

# Indiana Law Review

Volume 50

2017

Number 3

## ARTICLES

### A NEW TWIST ON REMEDIES: JUDICIAL ASSIGNMENT OF BAD FAITH CLAIMS

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*“For every right there is a remedy; where there is no remedy, there is no right.”<sup>1</sup>*

#### INTRODUCTION

Consider this scenario. An insured tortfeasor is sued for damages by a third party alleging she sustained damages as a result of the insured’s tortious conduct. The insurer fails to properly adjust the claim or meet its obligations to protect the insured and a judgment in excess of the policy results because of the insurer’s bad faith in handling the claim against its insured. The insured seeks to protect his assets and files a claim against his insurer for bad faith handling of the claim. The injured third party recovers the excess he is due from the insured who, in turn, may recover from the insurer if it acted in bad faith.<sup>2</sup>

Consider this slightly different scenario. An insured tortfeasor is sued for damages by a third party alleging she sustained damages as a result of the insured’s tortious conduct. The insurer fails to properly adjust the claim or meet its obligations to protect the insured and a judgment in excess of the policy results because of the insurer’s bad faith in handling the claim against its insured. The

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1. Roman legal maxim.

2. Evidencing the importance of allowing a remedy for bad faith practices by insurers, many states allow direct actions by insureds against their insurers for failure to treat the insureds with good faith and fair dealing; in fact, such claims are increasing. *See* Constance A. Anastopoulos, *Bad Faith: Building a House of Straw, Sticks, or Bricks*, 42 U. MEM. L. REV. 687, 704-06 (2012); *see also* Douglas R. Richmond, *An Overview of Insurance Bad Faith Law and Litigation*, 25 SETON HALL L. REV. 74, 75 (1994); Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Statutes: Restoring the Good Faith in Bad Faith*, 58 AM. U. L. REV. 1477, 1528 (2009) (explaining that despite incentives, the courts have seen an “increase in the number and size of [bad faith] claims”).

insured, however, is “judgment proof” with little or no assets to satisfy the judgment in excess of the insurance coverage.<sup>3</sup> The injured third party cannot recover the excess she is due because the insured has no assets. Left without full remedy because of the insurance company’s actions, the injured third party unfairly suffers.

Although it is true that the insured might assign his claim for bad faith to the injured party thereby allowing the injured party to proceed against the insurer for its bad faith, in order for an assignment to occur, the insured tortfeasor must be willing to make the assignment.<sup>4</sup>

So, what remedy does a third party have when the tortfeasor is unwilling or unavailable to consent to the assignment? There are situations where the tortfeasor cannot or will not agree to assign these rights to the third party that would permit the third party to bring a bad faith action against an insurer. Additionally, when assignment is permitted by law, there are often parameters and requirements imposed before the assignment is even obtainable. Does the assignment require the injured third party to first proceed against the tortfeasor? Does the potential future assignment require the plaintiff to obtain a judgment in excess of the policy limits before the assignment is available?

Questions abound, but judicial assignment of a bad faith claim may provide a remedy to the injured third party when the tortfeasor is unwilling or unable to assign his or her rights and claims against an insurer. Thus, by permitting judicial assignment of the bad faith claim, the third party can obtain a remedy to satisfy the right to enforce a judgment. Before addressing assignment, it is important to first understand the current state of bad faith claims in insurance law.

Part I of this Article discusses insurance claims generally, and provides a background for the evolution of bad faith claims. It also details the circumstances under which bad faith claims arise, the different types of claims, and parties who may bring them.

Part II describes assignment generally and then considers assignment in the context of the bad faith claim. Additionally, this Article distinguishes the bad faith action against the insurer from the potential malpractice claim against defense counsel who is hired by the insurer in the underlying tort action to defend the insured. Further, it identifies some of the states that permit assignment of an insured’s claim against the insurer to a third party through either statutory provisions or common law and discusses the differences in these enabling provisions. Also, the Article distinguishes the claims that exist to a third party from those of the first party in the bad faith context, given that bad faith arises out of the insurance contract.

Part III describes judicial assignment of debtor property and then reviews the

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3. *See, e.g.,* McNally v. Nationwide Ins. Co., 815 F.2d 254, 257 (3d Cir. 1987).

4. The idea of allowing a third-party claimant who is injured by an insured tortfeasor to step into the shoes of the insured in order to bring the insured’s potential claims against his or her insurer as an avenue of recovery, referred to as an assignment, is not new. In fact, the concept of assignment can be traced back to as early as 1933. *See* Tyger River Pine Co. v. Md. Cas. Co., 170 S.E. 346, 348 (S.C. 1933).

states that permit assignment, which can then be divided into those that have statutory provisions addressing creditor claims and those that do not. By closely examining the language of judgment creditor statutory provisions, it can be determined if a state that permits assignment can then utilize judicial assignment to provide a remedy to those third parties who have been harmed by insured tortfeasors but cannot obtain an assignment due to the absence or unwillingness of the tortfeasor. In order to fully examine the nuances of judicial assignment of bad faith claims, this Article concludes by considering how the assignment would proceed under the creditor statutory provisions.

#### I. UNDERSTANDING A BAD FAITH CLAIM

Bad faith claims continue to grow as an area of litigation in the United States.<sup>5</sup> At the heart of every bad faith claim is an insurer's duty to act in good faith and fair dealing toward its insureds.<sup>6</sup> It is basic contract law that every contract, including those for insurance, inherently provides an obligation for the parties to the contract to treat each other with good faith and fair dealing.<sup>7</sup> This is also true when an insurer deals with its own insured, when that insured is making a claim for reimbursement for a loss, or when a third party seeks compensation from the insured for a wrong committed by the insured. In order to consider the concept of assignment of the bad faith claim, it is instructive to understand the claim itself, how it arises, and how our courts treat it.

##### *A. The Obligation of Good Faith and Fair Dealing*

“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”<sup>8</sup> As early as 1882, it was said that the rule of good faith and fair dealing “should enter into and form a part of every insurance contract.”<sup>9</sup> When reviewing contracts, courts contemplate the obligations of both parties to the contract. Both parties are prohibited from doing anything to impair the other party's right to benefit from the contract.<sup>10</sup> At the heart of every claim involving insurance is the underlying contract and the duties that flow from the contract. When an insurer breaches its duty of good faith and fair dealing, it commits bad faith.<sup>11</sup> However, there is not a clear definition of

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5. Schwartz & Appel, *supra* note 2, at 1478; *see also* Douglas R. Richmond, *Bad Insurance Bad Faith Law*, 39 TORT TRIAL & INS. PRAC. L.J. 1, 1-2 (2003).

6. *See, e.g.*, *Genusa v. Robert*, 720 So. 2d 166, 172 (La. Ct. App. 1998).

7. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

8. *Id.*

9. *Germania Ins. Co. of N.Y. v. Rudwig & Co.*, 80 Ky. 223, 235 (1882).

10. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) (“Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.”).

11. *See, e.g.*, *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 50-51 (Tex. 1997) (“An insurer breaches its duty of good faith and fair dealing when ‘the insurer had no reasonable basis for denying or delaying payment of [a] claim, and [the insurer] knew or should have known that fact.’”)

what actions or inactions constitute bad faith. How does one determine when and if the insurer has breached its duty of good faith and fair dealing?

