REVISED DRAFT for Bill Barton
By Don Corson

Some Practical Thoughts on Oregon Insurance "Bad Faith": *Tuter v. GEICO*

Introduction

Insurance companies can be liable if they breach insurance contracts, if they act negligently, or if they breach fiduciary duties, but there is no specific independent tort of "bad faith" in Oregon.

Broadly speaking, we might call these insurance company negligence cases, not because negligence is necessarily the legal theory, but because an insurance company generally must act unreasonably by breaking insurance industry rules in order to be liable.

These insurance company negligence cases arise under only limited circumstances in Oregon. There are some exceptions, but generally there is no Oregon tort liability for the insurance company acting improperly if the homeowner's insurer mistreats its insured, or the life insurance company doesn't treat its insured fairly, or most any other situation where the insurance dispute is purely between the insurance company and the policyholder. These are first-party claims, generally over whether the insurance company should pay a claim or benefit to its own insured, or the amount that should be paid. (The exceptions that I am familiar with have to do with health insurers refusing to pay for medical treatment–e.g. *McKenzie v. Pacific Health & Life Ins. Co.*, 118 Or App 377 (1993)).

Addressed below is what would be called third-party bad faith cases in other parts of the country. The classic situation starts out where the policyholder buys liability insurance, the policyholder gets sued, and the insurance company is obligated to defend and to indemnify the policyholder up to the policy limits. An insurance

company negligence case can arise when the insurance company fails to meet its obligations and thereby exposes its policyholder to personal liability that should have been avoided.

Most attorneys are going to encounter the beginnings of an insurance company negligence case when representing a plaintiff, probably in a motor vehicle collision personal injury case, and the insurance company for the defendant breaks the claims handling rules and harms its policyholder defendant. That happens when the insurance company looks out first for its own interests, or the assigned insurance defense counsel seeks to protect the insurer at the expense of the insured.

How does one know that an adverse insurance company is acting improperly, as contrasted with simply being tough or difficult? One of the best starting points is ORS 746.230, which lays out rules for insurance companies. For example,

> insurance companies may not misrepresent facts when handling claims,
> they must act promptly on communications related to the claim,
> they must perform reasonable investigations,
> they must promptly and equitably settle claims,
> and so on.

Before the Case Ripens

An attorney who is representing a plaintiff and who sees an insurance company negligence claim brewing should do everything one reasonably can to avoid damaging the *defendant's* potential future claim against his or her own insurance company.

The insurance company negligence claim is going to belong to the original defendant. Contrary to insurance industry myth, the plaintiff's attorney cannot "set up" the insurance company for the defendant's future claim. But the plaintiff's

attorney can muck it up if the attorney doesn't think it through and act accordingly.

If the plaintiff's attorney has made a legitimate and supportable policy limits demand and the adverse insurance company doesn't respond in a timely fashion or refuses to settle, the plaintiff's attorney should be professional, reasonable, and courteous. Plaintiff's counsel should make sure that the insurance company has the information it needs to support the decision that the case is indeed a policy limits case. Write all letters and emails as though they may become jury exhibits in a later trial, because they might be.

It's getting ahead of the story a bit, but one of the reasons that Mr. Tuter had a good case is because Mike Gutzler was the underlying plaintiff's attorney in the original personal injury case, and Mike did a good job giving GEICO so much time and so many opportunities to settle after it was clear that GEICO should settle.

The attorney who represents the underlying plaintiff should *not* later handle the insurance company negligence case. The original plaintiff's attorney becomes a witness to the insurance company and defense misconduct, and ethically should avoid a situation where that attorney may be a witness.

Ideally, the original plaintiff's attorney should not have a financial interest in the outcome of the case against the insurance company. In the case of *Tuter v. GEICO*, that was taken care of for us by the defense, which settled with the underlying plaintiff by buying out that judgment before the trial against GEICO. That is, while the GEICO "bad faith" case was pending, GEICO paid money to the original plaintiff to satisfy that plaintiff's judgment. The defense theory was that by purchasing the judgment, there was no longer any harm to Mr. Tuter, and his claim was moot or essentially so. The flip side of that tactic was that the defense could not argue at the insurance company negligence trial that the original plaintiff's attorney was financially biased as a witness by having an economic stake in the insurance company negligence case.

Rules and documents

The Oregon Revised Statute mentioned above is one starting point for rules, but there are also insurance industry rules that can be found in insurance company training materials and policy manuals. Written rules help take these cases out of the "battle of the experts" category, and make them about the company's conscious choices to ignore and violate rules that the company -- or at least the industry -- agrees are important to protect policyholders from needless financial and emotional harm.[1] Examples include:

1 **A responsible insurance company must always protect its policyholders and be loyal to its policyholder's best interests when resolving claims.**

2 **A responsible insurance company must never put its interests above its policyholder's interests.**

3 **A responsible insurance company must never expose its policyholders to unnecessary financial harm or emotional distress.**

4 **A responsible insurance company must try to reasonably and promptly settle all claims within the policy limits.**

5 **An insurance company has fiduciary obligations that require it to sometimes put its policyholder's interests ahead of its own interests.**

The points above are from one of four posters we used at trial to show the rules that applied in Mr.Tuter's case. GEICO's corporate representative agreed to each of these rules in a deposition of the corporation taken under Oregon Rule of Civil Procedure 39C(6). We started with the rules in opening statement, and used them throughout direct exam, cross exam, and closing.

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[1] You will recognize these principles from"Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability" by Rick Friedman & Patrick Malone (Trial Guides, 2nd edition, 2010).

The importance of documents may be self-evident, but attorneys who have not done one of these cases before may be surprised by the sheer volume of materials. There were probably 20,000 pages of file materials to review before we started Mr.Tuter's litigation. That was before we got formal document discovery that allowed us to examine key materials such as claims handling policy documents.

In this kind of a case, there are detailed insurance company activity logs, which are a condensed diary of what happened in the case from the insurer's point of view. There are the time and billing statements from defense counsel. There are emails, letters, memos. There are the file materials from the original plaintiff's counsel. The documents in the *Tuter v. GEICO* case filled up a large bookcase at our law office.

All of these documents must of course be reviewed, and the important documents need to be placed in chronological order and integrated into a case master time line. That is a time-consuming and detailed undertaking. This process needs to be repeated multiple times because one appreciates new connections and gets new ideas each time one reviews the materials.

Tax and Punitive Damages Issues

Attorneys who represent individuals with personal injury claims arising out of bodily injuries may not know much about tax law, but they are familiar with the general rule that damages in such cases are generally not subject to income taxation. That rule does not apply to cases without physical injury and does not apply to any jury assessment of punitive damages. Tax implications can be significant issues in an insurance company negligence case, and those issues should be discussed with the client, who may need to involve independent tax counsel.

In a typical insurance company negligence case, if the plaintiff prevails, it does not matter from a tax point of view whether the damages are categorized as "economic" or "non-economic." Without physical injury, no matter how severe the

psychological harm, any recovery will be subject to income taxation. IRC § 104(a)(2). This was not true years ago, and some practitioners may not be aware that the Internal Revenue Code was amended to give this result. September 13, 1995. Pub. L. 104-188, Title I, Sec. 1605(a).

Similarly, if the jury assesses punitive damages, a recovery for those damages is also subject to income taxation. I don't practice tax law and I'm not qualified to give tax advice (and don't), but I appreciate how a punitive damages verdict is much less than meets the eye. The enduring question for your client is "what's my bottom line?" or "how much will I actually punt in my pocket?"

First, punitive damages are subject to guidelines from the United States Supreme Court that have the real-life consequence of lowering punitive damage assessments in an insurance company negligence case, sometimes dramatically. *State Farm Mut. Ins. Co v. Campbell*, 538 US 408, 418, 123 S Ct 1513, 155 L Ed 2d 585 (2003) (setting forth three guideposts for determining whether jury's punitive damages award comports with the Due Process Clause)*; BMW of North America, Inc. v. Gore*, 517 US 559, 568, 116 S Ct 1589, 134 L Ed 2d 809 (1996) (excessive punitive damages constitute arbitrary deprivations of property). Under current jurisprudence, there are arbitrary court-invented limitations on a jury's power to assess punitive damages for bad, even evil misconduct. This is particularly so where the harm does not involve physical injury or death. These arbitrary limitations are typically understood to be multipliers: the punitive damages judgment can be no larger than a certain multiple of the compensatory damages, no matter how big the defendant and no matter how bad the misconduct. *See, Goddard v. Farmers Ins Co. Of Oregon*, 344 Or 232, 276 (2008) (Under *Gore*, a 4:1 ratio between punitive damage amount and compensatory damage amount is constitutionally permissible). There is a some room for argument, but not enough to make a substantial difference.

In the *Tuter v. GEICO* trial, the jury assessed punitive damages against GEICO in the amount of $17,500,000.00. On post-verdict motions, the trial court

reduced the punitive damages to $2,679,443.80. What would have been a slap on the wrist to a company of GEICO's size became a mere tap on the finger.

Punitive damages are problematic from the standpoint of the plaintiff in an insurance company negligence case. Even after post-verdict reductions to make sure that the wrongdoing corporation does not suffer punishment substantial enough to likely change its behavior or truly set an example for others, the plaintiff runs a gauntlet between Oregon statutory grabs, the cost of obtaining a punitive damages verdict, and federal and state income taxation law.

