Northern Michigan

Anatomy of a Settlement

By Frederick M. Baker, Jr.*

In May 1992, on an unseasonably warm day, three boys went swimming in a pond located on an 85-acre property in northern Michigan. One of the boys lived in a house on the property that was rented to his parents by a couple who had purchased it with the goal of one day retiring there. Tragically, the tenants' son drowned while swimming in the pond. His mother, as personal representative of his estate, brought a wrongful death action against her landlords, as well as a claim in her own right alleging negligent infliction of personal injury resulting from her presence and observation of her son at the scene of the drowning. Both claims sounded in negligence.

Fast forward to August 1995. I received a call from my friend Ed Bladen[1] asking if I would be willing to meet with the defendants, against whom a verdict had been returned that, with interest, was slightly more than a million dollars, more than $900,000 in excess of the $100,000 available under their homeowner's policy. Perhaps, he thought, I could find some way to extricate the clients from this disastrous outcome?

When I met with my clients, it was obvious that they were frightened, confused, and outraged at what the jury had done. They were understandably despondent at the prospect of losing everything they had, which was far less than the amount by which the verdict exceeded the available coverage. Indeed, after meeting with them I was at least as concerned about their immediate emotional well being as I was about the gravity of their legal situation. No judgment had yet been entered on the verdict, owing to a dispute over the proper calculation of interest, so some time was available, pending a hearing on a motion to settle and enter the judgment, to allow me to review the file and try to develop some strategy for solving their problem. In the meantime, I tried to reassure them as best I could, outlining in general terms the relief available under the bankruptcy laws in a worst case scenario and describing for them the appeal process and the likelihood that a stay could be obtained while an appeal was pending.

But, when they left my office, the enormity of the problem I had tried to put in perspective for them began to sink in. I contacted their retained insurance defense counsel, and in my conversations with him the scope of the disaster soon became evident: The jury had returned a verdict in an amount *30 times the mediation award*. One of the reasons for that outcome was the trial judge's denial of a pretrial summary disposition motion based on the Recreational Land Use Act (RLUA), MCL 300.201; MSA 13.1485, on the ground that the RLUA did not apply to the pond in question, because, owing to improvements that the former owner had made to it, it was not in its "natural state." The trial court also had allowed the decedent's mother's separate personal injury claim to go to the jury despite the absence of any evidence that she sustained personal injury apart from her emotional distress.

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In essence, everything that could go wrong had gone wrong and, although grounds existed for post-trial motions for new trial, j.n.o.v., or remittitur, it was apparent that without some other strategy any relief would require at least a few more years of expensive litigation.

I was troubled by the verdict because it so greatly exceeded the available coverage. I wondered: Did the insurance company have any opportunity to settle this case within the policy limits? Given the mediation outcome, I assumed that settlement must have been discussed somewhere

With a hat tip to my friend John Voelker, author of Anatomy of a Murder, who would not mind I think: He took delight in a corporate report that he tacked to the wall of the cabin at his fish camp entitled, "Anatomy of a Merger."

along the line. Exercising my client's right to employ, at their own expense, personal counsel of their choosing, I secured a copy of the entire file, including portions of the insurer's claims file. I shall never forget where I was sitting and the elation I felt when I read the following exchange of pre-suit correspondence from the claims file. Plaintiffs' counsel first rejected the insurance company's previously stated "position" that the insured landlords "had absolutely no control over the property," noting that his clients "only rented a farmhouse, not a farm." He believed that the rest of the farm, "would be treated as a 'common area' under the control of the landlord." Nevertheless, after discussing the "liability aspects of this case" with his clients, he related, they had "asked that I make one more effort to settle this case," because they did not want to "relive this episode through litigation." His letter concluded:

> *"I have asked them to provide me with an amount of money below which they absolutely will not settle. They have calculated the bills attributable to their son's death and anticipated a future cost for [his sibling's] counseling and reached the figure of $40,000. They have indicated to me that they would accept no less than that amount to settle this case."*

The insurer's response: "My position remains the same as I stated in your office. I will not pay above the cost of defense to settle this file. Thank you."

The claims representative had memoed the file concerning the discussion at the office of the plaintiff's counsel referred to in his letter rejecting the settlement demand:

> *"Without getting into a blow-by-blow account of everything that was discussed, [plaintiff's counsel] wanted me to make him an offer to settle the case and I declined. Suit is a foregone conclusion, and I will assign this to defense counsel when suit is filed."*

Further review of the file and some research satisfied me that I had found the strategy I was looking for. It was time to write a letter:

I represent your insureds as their personal counsel in this matter. They retained me after a verdict for over $829,000 plus interest and costs was returned in July of this year. Although, as you know, judgment will enter only after the hearing held on October 23, because of disputes concerning interest calculations, the judgment that ultimately enters will probably exceed $850,000, and interest will continue to accrue during the post-trial motion and appeal phases.

Plaintiffs' counsel first rejected the insurance company's previously stated "position" that the insured landlords "had absolutely no control over the property," noting that his clients "only rented a farmhouse, not a farm."

My clients' policy is in the face amount of $100,000 per occurrence. At most, depending on the interpretation of the definition of occurrence in the policy ("an accident, including continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured"), and whether the drowning of the decedent and the injury to [his mother] are regarded as separate occurrences, my clients have $200,000 in coverage for the separate claims asserted by the estate (and its derivative claimants) and [decedent's mother], individually, for her emotional distress. Thus, the judgment will exceed the coverage available in an amount ranging from at least $650,000 to as much as $750,000.

My clients now have a serious problem. They are facing utter financial ruin as a result of the outcome of this case. Their net worth subject to execution (i.e., net of secured debt having priority over the judgment lien, *disregarding* any homestead, personal property, tools of the trade or other exemptions) is [in the low six-figure range]. [My client] is retired, drawing a pension, and working out of his home in a consulting practice. [His wife] is employed. The farm where the accident occurred was purchased as their intended retirement home.