In the insurance context, the doctrine of bad faith first emerged in third-party liability cases.<sup>12</sup> An insurer may be liable for failure to settle or compromise a claim if the insurer fails to meet its duty to act in good faith or not to act in bad faith.<sup>13</sup> Courts hold that an insurer's duty to act in good faith means that an insurer must exercise the care and diligence of ordinarily prudent persons in the investigation and adjustment of claims.<sup>14</sup> These early rulings tended to be based on contract theories of implied covenants of good faith and fair dealing rather than tort theories of negligence.<sup>15</sup> However, some courts define bad faith as "an actual or implied awareness of the absence of a *reasonable* basis for denying benefits of the [insurance] policy."<sup>16</sup> Thus, an insurer's incorrect assessment or unfair action may not always give rise to a bad faith cause of action. This means that the insurer will not be liable for bad faith so long as its actions or inactions were reasonable. It is only when the insurer acts in a way that rises to the level of not acting in good faith that bad faith occurs. However, it is clear from case law that the definition of bad faith continues to evolve.<sup>17</sup> It is important to understand how bad faith claims may arise in practice before considering the availability of the claim as a possible satisfaction of a debtor judgment. Therefore, it is helpful to understand the context that gives rise to a bad faith action.

### *B. First-party and Third-party Claims*

Bad faith claims can be divided into two categories based upon the classification of the plaintiff: first-party claims and third-party claims.<sup>18</sup> First-

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(internal citations omitted); *see also* *Badillo v. Mid Century Ins. Co.*, 121 P.3d 1080, 1093 (Okla. 2005).

12. *See Hilker v. W. Auto. Ins. Co.*, 235 N.W. 413, 414-15 (Wis. 1931) (finding automobile liability insurer's decision not to settle a third-party claim should be a good faith decision).

13. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985); *Cramer v. Ins. Exch. Agency*, 675 N.E.2d 897, 903 (Ill. 1996) ("This court has recognized that the insurer has a duty to act in good faith in responding to settlement offers.").

14. *Hilker*, 235 N.W. at 414 (noting in deciding whether to settle, the automobile liability insurer must "exercise . . . that degree of care and diligence which a man of ordinary care and prudence would exercise in the investigation and adjustment of claims").

15. *See generally id.*; *see also Cent. Glass Co. v. Hamburg-Bremen Fire Ins. Co.*, 63 So. 236 (La. 1913).

16. *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 324 (Nev. 2009) (quoting *Am. Excess Ins. Co. v. MGM*, 729 P.2d 1352, 1354-55 (Nev. 1986)) (emphasis added).

17. *See Anastopoulo*, *supra* note 2, at 691 ("As a result of numerous factors, the modern concept of bad faith is fluid, and no bright-line test exists to determine when an insurer's conduct constitutes bad faith. Further complicating the issue is the fact that there is no consensus among the states. Each state has its own body of law outlining the causes of action and the eligible parties.").

18. *See Gainsco Ins. Co. v. Amoco Prod. Co.*, 53 P.3d 1051, 1057-58 (Wyo. 2002) (citing *Herrig v. Herrig*, 844 P.2d 487, 490 (Wyo. 1992)).

party claimants receive benefits because they are in privity of contract with the insurer, meaning they have a contractual relationship with the insurer.<sup>19</sup> Third-party claimants generally have no direct recourse against an insurer because they are not in privity of contract with the insurer or they do not have a contractual relationship with the insurer.<sup>20</sup> Since the duty of good faith flows from the contractual relationship, the third-party claimant is usually left with suing the insured tortfeasor directly, and not the insurer.<sup>21</sup> However, in some situations, the third-party claimant may gain limited rights through an assignment agreement with the insured.<sup>22</sup> It is this assignment of a claim to the third party that forms the basis of a potential judicial assignment made by the court when the insured is unavailable or unwilling to make such an assignment.<sup>23</sup> The first question that must be addressed is how does an assignment agreement work and when is it available to a third party.

First-party claimants are insureds who enter the insurance contract to protect themselves against the risk of accidental or unavoidable loss.<sup>24</sup> The first-party insured submits its claim for payment under the provisions of the insurance contract for such losses.<sup>25</sup> Conversely, insurance companies are in business to maximize profits, either for the company itself or for their shareholders.<sup>26</sup> Insurance companies increase profits in two ways: cutting costs and generating income.<sup>27</sup> The simplest way for an insurer to cut costs is to decrease the number of claims paid. It is this conflict between an insurer's desire to decrease the number of claims paid and an insured's need to have claims paid fairly and promptly that often results in actions that give rise to bad faith claims by first-party insureds against their insurers. Often the questions at the heart of a bad faith action center around whether the insurer acted reasonably in handling the claim and in determining whether to pay the insured's claim so as to satisfy its duty of

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19. *Brethorst v. Allstate Prop. & Cas. Ins. Co.*, 798 N.W.2d 467, 480-82 (Wis. 2011) (addressing the necessity of contractual privity, explaining that a breach of contract by an insurer is a "fundamental prerequisite" for a first-party bad faith claim because a "first-party bad faith [claim] cannot exist without some wrongful denial of benefit under the insurance contract").

20. *See, e.g., Trancik v. USAA Ins. Co.*, 581 S.E.2d 858, 861 (S.C. Ct. App. 2003).

21. *See, e.g., Truestone, Inc. v. Travelers Ins. Co.*, 127 Cal. Rptr. 386, 389 (Ct. App. 1976).

22. *Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116, 119 (Colo. 2010) (en banc) ("[T]he insurer's duty of good faith and fair dealing extends only to its insured, not the third party. Therefore, the insured must make a formal assignment of its bad faith claims to the third party before the third party can assert such a claim directly against the insurer.").

23. *See, e.g., Progressive Express Ins. Co. v. Scoma*, 975 So. 2d 461, 465 (Fla. Dist. Ct. App. 2007).

24. *See, e.g., Trimper v. Nationwide Ins. Co.*, 540 F. Supp. 1188, 1193 (D.S.C. 1982); *Loudin v. Nat'l Liab. & Fire Ins. Co.*, 716 S.E.2d 696, 701 (W. Va. 2011).

25. *Trimper*, 540 F. Supp. at 1193.

26. *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 217 (1979) ("The manager of an insurance company is no different from the manager of any enterprise with the responsibility to minimize costs and maximize profits.").

27. *See id.* at 214.

good faith and fair dealing toward its insured.<sup>28</sup> That is not to say that the insurer's duty is to pay an insured the amount demanded in order to avoid a bad faith claim.<sup>29</sup> Rather, the insurer's duty is to act reasonably and in good faith toward its insured.<sup>30</sup>

The third-party claimant also factors into the conflict between insureds, who wish to have claims settled fairly and promptly, and insurers, who wish to protect profits. Since insurers have an interest in protecting the assets of their companies, shareholders, and policyholders and avoiding or minimizing payments on claims, there is pressure to deny, delay, or minimize these payments.<sup>31</sup> This not only includes claims made by their own first-party insureds, but also claims by and payments to third-party claimants who are injured by the insured tortfeasor. If a third party's claim for loss is denied or delayed, he has little recourse but to pursue tort actions against the first-party insured tortfeasor in hopes of obtaining a settlement or judgment that sufficiently compensates him for the injuries sustained.