Oregon law, ORS 31.735, gives the State the right to claim 70% of any punitive damages judgment, and then allows up to 20% to go for attorney fees, leaving only 10% to go to the plaintiff. To illustrate how this might play out in practice, imagine a $1 million punitive damages judgment. The State claims a right to $700,000 of the $1 million, leaving $300,000. The tax lawyers tell us that the plaintiff will be taxed on that $300,000. If the attorney takes the 20% fee allowed by the statute, or $200,000, the plaintiff would be left with $100,000, less the tax on the $300,000. Between state and local taxes, and depending on the taxpayer's tax bracket, under current law the combined income tax on $300,000 could be in the range of up to $150,000. The math is miserable: Out of his or her $100,000 punitive damages recovery, after paying $150,000 in taxes, the plaintiff is $50,000 in the hole. So much for the "bottom line."

Despite these issues, punitive damages may still affect settlement negotiations before a judgment. An enforceable judgment dollar still costs the defendant a dollar, no matter how the plaintiff is taxed on that dollar. If the defendant can shave some cents off the dollar, and the plaintiff can settle without a punitive damages judgment with all that implies, both parties may be better off with that settlement as compared to a fully litigated resolution.

Damages

What are the damages in an insurance company negligence case? The defense argued in Mr. Tuter's case that there were no damages because the underlying judgment against the insured was eventually paid off, and because the defense successfully moved to strike Mr. Tuter's claim for noneconomic damages. I have a great deal of respect for the trial judge in this case, but I disagree with his decision to strike noneconomic damages. In my view, non-economic damages can be a proper element of damages in an insurance company negligence case.[2] There is a fair amount of law to consider on this point, and this article is intended to be practical, so that issue is not fully addressed here. For those interested, there is substantial briefing available in the trial court files for *Tuter v. GEICO* on this point.

The trial judge's decision to take away non-economic damages from Mr. Tuter's case also had substantial implications for punitive damages. Assume under current jurisprudence that a trial court judge is likely to limit punitive damages to a modest multiplier of several times the compensatory damages. If the compensatory damages figure is kept low because non-economic damages are taken away, the allowable amount of punitive damages will be reduced accordingly. This has a serious practical impact on the defendant's exposure. To simplify greatly, every dollar of non-economic damages removed from the case might subtract 4 to 9 dollars of punitive damages from the case.

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[2] *Hammond v. Central Lane Communications Center,* 312 Or 17, 22-23 (1991) ("defendant's conduct infringed on some legally protected interest apart from causing the distress, even when that conduct was only negligent"); *Farris v. U. S. Fid. & Guar. Co.*, 284 Or 453, 455-56, 587 P2d 1015, 1018 (1978) ("[I]f the facts [of an insurer's conduct in defending a claim for their insured] justify an action of tort, courts are inclined to allow recovery for emotional distress as part of the damages flowing from a tort cause of action."); *see, also, Berglund v. State Farm Mut. Auto. Ins. Co.*, 121 F3d 1225, 1229 (8th Cir 1997) ("Most courts that have decided the issue permit recovery of emotional distress damages for breach of a liability insurer's duty to act in good faith in representing an insured against a third party.").

Should the Policyholder Sue Do You the Underlying Insurance Defense Counsel ?

One of the judgment calls for the attorney representing an insured person in a negligence claim against his or her insurance company is what to do with the original insurance defense counsel.

Our legal research indicated that GEICO was fully responsible for what its agents did, whether those were employee agents or non-employee agents. It was GEICO that promised to defend Mr. Tuter. GEICO was responsible for ensuring that its legal counsel protected Mr. Tuter. On the other hand, some of the most culpable misconduct, in our view, was by the law firm GEICO hired on the claim. When we started the case, both GEICO and the insurance defense law firm were defendants.

As a practical matter, full discovery from the insurance defense law firm is needed in this kind of a case. The insurance company logs and files need to be supplemented with the time and billing records and the files of the defense firm to generate a complete picture of what happened. The defense lawyers need to be deposed.

We made a tactical decision before trial to proceed against the insurance company only, and to settle with the insurance defense firm. Our legal position was that there was no reason for the law firm to be a separate party at the trial, because GEICO was ultimately responsible for everything done.

I still see good arguments for both approaches. The trial against GEICO, only, was more focused, and was defended by one lawyer, not two. If the insurance defense law firm had been kept in, it's possible that there could have been some finger-pointing at trial, but that's speculative. There are, in my view, even stronger arguments for allowing non-economic damages against a person's defense attorney for negligence and breach of fiduciary duty, and if those damages would have been allowed, that would have helped Mr. Tuter hold on to more of the punitive damages

verdict. After verdict, the trial court judge would credit the insurance company (principal) for the amount of any settlement with its defense law firm (agent), so there would be no financial advantage at the end of the case to letting the insurance defense lawyers out. On the other hand, the defense trial lawyers were attractive and personable witnesses, and put a personal face on the defense side that GEICO could not offer.

Other Practical Considerations

The attorney for the underlying plaintiff in the original personal injury action may be tempted to accept assignment of the underlying defendant's claim against the defendant's insurance company as part of a settlement. Setting aside the historical legal risks in doing such an assignment, there are practical reasons to resist that temptation. As noted above, the attorney for the underlying plaintiff in the original personal injury case will likely end up being a witness in any later case for insurance company negligence. If the attorney were to arrange an assignment of the claims to the underlying plaintiff, a different attorney would be needed in any event to prosecute the original defendant's case against the insurance company.

There may be other practical considerations in weighing whether or not to do an assignment. If the original defendant is unattractive, perhaps an assignment makes more sense. The original plaintiff, as the plaintiff in the subsequent "bad faith" trial, might be a more appealing person, that is deserving of the jury's consideration. But in this case, the original defendant was a decent, down-to-earth person, and what he was unnecessarily put through was deserving of the jury's consideration.

Another matter that counsel must be psychologically prepared for is that the attorney representing the insured is "on trial" and will likely be personally attacked. I like and respect the defense counsel who represented GEICO in Mr. Tuter's case, but there was still the strong undercurrent that somehow we were to blame for bringing the case, as though we had some personal fault in representing the insured.

Trial of Mr. Tuter's Case

The trial of Mr. Tuter's case took eight courtroom days, with a good number of witnesses and voluminous evidentiary materials offered by both sides. This paper will not attempt a blow-by-blow narrative of the trial, or provide more than a cursory examination of trial tactics and strategy. But for those who are interested in the facts of Mr. Tuter's case, which I tried with my co-counsel Travis Eiva, the following is an overview of the trial followed by a detailed chronology of the events in this case.

We buy car insurance so that, if we are in an accident and are sued, we are not at risk of losing everything we have worked for. Accordingly, the most fundamental rule in insurance is that, when resolving claims, a responsible insurance company must always protect and be loyal to its policyholders to protect those policyholders from financial ruin.

This is the first of twenty important insurance industry rules. These rules are based on national model rules, Oregon state laws and administrative rules, court cases, insurance company manuals and training materials, and industry custom and practice.

Insurance industry experts with decades of experience came to the courtroom and explained what the industry rules are, why they are important, and how they apply.

GEICO knows that these are the rules. We asked GEICO to designate official witnesses to testify on its behalf in this case. GEICO designated its Regional Liability Administrator for most of the Western United States, including Oregon, to testify about the rules. GEICO's official witness testified under oath about each of these twenty industry rules, which are:

1 A responsible insurance company must always protect its policyholders and be loyal to its policyholder's best interests when resolving claims.

2 A responsible insurance company must never put its interests above its policyholder's interests.

3 A responsible insurance company must never expose its policyholders to unnecessary financial harm or emotional distress.

4 A responsible insurance company must try to reasonably and promptly settle all claims within the policy limits.

5 An insurance company has fiduciary obligations that require it to sometimes put its policyholder's interests ahead of its own interests.

6 An insurance company's hired lawyers must represent the policyholder with the highest degree of loyalty and fidelity, acting solely in the best interests of policyholder.

7 An insurance company's hired lawyers must represent only the policyholder, not the insurance company.

8 An insurance company's hired lawyers must never collude with the insurance company against the policyholder.

9 A responsible insurance company must involve and communicate with the policyholder in decisions where the amount of claims is more than the policy limits.

10 If an excess verdict is likely, an insurance company's hired lawyers must communicate with the policyholder before rejecting a policy limits settlement offer.

11 A responsible insurance company must never reject a policy limits settlement to protect itself from liability to a lien holder.

12 A responsible insurance company must deal with federal liens either by including the lien holder on the check or by having a hold harmless agreement.

13 An insurance company has a duty to defend its policyholder from having to pay damages even after an excess judgment.

14 A responsible insurance company must protect policyholders from the

needless emotional harm and stress of financial ruin or bankruptcy from a claim.

15 A responsible insurance company must protect it policyholders from having to take bankruptcy from a claim.

16 A responsible insurance company must never encourage a policyholder to take bankruptcy as an alternative to defending a claim.

17 A responsible insurance company must use post-judgment strategies to help the policyholder avoid liability for damages.

18 A responsible insurance company must exercise good faith and fair dealing in deciding whether to give policyholder consent to assign an excess judgment claim.

19 An insurance company's hired lawyers should help the policyholder to assign an excess judgment claim.

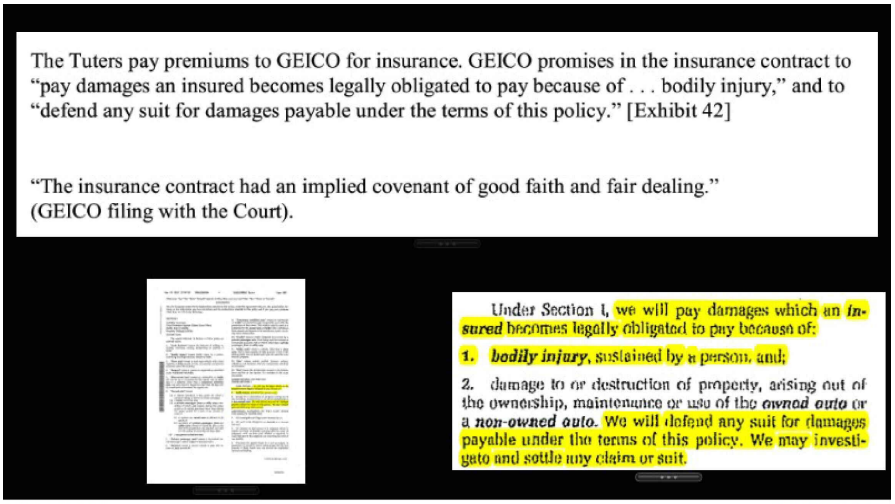
20 An insurance company's hired lawyers representing a policyholder must never advise the insurance company on preventing assignment.

