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Keep Your Friends Close And Your Enemies Closer: Assigning Your Bad Faith Claim In Bet The Company Litigation

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Commercial general liability (CGL) insurance policies are popular in the marketplace, as they protect policyholders of every stripe from the ever-present risk of liability for bodily injury and property damage. Of at least equal importance is the insurance company's duty to defend the policyholder, a clause for which is found in nearly every CGL policy. That is, the insurance company is obligated to supply and pay for the policyholder's defense against lawsuits alleging such liability – at the insurance company's sole expense outside of policy limits. In essence, the insurer's duty to defend amounts to litigation insurance, in addition to liability insurance. Without the resources of an insurance company to control the litigation and pay the defense bills, many policyholders would be unable to defend themselves, especially in complex and expensive cases with potential liability on a "bet-the-house" scale. Courts have recognized the role of an insurer-provided defense in obtaining just results in litigation, and the potentially catastrophic results that can result from an insurance company wrongfully pulling that defense. Accordingly, they have fashioned rules that give the policyholder flexibility to inexpensively resolve the litigation without sacrificing the prospect of a covered outcome – which is what the plaintiff usually seeks. For example, when an insurance company refuses to defend the policyholder, under certain states' laws, such as California, the policyholder may stipulate to an adverse judgment and assign its rights to coverage in exchange for a covenant not to execute any judgment against the policyholder's assets. *See, e.g.*, *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 728. Here is a hypothetical. Under California law a plaintiff may be able to sue the insurance company as if he or she were the policyholder seeking coverage of the judgment. Because the plaintiff is standing in the policyholder's shoes in such an example, he or she may assert whatever causes of action the policyholder would have, including breach of contract or bad faith. In addition, the plaintiff, in such an example, should be entitled to an evidentiary presumption, in the subsequent action against the insurance company, as to the insured's liability for the underlying claim, and the amount of such liability. When the law provides for it, if the insured can clearly articulate the wrongfulness of the insurance company's refusal to defend, the insured might be able to broker a settlement with the plaintiff of which a major component is the assignment of its bad faith claim against its insurance company. However, it is important to note that when an insurance company opts to defend its insured, there could be potential pitfalls for insureds to avoid in attempting to assign rights to pursue coverage against the insurance carrier and to cap the insured's liability to a third party. Under California law, "the covenant of good faith and

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fair dealing, which is implied in the contract between an insurance company and the insured, requires that the insurer take reasonable action to settle a claim within the policy limits when there is a substantial likelihood of recovery against the insured of an amount in excess of policy limits should the claimant proceed to trial." *Larraburu Bros. Inc. v. Royal Indem. Co.* "The gravamen of this species of insurer bad faith lies in exposing the insured to judgment for more money than the insurer is bound to indemnify, and accordingly, case law requires a *judgment in excess of policy limits* as an element of the claim." *J.B. Aquerre, Inc. v. American Guarantee & Liability Ins. Co.* Accordingly, if an insured assigns its rights against a *defending* insurer for bad faith premised on its failure to effectuate a within-limits settlement, the subsequent third-party action against the insurance company may fail for want of an *actual* judgment in excess of the policy's limits. But, declining a reasonable, within limits settlement offer is not the only insurer conduct respecting settlement that can give rise to bad faith liability. An insurer could be held liable for unreasonably coercing an insured to contribute to a settlement. By definition, this type of bad faith should not be seen as dependent on a judgment in excess of the policy's limits and, therefore, an insured could effectuate an assignment of this type of bad faith claim to avoid having to, in fact, pay the extorted sum of money that it previously agreed to contribute to settlement. Summarily, assignment of one's rights against an insurance company in furtherance of a low-cost settlement can be a complicated process that requires buy-in from a plaintiff. Several nuanced issues, all of which could not be addressed here, should be accounted for in executing this legal maneuver.