Over time, as insurance claims increased and the tension between the needs of insureds and the desires of the insurers grew, cases began to emerge that dealt with insurers' breaches of their duties in the handling of claims.<sup>32</sup> A California case, *Gruenberg v. Aetna Insurance Co.*,<sup>33</sup> is recognized as one of the first cases to allow a first-party claim for bad faith by an insured against its insurer.<sup>34</sup> The insurer in the case denied the plaintiff's claim for loss covered by the policy on the basis that the insured was involved in the fire that destroyed his property.<sup>35</sup> *Gruenberg* was one of the first cases to find that in every insurance contract there is an implied covenant of good faith and fair dealing, and this duty applied equally whether the insurer is dealing with claims by third persons against the insured or with claims made by the insured him or herself seeking coverage for his or her own loss.<sup>36</sup>

After *Gruenberg*, another California case, *Comunale v. Traders & General Insurance Company*,<sup>37</sup> considered a third-party claim against an insured that resulted ultimately in a bad faith claim by the insured for the insurer's handling of the claim.<sup>38</sup> *Comunale* was important for its consideration of the excess judgment obtained by a third party against an insured.<sup>39</sup> In *Comunale*, the

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28. See, e.g., *Aecon Bldgs., Inc. v. Zurich N. Am.*, 572 F. Supp. 2d 1227, 1235-36 (W.D. Wash. 2008).

29. *Id.*

30. *Id.* at 1235.

31. See generally *Grp. Life & Health Ins. Co.*, 440 U.S. at 217.

32. See, e.g., *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032 (Cal. 1973).

33. *Id.*

34. *Id.*

35. *Id.* at 1034-35.

36. *Id.* at 1038.

37. 328 P.2d 198 (Cal. 1958).

38. *Id.*

39. See *id.*

plaintiffs received a judgment in excess of the insured's policy limits after the insurer failed to settle the claim.<sup>40</sup> Rather than attempt to collect the judgment against the insured, the plaintiffs obtained an assignment of the insured's rights against the insurer.<sup>41</sup> The court noted that the insurer failed to deal with its insured with good faith and fair dealing when the insurer wrongfully refused to defend the action and refused to accept the third-party plaintiffs' offer to settle within the policy limits.<sup>42</sup> As a result of the insurer's actions, the insured was exposed to a judgment in excess of the policy limits.<sup>43</sup> Importantly, the court held the insurer could be liable for the excess judgment due to its failure to settle the claim within the policy limits.<sup>44</sup> *Comunale* not only helped frame the duties of the insurer in handling the third-party claim against its insured, but also recognized the ability of the insured to assign its rights to the third party.<sup>45</sup> Additionally, the court held the insurer responsible for the excess judgment in addition to the potential liability in the bad faith action.<sup>46</sup> This resulted in two possible remedies for the plaintiff: (1) the excess judgment obtained in the underlying action; and (2) additional compensation for the bad faith action against the insurer in forcing the plaintiff to engage in litigation to obtain the excess judgment.<sup>47</sup> These cases were two of the earliest to establish how bad faith claims can arise in either the first-party or third-party context by defining what obligations an insurer has in dealing with its insured, whether that insured is making a claim for his own loss, or a third party is making a claim against the insured. The insurer owes the insured a duty of good faith and fair dealing, regardless of which type of claim is being made.<sup>48</sup> Once the courts began to outline the parameters of what duties constituted good faith, bad faith claims began to gain traction.<sup>49</sup>

Other states began to recognize the need for this type of claim to protect policyholders when insurers failed to satisfy contractual obligations.<sup>50</sup> The claims needed to provide the insured with a remedy in addition to the limited benefits of the contract that contract law provided. The status of bad faith claims evolved as states addressed the different types of claims available to insureds particularly in regard to their dealings with their insurers, as bad faith claims grew out of the

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40. *Id.* at 200.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 200-02.

45. *Id.* at 202.

46. *See id.* at 201-02.

47. *Id.* at 201.

48. *Id.* at 200-02; *Gruenberg v. Aetna Ins. Co.*, 510 P.2d 1032, 1038 (Cal. 1973).

49. *See, e.g.*, *Johansen v. Cal. State Auto. Ass'n Inter-Ins. Bureau*, 538 P.2d 744 (Cal. 1975).

50. *See, e.g.*, *Grand Sheet Metal Prods. Co. v. Prot. Mut. Ins. Co.*, 375 A.2d 428, 430 (Conn. Super. Ct. 1977); *see also* *Ledingham v. Blue Cross Plan for Hosp. Care of Hosp. Serv. Corp.*, 330 N.E.2d 540, 548-49 (Ill. App. Ct. 1975); *U.S. Fid. & Guar. Co. v. Peterson*, 540 P.2d 1070, 1071 (Nev. 1975).

contract and duties owed therein.<sup>51</sup>

However, a gap still remained for third-party plaintiffs who were not in privity of contract with the insurer and therefore had no right to bring a breach of contract claim or a bad faith action against an insurer. Further, there were no protections for the third party who obtained an excess judgment against a first-party insured but who could not collect that judgment because the first-party insured tortfeasor was either unavailable, due to the fact that the tortfeasor had left the jurisdiction and could not be found, or was unable to pay the judgment because he did not have sufficient means to do so.<sup>52</sup> Courts and legislatures were left to develop a means for a remedy for the third party in such a situation.<sup>53</sup> In other words, when a third party has gone through the process of obtaining the excess judgment, what means are available to collect that judgment? In order to address this inequity, the concept of assignment was developed.<sup>54</sup> It is helpful to understand the evolution of assignment and how it is implemented.

## II. ASSIGNMENT: HOW IT WORKS

### *A. Assignment Generally*

An assignment is “a transfer of property or some other right from one person . . . to another . . . , which confers a complete and present right in the subject matter to the assignee.”<sup>55</sup> Assignment of one’s (the assignor’s) rights to another (the assignee) is a longstanding concept in law and has generally been utilized in the areas of contract and property.<sup>56</sup> An assignee can receive no rights greater or lesser than those of the assignor.<sup>57</sup> While the common law favors assignment, torts generally may not be assigned, except as discussed below.<sup>58</sup> However,

51. See Richmond, *supra* note 2, at 76-80.

52. Diana C. White, *Liability Insurers and Third-Party Claimants: The Limits of Duty*, 48 U. CHI. L. REV. 125, 125 (1981).

53. *Id.*

54. See Richmond, *supra* note 2, at 81 n.32.

55. 6 AM. JUR. 2D *Assignments* § 1 (2d ed. 2016).

56. See generally *Gayler v. Wilder*, 51 U.S. 477 (1850); see also *Burck v. Taylor*, 152 U.S. 634 (1894).

57. See, e.g., 29 WILLISTON ON CONTRACTS § 74:56 (4th ed. 2016); see also *Int’l Ribbon Mills, Ltd. v. Arjan Ribbons, Inc.*, 325 N.E.2d 137, 139 (N.Y. 1975) (reiterating the principle that “[i]t is elementary ancient law that an assignee never stands in any better position than his assignor. He is subject to all the equities and burdens which attach to the property assigned because he receives no more and can do no more than his assignor.”).