An official GEICO witness testified that each and every one of these rules are legitimate and are applicable to GEICO. The jury also heard from experienced insurance industry experts that these rules apply to insurance companies; the experts also explained to the jury what each of these rules mean.

Mr. Tuter is a Navy and Vietnam veteran. His wife of many years worked as a cook at an elementary school. In their free time Mr. Tuter loves outdoor recreation, and Ms. Tuter loves art. They have two grown children, and wonderful grandchildren.

After his military service, Mr. Tuter spent most of his working life in the woods. In 2007 Mr. Tuter worked for the BLM as a timber marker, just a few years before retirement. He worked four 10-hour days most weeks in the BLM Klamath Falls district, and commuted back and forth to home in Roseburg for the weekends.

Before 2007, the Tuters see the GEICO ads, and call a GEICO call center to buy what they think is the best insurance available.



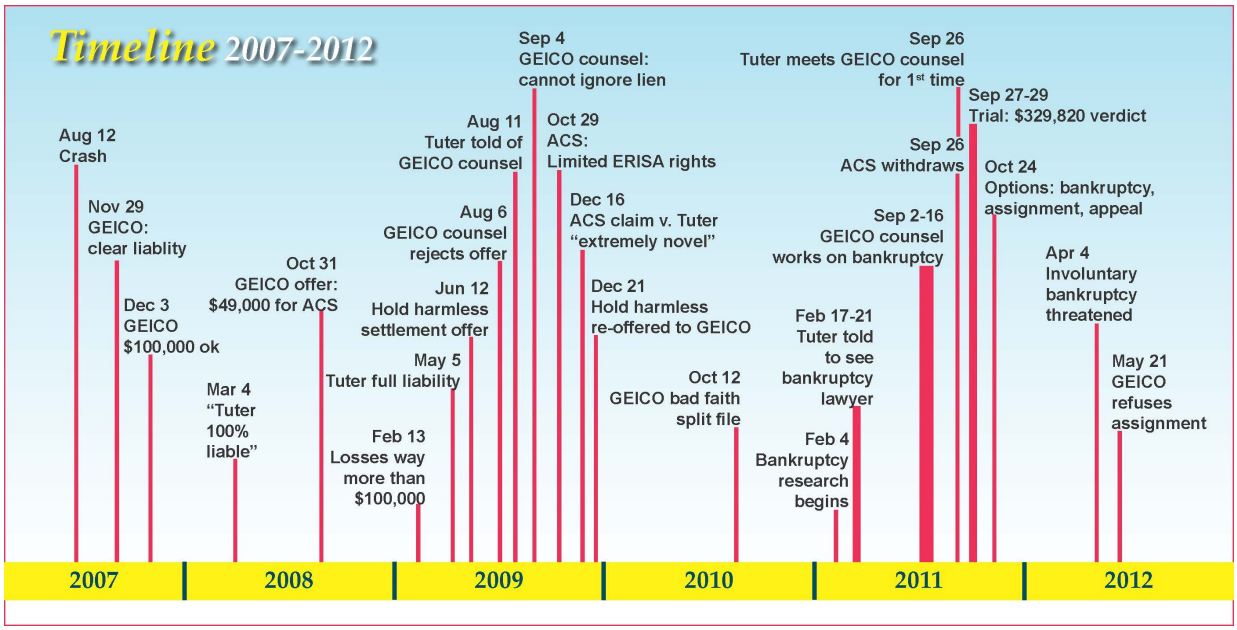
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The above image is from one of the trial exhibits. It shows a page from the Tuter's auto policy. The Tuters pay premiums to GEICO and GEICO promises in the insurance contract to "pay damages an insured becomes legally obligated to pay because of . . . bodily injury," and to "defend any suit for damages payable under the terms of this policy."

The insurance contract also has an implied covenant of good faith and fair dealing, that is, GEICO made an implicit promise to honestly, transparently, and fully deliver to the Tuters the promised benefits of the contract.

The insurance company's contractual promise to pay damages (indemnify), and its promise to defend, are two separate promises. There is the insurance company's duty to pay money up to the policy limits should the policyholder be liable for causing an accident. The insurance company's promise to defend is a duty to do what is reasonably necessary to protect the policyholder from personal liability, that

is, liability above the policy limits. There is no dollar limit to the duty to defend. The duty includes the promise to provide lawyers to represent Mr. Tuter. The duty continues even after a trial.



On August 12, 2007, on one of his regular work commutes, Mr. Tuter is in an accident with a motorcyclist, Mr. Glenn Hayman. Mr. Hayman has serious multiple orthopedic injuries with broken bones, and is life-flighted to the hospital.

The next day, there is an entry in the official GEICO Log: Mr. Tuter reports the auto loss. The log is GEICO's written diary of what happens on the case. GEICO staff and management use the company log to know what is going on. GEICO logs reflect that Mr. Tuter was at a stop sign, did not see the motorcyclist, pulled out, and the motorcyclist hit Mr. Tuter's car. The motorcyclist fell off and was injured.

It is now late November. The GEICO Supervisor writes to the Home Office GEICO lawyer. This is a clear liability Oregon case with $100k/300k limits. That is, there is $100,000 of liability insurance for any one person's claim. The

motorcyclist sustained fractures and the value of his claim will be at or in excess of the insurance policy limits. The GEICO Home Office Lawyer writes back that it is OK to set the reserve for the motorcyclist's claim at $100,000.

The reserve is the amount of money the insurance company sets aside on its books to pay the expected claim. The reserve in this case is initially set at the full $100,000 amount of Mr. and Ms. Tuter's policy limits.

There is nothing in the GEICO records through the end of 2007 that suggests GEICO attempted to settle the clear potential excess liability claim with the motorcyclist.

It's now 2008. A company called ACS Recovery Services sends a letter to GEICO. Many people pay premiums for health insurance to cover medical bills. If those bills are from an auto accident, and there might be a legal claim, most health insurance plans have some kind of reimbursement provision. Depending on the plan and the circumstances, those provisions may give the health insurer some kind of a right to seek reimbursement from a settlement.

ACS is hired by the motorcyclist's health insurer to seek reimbursement from part of any settlement the motorcyclist might get. ACS's letter claims an interest in any settlement proceeds. The letter says, Notice of Lien. "Lien" is a broad term that can mean very different things. Nobody owes anything to ACS yet. But if the motorcyclist later gets a recovery, ACS can try to get some of that money.

Sometimes a lien may be a claim against certain people or companies, but not against others. What's called an *equitable* lien may be a claim against certain funds or property. *Any* kind of claimed lien may be enforceable in whole, or in part, or not at all. It may be enforceable against certain funds under certain circumstances, but not enforceable at all against certain people. In order for *any* kind of lien to be valid, certain formalities must first be met.

It's now about two months later. There is a property damage arbitration between the insurance company for the motorcyclist and GEICO for Mr. Tuter. The arbitration determines that the insurance company for the motorcyclist "proves 100% liability" against Mr. Tuter. GEICO does not tell Mr. Tuter about the arbitration finding him 100% at fault.

Three months later, ACS writes to GEICO, claiming about $49,000, if there is a settlement. That claim is for reimbursement of medical bills paid by the motorcyclist's health insurer.

It's now the end of October, more than a year after the accident. GEICO now calls the motorcyclist and offers Mr. Tuter's $100,000 policy limits. GEICO says it will pay $49,707 to ACS for its claimed lien, and will pay the balance to the motorcyclist.

A week later GEICO writes to Mr. and Ms. Tuter, telling them that the total value of the motorcyclist's claim may be in excess of their available limit. GEICO informs the Tuters that they have a right to seek counsel, at their own expense, and to contribute to the settlement of the claim. GEICO says it will continue to work with the motorcyclist to resolve his claim within the limits of the policy.

The GEICO offer does not seem right to the motorcyclist. Within a month or so the motorcyclist has hired an attorney, who says his health carrier cannot assert a lien when the motorcyclist is not fully compensated.[3] The motorcyclist would not

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[3] *See, e.g., Barnes v. Independent Automobile Dealers Assoc. Of California Health and Welfare Benefit Plan*, 64 F3d 1389, 1394 (9th Cir 1995) (In federal ERISA cases, "[i]t is a general equitable principle of insurance law that, absent an agreement to the contrary, an insurance company may not enforce a right to subrogation until the insured has been fully compensated for her injuries, that is, has been made whole.")

be fully compensated by the $100,000 policy limits because his losses exceed that amount.

It is now January 2009. The motorcyclist's attorney writes to GEICO, asking for confirmation that Mr. Tuter does not have any additional insurance. If the motorcyclist is going to settle for the $100,000 policy limits, his attorney first needs to make sure that there is no other insurance available. There is none.

Two and a half weeks later, GEICO has not responded, so the motorcyclist's attorney again writes to GEICO, again asking whether there is any additional insurance. Soon afterward, the GEICO supervisor logs that the motorcyclist has the right to *all* the funds, which is what the motorcyclist's attorney says.