I know [trial counsel], and I am sure he will do all he can to secure a new trial, remittitur, or reversal on appeal. After reviewing his file, however (and admittedly without benefit of the trial transcript, particularly the instructions), I see no particular reason for optimism that this result will be reversed on appeal or substantially modified by the trial court. This was a jury verdict, and factual questions decided by the jury cannot be reopened on appeal. I have known [the trial judge] since we were in high school, and I will be very surprised if he grants any post-trial relief (e.g., remittitur, j.n.o.v. or new trial). According to [trial counsel], that leaves as the main issues for appeal only the Recreational Land Use Act (if the issue is preserved for appeal, a question not free from doubt, since no instruction on it was requested), which at least arguably does not apply, as [the trial judge] ruled; and the award on [decedent's mother's] individual claim for emotional distress (which would reduce the total award by only $125,000 even if it were reversed).

Now is the time, while the uncertainty (and delay) of an appeal works in our favor, to approach this case creatively to achieve a solution that my clients, [your company] and the plaintiffs can live with.

Any solution is going to require realistic appraisal by [your company] of its exposure to excess liability in this case, so I will address that point before describing to you what I believe is a workable settlement strategy.

The Bad Faith Claim Against [Your Company]

I briefed and argued *Stockdale v Jamison*, 416 Mich 217 (1982). I am familiar with the law of bad faith in Michigan. It is an area in which I have practiced during the decade since I largely stopped doing retained insurance defense work and began representing insureds in coverage disputes. When *Stockdale* was decided, I predicted that if insurers abused the rule limiting their excess liability to the value of the insured's nonexempt assets, the Court probably would re-examine that rule. In *Frankenmuth Mutual Insurance Co v Keeley (on reh)*, 436 Mich 372 (1990), the Court reversed its decision in that case reported at 433 Mich 525 (1989), and instead adopted the dissenting opinion by Justice Levin at 433 Mich 546. Although the Court ultimately retained the *Stockdale* measure of

damages in wrongful refusal to settle cases, the Court came within one vote of fulfilling my prediction. I mention this because, regrettably, [your company] made almost every mistake possible here. I have every confidence that bad faith can be established if [your company] forces my clients to assert such a claim. This case would afford the Court both an opportunity and a reason to revisit the rule once again.

If I sound confident of the merits of my clients' claim, it is because the Supreme Court finally ended any uncertainty about the rules governing recovery for wrongful refusal to settle with its decision in *Commercial Union Insurance Co v Liberty Mutual Insurance Co*, 426 Mich 127 (1986). The uncertainty stemmed from the fragmented origins of the rule in the early decision in *City of Wakefield v Globe Indemnity Co*, 246 Mich 645 (1929). A majority of the Court in *City of Wakefield* actually subscribed to an opinion originally authored as a dissent, so it was a puzzle to interpret. The decision in *Commercial Union* put to rest any argument under *City of Wakefield* that an insured had the burden of showing "fraud" or "dishonesty" on the part of the insurer to establish bad faith. After *Commercial Union*, the rule is very simple and easy to understand.

> *"We define 'bad faith' for instructional use in trial courts as arbitrary, reckless, indifferent or intentional disregard of the interest of the person owed a duty."* 426 Mich at 136 (emphasis added).

The Court went on to explain:

> *"Good-faith denials, offers of compromise, or other honest errors of judgment are not sufficient to establish bad faith. Further, claims of bad faith cannot be based upon negligence or bad judgment, so long as the actions were made honestly and without concealment. However, because bad faith is a state of mind, there can be bad faith without actual dishonesty or fraud. If the insurer is motivated by selfish purpose or by a desire to protect its own interests at the expense of its insured's interest, bad faith exists, even though the insurer's actions were not actually dishonest or fraudulent."* 426 Mich at 136-7 (emphasis added).

Finally, to simplify the determination, the Court listed the following "factors" to be considered by the jury in deciding whether an insurer acted in bad faith in refusing to settle:

1. *Failure to keep the insured fully informed of all developments in the claim or suit that could reasonably affect the interests of the insured;*

2. *Failure to inform the insured of all settlement offers that do not fall within the policy limits;*

3. *Failure to solicit a settlement offer or initiate settlement negotiations when warranted under the circumstances;*

4. *Failure to accept a reasonable compromise offer of settlement when the facts of the case or claim indicate obvious liability and serious injury;*

5. *Rejection of a reasonable offer of settlement within the policy limits;*

6. Undue delay in accepting a reasonable offer to settle a potentially dangerous case within the policy limits where the verdict potential is high;

7. An attempt by the insurer to coerce or obtain an involuntary contribution from the insured in order to settle within the policy limits;

8. *Failure to make a proper investigation of the claim before refusing an offer of settlement within the policy limits;*

9. Disregarding the advice or recommendations of an adjuster or attorney;

10. *Serious and recurrent negligence by the insurer;*

11. *Refusal to settle a case within the policy limits following an excessive verdict when the chances of reversal on appeal are slight or doubtful; and*

12. Failure to take an appeal following a verdict in excess of the policy limits where there are reasonable grounds for such an appeal, especially where trial counsel so recommended.

426 Mich at 137-8 (emphasis added).

In this case, virtually every (emphasized) factor listed above that is applicable to the circumstances of this case is present:

• After the plaintiff's counsel submitted his settlement brochure, dated 11-23-92 (Exhibit A), outlining the basis for his claims and demanding what he believed to be policy limits of $300,000, [one of your claims adjusters] memoed the file on 11/25/92. (Exhibit B). Incredibly, with a $300,000 demand in hand and an outline of the same theories of liability that persuaded the jury to award $829,000 in damages, [your adjuster] observes that "even though *the limits are well below our reinsurance retention*, the file should probably become a precautionary reinsurance report." Clearly, [your company] early recognized that the policy limits might be inadequate to cover the exposure in this wrongful death case. Equally clearly, [your company] acted without the benefit of a thorough investigation or any legal analysis of the claims asserted when it responded to the plaintiff's settlement demand. Instead, [your adjuster] merely wrote to the plaintiff's counsel to correct his mistaken belief that the policy limits were $300,000 (in fact they were $100,000), and to suggest a meeting "to discuss our respective positions." (Exhibit C).

