thompson v. Commercial Union Ins. Co., 250 So. 2d 259 (Fla. 1971). In this case, the Florida Supreme Court adopted the rule that injured third parties are intended beneficiaries of the insurance contract since the policy and the Financial Responsibility Law are primarily for the benefit and protection of third parties. Id. at 263. Contra Page v. Allstate Ins. Co., 126 Ariz. 258, 614 P.2d 339 (Ct. App. 1980); Murphy v. Allstate Ins. Co., 17 Cal. 3d 937, 553 P.2d 584, 132 Cal. Rptr.
Alt could be extended to permit a cause of action by a third-party claimant. In reaching the decision that it could not, Justice Callow emphasized the fact that in Kranzush the court was not dealing with an excess judgment since the underlying negligence action had not as yet been decided. The court further noted that the interest sought to be protected in Alt was not the claimant’s recovery, but rather, the insured’s potential excess liability.

Kranzush adheres to fifty years of case law in the area of excess liability-bad faith tort law. The relevant Wisconsin Supreme Court cases in this sphere of tort law demonstrate that the insurer’s duty to deal fairly and in good faith in the investigation, communication of settlement offers and notice of the possibility of an excess judgment can run only to the insured. Furthermore, the third-party claimant is a stranger to the contractual relationship between the insured and the insurer and any dealings with the third-party claimant are conducted in an adversarial manner.

An important basis for reaching the conclusion that the excess liability-bad faith cases provide an inadequate foundation for the inclusion of the type of cause of action at issue in Kranzush is the rationale set forth in Hilker. The primary

46. Of the cases which have allowed a private cause of action by a third-party claimant, the 1981 West Virginia case of Jenkins v. J.C. Penney Casualty Ins. Co., 280 S.E.2d 252 (W. Va. 1981), ruled that before the statutory claim for violation of the Unfair Claims Settlement Practices Act may be brought, it is necessary that the underlying claim be resolved. The court’s reasoning was that the claimant may not choose to pursue the statutory claim as he may be content with the result of the underlying claim. Id. at __, 280 S.E.2d at 259.

In accord is Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979). However, the California Supreme Court stated that the reasons the statutory claim should be delayed were that evidence of insurance is inadmissible, damages are more easily determined after the initial action, and the defense of the insured may be hampered by discovery by the injured claimant against the insurer. Id. at 891-92, 592 P.2d at 336-37, 153 Cal. Rptr. at 849-50.

47. 103 Wis. 2d at 63, 307 N.W.2d at 261.

48. Id. at 63-64, 307 N.W.2d at 260-61. Furthermore, the cases dealing with bad faith excess judgments have involved a plaintiff who is either the insured or an assignee of the insured.
reason the court permitted the cause of action in *Hilker* was that the insured gives up total control over the settlement of any claims arising from the insurance policy in exchange for indemnification. The court, in declaring that *Alt* was an inappropriate case to form a basis for recognizing the cause of action asserted by the petitioner in *Kranzush*, engaged in an in-depth analysis of the numerous articulated rationales underlying the development of bad faith as it relates to excess judgment cases. The *Kranzush* court concluded that the focus of insurer liability in this situation should be on a breach of duty owed to the *insured* and not to the injured claimant.49

**B. First-Party Cases**

Justice Callow next examined *Anderson* to see if the holding in that case would offer a foundation for recognizing a right of action by a claimant against the tortfeasor’s insurer for failure to settle an underlying claim in good faith. The *Anderson* court relied on the relationship between the insured and the insurer which is created by the insurance contract in concluding that there is a fiduciary relationship.50 Again, the third-party claimant’s lack of a contractual relationship and the fact that a claimant is a stranger to the insurance policy were cited as controlling factors by the court. Justice Heffernan, in a concurring opinion, strongly disagreed with the majority’s conclusion that the right of action asserted in *Kranzush* was dependent upon the prior relationship of the parties.51 Justice Heffernan maintained that the reasoning of the majority was contrary to basic tort law since intentional torts arise as a result of the actions of the tortfeasor and the ensuing relationship. Therefore, intentional torts do not depend upon prior relations between the parties.52

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50. 103 Wis. 2d at 64, 307 N.W.2d at 261. “The heart of the tort recognized in *Anderson* is the fiduciary relationship between the insurer and the insured and the insurer’s breach of the duty of good faith and fair dealing implicit in every contract.” *Id.*

51. 103 Wis. 2d at 84, 307 N.W.2d at 270 (Heffernan, J., concurring). “The majority opinion, following the argument of the insurance company defendant, takes the position that the possibility of a commission of a tort is dependent on the prior relationship of the parties. This, I conclude, is contrary to basic tort law.” *Id.*