The next day, the GEICO supervisor emails the adjuster to say, call the motorcyclist's attorney and also call ACS. Offer the $100,000 payable to the motorcyclist and his attorney only. Tell ACS that GEICO is not obligated to pay ACS. Do this today.

That same day the GEICO adjuster leaves a voice message for ACS, advising that GEICO is not obligated to pay ACS so the settlement check will be issued to the motorcyclist and his attorney, only. GEICO then faxes to the motorcyclist's attorney that GEICO is ready to pay Mr. Tuter's $100,000 policy limit to the motorcyclist to settle the case.

But GEICO does not pay.

Instead, three days later the GEICO adjuster leaves a message for ACS, saying GEICO is <u>un</u>able to settle the motorcyclist's claim due to ACS's claimed lien. No clear explanation is logged about why GEICO changed its position. The value of the motorcyclist's claim is noted to be *way more* than GEICO's policy limit.

A week later, GEICO again tells ACS that the motorcyclist's claim is "way more" than GEICO's policy limit.

Two months later, the motorcyclist renews his offer to GEICO to settle for the policy limits, but with only the motorcyclist and his attorney on the settlement check. Should GEICO feel it is necessary to continue to hold up this settlement because of ACS's improper insistence that it has a lien, GEICO risks exposing Mr. Tuter to personal liability.

Later that month, GEICO logs that it then thinks the ACS claim or lien *is* valid and enforceable.

A week later, GEICO makes this a "control file" case. Control files are cases that are controlled or supervised by the GEICO Claims Home Office near Washington, D.C.. The GEICO Control File Alert shows that GEICO assesses Mr. Tuter's liability as "Full." GEICO does not tell Mr. Tuter that he is fully liable for the accident.

Shortly after that, the GEICO Home Office Lawyer notes that the ACS claim is an ERISA lien. ERISA is the shorthand name of a federal law that applies to health insurance that a person gets through his or her private employer. Federal ERISA law applies to the ACS claim.

A month later, the motorcyclist's attorney writes to GEICO, saying that the motorcyclist would sign a hold harmless agreement as part of a proposed settlement. A hold harmless is a standard type of agreement in the insurance industry. In a hold harmless agreement, the motorcyclist would enter into a contract binding him to pay ACS if ACS is entitled to be paid, and requiring the motorcyclist to fully protect GEICO and Mr. Tuter from any claim by ACS.

GEICO's pre-printed standard release forms include a hold harmless provision.

Under GEICO's policies, all claims that have a federal lien must be settled either with the lien holder's name on the settlement check, or with a hold harmless agreement.

If GEICO does not send the motorcyclist a check *without* ACS on the check, GEICO will not be able to settle within policy limits, and the motorcyclist will pursue the full amount of his losses against Mr. Tuter. That is, if GEICO rejects the motorcyclist's offer for a policy limits settlement with a hold harmless agreement, the motorcyclist will sue Mr. Tuter for everything he is legally entitled to, which is way more than the $100,000 policy limits.

Shortly after that, the hold harmless proposal has reached the GEICO Home Office Lawyer. He notes that the motorcyclist's lawyer says that "ACS has its own remedies and I don't believe they can make GEICO act as their enforcer, as they have made efforts to do in this case."

About a week later, the GEICO supervisor is scheduling an appointment with regional and home office level GEICO management. The motorcyclist is again giving GEICO an opportunity to settle for the policy limits and protect Mr. Tuter. The next day, the GEICO Home Office Lawyer says to retain "fee counsel" to represent GEICO in attempting to resolve the ACS lien issue.

One of GEICO's insurance contract promises is to defend its policyholder. When the defense reaches the court stage, lawyers are needed. GEICO's lawyers can be either in-house direct employee lawyers, or what GEICO calls its "fee counsel" lawyers. Either way, the GEICO lawyers are paid to defend their policyholders as part of GEICO's duty to defend.

GEICO generally uses the term "fee counsel" in its logs. Fee counsel also means the same thing as fee attorneys, or hired counsel, or hired attorneys, or insurance defense lawyers. Ninety percent of GEICO's Oregon fee counsel cases are handled by its fee counsel, one particular law firm in Portland. Under GEICO's

written policies, its fee counsel was its agent on the specific case involving Mr. Tuter. According to GEICO, GEICO directed and controlled the claim through its agent, the fee counsel.

Fee counsel regularly submits detailed time records to GEICO, which carefully reviews and monitors everything. GEICO could tell its fee counsel what to do and what not to do, and replace fee counsel with another lawyer or law firm if it chose to do so.

That same day GEICO acknowledges that the motorcyclist has given GEICO an extension to consider the proposal to settle with a hold harmless agreement.

As discussed with its Regional Liability Administrator, GEICO is asking for a legal opinion from its fee counsel, asking about the enforceability of the ACS lien claim, any statutory or case law that may apply, and the enforceability of a hold harmless agreement.

Four days later, Ms. Tuter calls GEICO, which advises her that GEICO is seeking legal counsel on how best to protect hers and GEICO's interests. Ms. Tuter appreciates that, as she does not have resources to contribute. That same day GEICO's lead fee counsel, writes, "protect insured and GEICO from any additional exposure."

GEICO sends documents, asking fee counsel to address the ACS lien claim, the hold harmless issues, and if a lawsuit is filed, to defend Mr. and Ms. Tuter. GEICO's cover letter says that the motorcyclist has proposed that, in exchange for the $100,000 to be paid to the motorcyclist and his attorney, they will execute a hold harmless agreement. If GEICO does not do that, the motorcyclist's attorney will refer to legal counsel in Oregon to file a lawsuit, seeking money damages in excess of Mr. Tuter's policy limits.

A month later GEICO logs that the motorcyclist's attorney again told GEICO's fee counsel that the motorcyclist is willing to sign a hold harmless agreement. Fee counsel adds, "which of course does not protect ***us***."

Oregon has a two year statute of limitations. The two year anniversary of the accident is coming up in August 2009. On August 6, GEICO fee counsel rejects the motorcyclist's offer to settle for $100,000 policy limits with a hold harmless agreement.

GEICO fee counsel says that any amount paid to the motorcyclist that did not also include a satisfaction of the claimed ACS lien could expose the motorcyclist or GEICO to the possibility of having to satisfy the ACS lien claim in addition to the amount paid to the motorcyclist.

The motorcyclist's attorney writes back the next day, saying he will file a lawsuit against the Tuters soon because of the statute of limitations. The motorcyclist's medical bills total over $65,000, he is not back to his pre-collision condition, and may never be. He says, "It is unfortunate that Geico will be exposing their insureds to needless litigation and the possibility of an excess verdict."

Three days later, GEICO fee counsel says the key is whether ACS has a valid lien. They are skeptical whether there is a valid medical lien against the motorcyclist.

Ms. Tuter is now served with lawsuit papers. In the lawsuit, the motorcyclist asks for judgment against Mr. Tuter for $575,000, plus costs. GEICO writes to Mr. Tuter to let him know that GEICO has referred the defense to its fee counsel.

GEICO tells Mr. Tuter that "you may want to obtain your own attorney, at your expense, to cooperate with the defense attorney to protect your interests in excess of the policy limits. You need not hire your own attorney, but you have the right to do so under the policy. The defense attorney, that is, GEICO's fee counsel,

will do his best to protect your interests."

The next day, the GEICO supervisor asks the adjuster to call their fee counsel again, as the motorcyclist's attorney is still requesting a hold harmless agreement. The motorcyclist still wants to settle the case, even after the lawsuit is filed. That same day, GEICO logs that it is looking into a hold harmless agreement.

GEICO is also asking its fee counsel to request an extension on the settlement offer deadline as GEICO is trying to get him a hold harmless agreement form that GEICO uses. Five days later, the GEICO Home Office Lawyer is asking about the status of getting a hold harmless agreement.

The GEICO adjuster speaks with GEICO fee counsel, who has reviewed GEICO's hold harmless but will modify it. Fee counsel will fax his proposed revision so they can obtain Home Office approval. Also, the motorcyclist's new Oregon attorney is on board only recently, so settlement negotiations are still welcome.

About a week later, the motorcyclist's attorneys write to GEICO's fee counsel. While they have done their best to convince fee counsel and their client, GEICO, that there is no legal basis for placing ACS on the motorcyclist's settlement check, they have no choice but to move forward with litigation.

GEICO's fee counsel writes back, again not accepting the motorcyclist's policy limits settlement offer with a hold harmless agreement. Fee counsel says that they cannot proceed otherwise until they are able to determine with a high degree of certainty whether ACS's claim of lien is valid. Shortly after that, GEICO notes that the motorcyclist says he will look to the Tuters personally for any judgment above their $100,000 policy limit.

While GEICO fee counsel is waiting for documents from ACS to determine the validity of its claimed lien, GEICO fee counsel (Mr. Tuter's original defense lawyer

in the case brought by the motorcyclist) has his first phone conversation with Mr. Tuter. He says they cannot ignore the ACS lien claim. He explains they are taking steps to determine the validity of the lien. Fee counsel does not have any other phone conversation with Mr. Tuter in that year, 2009.

That same day the GEICO supervisor notes that the validity of the ACS claimed lien has been the question during the course of negotiations.

A week later, GEICO's fee counsel writes to Mr. Tuter, saying they offered the motorcyclist the full policy limit of $100,000, and he did not accept. Fee counsel did not mention that the motorcyclist repeatedly offered to settle for the $100,000 policy limit with a hold harmless agreement, and GEICO repeatedly rejected that settlement offer.

GEICO's fee counsel goes on to say, "If a jury returns a verdict in excess of of your policy limits, then you have personal exposure as your insurance company is obligated to pay only up to $100,000." GEICO's fee counsel does not give Mr. Tuter an assessment of the risk or odds of that happening.