***...claims of bad faith cannot be based upon negligence or bad judgment,* so long as the actions were made honestly and without concealment.**

• [Your adjuster] then wrote to [your insured] and asked him to call, by letter dated 12/16/92. (Exhibit D). He wanted to discuss "a couple of questions that have come up in my mind." According to his subsequent memo to the file (Exhibit E), *he learned from [your insured] that in all probability the pond where the drowning occurred was man made or had been "worked on."* This ultimately proved to be the case, and on that basis [the trial judge] held the Recreational Use Act inapplicable (Exhibit F, Opinion). Thus, [your adjuster] and [your company] knew the facts on which the Recreational Land Use Act defense would fail by no later than December 21, 1992, nearly a year before suit was filed.

• As Exhibit E reflects, [your adjuster] also knew about the lease (the "letter of understanding,") under which, the Court ruled (see Exhibit F), a question of fact existed on the issue of control. Yet [your adjuster], *knowing* that "of course, *control is a critical issue,*" and that "there were restrictions [on the tenants' use of the property] written into the letter of understanding," nevertheless stated that "it will be *my position* that our insured had *absolutely no control* over the property." (Exhibit E). Nothing [your adjuster] then knew, and nothing uncovered by [trial counsel] in the course of discovery, ever negated the ambiguity on

the issue of control that guaranteed that issue would remain one of fact and go to the jury. Certainly, nothing [your adjuster] knew then or later learned supported a claim that the insureds had "absolutely no control" over the property.

- Nevertheless, [your adjuster] met with plaintiffs' counsel on January 12, 1993, and, as his memo of January 13, 1993, reflects (Exhibit G); *"[Plaintiffs' counsel] wanted me to make him an offer to settle the case and I declined."* In short: (1) with no clear *legal* or *factual* basis for concluding that your insured had no liability, and (2) *without* having conferred with counsel on the "critical issue" of control, (a point on which he realized "we may ultimately have to seek a legal opinion"—see Exhibit G), and (3) with no factual basis for his "position" that the insureds had "absolutely no control," [your adjuster] *refused* to negotiate, or make any offer of settlement, in a death case involving a young boy and claims by several relatives.

- However, that is not the worst of it: [Your adjuster] concludes in his 1/13/92 memo (Exhibit G) that *"suit is a foregone conclusion,"* and that he "will assign this to defense counsel *when suit is filed.*" He decided to reject settlement and to *force suit* and adhered to that position despite the further developments that occurred. Indeed, on the same day, he wrote to your insured that "In the not too distant future the attorneys, representing the Estate of [the decedent], *will be filing suit.*" He does not even *mention* in that letter to your insureds: (1) that a written offer of settlement had been received, (2) that [your company] had spurned the plaintiffs' offer to settle at (the correct) policy limits, (3) that [your company] had refused to make any counteroffer of settlement, and (4) and [your company] was forcing the plaintiff to sue. See Exhibit H. Of course, his letter contains no disclosure that your insureds also had already been subject to a settlement demand *in excess* of the policy limits; that the policy limits had been demanded; that your insureds might need separate counsel; or that he had rejected the settlement proposal *without even having secured an opinion on the legal issue that he himself characterizes as "critical."* In so doing, [your adjuster] satisfied factors 1, 2, 3, 4, 8 and 10. *See Commercial Union, supra.*

- Next, after confirming that the limits were lower than plaintiffs' counsel had thought (Exhibit I), [your adjuster] received a final settlement demand (Exhibit J) of $40,000. To this demand, which was less than *five percent of the verdict, and only 40 percent of the policy limits,* he responded: "My position remains the same as I stated in your office. *I will not pay above the cost of defense to settle this file.*" (Exhibit K). (Emphasis added). This response is incomprehensible to me. As you know, that is what is commonly termed a "nuisance settlement" offer. *[Your adjuster] had no factual or legal basis for concluding that this was a meritless claim having only nuisance value.* More importantly, *he did not inform your insureds that such an offer had been made,* nor did he, once again, advise them to seek counsel. He rolled the dice with your insured's fate, future, and security. He also supplied factor 5 and additional instances of factors 1, 3 and 4. *See Commercial Union, supra.* Certainly his decision and conduct were "arbitrary, reckless, indifferent" and/or in "intentional disregard for the interests of the person owed a duty," *i.e.,* your insureds. Indeed, it is highly significant that *not one* of his communications with plaintiffs' counsel was copied to your insureds, and *not once* did [your company] disclose to its insureds that it had repeatedly rejected settlement offers, refused to negotiate settlement, and rejected an offer to settle for less than half of the policy limits.

- It is thus ironic that, nine months later, when suit was finally filed, [your adjuster] wrote to your insureds directing them to "extend [their] fullest cooperation" to assigned defense counsel. (Exhibit L). Even though [your adjuster] expressly recognized that "the possibility exists that an award could be in excess of the coverage available under your policy," he *concealed* all that had occurred. His advice to your insureds that they had the "right to retain counsel of your own choosing, at your expense, to protect your interests," was not only an empty form of words (all opportunity to consult with their own counsel at a meaningful time, while settlement was being discussed, having been lost), it was essentially dishonest, because he never revealed what he had done to *jeopardize* their interests by refusing to negotiate and rejecting all settlement proposals. Indeed, *my clients were unaware until receiving copies of this correspondence after the verdict was rendered that [your adjuster] had exposed them to financial ruin by rejecting a reasonable settlement offer well within the policy limits and forcing this case to go to trial.* See Factor 1.