58. See R.D. Hursh, *Assignability of Claim for Personal Injury or Death*, 40 A.L.R.2d 500 § 3 (1955) (“It seems that few legal principles are as well settled, and as universally agreed upon, as the rule that the common law does not permit assignments of causes of action to recover for personal injuries.”), *superseded in part by* Andrea G. Nadel, *Assignability of Proceeds of Claim for Personal Injury or Death*, 33 A.L.R.4th 82 (1984) (“In the following cases, the courts, although acknowledging the nonassignability of a personal injury claim, drew a distinction between an



assignment usually will be permitted unless expressly prohibited.<sup>59</sup> This prohibition may be explicitly stated as a provision of the contract or may be barred by some other operation of law.<sup>60</sup> The effect of the assignment is to extinguish the contractual relationship between the assignor and the other party to the contract and create privity between the third-party assignee and the other party to the contract.<sup>61</sup> Additionally, the assignee does not receive rights greater than those of the assignor and the other party to the contract does not need to agree to the assignment.<sup>62</sup> In essence, the assignee steps into the shoes of the assignor and obtains the same rights and privileges held by the assignor, not more or less.<sup>63</sup>

Assignment is not generally applied to torts as it is deemed against public policy.<sup>64</sup> However, it is recognized that if a right of action arising out of tort would survive in statute to the injured party's personal representative, it may be assigned; or in simpler terms, "survival is the test of assignability of a right."<sup>65</sup> Therefore, in the context of the insurance claim, when a plaintiff believes the defendant may have causes of action against his insurance company for the insurer's failure to defend its insured and properly protect the insured's interests in an underlying action, the plaintiff may seek an assignment of that claim. South

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assignment of the cause of action itself and an assignment of the proceeds of whatever recovery is had in such an action, and found the latter enforceable.").

59. *See, e.g.,* Puget Sound Nat'l Bank v. State Dep't of Revenue, 868 P.2d 127, 130 (Wash. 1994) ("[A]ll contracts are assignable unless such assignment is expressly prohibited by statute or is in contravention of public policy."); *see also* L.V. McClendon Kennels, Inc. v. Inv. Corp. of S. Fla., 490 So. 2d 1374, 1375 (Fla. Dist. Ct. App. 1986).

60. *L.V. McClendon Kennels, Inc.*, 490 So. 2d at 1375.

61. *Moore v. Weinberg*, 644 S.E.2d 740, 745 (S.C. Ct. App. 2007) ("An assignment is the act of transferring to another all or part of one's property, interest, or rights.") (citing BLACK'S LAW DICTIONARY 119 (6th ed. 1992)).

62. *Condren, Walker & Co. v. Portnoy*, 856 N.Y.S.2d 42, 43 (N.Y. App. Div. 2008) (the assignee's rights are as if the "assignee [were standing] in the shoes of its assignor"); *Smith v. Cumberland Grp., Ltd.*, 687 A.2d 1167, 1172 (Pa. Super. Ct. 1997) ("Absent an express provision against assignment, the rights and duties under an executory bilateral contract . . . may be assigned without the consent of the other party so long as it does not materially alter the other party's duties and responsibilities.").

63. *Condren, Walker & Co.*, 856 N.Y.S.2d at 43; *Smith*, 687 A.2d at 1172.

64. *Schweiss v. Sisters of Mercy, St. Louis, Inc.*, 950 S.W.2d 537, 538 (Mo. Ct. App. 1997) ("Missouri law prohibits the assignment of bodily injury claims for reasons of public policy."); *Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co.*, 455 S.E.2d 655, 657 (N.C. 1995) ("There is a distinction between the assignment of a claim for personal injury and the assignment of the proceeds of such a claim. The assignment of a claim gives the assignee control of the claim and promotes champerty. Such a contract is against public policy and void. The assignment of the proceeds of a claim does not give the assignee control of the case and there is no reason it should not be valid.").

65. *Doremus v. Atl. Coast Line R.R. Co.*, 130 S.E.2d 370, 376 (S.C. 1963) (citing 6 C.J.S. *Assignments* § 32); *see also* 6 AM. JUR. 2D *Assignments* § 49 (2d ed. 2016) ("[C]hoses in action that survive as assets or continue as liabilities can be assigned.").

Carolina, for example, has long recognized that causes of action in tort “survive both to and against the personal or real representative [of the injured party or tortfeasor] . . . any law or rule to the contrary notwithstanding.”<sup>66</sup> Logically, courts in South Carolina have extended this and adopted the general rule to hold that the survivability statute authorizes the assignment of a cause of action in tort.<sup>67</sup> In fact, the assignability of choses in action was recognized as early as 1804 in South Carolina.<sup>68</sup> Thus, while assignability of tort claims generally is limited, states permit assignability of such tort actions as bad faith claims against the insurer because such a claim would survive to the personal representative should the plaintiff die.

Courts have addressed the issue of which claims are in fact survivable. A chose in action is essentially a right to sue.<sup>69</sup> Courts further clarified a chose in action, holding, “It is an intangible personal property right recognized and protected by law . . . .”<sup>70</sup> A defendant’s choses in action, including bad faith and breach of contract, are claims that would survive in the event of the defendant’s death.<sup>71</sup> Therefore, they are assignable as choses in action under a general judicial assignment. States have allowed such assignments of other actions so long as they are survivable.<sup>72</sup> Therefore, it is logical to conclude that similar judicial

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66. S.C. CODE ANN. § 15-5-90 (2016), *previously* S.C. CODE ANN. § 10-209 (1962); *see also Doremus*, 130 S.E.2d at 377; *Bultman v. Atl. Coast Line R.R. Co.*, 88 S.E. 279, 280 (S.C. 1916).

67. *See generally* *Hair v. Savannah Steel Drum Corp.*, 161 F. Supp. 654, 655 (E.D.S.C. 1955); *McWhirter v. Otis Elevator Co.*, 40 F. Supp. 11, 15 (W.D.S.C. 1941); *Bultman*, 88 S.E. at 280.

68. *See* *Forrest v. Warrington*, 2 S.C.Eq. 254, 262 (S.C. Ch. 1804) (“It was contended by complainant[']s counsel that a chose in action is not assignable at law . . . . This may have been the case formerly, but the case of *Carteret & Paschal*, 1st Peer Wm. 199, it is held that where Baron is entitled to a chose in action, as he may release or forfeit it, so if he should assign it for valuable consideration, it would be good.”); *see also* *Slater Corp. v. S.C. Tax Comm’n*, 314 S.E.2d 31, 33 (S.C. Ct. App. 1984) (“The law of South Carolina has long recognized that a chose in action can be validly assigned in either law or equity.”).

69. BLACK’S LAW DICTIONARY 275 (9th ed. 2009) (a chose in action is “[a] proprietary right in personam, such as a debt owed by another person, . . . [t]he right to bring an action to recover a debt, money or thing, . . . [and] [p]ersonal property that one person owns but another person possesses, the owner being able to regain possession through a lawsuit”).