GEICO's fee counsel goes on to say, "I recommend that you speak to an attorney of your own choosing and at your own expense to discuss your rights and responsibilities in respect to your insurance company. I have been retained by your insurance company to defend you and I will do so to the best of my abilities. Because I am paid by your insurance company, however, you may want to speak to an independent attorney."

Five days later GEICO's fee counsel is saying GEICO's hold harmless form will not work. GEICO needs a response regarding the ACS contract wording to verify if it is a lien or subrogation. They ask, is it an ERISA plan?

The GEICO log uses the word subrogation, the idea that someone steps into the

shoes of another to assert that other person's rights. The question of whether it is an ERISA plan was answered in the GEICO log four months earlier, on May 13, 2009: yes, the ACS claim is under federal ERISA lien law, what GEICO calls a federal lien. The motorcyclist is not in debt to ACS. But, if the motorcyclist gets a settlement, ACS can try to make a claim against the settlement proceeds. ERISA federal lien law applies to how and to what extent the ACS claim may or may not be enforceable, and against whom.

Fee counsel prepares a legal memorandum on the "ERISA lien." The legal memo could not find a single ERISA case anywhere in which an injured person's health insurer could sue the person who caused an accident. If ACS were to try to sue Mr. Tuter, that might be a legal first.

Under ERISA, ACS potentially did have the right to seek what is called equitable relief. The legal memo says,"The equitable relief . . . includes the ability to impose a constructive trust or equitable lien on particular funds or property." ACS could try to recover from particular funds or property, specifically, the motorcyclist's settlement funds.

The legal memo goes on to say, that if they can show the motorcyclist was not completely compensated for his injuries through settlement,"we will have a valid defense against a subrogation claim made by the Plan" under the 'made whole' doctrine." There's a lot packed into that sentence. In a nutshell, the "made whole" rule is that if the motorcyclist is not fully compensated, then ACS cannot recover from the motorcyclist's settlement.

Here's how it works. The motorcyclist is entitled to be compensated for all of his human losses, *plus* all of his medical bills. The motorcyclist gets his human losses paid first. If there is any settlement money left over after the human losses are paid, then ACS can seek reimbursement out of those left-over funds.

The motorcyclist's human losses are much more than the policy limits. Because he would not be compensated fully for his human losses with a settlement of only $100,000, there would be no money left over from which ACS could seek reimbursement. If there were a lot more money, ACS *could* seek reimbursement. That's how the made whole rule works.

The legal memo goes on to say, quote, "Even if we could successfully raise the 'made whole' defense, we would incur considerable expenses in doing so. Therefore, I would recommend against settling directly with Plaintiff." That is, even if GEICO's fee counsel could successfully defend Mr. Tuter if ACS tried to collect from Mr. Tuter, GEICO's fee counsel thinks GEICO should not have to incur that expense of defending Mr. Tuter.

There is a break in the insurance company log here of about a month and a half. There are again apparently behind-the-scenes settlement negotiations going on between GEICO's fee counsel and the motorcyclist's attorney during this time.

A month and a half after the legal memorandum, GEICO's fee counsel writes to GEICO, saying that under ERISA law, ACS has equitable enforcement rights, including "the ability to impose a constructive trust or an equitable lien on funds or property that are actually in the defendant's possession in an ERISA action, such as money in Mr. Hayman's possession in this case."

Fee counsel's letter does not mention the made whole defense that is documented in its formal legal memorandum.

GEICO's fee counsel says that the theory on which ACS could hypothetically proceed against Mr. Tuter, quote, "appears to be an extremely novel one." That is to say, it's never been heard of before.

The very same day, GEICO fee counsel writes to the motorcyclist's attorneys,

claiming that ACS appears to have an "airtight claim"against the motorcyclist. That letter does not mention the made whole rule that is documented in the formal legal memorandum.

GEICO again offers to settle for $100,000, "inclusive of all liens," which is to say, with ACS named on the settlement check.

The motorcyclist's attorney Mr. Gutzler writes back, saying that he thought they were moving toward an agreement with the settlement check to be sent without ACS being named on the check, but with notification to ACS. He was surprised to receive GEICO's fee counsel's letter that suggested they were back to square one.

The motorcyclist's attorney writes, whether ACS has recovery rights against the motorcyclist is between the motorcyclist and ACS. That's not between ACS and GEICO fee counsel's client, whether that client is Mr. Tuter or GEICO. The motorcyclist has been willing, all along, to sign a hold harmless agreement that would hold GEICO's fee counsel's client, whether that is Mr. Tuter or GEICO, harmless from any claims. That would include any rights that ACS has.

The motorcyclist's attorney reminds GEICO that the motorcyclist has been prepared for months to release Mr. Tuter from all further responsibility by payment of $100,000. The claims greatly exceed that amount. He had hoped the matter would be concluded without further expense and time, but apparently that is not going to be the case. This has gone on long enough, and he gives a settlement deadline.

The next day the GEICO adjuster, supervisor, and manager recommend to accept the motorcyclist's offer of a hold harmless agreement and to issue the check to the motorcyclist and his attorney alone. The adjuster is to speak with the GEICO Home Office lawyer about the recommendation to settle on the motorcyclist's proposed terms.

The next day ACS writes, again requesting to be named on the settlement check. That same day GEICO's fee counsel says ERISA applies to the ACS lien. The next day the GEICO conference call includes the Supervisor, Manager, and Home Office Lawyer. GEICO says it will make sure the check is there by December 29 but the check will be issued to the motorcyclist, his attorney, and ACS. This is the same GEICO offer that had been repeatedly rejected for months.

The case does not settle.

It's now early 2010. It appears likely to GEICO that Mr. Tuter will be found liable for the damages the motorcyclist has raised in his legal papers.

GEICO's fee counsel's office reports that it has worked with the motorcyclist's attorney Mr. Gutzler on many other matters, and that Mr. Gutzler is generally fair and reasonable to work with.

Mr. Gutzler is licensed by the Oregon State Bar. He is subject to the State Bar's disciplinary rules and laws. Under the rules, if GEICO sends Mr. Gutzler a $100,000 check made payable only to the motorcyclist and him, and ACS is making a claim against some of those settlement proceeds, Mr. Gutzler must hold the full amount ACS claims in a special client trust account, separate from his law firm's regular bank account. He must keep those funds in that special trust account until the dispute between the motorcyclist and ACS is fully and finally resolved.

By May of 2010, GEICO's fee counsel contacts ACS and tries to get ACS involved in the litigation.

In July of 2010, the GEICO junior associate fee counsel meets with Mr. Tuter. This is the first in-person meeting of any fee counsel lawyer with Mr. Tuter. Afterwards, GEICO's fee counsel reports that Mr. Tuter appears to be a truthful

witness.

In early September 2010, GEICO's fee counsel says that the motorcyclist's counsel is asserting that the ACS lien was not valid, that GEICO should have just paid the policy limits to them directly, and that GEICO has done wrong and opened the policy limits now. Fee counsel does not agree and will research some more.

The motorcyclist's attorney actually had been saying that the ACS claim was between the motorcyclist and ACS, and that GEICO should settle by paying the $100,000 policy limits to the motorcyclist with a hold harmless agreement, so Mr. Tuter would not have to go through litigation and get an excess judgment against him.

The expression in the GEICO log that GEICO had "opened our policy limits" is an industry expression meaning that, as a practical matter, there may no longer be just $100,000 available. GEICO may have to pay more than that because of how it had (mis)handled the claim.

A month later, the GEICO Home Office Lawyer is saying that GEICO should ask its fee counsel if there is any way GEICO can bring ACS into the motorcyclist's lawsuit against Mr. Tuter.

That same day, the GEICO fee counsel calls to request that GEICO split the file. Fee counsel says it likely will be in the client's interest to accept some demand which includes an assignment of the rights the client may have against GEICO.

When an insurance company splits a file, the existing adjuster continues defending the pending lawsuit against their insured. A new file, the "split" file, is then set up for a separate adjuster to work on defending against any future lawsuit the insured (Mr. Tuter) might file against GEICO. When a policyholder is harmed by an insurance company unreasonably rejecting opportunities to settle within the policy limits, the policyholder has the right to bring a claim against the insurance company.

GEICO did not inform Mr. Tuter that he would have rights against GEICO.

When GEICO's fee counsel says it will likely be in Mr. Tuter's interest to have an assignment of his rights against GEICO, that's a shorthand way of saying that it would be good for Mr. Tuter to later have a settlement that includes an assignment of Mr. Tuter's claims against GEICO to the motorcyclist. Mr. Tuter does not know that he has rights against GEICO, and he does not know what an assignment is.

When there is an excess judgment, the motorcyclist might agree to settle with Mr. Tuter by accepting the $100,000 policy limits *plus* Mr. Tuter assigning to the motorcyclist Mr. Tuter's rights against GEICO. Mr. Tuter would be done. The motorcyclist could then try to enforce Mr. Tuter's rights against GEICO in a lawsuit, and if successful, collect money in addition to the policy limits. In other words, assignment allows a policyholder to trade his legal rights against his insurance company in exchange for having no personal liability for an excess judgment.

That same day, the GEICO fee counsel notes his phone call with the GEICO adjuster. The motorcyclist likely looks to make an excess claim and take an assignment from Tuter. Fee counsel says he will advise Mr. Tuter on whether to make that assignment.

GEICO's fee counsel then has a phone call with the GEICO supervisor and adjuster, saying it will be in Mr. Tuter's best interest to have an assignment of his bad faith claims against GEICO. Fee counsel says he cannot advise GEICO on the potential for a bad faith claim nor argue with motorcyclist's attorney regarding the possible value of that claim.