I will not continue the catalog of [your company's] bad faith conduct beyond this point, for several reasons. First, I lack complete information (for example, although [trial counsel] has confirmed that the "defense costs" that [your adjuster] offered as a nuisance settlement were much greater than his initial budget estimate of $10,000, and promised to provide that total, he has not as yet obliged). In addition, I have had no opportunity to review the complete home office and branch office claims files, nor to depose [your adjuster] and those involved in the decision to reject settlement and force trial.

I will not spend any more time rattling sabers—we need to cooperate to solve the problems that the mishandling of this case has caused, and it would not be constructive to threaten you with dire consequences. I will, however, state a simple fact: The circumstances outlined above afford an ample basis for holding [your company] responsible for wrongful refusal to settle.

A Workable Settlement Strategy

Fortunately, for [your company] (and my clients), there is still some light at the end of this tunnel. As you can see (Exhibit M), I have spoken to the plaintiffs' counsel to advise him that I am representing your insureds as their personal counsel. I inquired whether any possibility of settlement exists, such as a "high/low" arrangement pending appeal, under which his clients might agree to accept less than the verdict if they win on appeal in exchange for a lower guaranteed recovery if they lose. His response (Exhibit M) reveals that he is unaware of two important facts: (1) my clients' net worth is only slightly greater than the policy limits, and (2) under *Frankenmuth,* that is a limit on his total recovery, because the Court reaffirmed (by one vote, on rehearing) application of the damage rule in *Stockdale* in wrongful refusal to settle cases.

[Your company] can protect itself (and its insureds), then, by agreeing to fund a settlement offer in an amount roughly equivalent to policy limits and my clients' net worth (their assets not exempt from attachment), which I suspect would total from $250,000 to $300,000. By doing so, [your company] can: (1) avoid adding factor 11 from *Commercial Union* to my clients' bad faith case, (2) avoid a bad faith judgment against it (including payment of

my fees for securing it, under *Murphy v Cincinnati Insurance Co,* 772 F2d 273 (CA 6, 1985) (applying Michigan law to allow an attorney fee award to an insured whose insurer forced its insured to incur the fees to recover for the insurer's bad faith refusal to pay its claim), (3) avoid jeopardizing the rule in Michigan, established in *Stockdale* and nearly overturned in *Frankenmuth,* limiting insurers' excess liability to the value of their insured's nonexempt assets, and (4) avoid incurring the substantial expense of further proceedings (post-trial and on appeal) in this case and the expense of litigating the bad faith claim that will surely be filed if [your company] refuses to face up to its responsibilities in this case.

My friend [name omitted], who founded your company in the same year I was born, has told me more than once that in his day the company's philosophy was very simple: "If we owe the claim, pay it." You owe this claim. Not because [your company] is evil or bad, but because [your company] blundered badly in its handling of this claim. Virtually every rule that applied to this case, as set out in *Commercial Union,* has been broken. It is now time to step up and do the right thing. Rather than jeopardizing everything my clients have worked and saved their entire lives to accumulate, rather than insisting that [your company] did nothing wrong, rather than wishfully thinking that a jury will not agree with me (this time a jury from [your insured's] home town), [your company] should take this opportunity to cut its losses and protect its insureds.

Given the authority to do so, I believe I can demonstrate to plaintiffs' counsel why he should agree to a negotiated compromise. Give me that authority, please, or, if you prefer, do it yourself, through [trial counsel], for whose abilities I have high regard.

When Chief Justice Williams asked me during argument why the Court should reverse the judgment against the insurer in *Stockdale,* I told him that I asked myself the same question until I learned from trial counsel that the jury had actually found for the insurer, and that the Court had set aside that verdict of no bad faith on j.n.o.v. "When I found that out," I said, "I felt like Brother Dominick and looked to the heavens, saying 'It's a miracle.'" Soapy laughed, and the Court reinstated the jury's verdict in *Stockdale.*

In this case, the jury found for [plaintiffs]. I am firmly of the opinion that this time salvation does not lie in a miracle on appeal—rather, it lies in acknowledging error and correcting it now, while reason exists to believe that the error can be repaired.

I have not designated this as an offer of compromise inadmissible under MRE 408 because, if [your company] refuses this proposal, it will be Exhibit A in a bad faith action against [your company]. I have shown you the way out of a dilemma in which [your company] has placed itself and my clients. I hope [your company] will have the good sense to avail itself of that way out and do the correct and honorable thing here.

I look forward to hearing your response, and hope I can look forward to working cooperatively with [your company] and [trial counsel] to resolve this matter sensibly along the lines I have proposed. Nothing in this letter should be interpreted, however, as a waiver of any rights my clients have at law or in equity.

In the meantime, I am by copy of this letter informing [your company's] selected counsel that I wish to receive copies of all future correspondence and pleadings in this matter, so that I can effectively monitor the proceedings and assist my clients in my capacity as their personal counsel. This will also confirm that, at my request, plaintiffs' counsel has agreed, for the time being, to defer the taking of the debtor's exam that he demanded in his letter of September 20, 1995, a copy of which is enclosed. (Exhibit N).

Thank you for your attention.

I am a firm believer in pulling out all of the stops in demand letters to insurers. That was what I did here, because doing any less would not accomplish the goal of getting my clients out from under the terrible weight of the judgment about to enter against them. I wanted the insurance company to sit up, take notice, assign the case to outside counsel, and give me someone to negotiate with to secure the authority I needed to implement the strategy I had in mind. Because everything my clients had was only a drop in the bucket of this verdict, I wanted to accomplish one of two things: Either I would secure authority to offer the plaintiffs enough of the insurance company's money to settle this case, or I would exchange my clients' cause of action against their insurer for wrongful refusal to settle for a covenant not to execute against them. Or, perhaps, some combination of the two.