52. *Id.* at 84, 307 N.W.2d at 270 (Heffernan, J., concurring).
The *Kranzush* court distinguished the right of a third-party to bring an action for failure to settle a claim in bad faith and the right of an insured to maintain such an action. In the latter situation, the right of the insured to be dealt with fairly is established at the time the parties enter into the contract of insurance and, therefore, finds its roots in the insurance policy. On the other hand, in the situation involving a third-party claimant, there is no comparable relationship of trust and confidence implicit in the contract. In discussing this area of the tort of bad faith, the court sent a sufficiently simple and unqualified signal to the courts, the insurance industry and members of the plaintiffs’ bar: no cause of action involving the right of a claimant to be treated in a fair manner in the settlement of the claim is actionable unless the claimant is in a contractual relationship with the insurer which involves trust and confidence.

It therefore appears that the necessary prerequisite to maintaining a bad faith cause of action is a vested right which emanates from the contract of insurance. There is a vested right because the insured has a reasonable expectation, when entering into the contractual relationship, that any claim arising out of such contract will be paid without delay once the insurer determines, in a reasonable amount of time, that the claim is legitimate. On the other hand, a third-party claimant has no reasonable basis for believing that an insurer owes him or her a duty to deal fairly and in good faith.

One commentator has suggested that allowing the duty of good faith to cover the injured party is a natural extension of the first-party bad faith claim. While the protection of per-
sons from all damages sustained by the conduct of others is an admirable position, liability should not be imposed for tortious conduct of any kind unless the law has recognized some specific duty which has been breached. In this context, the Wisconsin Supreme Court explicitly held that no common-law or contractual duty to act fairly and in good faith ran to a third-party claimant and thus concluded that no cause of action for tortious conduct could be maintained in this situation.

C. The Coleman Rationale

*Kranzush* also entered into a discussion of whether the decision in *Coleman* could be read to offer a basis for a third-party claim against an insurer for failure to settle the claim in good faith. In reaching the conclusion that *Coleman* does not provide such a basis, the court engaged in a comparison of the alternatives available to the injured worker as opposed to the claimant if there is a failure to settle a claim in bad faith. Justice Callow placed emphasis on the fact that since the injured worker was faced with the problem of the exclusive remedy provision of the Worker's Compensation Act, his alternatives were far more restricted than those of an injured claimant. Another factor set forth to distinguish the injured worker from the injured claimant is that the injured third-party claimant must still prove the fault of the tortfeasor whereas the injured worker need not prove fault in order to get recovery for a work-related injury.

The *Kranzush* court was faced with the dilemma of how to interpret broad language embodied in the *Coleman* decision. The language could easily have been read to grant the type of

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58. The third-party claimant still has the ability to recover primary damages incurred as a result of the initial tort, whereas the injured worker who is denied benefits in bad faith has very little else he can do.

59. In *Coleman* the Wisconsin Supreme Court appeared to sanction just such a claim as was at issue in *Kranzush* when it read the rationale underlying the *Anderson* decision in the following manner: "It is apparent that the rationale of *Anderson* is applicable not only to the claim of a first-party insured against its insurance company, but is also applicable when the case involves a third-party claim against an insurer." 86 Wis. 2d at 620, 273 N.W.2d at 221-22.
cause of action the petitioner in Kranzush was asserting.\(^{60}\) Notwithstanding this apparently obvious language extending the Anderson rationale to encompass all third parties, the Kranzush court determined that the broad language was merely dicta. In making this determination, the court limited the language to the situation involving worker’s compensation.\(^{61}\) The court set forth numerous reasons why the Coleman language should not be read as conferring a right of action upon a claimant against the tortfeasor’s insurer.\(^{62}\) Among those reasons, the most compelling was the lack of a comprehensive statutory scheme\(^{63}\) which pointedly disclosed that if a duty were found to exist, it must be a common law duty. Furthermore, the court emphasized the need for a fiduciary relationship when it compared the relationship of the injured employee and the insurer to that of the insured and the insurer in a first-party situation.\(^{64}\) Therefore, it appears that in all

\(^{60}\) Thus, the court could have stated that it was merely following precedent and was simply holding steadfast to the rationale underlying the tort of bad faith which was announced in Anderson.