GEICO's fee counsel uses the term "bad faith claim" as an insurance industry term for a claim that the insurance company was negligent, or worse. Here, bad faith includes GEICO exposing Mr. Tuter to personal liability from an unnecessary excess

judgment.

The GEICO supervisor now recommends splitting this file to allow someone to decide whether there might be value to a possible bad faith claim by Tuter. What is referred to as the split file is the bad faith claim file: the file set up to defend GEICO against the potential future claim that GEICO was negligent in handling the claim against Mr. Tuter. (That is, the case discussed here, Mr. Tuter's case that was tried against GEICO in 2015).

As of October 12, 2010, GEICO expressly recognizes that there is a possible conflict of interest between it and Mr. Tuter. The GEICO supervisor discusses this with the GEICO Home Office Lawyer. GEICO decides to split the file at this time. A new claim is to be opened and assigned to the new adjuster for the split file for defense of the bad faith (or negligence) claim. Mr. Tuter is *not* notified that a GEICO file has been started to defend against him in the event he later must assert his legal rights to good faith and fair dealing.

The next day the GEICO split file adjuster defending against Mr. Tuter's future negligence or so-called bad faith claim starts making entries in the GEICO log. The same day the GEICO bad faith adjuster logs a note about a defense counsel letter. Two days later GEICO's fee counsel hears from from the GEICO bad faith adjuster, who would like copies of ACS documents.

GEICO fee counsel drafts correspondence to the GEICO bad faith adjuster, and says they will provide her copies of documents as quickly as possible. Five days later, GEICO fee counsel reviews the file and identifies documents requested by the split file bad faith adjuster. GEICO fee counsel writes to the GEICO bad faith adjuster and provides requested documents.

GEICO fee counsel has a phone conference with the regular GEICO adjuster and notes that the regular adjuster will follow up with her folks handling the coverage

aspect of this file and let him know when she hears something. The expression "her folks handling the coverage aspect of this file" is "code language" for the split file bad faith defense team.

Three days later, the GEICO Home Office Control file on Mr. Tuter is transferred to a new GEICO Home Office Lawyer, who says that he will get with the bad faith adjuster himself.

Its now early 2011, and the GEICO Home Office Lawyer is discussing the case with others in GEICO management. In mid January 2011, GEICO fee counsel is again noting that GEICO has a separate adjuster looking into whether there was a potential claim for GEICO's bad faith.

At the start of February, there is a GEICO log entry: Can't GEICO pay the policy to the motorcyclist and his attorney, notify ACS that its doing so, and let ACS either get its lien amount or fail trying? GEICO does not do that.

Three days later GEICO's fee counsel is researching how Mr. Tuter's possible bankruptcy would affect the upcoming trial. That would likely cause a reset of the personal injury trial. Potentially a stay could be granted, allowing the motorcyclist to move forward against the policy proceeds only.

It is now roughly three and a half years after the accident. It is a few months after the split file was created for defense of the bad faith or negligence claim. This appears to be the first reference to bankruptcy for Mr. Tuter. In bankruptcy, the policyholder goes bankrupt, and is personally discharged from his debts and liabilities, including lawsuit claims against him.

A bankruptcy court stay is how Mr. Tuter's filing for bankruptcy would stop the motorcyclist's lawsuit against Mr. Tuter. After that, the motorcyclist could still

try to get the $100,000 policy limits, but nothing more. There would be no trial. GEICO would be safe from a negligence or bad fath claim because there would be no judgment in excess of the policy limits. Mr. Tuter's claim against GEICO would be destroyed. There would be no assignment because, after bankruptcy, Mr. Tuter would no longer have a claim he could assign.

The same day that GEICO's fee counsel is researching possible bankruptcy for the Tuters, the GEICO adjuster notes that Mr. Tuter was willing to contribute a piece of his real property if that would help settle the case.

Three days later, GEICO fee counsel say in an internal email that they would like to follow up with Mr. Tuter, who told them he probably will seek out a free bankruptcy consult.

Two days after that, GEICO fee counsel email again. One GEICO lawyer says: Mr. Tuter "called me and let me know he is going to seek a bankruptcy consultation with an attorney (not yet picked). He asked me if there was any way we could postpone trial so he has time to do that." The response was, "I agree. He should assume we won't get a setover, and consult quickly."

At the time, there was a trial date coming up, and GEICO fee counsel is saying that Mr. Tuter should talk with a bankruptcy lawyer quickly because they could not assume the judge would postpone the trial.

That same day, GEICO fee counsel writes to Mr. Tuter, with a copy to the GEICO adjuster. He encourages Mr. Tuter to seek out an attorney who specializes in bankruptcy. GEICO fee counsel tells Mr. Tuter that whether his insurance policy obligates GEICO to pay more than $100,000 is between GEICO and him. What that means is not explained.

GEICO fee counsel reminds Mr. Tuter of his right to speak to another attorney

at his own expense, quote, “to discuss your rights and responsibilities in respect to your insurance company.” What that means is not explained. At the same time, the GEICO fee counsel again tells Mr. Tuter, “I have been retained by your insurance company to defend you and I will do so to the best of my abilities . . . ."

Five days later the GEICO fee counsel writes to the GEICO adjuster, reminding her that the motorcyclist’s trial attorney, Mike Gutzler, is well regarded and will represent the motorcyclist well at trial. Fee counsel adds, quote, "This case is very likely to go to trial."

Next, ACS files papers with the Court to become a party by intervening in the motorcyclist’s lawsuit against Mr. Tuter. It is just over four months since the GEICO Home Office Lawyer *asked* if there was any way GEICO could bring ACS into the lawsuit as a party. When ACS does intervene, it does not make a claim against Mr. Tuter or GEICO. Instead, ACS tries to go after some of the recovery that the motorcyclist is planning on making.

On February 17, in a GEICO fee counsel internal email, one lawyer says to the other that he spoke to Mr. Tuter, who “seemed a bit confused on what kind of counsel we recommended he seek. He thought we wanted him to get a trial lawyer . . . I told him that was not so. We thought it was more in his interest to speak to a bankruptcy specialist to advise him if that was the right option or not. He said he was going to go back to the referral service (through the government apparently) and look for a bankruptcy attorney. I'll follow up with him on that later this week."

A week later GEICO fee counsel is sending emails to other insurance defense lawyers who are part of the confidential Oregon Association of Defense Counsel list serve. They are trying to find a bankruptcy lawyer for Mr. Tuter.

Then GEICO Home Office Lawyer emails: “Yes, we are proceeding to trial on this one. I think we all knew that barring settlement for our policy limits, inclusive

of the lien, we were taking this one to trial . . . . " The GEICO Home Office Lawyer does not mention how GEICO's decision to go to trial will affect Mr. Tuter in terms of having an excess judgment with ACS's claim still not resolved.

Next, GEICO's fee counsel says that he spoke to Mr. Tuter, who still has not consulted with anyone on bankruptcy, but fee counsel advised Mr. Tuter to do so. He's going to look into it.

A month after that, the GEICO adjuster calls fee counsel about a potential reduction of the ACS claimed lien. GEICO wants to get a letter out to Mr. Tuter about Mr. Tuter satisfying the ACS lien claim if GEICO offers the limits to the motorcyclist. The GEICO adjuster asks fee counsel to write to ACS , and propose that ACS give GEICO a number to let Mr. Tuter know that he could pay to get case resolved. Fee counsel discusses with Mr. Tuter and advises him that if he could put some money toward the ACS claim, then GEICO may get things resolved. Mr. Tuter has no money to give, just the piece of property he had already offered.

A week later fee counsel speaks with Mr. Tuter again, and notes in the file that Mr. Tuter is probably going to be losing his job soon due to the economy, so has no money to contribute toward a settlement. A month after that, GEICO's fee counsel wants to get a letter to Mr. Tuter; if Mr. Tuter could take care of the ACS lien claim, then this would all be resolved. GEICO fee counsel says he will work on getting a letter to Mr. Tuter to advise of the claimed ACS lien, and to also see if Mr. Tuter would want to contribute towards the settlement for ACS.

It's now late August, and trial will be held in September. GEICO fee counsel talks with the GEICO adjuster, and will look into whether they want ACS involved at trial; perhaps they do as it may be beneficial for the jury to learn that many of the motorcyclist's bills are covered, something the jury normally would not hear. GEICO fee counsel reviews the court papers and cases to determine whether they can keep ACS in the trial. GEICO fee counsel next drafts a letter to the GEICO adjuster,

explaining reasons why ACS should be at the trial. GEICO fee counsel talks with the GEICO adjuster, who agrees ACS needs to be at the trial.

GEICO fee counsel is researching the law and thinks that they should be able to discuss the motorcyclist's health insurance and ACS at the trial, while preventing the motorcyclist or ACS from mentioning that GEICO insures Mr. Tuter. Of course, the normal rule is that neither side in a personal injury trial gets to talk about insurance, whether that is health insurance or liability insurance. If GEICO's fee counsel can keep ACS in the trial and talk about the motorcyclist's health insurance payments, that would give GEICO a tactical trial advantage.

But ACS does not want to participate in the trial. GEICO's fee counsel will argue that ACS should be a party in the trial.

A few days later we are seeing a new file, that of a bankruptcy attorney who got a phone message from GEICO fee counsel: "May have referral for you. PDX attorney, said he went to school with you." GEICO fee counsel talks with the bankruptcy lawyer that day and explains that the motorcyclist's attorneys are not looking to collect any judgment from Mr. Tuter. Their target is GEICO, but Mr. Tuter's bankruptcy would likely ensure that no trial takes place. That is, if Mr. Tuter takes bankruptcy, there would be no trial, and no negligence claim by Mr. Tuter against GEICO. Mr. Tuter would suffer the consequences of personal bankruptcy, and GEICO would get the benefits of that bankruptcy.