Uncertainty and the delays inherent in the legal process would be my allies. My goal was to have my clients extricated completely from this case long before any appeal could be decided. All settlements are the product of uncertainty, and the trial court's rulings supplied that ingredient in abundance.

I did not control events, because I was merely the insureds' personal counsel, but I was determined to control what events I could. Before I could put my plan in motion, however, and within days after the demand letter was sent, the insurer unilaterally directed trial counsel to tender its policy limits, with interest, to plaintiffs, an action I learned of only after he had done so. I was hot—this action represented yet another instance, I feared, of factor 10 under *Commercial Union,* for the reasons explained within.

I am a firm believer in pulling out all of the stops in demand letters to insurers...because doing any less would not accomplish the goal of getting my clients out from under the terrible weight of the judgment about to enter against them.

At the same time, trial counsel was preparing post-trial motions for j.n.o.v., new trial and remittitur, which I asked to review and comment upon, because it was essential that plaintiffs' counsel perceive them as posing a credible threat to the verdict he had obtained if there was to be any hope of a negotiated settlement.

Meanwhile, it was time to speak further with plaintiffs' counsel and begin the process of exploring the possibility of settlement. I did so with the permission of the new outside counsel, whom the insurance company had retained in response to my demand letter. Working in cooperation

with trial counsel, the new outside counsel also paid me the compliment of asking me to assist in preparing the post-trial motions and brief. (With my clients' consent, I agreed to do so, despite my recognition that my participation could help insulate the insurer from any claim that it had mishandled the post-trial phase. Out of concern for the expense that work would entail for my clients, however, my assistance was conditioned on the insurance company's paying my fees for time spent on that effort, to which the insurer agreed, and to which my clients also consented after full disclosure to them of this unique arrangement).

Meanwhile, not only had the insurer's outside counsel approved of my proposal to seek settlement in discussions with the plaintiffs' counsel, he had secured authorization from the insurer to grant me $200,000 worth of authority, including what already had been tendered and paid. It was clear from the cooperation I was receiving that outside counsel had brought factor 11 under *Commercial Union* to the insurer's attention.[2]

I called plaintiffs' counsel and outlined to him the same proposal described in the demand letter to the insurer. Plaintiffs' counsel, to his credit, had read carefully the same cases I relied on, and brought to my attention the cursed footnote in Justice Levin's dissent in *Frankenmuth*, 433 Mich at 565 n 28.[3] It is, without a doubt, the most troublesome footnote Justice Levin ever wrote, which I say with all the respect due one of Michigan's greatest jurists. The whole purpose, it seems to me, of the rule in *Stockdale*, of which the rule ultimately adopted in *Frankenmuth* is but a counterpart, is to provide a means of establishing the amount of an insurer's liability *without* requiring the insured actually to declare bankruptcy. By limiting the amount recoverable to a sum equal to the insured's nonexempt assets, the Court sought to make it unnecessary for the insured actually to declare, and incur the expense of, bankruptcy.

The rule in *Stockdale* called for *one* assessment, *as if* the insured had declared bankruptcy, but *without* requiring the insured to actually do so. This is so because, were the insured actually to declare bankruptcy and secure a discharge (which would be available in this case, because the claim was not based on intentional or wilful misconduct), *no further collection of the debt would be possible*. Therefore, it seems to me, the same should be true under the *Stockdale/Frankenmuth* approach, with the salutary effect that the insured is actually to spare declaring bankruptcy.

Even though it is inconsistent with the "hypothetical bankruptcy" measure of damages *Stockdale* prescribes, I have no quarrel with including the insured's hypothetical future income in determining net worth—that would enhance the total recovery. But Justice Levin's approach, which can be read as calling for *successive hearings* over the course of the insured's "measuring life" on the current state of his or her finances, strikes me as both unwieldy and unwise. It also complicates the problem of arriving at a settlement figure: The plaintiffs' counsel can always argue (as he did in this case) that the insured might win the lottery or inherit a fortune from a rich uncle. On the other hand, if settlements are the children of uncertainty, this footnote certainly contributed a good measure of it to the cause.

In any case, plaintiffs' counsel made excellent use of footnote 28, which, he believed, in yet another possible interpretation, suggested that the rule in *Frankenmuth* contemplates an initial hearing to determine the insured's collectibility. This would include a determination of both the insured's *present* ability to pay (*i.e.*, nonexempt assets *currently available* at the time of the hearing) *and* of the insured's *future prospects* (using expert testimony to predict future earnings, and allowing the assessment of other future prospects, such as inheritance), with the total amount determined at such a hearing to be payable *immediately*, but with the possibility of additional future hearings and awards—apparently throughout the insured's lifetime—if, as a result of future good fortune, the insured actually comes into more than the amount found collectible at the original hearing. In other words, plaintiffs' counsel made use of the same uncertainty principle that I hoped to use to encourage settlement to increase the hypothetical amount of that settlement. If his interpretation of the procedure described in Footnote 28 was the law, however, I feared that settlement at any compromise figure would be infinitely more complicated.

After our initial discussions and an exchange of correspondence highlighting our different interpretations of *Frankenmuth*, I wrote to counsel for plaintiffs to summarize the uncertainties that, I believed, warranted consideration of a settlement in the amount the insurer had authorized me to offer:

- The verdict was remarkably unsupported by any proofs of loss at trial, and exceeded the mediation award (after discovery had been completed) by a factor of 30, suggesting at least some possibility of remittitur, or reduction or reversal on appeal;
- A possible double (or overlapping) recovery by the decedent's mother, whose claim was unsupported by any showing that she sustained any physical injury; and
- The strong possibility that the trial court's ruling on the RLUA's applicability was incorrect (although I also had to acknowledge that, because trial counsel had elected not to request an instruction under the RLUA—owing to the trial court's pretrial ruling that it did not apply—at least some question existed whether that issue was preserved for appeal).