\(^{61}\) Prior to the Kranzush decision, holding that the aforementioned language was unnecessarily broad, a federal district court and the Wisconsin Court of Appeals determined that Coleman should be limited to its facts. In Bruheim v. Little, 98 Wis. 2d 178, 295 N.W.2d 793 (Ct. App. 1980), aff’d, 103 Wis. 2d 96, 307 N.W.2d 276 (1981), the court held that the trial court correctly limited Coleman to its facts. The court stated that “[t]he court’s decision in . . . [Coleman] specifically pointed out that the basis for the tort of bad faith being recognized there arose out of the contractual obligation of the insurer to pay worker’s compensation benefits to the claimant.” \(\text{Id.}\) at 180-81, 295 N.W.2d at 794. Therefore, Coleman was interpreted as creating a cause of action for bad faith which arises from the employment contractual relationship. The court further found that granting this right to all third-party claimants “would negate the fundamental contractual basis for this right, including the consideration paid for it by the insureds.” \(\text{Id.}\) at 181, 295 N.W. 2d at 795. Accord Ginger v. Coronet Ins. Co., 508 F. Supp. 718 (E.D. Wis. 1981); Uebelacker v. Horace Mann Ins. Co., 500 F. Supp. 180 (E.D. Wis. 1980).

\(^{62}\) 103 Wis. 2d at 65-67, 307 N.W.2d at 261-62.

\(^{63}\) The court looked at Wis. STAT. §§ 632.34(2), (3), (6), 632.35, 632.24, and 632.22 (1977) which the petitioner asserted granted the third-party claimant a special relationship with the tortfeasor’s insurer. In examining these statutes, the Kranzush court concluded that it did not combine to create the type of no-fault comprehensive statutory scheme embodied in the worker’s compensation statutes. Therefore, the special conditions which are present in the injured worker-insurer relationship which give rise to a recognizable cause of action were found not to be present in the third-party claimant-insurer relationship. 103 Wis. 2d at 66-67, 307 N.W.2d at 262.

\(^{64}\) “[O]wing to the design of the worker’s compensation laws, the injured employee and the insurance carrier occupy relative positions which are analogous to the insurer-insured relationship at the heart of the Anderson tort.” \(\text{Id.}\) at 66, 307 N.W.2d at 261.

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60. Thus, the court could have stated that it was merely following precedent and was simply holding steadfast to the rationale underlying the tort of bad faith which was announced in Anderson.

61. Prior to the Kranzush decision, holding that the aforementioned language was unnecessarily broad, a federal district court and the Wisconsin Court of Appeals determined that Coleman should be limited to its facts. In Bruheim v. Little, 98 Wis. 2d 178, 295 N.W.2d 793 (Ct. App. 1980), aff’d, 103 Wis. 2d 96, 307 N.W.2d 276 (1981), the court held that the trial court correctly limited Coleman to its facts. The court stated that “[t]he court’s decision in . . . [Coleman] specifically pointed out that the basis for the tort of bad faith being recognized there arose out of the contractual obligation of the insurer to pay worker’s compensation benefits to the claimant.” \(\text{Id.}\) at 180-81, 295 N.W.2d at 794. Therefore, Coleman was interpreted as creating a cause of action for bad faith which arises from the employment contractual relationship. The court further found that granting this right to all third-party claimants “would negate the fundamental contractual basis for this right, including the consideration paid for it by the insureds.” \(\text{Id.}\) at 181, 295 N.W. 2d at 795. Accord Ginger v. Coronet Ins. Co., 508 F. Supp. 718 (E.D. Wis. 1981); Uebelacker v. Horace Mann Ins. Co., 500 F. Supp. 180 (E.D. Wis. 1980).

62. 103 Wis. 2d at 65-67, 307 N.W.2d at 261-62.

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64. “[O]wing to the design of the worker’s compensation laws, the injured employee and the insurance carrier occupy relative positions which are analogous to the insurer-insured relationship at the heart of the Anderson tort.” \(\text{Id.}\) at 66, 307 N.W.2d at 261.
three situations thus far discussed, a necessary prerequisite to recovery on the theory of bad faith is a contractual relationship with its attendant fiduciary duties.

D. Judicial Recognition

Subsequent to concluding that Coleman failed to offer a basis for recognizing a claim by a tort victim against the tortfeasor’s insurer, the Wisconsin Supreme Court entered into a discussion of whether it should nevertheless recognize this additional right of action. The court initially discussed the often litigated issue of whether to allow a judgment creditor to seek the excess judgment from the insurer where no assignment has been made. The majority of jurisdictions which have addressed this issue have found that, absent an assignment from the insured, an excess judgment creditor has no cause of action directly against the insurer.65

The court then reached the heart of the issue of whether to allow a bad faith action by a claimant against the tortfeasor’s insurer. The discussion began with an acknowledgment of the fact that few courts had addressed the issue presented in Kranzush.66 The court characterized the peti-

65. A judgment creditor, in the bad faith situation, is a claimant who has received a judgment in excess of the tortfeasor’s policy limits and where the tortfeasor in turn has a claim for bad faith in failing to settle the claim against his insurer. See generally J. Ghiardi & J. Kircher, Punitive Damages — Law and Practice § 8.03 (1981).