The bankruptcy lawyer documents that phone call with GEICO fee counsel: Looking at excess judgment. GEICO fee counsel reviews bankruptcy law, the effect of the bankruptcy stay on the motorcyclist's lawsuit, and determines Mr. Tuter's bankruptcy will likely mean no trial and no possibility of excess verdict and adverse consequences for client.

Ten days later, GEICO fee counsel email each other, writing: see whether Mr.

Tuter still is considering bankruptcy, and if so tell him they have a referral. Bankruptcy attorney here in Portland. The motorcyclist's trial is now about two weeks away, and is going to happen unless Mr. Tuter takes bankruptcy.

That same day we see in the bankruptcy attorney's file another phone call with GEICO fee counsel: wants a yes or no on the bankruptcy for Mr. Tuter. The next day, GEICO fee counsel emails to the bankruptcy attorney a copy of the confidential GEICO pretrial report.

GEICO fee counsel talks with the bankruptcy attorney and explains that the reports are not exaggerated. There will likely be an excess verdict. However, it is unlikely the motorcyclist will ever seek to collect from the Tuters; the motorcyclist will likely seek an assignment. At the same time, GEICO fee counsel is keeping the GEICO adjuster updated, and explains that Mr. Tuter is being advised on bankruptcy issues. GEICO fee counsel calls the bankruptcy attorney again concerning Mr. Tuter's possible bankruptcy progress.

It's still two weeks before the trial. GEICO fee counsel has more calls with Mr. Tuter and with the GEICO adjuster to find out whether Mr. Tuter wishes to file for bankruptcy. The GEICO adjuster emails GEICO fee counsel to ask if Mr. Tuter has filed for bankruptcy. GEICO's fee counsel trial lawyer says he has not heard, and asks the associate lawyer to check with Mr. Tuter or the bankruptcy attorney and give the adjuster a call.

GEICO fee counsel emails the GEICO adjuster. He spoke with Mr. Tuter, who consulted with the bankruptcy lawyer and it appears that he is leaning toward not filing for bankruptcy. Fee counsel has a call in to the bankruptcy lawyer, but that is the latest word. GEICO fee counsel puts in another call to the bankruptcy lawyer.

The GEICO adjuster writes that Mr. Tuter met with a bankruptcy attorney and has chosen to "now" file bankruptcy. (There is no record of Mr. Tuter personally

meeting with a bankruptcy lawyer, only phone calls. In fact, Mr. Tuter had chosen *not* to file bankruptcy, not to *now* file.)

Next is a GEICO fee counsel internal email. The bankruptcy lawyer has not given them a call back. Mr. Tuter thought the bankruptcy lawyer was going to call fee counsel, and fee counsel has two voicemails in to the bankruptcy lawyer. That same day the GEICO split file "bad faith" adjuster enters in the GEICO log: Liability, defense counsel correspondence.

The next day GEICO fee counsel has a new call from the bankruptcy lawyer. GEICO fee counsel email each other. They spoke with the bankruptcy lawyer and understand that Mr. Tuter would like to hold off on filing for bankruptcy. They say that if the verdict comes in at a substantial number, Mr. Tuter will consider filing for bankruptcy then. This is Mr. Tuter's "decision after some soul-searching and after speaking things over with his wife."

The day before the trial, ACS is allowed to be dismissed from the case and the trial. The court filings document that "ACS has intervened in this action, asserting a reimbursement right only in the proceeds of any settlement, verdict or judgment against the plaintiff, Glenn Hayman. ACS has not asserted any rights directly against the Defendant Cornel Tuter or his carrier, Geico Insurance."

That same day, the day before the trial, GEICO fee counsel's trial lawyer meets Mr. Tuter, in person, for the very first time.

In the motorcyclist's trial, the jury returns a verdict against Mr. Tutor for a total of $329,820.50.

After the excess verdict, the GEICO fee counsel trial lawyer has dinner with Mr. and Ms. Tuter. A few days later he writes a letter to the GEICO adjuster about that meeting:

> Fee counsel explained to the Tuters that it is his understanding that the motorcyclist's attorneys will not be seeking to collect the verdict from them. He says the motorcyclist's attorneys will likely try to seek an assignment from them for any potential bad faith claim they have against GEICO. The Tuters were confused and indicated several times they did not feel that GEICO did anything wrong. They indicated several times that they would not want to sue GEICO because GEICO had protected them.

GEICO's fee counsel said he could not advise the Tuters on whether they should give an assignment to the motorcyclist for any potential bad faith claim against GEICO. He indicated to Mr. Tuter that he would talk with the bankruptcy attorney. Five days later GEICO fee counsel again phones the bankruptcy attorney.

The GEICO fee counsel writes about his phone call with the bankruptcy lawyer. He will continue to speak with him. If Mr. Tuter considers bankruptcy, fee counsel may call the bankruptcy lawyer in the near future. Three days later GEICO fee counsel talks with the GEICO adjuster. He discusses the appeal, which is unlikely to succeed.

The GEICO adjuster talks with fee counsel. He has not been able to speak with Mr. Tuter much, but did call and speak with the bankruptcy lawyer and a left message for a call back.

The court officially enters a formal Judgment against Mr. Tuter in the amount of $329,820.50, plus costs, plus 9% per year statutory interest.

Some months later, GEICO pays its $100,000 policy limits directly to the motorcyclist and his attorney, without putting ACS on the check. Mr. Tuter is a judgment debtor for the remaining balance of the judgment, roughly $230,000, plus interest. The motorcyclist and his attorney pay over $5,000 to ACS, under an agreement they have worked out.

The GEICO adjuster writes that based on fee counsel review there is really no chance to appeal. GEICO's fee counsel will file an appeal, but later admits he knew it was a loser. A successful appeal would in any event not win the case; it would simply result in another trial, which might have a lower or higher excess verdict.

That same day the GEICO adjuster gets a call from fee counsel to set up a meeting to discuss their options. Fee counsel has also has spoken with the bankruptcy lawyer, but has not heard from Mr. Tuter. The next day the bankruptcy lawyer talks with Mr. Tuter's wife by phone. The bankruptcy lawyer notes that Mr. Tuter had hoped to be retired this Fall (2011).

That same day the GEICO fee counsel talks with the GEICO adjuster and says he also spoke with Ms. Tuter. Mr. Tuter is having a very tough time. GEICO fee counsel discussed again that the motorcyclist likely just wants an assignment.

On October 31 GEICO fee counsel talks with Mr. Tuter on the phone and they discuss what GEICO fee counsel calls all the the options, namely, assignment, potential bankruptcy, and an appeal. An appeal isn't really an option for solving things; it is more of an option for trying to buy time.

Mr. Tuter cannot deal with this because his wife's mother just died. He wants an appeal and that gives him time to potentially work through bankruptcy, at least as reported by GEICO fee counsel.

GEICO fee counsel has a phone meeting with others at GEICO. He reports that he spoke with Mr. Tuter and explained three options: assignment, can pursue bankruptcy; and appeal. But Mr. Tuter does not really understand assignment. Fee counsel says that he attempted to explain assignment and that Mr. Tuter needs his own attorney. Mr. Tuter wants to appeal, at best gives him time to sort out options.

Eleven days later we see in the log more work by the split file "bad faith"

adjuster. Ten days later the GEICO Home Office Lawyer writes that they should make sure Mr. Tuter is aware that filing the appeal does not stay the execution of the judgment.

It's now January 2012. GEICO fee counsel gives GEICO a copy of his letter to Mr. Tuter. They have filed an appeal. Fee counsel addresses Mr. Tuter's concerns regarding when the motorcyclist may attempt to collect on the judgment. Next month, we see in the logs that the GEICO split file "bad faith" adjuster is continuing work on her case against Mr. Tuter.

It's now late February 2012. The GEICO fee counsel writes to both Mr. Tuter and to GEICO, confirming that at various times they have advised Mr. Tuter to consult with an attorney who specializes in bankruptcy law. Fee counsel renews that recommendation. Fee counsel notes they will of course cooperate with any bankruptcy attorney.

The GEICO adjuster notes that it would not be surprising if the motorcyclist starts collections efforts against Mr. Tuter soon. For example, the motorcyclist could require Mr. Tuter to attend a debtor's examination, or could seek garnishment of Mr. Tuter's bank accounts, or could attempt to execute against Mr. Tuter's real property.

GEICO fee counsel talks with Mr. Tuter on the phone. Mr. Tuter wants to know what the motorcyclist's attorney's intentions are, and would like GEICO's fee counsel to pass along any deal that Mr. Gutzler may propose.

GEICO fee counsel makes notes from his phone call with Mr. Tuter: The motorcyclist can try to collect on the judgment. Mr. Tuter asked about a deal with the motorcyclist, and fee counsel says that if the motorcyclist gives a deal he will pass it along.

The GEICO log records how Mr. Tuter has been advised at various times that

it would be worthwhile to consult with another attorney. It is GEICO's understanding that Mr. Tuter has an attorney that specializes in bankruptcy law.

It's now mid-March. The motorcyclist's attorney, Mr. Gutzler, writes to GEICO fee counsel to say that the motorcyclist is considering making an offer to Mr. Tuter regarding an assignment of rights, and asks for copy of the GEICO insurance policy. A few days later the logs show that the GEICO split file "bad faith" adjuster continues to work on GEICO's case against Mr. Tuter. Ten days later, there's more in the company records from the GEICO split file "bad faith" adjuster.

The GEICO insurance policy has this provision: "Your rights and duties under this policy may not be assigned without our written consent." A few days later the motorcyclist's attorney Mike Gutzler writes to GEICO's fee counsel to confirm that the motorcyclist is interested in exploring an assignment of rights. He asks, is GEICO willing to consent to an assignment? If so, the motorcyclist will probably do that. If not, they would begin collection proceedings against Mr. Tuter. The result could be involuntary bankruptcy, which would nullify the non-assignment clause.