Indeed, uncertainties abounded, and they continued to multiply. Plaintiffs' counsel was not persuaded that a second policy limit did not apply to the mother's separate claim (*i.e.*, he did not agree that it was merely a derivative claim, but viewed it as a separate occurrence for which a second recovery was possible under the policy up to the policy amount). So, he did not regard the $200,000 that I had authority to offer as any more than could be recovered under the policy itself. He also recognized (as I did) that the Court might very well be willing to revisit (or, worse, confirm his interpretation of) the *Stockdale/Frankenmuth* rule limiting recovery to the amount of the insured's nonexempt assets.

Finally, plaintiffs' counsel injected a new wrinkle—and a new element of uncertainty—by arguing, in opposition to the motion for j.n.o.v., new trial or remittitur, and in opposition to a motion to stay proceedings pending disposition of that motion, that my clients' right to appeal had been extinguished by the insurer's "voluntary" payment of its policy limits, with interest. He reasoned that such a payment constituted an acknowledgment of the validity of the judgment, *thereby rendering any appeal moot!*[4] Needless to say, this prompted yet another round of frantic research and briefing.

Meanwhile, counsel for the insurer was careful to respond, point by point, to the *Commercial Union* factors addressed in the

demand letter to the insurer, outlining all of the reasons for concluding that the insurer had behaved reasonably, particularly given the *Commercial Union* Court's recognition that "the conduct under scrutiny must be considered in light of the circumstances existing at the time."

This was not going to be easy. Nevertheless, I arranged for a meeting at my office of counsel for the plaintiffs and counsel for the insurer to discuss in detail the possibility of devising a settlement (either partial or complete) that would be acceptable to all and that would extricate my clients from further exposure to liability. At the meeting I provided detailed information about my clients' assets, income, and future prospects. It was my hope that, through a combination of: using some or all of the authority the insurer had extended; a covenant not to execute; and an assignment to plaintiffs of my clients' rights under the policy (*i.e.*, any "bad faith" claim they might have), I could persuade plaintiffs and the insurer to, in effect, "let my people go" and agree to sort out between themselves whether any additional amounts were recoverable.

The only leverage I had—the threat of bankruptcy—was a two-edged (or perhaps three-edged) sword: On one hand, I could deprive plaintiffs of any recovery beyond my clients' nonexempt assets not subject to prior liens, but obviously that would mean the loss to my clients of everything they had accumulated in working lives that had not so many years left in which to accumulate more. Moreover, arguably, declaring bankruptcy would work to the insurer's *advantage*, because any bad faith claim that my clients held would be lost to them in bankruptcy, and probably not pursued vigorously unless it were acquired by plaintiffs, as in *Rutter v King, supra*. It was of value to my clients only if I could use it as a bargaining chip to *avoid* the need to go through bankruptcy (or, under plaintiffs' counsel's interpretation of *Frankenmuth*, the years of litigation and expense that establishing and enforcing a bad faith claim would entail)!

Finally, because the net worth rule establishes a ceiling on the recovery for bad faith, owing to the "commercial contract" damage rule adopted in *Kewin v Massachusetts Mutual*, 409 Mich 401; 295 NW2d 50 (1980), attorney fees would be deducted from my clients' net worth recovery in a bad faith action unless a Michigan state court could be persuaded to apply the rule in *Murphy v Cincinnati Insurance Co, supra*. Thus, even assuming that an attorney could be found who would be willing to gamble on a contingent fee arrangement or the possibility of a *Murphy* fee award, the ceiling on recovery probably diminished the bad faith claim's value by the transactional costs involved, especially if the claim emerged as an asset held by plaintiffs out of a bankruptcy that would entail additional expense for all concerned and leave my clients with little more than a clean slate. These concerns I kept to myself, however.

At the conclusion of our meeting, I detected at least some interest on the part of both plaintiffs' counsel and the insurer's counsel in pursuing the possibility of such an arrangement. Plaintiffs' counsel wanted additional information about my clients' assets and future financial prospects, which we agreed to and did provide. The insurer extended slightly more authority, justifying its decision to do so on the at least arguable proposition that there were two occurrences under the policy, rather than a single occurrence (the child's death) from which the mother's claim derived.

Still, it appeared unlikely that plaintiffs would be willing to let my clients go, and plaintiffs' counsel appeared to regard it as to his client's advantage to keep my clients under the heavy cloud of the judgment against them, so that their plight could be used as a lever in bargaining with both my clients and the insurer.

What caused the change in position I cannot be certain, but within a few weeks, after further discussions, plaintiffs' counsel was willing at least to consider the terms of an agreement calling for a substantial payment (to be funded by the insurer, using the authority it had granted), coupled with an assignment to plaintiffs of any claim that my clients had against the insurer for bad faith, and otherwise releasing the insurer from any other claims. Was it the threat of declaring bankruptcy? Was it the strength of the arguments advanced in support of the motion for new trial, j.n.o.v., and remittitur, or the weakness of the opinion denying those motions, which was issued only a few days before the partial settlement and release was executed? Was it the trial court's grant of a stay and its rejection of plaintiffs' argument that the insurer's partial satisfaction of the judgment resulted in waiver of my clients' right to appeal? Was it the impatience of plaintiffs themselves to secure additional funds? Was it plaintiffs' counsel's belief that, by securing an assignment of any and all claims that my clients possessed, and by securing their agreement to cooperate in bringing any claim for malpractice that they might have (but which they could not assign under Michigan law),[5] he could multiply the recovery the jury had bestowed on his clients? Was it a concern that the appeal itself might succeed (a concern I believed justified), and that it was best to clear the field and empower plaintiffs to negotiate exclusively with the insurer for an advantageous settlement while the appeal was pending? Was it plaintiffs' counsel's desire to rid himself of me and my endless meddling, which must have left him feeling as if he were being pecked to death by a duck ? (I like to think so.)