66. The court could have ignored this issue since it had no direct relationship to the issue in Kranzush. However, it appears that the court entered into the discussion in order to set an historical backdrop to a general judicial stance showing the hesitancy of permitting direct third-party actions. The reason most often advanced for denying this cause of action is that there is a lack of a contractual relationship between the third-party claimant and the insurer. Furthermore, courts often cite the proposition that rather than suffering a loss from the failure to settle, the third-party claimant often benefits from breach of the duty to act fairly and in good faith. See, e.g., Page v. Allstate Ins. Co., 126 Ariz. 258, 614 P.2d 339 (Ct. App. 1980); Murphy v. Allstate Ins. Co., 17 Cal. 3d 937, 553 P.2d 584, 132 Cal. Rptr. 424 (1976); Scroggins v. Allstate Ins. Co., 74 Ill. App. 3d 1027, 393 N.E.2d 718 (App. Ct. 1979); Bennett v. Slater, 154 Ind. App. 67, 289 N.E.2d 144 (Ct. App. 1972); Bean v. Allstate Ins. Co., 285 Md. 572, 403 A.2d 793 (1979); Lisiewski v. Countrywide Ins. Co., 75 Mich. App. 631, 255 N.W.2d 714 (Ct. App. 1977). See also cases recognizing this cause of action, Thompson v. Commercial Union Ins. Co., 250 So. 2d 259 (Fla. 1971); Rutter v. King, 57 Mich. App. 152, 226 N.W.2d 79 (Ct. App. 1974).


67. 103 Wis. 2d at 68, 307 N.W.2d at 263.
tioner's cause of action as being for injuries, involving embarrassment and distress, sustained as a result of unfair tactics by the insurer in refusing to settle the claim and the deprivation of benefits which the claimant believes is due.\textsuperscript{68} By characterizing the cause of action as involving the breach of a duty owed directly to third-party claimants, the court laid to rest any future reliance by claimants on the excess judgment cases or on the implied covenant of good faith and fair dealing which runs to the insured.

The \textit{Kranzush} court adopted the language of a 1977 Maine case\textsuperscript{69} in making a public policy determination that a recognition of this type of claim would be a "serious and unprecedented departure"\textsuperscript{70} from firmly entrenched principles of tort law. The rationale employed by the Supreme Court of Maine and adopted by the \textit{Kranzush} court was to analyze the relationship between the claimant and the insured. This relationship was found to be an adversarial one wherein the insured was under no obligation to settle or negotiate with the claimant. The Maine Supreme Court applied principles of agency law in placing the insurer in the shoes of its insured with the insurer being the insured's agent.\textsuperscript{71} Viewing this relationship as involving a principal (the insured) and an agent (the insurer), the court concluded that the claimant has no greater rights against the agent than he would have against the principal.

Other courts have advanced different reasons for not extending the insurer's implied duty to the third-party claimant. One court placed reliance upon the excess judgment cases with the resulting conclusion that if the basic principle that the duty runs to the insured bars actions by excess judgment creditors lacking an assignment, then it obviously also bars claimants who are merely potential judgment creditors.\textsuperscript{72} A

\begin{footnotes}
\item[68] Id. at 73, 307 N.W.2d at 265.
\item[70] 103 Wis. 2d at 73, 307 N.W.2d at 265.
\item[71] [T]hat the insurer is the representative of the insured logically imports that the third party tort claimant's status as the adversary of the insured renders him, ipso facto, the adversary of the insured's agent. Thus, prior to the establishment of legal liability, as the tort claimant has no legal right to require the tortfeasor to negotiate or settle, it likewise lacks right to require such action by his representative. 368 A.2d at 1163-64 (citation omitted).
\item[72] Scroggins v. Allstate Ins. Co., 74 Ill. App. 3d 1027,\textemdash, 393 N.E.2d 718, 721
\end{footnotes}
Washington court simply relied on basic contract law in concluding that the implied covenant to deal fairly and in good faith runs only to the insured and, therefore, an insurer has no contractual obligations to a claimant.\textsuperscript{73}

The Wisconsin Supreme Court, after reviewing numerous cases dealing with the issue presented in \textit{Kranzush}, found a recurrent theme emphasized in every case: no duty is owed by the insurer to a third-party claimant to settle or negotiate the claim in good faith.\textsuperscript{74} Justice Callow took all of the foregoing factors into consideration in reaching his conclusion not to recognize this new right of action.\textsuperscript{75}