70. *Chose*, WIKIPEDIA (citing *Chose*, ENCYCLOPEDIA BRITANNICA 271 (Hugh Chisholm ed., 11th ed. 1911)), <https://en.wikipedia.org/wiki/Chose#CITEREFChisholm1911>, [<https://perma.cc/5EK7-PCBZ>].

71. *See, e.g.*, *Jackson v. Rogers & Wells*, 258 Cal. Rptr. 454, 457 (Ct. App. 1989); *Groce v. Fid. Gen. Ins. Co.*, 448 P.2d 554, 557 (Or. 1968) (“Even if the insurer’s breach of its reciprocal obligation of good faith may be said for certain purposes to be tortious, the cause of action arising from such breach is one that affects the insured in his property, as distinguished from his person, and so ought to be as capable of assignment and survival as any other contract right.”).

72. *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 340 (Ind. 1991) (“The common law in most states today, including Indiana, teaches that any chose in action that survives the death of the assignor may be assigned.”).

assignment of a tort action would be permissible. We turn now to the specific assignment of the bad faith claim. It is important to understand the treatment and availability of a bad faith action by states in order to determine whether it can be assigned and thus available for judicial assignment by the courts.

### *B. Assignment of Bad Faith Claims*

Bad faith claims can be brought as either a contract action, a tort action, or both, but recovery is limited to either contract or tort, but not both. However, some states limit a plaintiff's claim to either contract or tort.<sup>73</sup> Other states permit the plaintiff to bring the bad faith action in both contract and tort contemporaneously and then elect between the two as to which claim, contract or tort, the plaintiff wishes to receive damages.<sup>74</sup> A minority of states do not permit bad faith claims at all.<sup>75</sup> In such states, there obviously would not be the opportunity for assignment, but these states are few. However, even if a state permits bad faith claims, not every state permits assignment of an insured's action against the insurer to the third-party plaintiff.<sup>76</sup> Therefore, analysis is needed to determine if a state permits bad faith actions, in what capacity the state permits them, as well as the availability of assignment.

The concept of assignment of a bad faith claim can be described as where, in lieu of seizing the first-party insured or defendant's personal assets to satisfy a judgment obtained in the underlying action, the third-party plaintiff may offer to accept an assignment of these claims in exchange for entering into a covenant not to execute the judgment against the defendant personally.<sup>77</sup> Although this settlement appears to be in the best interest of both parties because it (1) allows the third party to step into the shoes of the insured and proceed by bringing an action against the insurer for failing to promptly and fairly settle the underlying tort action and (2) offers the insured relief of the potential for execution against his personal assets, assignment does not always occur. For example, while the third-party plaintiff and the first-party insured or defendant might both benefit from such an assignment, the insured or defendant's attorney may be unable or unwilling to communicate this offer to the defendant because the insured is unavailable or the attorney's interest (and the interest of the insurer) is not aligned with those of the insured regarding assignment of a claim against the insurer. Thus, when the attorney is unable or unwilling to gain the permission of the insured to agree to the assignment, although it would be in the insured's best

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73. See Anastopoulo, *supra* note 2, at 699-786 (examining state insurance laws and, in part, whether the state recognizes an action in tort for bad faith).

74. See *id.*; see also *Comunale v. Traders & Gen. Ins. Co.*, 328 P.2d 198, 203 (Cal. 1958) (“[W]here a case sounds both in contract and tort the plaintiff will ordinarily have freedom of election between an action of tort and one of contract.”).

75. See Anastopoulo, *supra* note 2, at 711-28.

76. See *id.* at 728-66.

77. George J. Kefalos et al., *Bad-Faith Insurance Litigation in the South Carolina Practice Manual*, 13-AUG S.C. LAW. 18, 20 (2001).

interest, the assignment will not occur.

Generally, by permitting assignment, states provide protection for third-party plaintiffs who successfully pursue tort actions against judgment-proof insureds. Further, assignment of bad faith claims may incentivize an insurer against committing bad faith in negotiating the settlement of the tort action and provide protections to the third-party claimant, even though the third party lacks privity of contract with the insurer. However, there are concerns associated with permitting assignment. The primary concern in many cases involving an assignment of the first-party insured's actions against his insurer is the risk of collusion between the third-party plaintiff and the insured.<sup>78</sup> This is especially true when the insured is protected against tort liability by an agreement not to execute a potential judgment prior to the entry of the judgment in the underlying tort action.<sup>79</sup> Courts often are concerned that when the insured faces no threat of satisfaction of the judgment against him, he has little incentive to challenge the third-party plaintiff and may even collude with the plaintiff to obtain that judgment in consideration of facing no risk.<sup>80</sup> In *Fowler v. Hunter*,<sup>81</sup> the South Carolina Supreme Court considered this concern and while acknowledging the risk of collusion, the court recognized the public policy consideration of facilitating settlement agreements between parties and permitting assignment of certain claims, such as bad faith.<sup>82</sup> Specifically, the court noted when considering assignment and concerns about collusion, "the existence of conflicting approaches to this issue throughout the country reflects a balancing of policy considerations."<sup>83</sup> Thus, the court reasoned that absent some evidence of collusion between the parties, the public policy in favor of settlement outweighs these concerns.<sup>84</sup> Some states permit assignment of claims and, more specifically, assignment of the bad faith claim to an injured third party. Of the fifty states, a few specifically permit some form of assignment of the bad faith claim.<sup>85</sup> For example, Illinois allows insureds to assign their rights to pursue claims to third parties.<sup>86</sup> Other states, such as Kansas, provide for limited assignment where "an

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78. *Fowler v. Hunter*, 697 S.E.2d 531, 535 (S.C. 2010).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. See, e.g., MO. ANN. STAT. § 537.065 (2016); *Mid-Am. Bank & Trust Co. v. Com. Union Ins. Co.*, 587 N.E.2d 81 (Ill. App. Ct. 1992), limited by *Stevenson v. State Farm Fire & Cas. Co.*, 628 N.E.2d 810, 813 (Ill. App. Ct. 1993); *Glenn v. Fleming*, 799 P.2d 79, 89 (Kan. 1990).

86. *Mid-Am. Bank & Trust Co.*, 587 N.E.2d at 82-83 (explaining truck driver assigned his claims against the insurer to the plaintiff in exchange for a covenant not to execute the judgment against him), limited by *Stevenson*, 628 N.E.2d at 813 (limiting *Mid-America* to its facts and stating it is not the rule where the question of insurance coverage is at issue). The court stated that where the insurance company "can reasonably examine a set of facts and determine that the incident or occurrence which is the substance of the underlying controversy is not one contemplated by the

insured's breach of contract claim for bad faith or negligent refusal to settle may be assigned," but that assignment does not extend to a tort action.<sup>87</sup> Additionally, other states, such as Missouri, provide that while a third party has no direct right to sue an insurer, he can bring the claim if the insured assigns that right to the third party.<sup>88</sup> However, assignment in Missouri is also limited to situations where the insurer has first undertaken the defense of the insured.<sup>89</sup> Similar to Missouri, Oregon generally only permits assignment where third-party claims arise when the insurer assumes the defense of the insured.<sup>90</sup> Therefore, as a prerequisite to the assignment, the insurer must have undertaken the defense of the claim, thus acknowledging that the third-party's claim against the insured falls within the coverage and the insurer is engaged in the handling of the claim. Oregon and Missouri, therefore, recognize that the insurer can be held responsible for its actions in handling the claim and potentially subject to assignment to the third party when it controls the defense and thus the right to settle.<sup>91</sup> These states build in a protection for the insurer by subjecting the insurer to potential claims by the third party only when it has engaged in not only handling the claim, but also controlling the defense.