I am uncertain.

What I do know is that my clients were the beneficiaries of a tripartite agreement, executed 12 days after denial of the motions for new trial, j.n.o.v., and remittitur. Under the agreement, in exchange for a payment in a substantial amount, funded by the insurer, and my clients' assignment to plaintiffs of any and all claims that they might possess against their insurer (accompanied by their agreement to cooperate by providing truthful testimony in pursuing such claims), my clients were insulated from all further liability by an all-encompassing covenant not to sue, execute, levy, or otherwise enforce the judgment against them.

I suspect that the equanimity with which my clients received the news that, at last, a breakthrough had been achieved, and that they were free from the threat of bankruptcy, with their assets intact (and with the lion's share of my fees having been paid

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by the insurer), is attributable to their abiding and deep-seated belief, amounting to a moral certainty, that they had done nothing wrong, and that, therefore, this result was nothing more than their due—and I understand that. They are not lawyers. They do not know how much thought, lying awake at night blinking in the dark, research, agonizing, swallowed anger, frustration, disappointment, posturing, threats (made and given), and sheer anxiety at the prospect of what would befall them if I failed were involved in the months of negotiations that culminated in this agreement. That is, at once, one of the joys and frustrations of being an attorney: Often, when a good result is achieved, only another attorney can really appreciate what has been accomplished.

I will say this, however: I was no cleverer than, and just as lucky as, the other attorneys with whom I labored and negotiated to find a way to resolve this case. Even when their tenacity aggravated me as much as mine did them, I counted it a privilege to be working with them, because they were professionals who took seriously the overriding goal of achieving the best possible outcome for their clients. They understood the uncertainty principle and, like me, used it to their clients' advantage. They recognized, as the best attorneys always do, that some things are too important to be left to judges.

As a postscript, I later learned that a final compromise was achieved, and counsel were good enough to send me a copy of the satisfaction that was entered when the underlying action was dismissed, nearly a year after the agreement that relieved my clients of any further liability. In my estimation, each side did an excellent job for their clients; serious money moved, but significantly less than the judgment.

In the end, I suppose, that's what most attorneys do: they move money (or prevent it from moving), with the justification for their existence—and the cost of their services—being measured by how much money does or does not move. In this case, everyone involved was entitled to a little "hero" badge, even if our respective clients, so bruised and brutalized by the events that gave rise to the litigation, and by the awesome, impersonal, inexorable machinery of the law, came away from the experience with nothing more than relief that it was over, and thus had no

Lawyers and Judges Alcoholics Anonymous and Narcotics Anonymous MEETING DIRECTORY

The following list of meetings reflects the latest information about lawyers and judges AA and NA meetings. Those meetings marked with "*" are meetings that have been designated for lawyers, judges and law students only. All other meetings are attended primarily by lawyers, judges and law students, but also are attended by others seeking recovery. In addition, we have listed "Suggested Meetings" which others in recovery have recommended as being good meetings for those in the legal profession.

Monday 12:00 PM
St. Joseph Hospital East
Bailey Room A
Parkview and North Streets
Mt. Clemens

Monday 12:15 PM
St. Philip's Center
112 Capital Ave. N.E.
Battle Creek

Monday 12:30 PM
Detroit Metropolitan Bar Association
21st Floor, Buhl Bldg.
Detroit

Monday 7:00 PM
Prince of Peace Lutheran Church
19100 Ford Rd.
(Just west of Southfield Freeway)
Dearborn
(NA meeting also
held concurrently)

Narcotics Anonymous Meetings

Monday 7:00 PM
Prince of Peace Lutheran Church
19100 Ford Rd.
(Just west of Southfield Freeway)
Dearborn
(AA meeting also held concurrently)

For other AA or NA meetings, see listings in your local phone book or call:

Lawyers and Judges Assistance Program
1-800-996-5522

Wednesday 12:00 PM
First Presbyterian Church
Conference Room—Lower Level
321 W. South St., Kalamazoo

***Wednesday 6:30 PM**
Kirk In The Hills Presbyterian Church
1340 W. Long Lake Rd.
(½ mile west of Telegraph)
Bloomfield Hills

Wednesday 6:00 PM
Unitarian Church
2474 S. Ballenger Rd.
Lower Level, Room 2C
(1 block south of Miller Rd.)
Flint

Thursday 7:00 PM
Central Methodist Church
2nd Floor
Corner of Capitol and Ottawa Streets
Lansing

Suggested Meetings

Wednesday 12:00 PM
Cooley Law School
Blair Room (1st Floor)
217 S. Capitol
Lansing

Thursday 8:00 PM
(also Sunday 8:00 PM)
Manresa Stag
1390 Quarton Rd.
Bloomfield Hills

Friday 8:00 PM
Rochester Presbyterian Church
1385 S. Adams
(South of Avon Rd.)
Rochester

impulse to pin medals on our chests. That's perfectly all right: That's what we're paid for, and that's why, in the end, doing a good job for a client must be its own reward. ■