As an aside, the anti-assignment provision in the insurance policy does not prevent assignment of the insured's cause of action against the insured's own insurance company. See ORS 31.825 (defendant in tort action against whom judgment is rendered may assign to plaintiff any cause of action defendant has against defendant's insurer as result of that judgment).

With assignment, it would be up to the motorcyclist to try to get the rest of his judgment money from GEICO. With involuntary bankruptcy, the motorcyclist is saying that the federal bankruptcy court could nullify, or overrule, the provision in the GEICO policy that claims "your rights and duties under this policy may not be assigned without our written consent." In other words, there would be an assignment of Mr. Tuter's claim against GEICO, and the motorcyclist would end up having the right to sue GEICO himself.

That same day GEICO fee counsel analyzes the bankruptcy code in order to provide information to Mr. Tuter and to GEICO.

On April 11, GEICO fee counsel writes a letter addressed to both Mr. Tuter and to GEICO. The motorcyclist would like Mr. Tuter to assign his rights against GEICO to the motorcyclist. But GEICO's policy claims that Mr. Tuter's rights cannot be assigned without GEICO's written permission. The motorcyclist asks if GEICO will consent. GEICO's fee counsel then claims that there is a conflict in Oregon law over whether this kind of 'anti-assignment' provision is enforceable. And while the motorcyclist's attorney says that the bankruptcy court can nullify any claimed anti- assignment provision, GEICO fee counsel says that interpretation may not be accepted by the bankruptcy court. So, GEICO fee counsel says, it's not clear, but perhaps GEICO can block assignment under both Oregon law and under federal bankruptcy law.

A week later the logs show the GEICO split file "bad faith" adjuster still at work.

The GEICO log shows that GEICO has a copy of the motorcyclist's attorney's letter requesting that GEICO consent to the assignment. The decision is being sent up to GEICO Home Office. Five days later GEICO Home Office Lawyer gives the insurance company's response: GEICO discussed the matter at Claims Home Office - Legal. Based on the policy language, GEICO will not consent to Mr. Tuter assigning his rights over to plaintiff's counsel. Plaintiff's counsel will have to proceed with collection efforts against Mr. Tuter. "As previously stated throughout the life of this case, the insured has few assets to proceed against and is now even contemplating bankruptcy."

After that, the motorcyclist's attorney Mr. Gutzler writes to GEICO fee counsel: If GEICO had agreed to waive the anti-assignment provision, Mr. Tuter

likely would have been able to avoid personal financial loss. It is in Mr. Tuter's financial interest to have the anti-assignment clause waived, but GEICO is unwilling to do that. GEICO is electing to have Mr. Tuter face financial exposure, rather than running the risk of financial exposure itself.

Mr. Gutzler gives Mr. Tuter until May 25 to consult with independent legal counsel. A few days later, GEICO's fee counsel talks with the GEICO adjuster, writing in his notes: Will call Mr. Tuter Monday. Be in contact May 25th. Bankruptcy?

GEICO logs show it is aware that the motorcyclist is prepared to take the next steps against Mr. Tuter. GEICO fee counsel gets a phone call from Mr. Tuter. He does not understand the letters.

The motorcyclist's attorney Mr. Gutzler writes again to GEICO fee counsel. His next move is to file a Petition for Involuntary Bankruptcy against Mr. Tuter. He will do that if a lawyer representing Mr. Tuter does not get in touch with him by May 25th.

If an involuntary bankruptcy petition is filed, Mr. Gutzler would then either have the bankruptcy trustee assign Mr. Tuter's rights to the motorcyclist, or the trustee would itself pursue the claim against GEICO. In other words, if Mr. Tuter does not get an independent attorney soon, the motorcyclist will have the claim against GEICO prosecuted one way or another.

Shortly after that, GEICO fee counsel calls Mr. Tuter, and explains that Mr. Gutzler wants him to get his own attorney, and that GEICO will not consent to assignment. Mr. Tuter then asks GEICO fee counsel for the name of an independent attorney.

The GEICO adjuster dictates a letter to fee counsel about GEICO not

consenting to assignment. The letter is sent to the Supervisor, then to GEICO Claims Home Office for approval.

GEICO sends its letter to Mr. Tuter: "We have received correspondence from Mr. Gutzler, counsel for Glenn Hayman, requesting our consent to the assignment of your rights under your GEICO policy. In exchange, Mr. Gutzler agrees to cease with collection of the judgment against you." "This matter has been reviewed and we are not consenting to the assignment of your rights to Mr. Gutzler."

The next day the logs show the GEICO split file adjuster working on the defense of the anticipated bad faith case.

The following day, GEICO fee counsel writes Mr. Tuter: “I contacted Mr. Gutzler and requested that he provide a recommendation for an attorney in southern Oregon. Thus far, Mr. Gutzler has not responded to my request. If he does provide a name, I will forward it to you immediately.” There is a blind copy of the letter between attorney and client to GEICO, whose interests are adverse to Mr. Tuter.

Meanwhile, GEICO fee counsel is working on another letter to Mr. Tuter. GEICO fee counsel have emails about their draft letter to Mr. Tuter: "did you want to add the line recommending [the bankruptcy lawyer] to the letter?" Response: "I'll do it."

GEICO fee counsel finalizes and sends its letter to Mr. Tuter, explaining that it appears Mr. Gutzler may be able to place Mr. Tuter into bankruptcy involuntarily. GEICO fee counsel advises Mr. Tuter to seek independent legal advice on these matters. He says Mr. Gutzler has indicated he would recommend an attorney in southern Oregon; however, he has not yet done so. Fee counsel once again says it may be a good idea for Mr. Tuter to contact their recommended bankruptcy lawyer. GEICO fee counsel sends a blind copy of this letter to the GEICO adjuster.

Almost a year later, Mr. Tuter's case against GEICO is filed. Interest on the excess judgment has been growing at 9% per year. That brings us to September 2014. Over 7 years after the accident, and after about a year of litigation against GEICO, GEICO contributes part of the money to help satisfy the excess judgment. After the excess judgment is gone, Mr. Tuter is finally able to retire.

Post Trial Matters

Clients often think of trials as the end of a long and difficult litigation process. Defense counsel may think of trial as simply another stage that affects negotiations. After the trial, there were the expected rounds of motions, with GEICO basically telling the judge who presided over the trial that the jury got it wrong and that GEICO had done nothing that justified punishment.

The more painful motions were to decrease the amount of punitive damages. Under the prevailing view of punitive damages as reflected in a number of United States Supreme Court decisions, defendants have sort of a substantive due process right in avoiding significant punishment. That right is put into effect by arbitrary multipliers that cannot be found by any careful reading of the U.S. Constitution or the proceedings related to the adoption of the Constitution. Currently, if a jury, after hearing extensive evidence, being properly instructed in the law, and after thoughtful deliberations, finds that compensatory damages were $Y and punitive damages should be $X, punitive damages cannot exceed a multiplier of Y, which may be a far smaller number than the jury found. That multiplier is lower when there are no non-economic damages, and accordingly the amount that the trial court was allowed to assess against GEICO was correspondingly lower.

As noted above, the jury's $17,500,000.00 punitive damages verdict was reduced by the trial court to $2,679,443.80. As a $22 billion company, the reduced amount of punitive damages represented about 1/10th of 1% of GEICO's financial totals . So much for setting an example, punishment, or deterrence.

If a judgment were entered based on that $2,679,443.80 amount, the State would claim 70% of it. So, some time after the trial, GEICO faced the risk that it might have to pay that full amount (plus the much lesser amount of economic damages). Mr. Tuter faced the risk and delay of a GEICO appeal if a judgment were entered, and the risk that the State would take most of what was left of that judgment.

Those risks encouraged the parties to talk before a judgment were entered and the State's rights attached to a punitive damages judgment. The parties participated in three mediations that stretched out over months. What happens in mediation is confidential, and the results of this negotiating process were agreed to be kept confidential by the parties, so my comments below are generic, only, and are intended merely to help other counsel plan ahead as they work through similar issues with their clients.

In preparing for and working through the mediations, tax implications were important driving forces. For a plaintiff in an insurance company negligence case facing the prospect of a lump sum recovery, taxes are a significant consideration. Whether the recovery is for economic damages, non-economic damages, or punitive damages, or some combination of such damages, without physical injury, the full amount of that plaintiff's individual recovery will be taxed.

I know almost nothing about tax law, so we had to obtain quite a bit of tax and accounting assistance to work through this process. Essentially what we were advised is that because a plaintiff in this kind of a case would be taxed on the entire recovery amount with limited ability to deduct the cost of attorney fees and litigation expenses (due to the Alternative Minimum Tax), it may be in the plaintiff's best interests to have a settlement that involves payments over a number of years. There will still be taxes on the recovery, but with careful planning with the person's tax advisors, the plaintiff can have lower annual settlement payments and higher annual deductions, resulting in greater post-tax benefits.

Conclusion

Insurance, when done properly, serves an important social function: risks are spread among the many, and each individual is protected from risks that he or she otherwise could not personally afford. Insurance, when not done properly, can needlessly expose people to the very risks that liability insurance was intended to protect against. "Bad faith" claims against insurance companies are an important way society can motivate the insurance industry to deliver the social benefits the industry should.

Representing an individual against his or her own insurance company can be both satisfying and extremely challenging work. As the story above suggests, there are a lot of important facts that must be found, organized, and effectively presented in order for the jury to understand what happened, and to understand that what happened was wrong. These cases are more complex and demanding than many other cases, and are more vigorously defended. But if we want insurance to work for the average person, these cases are necessary and important.