\subsection*{E. Statutory Basis}

After declining to acknowledge the existence of this new right of action under common law tort principles, Justice Callow turned to an examination of relevant Wisconsin statutes to determine whether there was a statutory or regulatory right of action. The court properly set forth the axiom of law which must be employed as a guideline when the court engages in statutory interpretation. The general rule is that statutes will not be construed as changing the common law unless the intention to do so is clearly expressed.\textsuperscript{76} Furthermore, the court must look at several factors when making a determination of

\begin{footnotesize}
\begin{enumerate}
\item The Illinois Appellate Court further concluded that since in order to bring a cause of action, "the plaintiff must allege facts showing a breach of a duty owed to him," taken together with the basic premise that the duty is one owed to the insured, the third-party claimant is incapable of making the necessary allegations as there can be no breach of a duty without finding a duty in the first instance. \textit{Id. at \ldots}, 393 N.E.2d at 721.
\item Bowe v. Eaton, 17 Wash. App. 840, 565 P.2d 826 (Ct. App. 1977). "Regardless of the choice of language, the insurance company must have breached a duty owed to the appellant [the tort victim] before it was liable for damages under a tort theory." \textit{Id. at \ldots}, 565 P.2d at 829.
\item 103 Wis. 2d at 72, 307 N.W.2d at 265.
\item The court analyzed agency law, contract law and the fundamental principles espoused in their previous bad faith decisions in reaching the inevitable conclusion that the duty of good faith arises from the contract of insurance; it cannot be implied to run to the tort victim and there can be no reasonable expectation on the part of the tort victim that there would be such a duty in existence. \textit{Id. at 73-74}, 307 N.W.2d at 265.
\item Wisconsin Bridge & Iron Co. v. Industrial Comm'n, 233 Wis. 467, 290 N.W.199 (1940). "Statutes are not to be construed as changing the common law unless the purpose to effect such change is clearly expressed therein . . . . [The language of the statute] must be clear, unambiguous and preemptory." \textit{Id. at 474}, 290 N.W. at 202 (quoting Meek v. Fierce, 19 Wis. 300, 303 (1865)).
\end{enumerate}
\end{footnotesize}
whether a statute confers a private right of action. These factors include looking at the form or language of the statute, determining the kind of evil sought to be cured, and the purpose behind enacting the legislation.\footnote{77. McNeill v. Jacobson, 55 Wis. 2d 254, 258-59, 198 N.W.2d 611, 613 (1972). Another precept which must be kept in mind when engaging in statutory interpretation is that "the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity, is not subject to a construction establishing a civil liability." Id. at 259, 198 N.W.2d at 614 (quoting 50 Am. Jur., Statutes § 586 (1944)).}

The court initially analyzed the direct action statute\footnote{78. Wis. STAT. § 632.24 (1977) which provides that an insurer is liable up to policy limits to "the persons entitled to recover against the insured for the death of any person or for injury to persons or property."} to see whether this statute granted a third-party claimant a right of action for bad faith directly against the insurer. The court dismissed the direct action statute as not conferring such a right of action by a claimant in this situation since it was clear from the language of the statute that the claimant has only those rights against the insurer that he would have against the insured. Therefore, since the claimant could not maintain a bad faith action against the insured, he is unable to maintain one directly against the insurer using the direct action statute.\footnote{79. In other words, the liability of the insurer to the claimant is contingent upon the liability of the insured in the first instance. 103 Wis. 2d at 75, 307 N.W.2d at 266.}

Justice Callow then examined section 601.01(2) to determine if a right of action exists under this statute which contains one of eleven enumerated purposes of chapters 600-646.\footnote{80. Wis. STAT. § 601.01(2) (1977) provides that one of the purposes of chapters 600 to 646, the insurance regulatory statutes, is "[t]o ensure that policyholders, claimants and insurers are treated fairly and equitably."} The petitioner contended that this statute should be read as imposing a statutory duty on an insurer to treat claimants as fairly and equitably as its policyholders. The court disagreed strongly with this contention, determining that the statute expressed no clear intent to change the common law. It was clear that the enumerated purposes, when read together, evinced the primary goal of the legislature in enacting these statutes: to provide "benefits to the general public welfare which flow from a well-regulated insurance industry."\footnote{81. 103 Wis. 2d at 76, 307 N.W.2d at 267. The court was further influenced by the fact that the duty of enforcement for violations of specific statutes or rules was placed with the Commissioner of Insurance under section 601.41(1).}
Applying the aforementioned goal to the general rule that a cause of action will not be implied from a statute or regulation which primarily provides for the general welfare, the court concluded that this was just such a statute; therefore, no right of action would be implied in favor of the claimant against the insurer.