Not all states require the undertaking of the defense as a prerequisite to assignment of the bad faith action. Some states permit assignment to the third party as a means to protect the third-party claimant.<sup>92</sup> For example, Colorado provides for assignment to third-party claimants.<sup>93</sup> As with most states, Colorado law does not permit a direct action by a third-party claimant against an insurer and, therefore, the only way a third party can recover for the actions of the insurer

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policy, then it does not owe the same kind of duty as that required by . . . *Mid-America*." *Stevenson*, 628 N.E.2d at 813.

87. Anastopoulos, *supra* note 2, at 716 (citing *Glenn v. Fleming*, 799 P.2d 79, 89 (Kan. 1990)).

88. See MO. REV. STAT. § 537.065 (2016).

89. *Johnson v. Allstate Ins. Co.*, 262 S.W.3d 655, 662 (Mo. Ct. App. 2008) ("An insurer that assumes control of the right to settle claims against its insured may become liable in excess of the policy limits if it fails to exercise good faith in considering an offer to compromise the claim for an amount within the policy limits."); see also *Dyer v. Gen. Am. Life Ins. Co.*, 541 S.W.2d 702, 704 (Mo. Ct. App. 1976) (indicating for a bad faith failure to settle claim to exist, the insurer must first assume control of the defense of the claim against the insured). Thus, it logically follows that if the insurer must assume control of the defense for the claim to exist, it must also assume control of the defense for an assignment to occur. In other words, the claim must exist before the assignment of the claim can occur.

90. See *Georgetown Realty, Inc. v. Home Ins. Co.*, 831 P.2d 7, 13-14 (Or. 1992) (explaining the third party's claim against the insurer arises out of the insurer's duty to meet the ordinary standard of care when defending its insured); see also *Groce v. Fid. Gen. Ins. Co.*, 448 P.2d 554, 557 (Or. 1968) (holding the insurer's breach of the obligation to perform under the policy in good faith is "as capable of assignment and survival as any other contract right").

91. See, e.g., *Johnson*, 262 S.W.3d at 662; *Georgetown Realty, Inc.*, 831 P.2d at 13-14.

92. See, e.g., *Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116, 119 (Colo. 2010) (en banc).

93. See *id.*

in handling its claim against the insured is through assignment.<sup>94</sup> Similarly, Hawaii only permits bad faith claims to either first-party insureds or those that a first-party claimant has assigned to another individual.<sup>95</sup> Nevada also permits assignment of tort claims and specifically bad faith claims.<sup>96</sup>

Rhode Island also permits assignment, but on a limited basis.<sup>97</sup> Rhode Island provides that assignment is valid only when an excess judgment against a tortfeasor has already been adjudicated.<sup>98</sup> When there has not been an excess judgment, the assignment is unenforceable.<sup>99</sup> Thus, Rhode Island requires an excess judgment against the insured tortfeasor before assignment is permissible. The requirement of the excess judgment as a prerequisite to assignment builds in protections and creates burdens simultaneously. In considering the requirement of the excess judgment from the insurer's perspective, it allows the insurer the opportunity to control both the litigation as well as the opportunity for settlement throughout the litigation. However, it places a burden on the third-party claimant by requiring the third party to first proceed with litigation against the tortfeasor, proving not only liability but also that the damages exceed the coverage, and then proceed to obtain the assignment.

South Carolina also permits assignment.<sup>100</sup> Assignment in South Carolina has been upheld even when the policy itself conditions assignment of any interest under the policy only on consent of the insurer.<sup>101</sup> Policy language restricting an insured's right to assign his or her claims is not unusual. South Carolina courts considered the permissibility of these restrictions through policy language against the public policy in favor of assignment of these claims.<sup>102</sup> In other words, the court determined that assignment was permitted where insurers attempted to circumvent tort law by restricting an insured's right to bring or assign a bad faith action through policy language that stated that the plaintiff, with the consent of the insurer, can only bring the action.<sup>103</sup> The insurer attempted to restrict not only who could bring the action, only the insured, but also when an action could be

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94. *See Schnacker v. State Farm Mut. Auto. Ins. Co.*, 843 P.2d 102, 104-05 (Colo. App. 1992).

95. *See Simmons v. Puu*, 94 P.3d 667, 684 (Haw. 2004) (explaining "an injured third-party claimant does not have a claim for relief for bad faith" unless the insured tortfeasor assigns the claim).

96. *Bell v. Am. Family Mutual Ins. Co.*, No. 57861, 2011 WL 6141433, at \*1 (Nev. 2011).

97. *DeMarco v. Travelers Ins. Co.*, 26 A.3d 585, 622 (R.I. 2011).

98. *Id.* (stating the insured may assign its claim where "judgment in excess of policy limits [has been entered] against an insured").

99. *See id.*

100. *See Smith v. Md. Cas. Co.*, 742 F.2d 167 (4th Cir. 1984); *Tyger River Pine Co. v. Md. Cas. Ins. Co.*, 170 S.E. 346 (S.C. 1933).

101. *See Narruhn v. Alea London Ltc.*, 745 S.E.2d 90, 94 (S.C. 2013).

102. *Smith*, 742 F.2d at 167; *Fowler v. Hunter*, 697 S.E.2d 531, 535 (S.C. 2010); *Tyger River Pine Co.*, 170 S.E. at 346.

103. *Smith*, 742 F.2d at 167; *Narruhn*, 745 S.E.2d at 94; *Tyger River Pine Co.*, 170 S.E. at 346.

brought, only with the consent of the insurer.<sup>104</sup> South Carolina courts struck down such provisions as against public policy recognizing that limiting a plaintiff's claims to be available only with the consent of the proposed defendant is no right at all.<sup>105</sup> However, South Carolina courts imposed the limitation that only the claim for the excess judgment over policy limits is assignable, as opposed to any claim for other damages including those for emotional distress or punitive damages.<sup>106</sup> Thus, similar to Rhode Island, assignment in South Carolina is permissible, but only after the third-party plaintiff has obtained an excess judgment.

Florida is another state with a unique approach to bad faith.<sup>107</sup> Florida law does not recognize a common law bad faith cause of action by a first-party insured against its insurer.<sup>108</sup> However, Florida enacted statutory provisions that courts have interpreted as authorizing first-party bad faith actions.<sup>109</sup> The statute provides for damages in addition to contractual damages and lists specific conduct by the insurer, which may give rise to a claim.<sup>110</sup> Therefore, first-party actions are available under Florida law but only under the statutes and not common law. However, Florida differs from every other state in its approach to actions by third-party plaintiffs.<sup>111</sup> In addition to providing statutory provisions for first-party insureds, Florida statutes provide for a direct action for bad faith by "any person against an insurer when such person is damaged," including actions by third-party claimants.<sup>112</sup> The question then is how this affects a potential assignment of the first-party claimant's bad faith action. Logically, the allegations in a first-party claim are different from those of the third-party claimant. Bad faith is rooted in the duty of good faith and fair dealing implied in every contract, including those for insurance.<sup>113</sup> It is reasonable then to suggest that the third party could bring two simultaneous but separate actions against an insurer if assignment is permissible. Therefore, under Florida's statutory provisions, the third-party claimant can assert allegations directly against an

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104. *Smith*, 742 F.2d at 167; *Tyger River Pine Co.*, 170 S.E. at 346.