Footnotes

1. By the time this is published, he will be the Hon. Edwin M. Bladen, as he recently accepted an appointment as an administrative law judge with the United States Coast Guard.
2. Indeed, the insurer's outside counsel were so cooperative—within understandable limits—that it occurred to me to wonder whether the insurer's helpful post-judgment conduct could render the bad faith claim valueless. If a covenant not to execute were obtained in exchange for an assignment of any bad faith claim and additional consideration provided by the insurer, could the insurer argue that the bad faith claim had no value because the insurer had acted effectively to protect the insured from the consequences of the excess judgment brought about by any bad faith in the insurer's pre-judgment handling of the case? On balance, I think not, not only because *Rutter v King*, 57 Mich App 152; 226 NW2d 79 (1974), and, indeed, *Stockdale*, involved claims obtained from the insured by assignment (albeit an assignment in bankruptcy in *Rutter*), but also because such a rule would operate to destroy the insured's only means of extricating him or herself from the consequences of an insurer's bad faith short of actually undergoing those consequences. Although the life of the law is not logic, it nevertheless seemed to me improbable that an insured's efforts to mitigate damage, using the covenant/assignment method, would produce such a counter-intuitive result. At most, it seemed to me, the insurer's post-judgment (and post-bad faith) conduct might be raised later, in any bad faith action, as a mitigating factor, with credit to be given against the insurer's ultimate liability for any contribution it made to assist the insured. That seemed consistent with the requirement, under factor 11 of *Commercial Union*, that the insurer must refuse to *settle* within policy limits after an excess judgment when an appeal is doubtful: An assignment/covenant arrangement is not a settlement, after all, but merely a protective measure that mitigates the harm to the insured and prevents any further harm from occurring. In any case, I did not share my musings on this question with counsel for plaintiffs or the insurer, regarding this as a question to which the answer should best be left uncertain.
3. Footnote 28 reads: The Court should, in determining Keeley's prospect of attaining in the future additional assets, consider his educational achievement and plans for future education, his skills, present and prospective, and the job opportunities that might be available to him.

   I would prefer to direct entry of a judgment declaring that Frankenmuth *is subject to liability* (not that it is liable) for the $600,000 excess plus interest as it accrues, but would not require Frankenmuth to pay any amount in respect to that judgment unless and until and then only to the extent Boone can establish that Keeley is collectable *[sic]*.

   As and when Keeley acquires assets, greater income, inheritance, whatever, Boone could seek a declaration requiring Frankenmuth to pay an equivalent amount. The judgment against Frankenmuth would substitute for the judgment against Keeley, so that Keeley's credit would no longer be adversely affected. The burden thus imposed on Boone, the injured person, would be no greater than in any case where there is inadequate insurance—he could only recover to the extent that he could find attachable or garnishable assets.

   Boone would be better off because he need not actually attach or garnish, and there should be a minimum of judicial proceedings. Such a judgment should not be subject to any statute of limitations. There would be no possibility of bankruptcy discharge of Keeley's debt.
4. On this point, which may sound absurd on its face, and which, fortunately, and I believe correctly, the trial court rejected, the reader is invited to examine the rather ambiguous line of Michigan cases addressing this issue. *See, Watson v Kane*, 31 Mich 61 (1875) (payment by garnishee defendant was not an objection to pursuing a writ of error because payment upon execution by a garnishor cannot be treated as "voluntary"), *People v Leavitt*, 41 Mich 470; 2 NW 812 (1879) (payment of a fine of $5 for violation of an ordinance requiring snow removal resulted in the defendant's having "voluntarily submitted to the conviction and discharged the entire penalty without the award of process," and thus it was unnecessary to address the merits of the appeal, because nothing remained "on which the judgment of the Court can act effectively and work advantage to the plaintiff"), *Horowitz v Rott*, 235 Mich 369; 209 NW 131 (1926) (defendant who appealed from an award of a writ of restitution in a summary proceeding after paying the amount found due to stay the operation of the writ of restitution was not entitled to appeal; because a judgment that has been satisfied "no longer exists," there was "nothing upon which a writ of error can operate") (this decision is very questionable, particularly in light of MCL 600.1475; MSA 27A.1475, which, rather than purporting to *confer jurisdiction* upon the Court, appears properly to be interpreted as creating a *remedy* upon which an appellate decree could *operate*), *Clairview Park Improvement Co v Detroit & Lake St. Clair Ry*, 164 Mich 74; 129 NW 353 (1910) (this is a curious case in which, apparently, the Court regarded plaintiff's insistence that the defendant satisfy the judgment as resulting in a waiver of the *plaintiff's* right to appeal), *Drolshagen v Drolshagen*, 230 Mich 444; 202 NW 959 (1925) (because defendant paid the judgment against it, the Court said that it could hear only defendant's argument in opposition to plaintiff's appeal seeking different relief—an injunction—but could not hear defendant's argument on cross-appeal because defendant's satisfaction of the judgment "placed it beyond our power to grant plaintiff less than defendant has paid" or grant other relief to defendant), *Tong v Wayne Circuit Judge*, 231 Mich 356; 204 NW 108 (1925) (payment of the entire amount of the judgment to the clerk of the Court, without having obtained a stay of proceedings, resulted in a waiver of the right to appeal), *Industrial Lease-Back Corp v Township of Romulus*, 23 Mich App 449, 451-452; 178 NW2d 819 (1970) (Justice—then Judge—Levin strikes again, suggesting that, had the Township issued building permits in response to the trial court's injunction under a threat of contempt or other execution on the judgment, rather than simply obeying the judgment itself, the result might have been different, but that, because the compulsion of the judgment was not "so overwhelming" that the defendant Township was obliged to issue the permits before it could file a claim of appeal and move to stay proceedings, the issuance of the permits was deemed voluntary, extinguishing the right to appeal). Especially now that a stay is not automatically available upon filing a supersedeas bond, as was apparently the case in the past, and a stay of proceedings is at least arguably discretionary under MCR 7.209, this is an area of uncertainty that the Court should address by promulgating an appropriate rule, so that litigants confronted with an unstayed order are not deemed to have abandoned their right to appeal if they obey the order without first being subjected to punishment for contempt, or execution, either of which can produce extremely disruptive consequences.
5. Although Michigan permits an assignment of *proceeds* from a malpractice action, Weston v Dowty, 163 Mich App 238; 414 NW2d 165 (1987), a malpractice claim is not assignable, owing to the personal nature of the attorney-client relationship and public policy considerations, such as precluding claims that could promote champerty and force attorneys to defend themselves against strangers. *Joos v Drilloch*, 127 Mich App 99; 338 NW2d 736 (1983).