Having concluded that neither of the foregoing statutes conferred a right of action on the claimant, the court next focused on Wisconsin Administrative Code, section Insurance 6.11.82 This regulation, referred to as the Unfair Claims Settlement Practices Act, describes specific insurer practices which are denominated as unfair. An insurer who engages in such practices will be subject to the sanctions available to the commissioner of insurance under the Code. Justice Callow engaged in a more in-depth analysis of the Unfair Claims Settlement Practices Act since, at the time of the decision, California had already declared it to grant a private right of action in *Royal Globe Insurance Co. v. Superior Court.*83 Justice Callow began his analysis by concluding that there was a basic distinction between the Act and section 601.01(2) of the Wisconsin Statutes. While section 601.01(2) was construed as directed toward benefitting the general public welfare, the Act was interpreted as being for the benefit of insureds and claimants.84 The court found that the Act represented a more imminent concern of the legislators regarding the treatment of claimants and insureds. Although the court determined that the Act was enacted to benefit a specific group of persons, this did not necessarily lead to the conclusion that a private right of action had been created.

The court was influenced by the lack of any expression of legislative intent to create such a vested statutory right. Accordingly, the court concluded that the expressed purpose of

82. *See supra* note 42 and accompanying text.
83. 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979). *See supra* notes 14-16 and accompanying text. Since California had relied upon Hilker in the Gruenberg case which sanctioned a cause of action for insurer bad faith and Wisconsin, in turn, relied upon Gruenberg, a California Supreme Court case, in extending the duty to first-party actions, the Kranzush court would have been improper if it had totally ignored this new and radical development in California bad faith tort law.
84. 103 Wis. 2d at 79, 307 N.W.2d at 258.
the rule signaled that it should be treated as the logical complement of sections 601.01(3) and 601.64, which define certain practices as constituting unfair conduct. Moreover, the Kranzush court interpreted the prefatory language of Ins 6.11 as merely providing an interpretive aid to the commissioner of insurance in performing her enforcement duties. The court ended its analysis of this rule by stating that it would be inconsistent with general rules of statutory interpretation and the function of Ins 6.11 to imply a private right of action.

The imposition of a vested statutory duty running to third-party claimants would be an abrogation of the judicially-created rule of insurance law that the duty to deal fairly and in good faith runs only to the insured. Therefore, a court of law should not imply a private right of action from a statute or regulation unless the intent to do so is clearly and unambiguously expressed. It is clear that the Act does not clearly express such a legislative intent.

Although it might be obvious to most that the Act does not grant such a right of action to third-party claimants, the California Supreme Court interpreted the Act in a different light in Royal Globe. The Royal Globe decision was grounded upon a provision of the Act which has no companion in the

85. Ins 6.11(1) expresses the purpose of the rule as “promot[ing] the fair and equitable treatment of policyholders, claimants and insurers by defining certain claim adjustment practices which are considered to be unfair methods and practices in the business of insurance.” (emphasis added).

The court found the italicized phrase to be compelling in its determination that Ins 6.11 should merely be viewed as an extension of §§ 601.01(3) and 601.64 of the Wisconsin Statutes. 103 Wis. 2d at 80, 307 N.W.2d at 268.

86. The function of Ins 6.11 was simply found to be an “aid to the interpretation and implementation of the insurance statutes.” 103 Wis. 2d at 81, 307 N.W.2d at 269.

87. The duty of good faith and fair dealing was aptly described by a Michigan court when it stated that “the duty of using good-faith in settlement negotiation is a duty to protect the insured — it is of a fiduciary nature and is personal to the relationship between the insured and insurer . . . .” Lisiewski v. Countrywide Ins. Co., 75 Mich. App. 631, _, 255 N.W.2d 714, 717 (Ct. App. 1977).


89. “While other unfair practices defined in the statute may refer to claimants, we believe that a more explicit legislative intent to extend the duty to settle to third party claimants should be required where imposition of such a duty would be in derogation of so much common law.” 74 Ill. App. 3d at _, 393 N.E.2d at 724.

Wisconsin insurance laws. Concluding that there was no comparable provision in Wisconsin, the Kranzush court determined that the Act was merely a description of the "commissioner's arsenal of enforcement tools . . . ." The Wisconsin Supreme Court simply did not find the Royal Globe analysis to be persuasive.

III. JUSTICE ABRAHAMSON CONCURRENCE

Justice Abrahamson, in a concurring opinion, was persuaded by the theory of the claimant being a third-party beneficiary of the insurance contract. By viewing the claimant as an intended beneficiary, Justice Abrahamson concluded that claimants should be treated in the same manner as an insured; therefore, the duty to deal fairly and in good faith

91. The statute in Royal Globe provided that a "cease and desist order issued by the commissioner under the provisions of the act shall not absolve an insurer from 'civil liability or criminal penalty under the laws of this State arising out of the methods, acts or practices found unfair or deceptive.'" (emphasis in original). 23 Cal. 3d at 885, 592 P.2d at 332, 153 Cal. Rptr. at 845.