105. *Smith*, 742 F.2d at 167; *Tyger River Pine Co.*, 170 S.E. at 346.

106. *See generally Smith*, 742 F.2d at 167; *Tyger Rive Pine Co.*, 170 S.E. at 346.

107. *See generally* *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263 (Fla. Dist. Ct. App. 1987).

108. *Anastopoulos*, *supra* note 2, at 773.

109. *Opperman*, 515 So. 2d at 265-66; *Anastopoulos*, *supra* note 2, at 773-74.

110. *Anastopoulos*, *supra* note 2, at 774.

111. *Id.*

112. *Id.*

113. *Comunale v. Traders & Gen. Ins. Co.*, 328 P.2d 198, 200 (Cal. 1958); *Brown v. Superior Court of L.A. Cty.*, 212 P.2d 878, 881 (Cal. 1949). *See, e.g.*, *Best Place, Inc. v. Penn Am. Ins. Co.*, 920 P.2d 334, 338 (Haw. 1996) ("The obligation to deal in good faith is now a well-established principle of contract law."); *RESTATEMENT (SECOND) OF CONTRACTS* § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.").

insurer as a person “damaged”<sup>114</sup> by the insurer’s conduct, such as by delayed or denied settlements, no appropriate or sufficient communication, being forced to file litigation when settlement was reasonable, or being required to obtain a jury verdict. The third-party claimant can assert these allegations against the insurer in addition to their ability to step into the shoes of the insured through assignment and assert the claims of a first-party insured. The first-party claims would be different from those of the third party and may include claims such as failure to protect the interests of the insured, failure to communicate a settlement demand, requiring the insured to endure litigation when settlement was reasonable, and exposing the assets of the insured to a potential judgment. Thus, although Florida allows for a direct action by a third-party plaintiff against an insurer for his damages,<sup>115</sup> this would not eliminate the ability of the third party to seek assignment, and potentially judicial assignment, of the first-party claimant’s actions against the insurer for the separate damages of the insured as well. Therefore, the third-party plaintiff would gain additional protections and the insured would have the ability to either pursue his or her potential damages against his or her insurer, or assign these claims to the third party.

Although states have taken different approaches to providing avenues for the protection of third-party plaintiffs, including assignment of the insured’s bad faith claim, the availability and parameters for assignment vary.<sup>116</sup> It is recognized that assignment of bad faith claims may encourage settlement between the first-party insured and the third-party plaintiff, but assignment of the bad faith claim may not be the only claim available.<sup>117</sup> Due to the important role of the defense attorney in negotiating a settlement or facilitating an assignment, the actions of the attorney must be scrutinized as well. The role of the defense attorney regarding a bad faith claim is an important consideration and therefore a discussion is merited.

### *C. Malpractice Claims and Assignment*

Although the bad faith claim may be the larger prize when it comes to assignment, a malpractice claim may be the bigger stick. Thus, it is important to understand the potential malpractice claim and how it interacts with the bad faith action and any potential assignment. There are three areas where a possible malpractice claim may arise in the context of a third-party claim against an

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114. *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1124 (Fla. 2005).

115. *Id.* at 1125.

116. *See generally* *Comunale*, 328 P.2d at 202; *Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116, 119 (Colo. 2010); *Allstate Indem. Co.*, 899 So. 2d at 1124-25; *Tyger River Pine Co. v. Md. Cas. Ins. Co.*, 170 S.E. 346 (S.C. 1933).

117. *See generally* Douglas R. Richmond, *Emerging Conflicts of Interest in Insurance Defense Practice*, 32 TORT & INS. L.J. 69 (1996); Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583 (1994); Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995).



insured for the actions of the attorney hired to defend such a claim. The most critical areas involve: 1) preserving attorney-client privilege especially in coverage disputes, 2) conflicts of interest, and 3) consultation and consent, particularly as it relates to consultation with the insured as well as the insurer regarding settlement.<sup>118</sup> In other words, did the defense attorney keep the insured adequately informed about offers of settlement and did the attorney sufficiently advise the insurer about settlement, when settlement was available? Conflicts of interest are inevitable in insurance litigation.<sup>119</sup> A conflict of interest will usually arise in the insurance context when a practitioner finds himself representing more than one individual or entity, and his representation of one is impacted by his representation of the other.<sup>120</sup> Indeed, the insurance defense lawyer will, at one point or another during his career, unavoidably find himself asking whether he represents the insurer (who pays the bills and to whom he owes a duty) or the insured (to whom he is beholden as the insured's fiduciary) in the tripartite relationship.<sup>121</sup> The malpractice claim may arise when the insured believes that the defense attorney has not effectively represented the interests of the insured, and rather has worked for the benefit of the insurer to the detriment of the insured. In such cases, the insured may bring an action for bad faith against the insurer as well as possibly a malpractice claim against the defense counsel for failing to adequately represent his or her interest.<sup>122</sup> The defense attorney, hired by the insurer under its contractual duty to defend an action against the insured that falls within the coverage, is not discharged of the duty to represent the interests of the insured just because the insurer is paying him.<sup>123</sup> One court described this tripartite relationship as follows:

The duty to defend in a liability policy at times makes for an uneasy alliance. The insured wants the best defense possible. The insurance company, always looking at the bottom line, wants to provide a defense at the lowest possible cost. The lawyer the insurer retains to defend the insured is caught in middle. There is a lot of wisdom in the old proverb: *He who pays the piper calls the tune*. The lawyer wants to provide a competent defense, yet knows who pays the bills and who is most likely to send new business. This so-called tripartite relationship has been well documented as a source of unending ethical, legal, and economic tension.<sup>124</sup>

States have adopted ethics standards to address the tripartite relationship where a defense attorney is hired and paid by an insurer to represent the interests

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118. See generally Richard L. Neumeier, *Serving Two Masters: Problems Facing Insurance Defense Counsel and Some Proposed Solutions*, 77 MASS. L. REV. 66 (1992).