92. 103 Wis. 2d at 82, 307 N.W.2d at 269. Other jurisdictions addressing this issue have been in accord with Wisconsin in their holdings. See Scroggins v. Allstate Ins. Co., 74 Ill. App. 3d 1027, 393 N.E.2d 718 (App. Ct. 1979) (the court concluded that the statute was not designed to protect the class of persons including claimants, but rather was designed to benefit the insured and to protect the public at large); Bowe v. Eaton, 17 Wash. App. 840, 565 P.2d 826 (Ct. App. 1977); Contra Jenkins v. J.C. Penney Casualty Ins. Co., 280 S.E.2d 252 (W. Va. 1981) (the court concluded that a private right of action does exist; however, the unfair conduct must be "frequent," which was defined as the occurrence of different violations as well as repetition of the same violation).

93. 103 Wis. 2d at 81, 307 N.W.2d at 269. One commentator has suggested that the court's reliance on the legislative history of the Act and its analysis of the Act in Royal Globe was unconvincing and misplaced. "A review of the history of the Act, an objective examination of the language of the statute, and the construction given the Act by the agency empowered to enforce it, all support the conclusion that the insurance commissioner was intended to have exclusive power to enforce the prohibitions of section 790.03." Comment, Royal Globe Insurance Co. v. Superior Court: Right to Direct Suit Against an Insurer by a Third Party Claimant, 31 HASTINGS L.J. 1161, 1176-83 (1980).

Furthermore, as Justice Richardson pointed out in his dissent, the majority's word-by-word analysis was "erroneous in its labored attempt to find an ambiguity where none whatever exists." 23 Cal. 3d at 894, 592 P.2d at 338, 153 Cal. Rptr. at 851 (Richardson, J., dissenting). Justice Richardson further pointed out that "[i]t would seem obvious that the . . . provision was intended to preserve any civil or criminal liability already provided for under state law, rather than to create new liability thereby changing pre-existing state law." Id. at 896, 592 P.2d at 339, 153 Cal. Rptr. at 852 (emphasis in original).
should be extended to encompass claimants. Furthermore, Justice Abrahamson was persuaded by the manner in which society views the purpose of the insurance industry as it relates to compensating persons injured by the acts of another. Although the primary purpose of obtaining liability insurance is the protection of one’s personal assets, another purpose is to make a person whole again after they have been injured by the insured. Justice Abrahamson also found support for the contention of the claimant being a third-party beneficiary of the insurance contract in certain Wisconsin laws: the direct action statute, section 803.04(2); the financial responsibility laws, chapter 344; worker's compensation laws, chapter 102; and various insurance laws discussed by the majority.

Justice Abrahamson further maintained that even if the theory of treating the injured persons as a third-party beneficiary were rejected, it does not follow that a third-party bad faith cause of action may not be recognized. The Justice believed that the majority overlooked the important question of whether a duty to deal fairly and act in good faith should be imposed on an insurer by a third-party claimant even in the absence of a contractual relation. The duty of good faith does not arise from the language of the contract, rather it is founded upon “principles of justice” and upon “public policy grounds.” The concept of good faith was viewed as an equitable concept. Therefore, the court, in making the determination of whether to sanction this type of bad faith cause of ac-

94. “Accepting the majority’s assertion that privity of contract is required for the maintenance of a bad faith claim, I would conclude that privity of contract exists on the facts of the instant case. The third-party victim in this case is the spouse of the insured and is closely related in interest to the insured. The spouse is, by statute, protected by the policy.” 103 Wis. 2d at 88, 307 N.W.2d at 272 (Abrahamson, J., concurring).
95. 103 Wis. 2d at 90, 307 N.W.2d at 273 (Abrahamson, J., concurring).
96. Id.
97. 103 Wis. 2d at 88, 307 N.W.2d at 272 (Abrahamson, J., concurring).
98. 103 Wis. 2d at 91, 307 N.W.2d at 273-74 (Abrahamson, J., concurring).
tion, should rest its decision on public policy grounds and not on whether there was “privity” of contract between the parties. Justice Abrahamson relied on Walker v. Bignell for the proposition that when a court is faced with the issue of whether a legal duty exists, the court is making a policy determination. Among the public policy reasons that Justice Abrahamson found compelling were: society has an interest in the fair settlement of insurance claims; the third-party claimant and an insured are in relatively like positions with the insurer and, therefore, will suffer the same result if there is a bad faith refusal to settle; viewing the claimant as an intended third-party beneficiary goes along with societal views, legislative views and the intent of the first-party insured.

Justice Abrahamson did recognize that there were important public policy reasons supporting the view against recognition of the cause of action. However, these reasons against recognition were viewed as being just as relevant to the first-party bad faith claim. Therefore, Justice Abrahamson maintained that the decision should rest in the hands of the Commissioner of Insurance and the legislature until the court followed precedent and explained why, as a matter of public policy, it would not sanction a third-party bad faith cause of action.

IV. Conclusion

In summary, prior case law and public policy dictate that the duty to deal fairly and in good faith should run only to the insured. Accordingly, the implied duty of good faith does not offer a proper basis to permit recovery by third-party claimants. There are also a number of articulated and unarticulated policy factors which must be taken into consideration in making the determination whether to sanction direct

99. 100 Wis. 2d 256, 301 N.W.2d 447 (1981).
100. 103 Wis. 2d at 92-93, 307 N.W.2d at 274. See also Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 183-84, 77 N.W.2d 397, 401-02 (1956).
101. 103 Wis. 2d at 93-94, 307 N.W.2d at 274-75.
102. Id. at 95, 307 N.W.2d at 274-75.
103. Id. at 95, 307 N.W.2d at 276. "Until this court takes a position on the question, the problem of defining the existence, scope and enforceability of the insurer's obligation of good faith in dealing with third-party victims is for the Commissioner of Insurance and the legislature." Id.
third-party bad faith suits. Among these factors, the most compelling is that there would be the risk of increased insurance costs. While the goal sought to be reached is admirable, there would certainly be an increase in the number of settlement agreements reached. At first glance, this would appear to be an excellent position to achieve. However, it is highly likely that the settlement offers would be closer to policy limits thereby increasing the cost of insurance or making it more difficult to obtain.

Another policy factor which must be taken into account is the probability of an increase in the number of lawsuits. It is quite predictable that any time a third-party claim does not reach settlement and goes to trial, an assertion of bad faith dealing in the failure to settle or negotiate will be included in the complaint. In states which do not allow the existence of liability coverage to be introduced into evidence at the trial for the underlying tort, an additional trial will be necessary to address the issue of insurer bad faith.

Another problem implicit in the recognition of a direct third-party bad faith action is the measure of damages. The claimant often benefits from the claim going to trial since the award is often in excess of the policy limits. Therefore, it would be difficult for the courts to calculate the damages sustained by the claimant as a result of the failure to negotiate or settle in good faith.\textsuperscript{104}

Since the tort of bad faith is characterized as an intentional tort, there is also the possibility that the claimants will demand punitive damages. As one commentator on the subject points out, juries tend to have a predisposition and prejudice toward insurers; therefore, punitive damage awards generally do not reflect the compensatory awards.\textsuperscript{105}

Aside from the public policy arguments which support not extending the duty to third-party claimants, the fundamental principles which lie at the foundation of this relatively new

\textsuperscript{104} One commentator suggests that the appropriate damages should include attorney's fees, damages to compensate for emotional distress, and an interest penalty covering the period between the settlement offer and the entry of judgment. See generally Comment, Liability Insurers and Third-Party Claimants: The Limits of Duty, 48 U. Chi. L. Rev. 125 (1981).

tort of bad faith do not lend support for recognizing this new cause of action. The duty to deal fairly and in good faith toward the insured arises from the contract of insurance and is based upon a fiduciary relationship. In an excess judgment case the duty to settle is implied in law to protect the insured from exposure to a judgment in excess of policy limits. It is implied because the insured gives up total control to the insurer and there is an ensuing conflict of interest.

None of the aforementioned principles underlying the recognition of the tort of bad faith could logically be viewed to offer a basis for sanctioning a direct third-party claimant bad faith action against an insurer. Therefore, a clear signal was sent to all interested parties: the Wisconsin Supreme Court will not recognize a cause of action based on a duty to deal fairly and in good faith which runs to and protects third-party claimants.

NANCY J. RICE


The accelerating momentum of corporate acquisitions has yielded a persistent legal issue which, despite thorough litigation, still lacks final resolution. The question is whether the federal securities laws are controlling when parties execute the sale of an incorporated business by means of a transfer of 100% of the corporate stock. Prior to 1970, it was customary to assume that sale of an existing incorporated business entity via a transfer of stock would fall within the purview of the federal securities laws. However, in subsequent lawsuits de-

106. 23 Cal. 3d at 893, 592 P.2d at 337, 153 Cal. Rptr. at 850 (Richardson, J., dissenting).

1. See, e.g., Matheson v. Armbrust, 284 F.2d 670 (9th Cir. 1960), cert. denied, 365 U.S. 870 (1961), where defendant selling 100% of corporate stock contested federal jurisdiction, contending that the federal securities laws exclude private transactions taking place independently of the national exchanges. There was no allegation that stock was not a security.