119. See Richmond, *supra* note 117.

120. See generally *id.*; Silver, *supra* note 117; Silver & Syverud, *supra* note 117.

121. Neumeier, *supra* note 118, at 66.

122. *Id.*

123. State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625, 628 (Tex. 1998).

124. *Id.* at 633 (emphasis added).

and handle the claim against the insured. Some states provide for a dual-client model wherein the attorney must serve two masters simultaneously—the insurer and the insured.<sup>125</sup> Other states adopt a single-client model. Particularly in states with a single-client model, the duty of the attorney is to represent the interests of the insured at least as much as those of the insurer.<sup>126</sup> In outlining the duty of the defense attorney hired by the insurer to defend the insured, the Rules of Professional Conduct state, “A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.”<sup>127</sup> Additionally, in the tripartite relationship concerns about attorney-client privilege may arise.<sup>128</sup> In some circumstances, the attorney may even have a greater duty to the insured.<sup>129</sup> As stated by one court in the third-party context,

In the usual tripartite insurer-attorney-insured relationship, the insurer has a duty to defend the insured, and hires counsel to provide the defense. “So long as the interests of the insurer and the insured coincide, they are both the clients of the defense attorney and the defense attorney’s fiduciary duty runs to both the insurer and the insured.” The insurance defense attorney is placed in a position of conflict, however, when issues of coverage are asserted by the insurer through a reservation of rights.<sup>130</sup>

Therefore, when the insurer undertakes its duty to defend, but reserves its right to later dispute coverage through a reservation of rights, the insurer and defense counsel still owe a good faith duty to the insured. Not only does the attorney have a duty in such situations, but the question of where the attorney-client privilege begins and ends becomes an ethical dilemma for the attorney, as well.<sup>131</sup> This may also result in a malpractice claim against the attorney. For example, when the plaintiff makes a claim against the insured and offers to settle within the policy limits, a conflict of interest may arise.<sup>132</sup> The insured wants to

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125. *Hansen v. State Farm Mut. Auto. Ins. Co.*, No. 2:10-cv-01434-MMD-RJJ, 2012 WL 6205722, at \*6 (D. Nev. Dec. 12, 2012) (citing *Nev. Yellow Cab Corp. v. Eighth Jud. Dist. Court*, 152 P.3d 737, 742-43 (Nev. 2007)).

126. Jamie R. Carsey et al., *Is Three Company or A Crowd? Conflicts and the Tripartite Relationship*, paper presented at ABA Section of Litig. Ins. Coverage Litig. Comm. CLE Seminar in Tucson, AZ (Mar. 4-7, 2009), [http://www.potteranderson.com/media/publication/105\\_JCW\\_20Is\\_20Three\\_20Company\\_20Or\\_20A\\_20Crowd\\_20--\\_20FINAL\\_20VERSION\\_20\\_2\\_.pdf](http://www.potteranderson.com/media/publication/105_JCW_20Is_20Three_20Company_20Or_20A_20Crowd_20--_20FINAL_20VERSION_20_2_.pdf) [<https://perma.cc/G47K-WE3M>].

127. S.C. R. APP. P. 407, RULES OF PROF’L CONDUCT r. 5.4 (2016).

128. *See Shaffery v. Wilson, Elser, Moskowitz, Edelman & Dicker LLP*, 98 Cal. Rptr. 2d 419, 424 (Ct. App. 2000).

129. *Id.*

130. *Id.* (quoting *Nat’l Union Fire Ins. Co. v. Stites Prof. Law Corp.*, 235 Cal. App. 3d 1718, 1727, (1991)).

131. MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(1)-(2) (2016).

132. *See Blanchard v. State Farm Fire & Cas. Co.*, 2 Cal. Rptr. 2d 884 (Ct. App. 1991).

settle within policy limits to avoid excess judgments, while the insurer lacks the same incentive because it may potentially not be liable for the excess amount and believes that its exposure is limited to the policy limits. Some states provide avenues that can make the insurer liable for an excess judgment, nonetheless a conflict can be created.<sup>133</sup> A California case, *Lysick v. Walcom*,<sup>134</sup> addressed this very issue. In *Lysick*, the insured's liability policy had a limit of \$10,000, and after the insurer refused to settle a suit against the insured, the defendant won a \$225,000 judgment.<sup>135</sup> The insured subsequently sued the insurer for breach of duty to settle and the attorney for malpractice.<sup>136</sup> The insurer settled, yet the attorney litigated.<sup>137</sup> After winning at trial, the attorney lost on appeal.<sup>138</sup> The court held the attorney owed the insurer and the insured a duty of care, and he breached that duty by failing to communicate with the insured regarding settlement negotiations and by insisting the insurer pay the policy limits by settling.<sup>139</sup>

*Lysick* is an example where the attorney failed to take the appropriate steps when confronted with an out-right conflict of interest due to the incompatible interests of the client (the insured) and the employer (the insurer).<sup>140</sup> The attorney should have withdrawn from representing both. Even if he had tried to persuade the insurer to pay the policy limits, the attorney would be acting in complete contravention to the insurer's interest. In such a situation, the only acceptable path would be withdrawal.

Even in states that provide that the insurer pay an excess judgment when it has made the decision not to settle a claim against its insured within the policy limits, this does not obviate the duty of the defense attorney regarding his or her duty to the insured.<sup>141</sup> In other words, the malpractice claim may still survive against the attorney, even when the insured is not obligated to pay the excess judgment obtained by the third party at trial. Regardless, the insured has suffered damages, including enduring litigation as a result of the insurer's decision not to settle the claim within the policy limits and the potential exposure of his or her personal assets. Thus, although the third-party plaintiff may be required to obtain an excess judgment against the insured as a predicate to seeking an assignment of the bad faith claim, the actual responsibility for paying the judgment is not a requirement for assignment of the bad faith claim nor does it seem so for assignment of the malpractice action either. Therefore, both claims, the bad faith action and the malpractice claim, may be available for assignment regardless of

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133. See, e.g., *Crisci v. Sec. Ins. Co.*, 426 P.2d 173 (Cal. 1967); *Tyger River Pine Co. v. Md. Cas. Co.*, 170 S.E. 346 (S.C. 1933).

134. 65 Cal. Rptr. 406 (Ct. App. 1968).

135. *Id.* at 410-12.

136. *Id.* at 412.

137. *Id.*

138. *Id.* at 412, 421.

139. *Id.* at 417.

140. *Id.* at 406-21.

141. See generally *Tyger River Pine Co. v. Md. Cas. Co.*, 170 S.E. 346 (S.C. 1933).

the status of the excess judgment.

However, the assignment of a malpractice claim against an attorney handling the underlying action is often limited. In a recent South Carolina case considering assignment of malpractice claims in such a situation, the court stated, “The majority rule in other jurisdictions is to prohibit the assignment of legal malpractice claims between adversaries in the litigation in which the alleged malpractice arose.”<sup>142</sup> Citing concerns over the costs to society outweighing the benefits, the majority of states have held that overriding public policy concerns render these types of assignments invalid.<sup>143</sup> “The most common reason other courts have declined to permit assignments of legal malpractice claims is to avoid the risk of collusion between the parties.”<sup>144</sup> Courts have reached different conclusions regarding concerns about collusion between the parties as it relates to the availability of assignment.<sup>145</sup> States that permit assignment of bad faith claims have determined that public policy in favor of settlement outweighs those concerns, while finding the risk of collusion between the parties to be too great when considering permitting assignment of malpractice claims in this area.<sup>146</sup> Thus, the assignment of the malpractice action may not be permissible in every state. Nonetheless, states continue to review the possibility of permitting assignment of malpractice claims. Therefore, it is important to understand the issues surrounding the possible malpractice action and its potential availability to be joined with a bad faith action against the insurer. If concerns about possible collusion between the parties are outweighed by public policy, it is likely courts that permit assignment of bad faith actions may permit the assignment of the malpractice claim also.

### III. JUDICIAL ASSIGNMENT

#### *A. Judicial Assignment of Defendant/Judgment Debtor’s Right to Plaintiff/Judgment Creditor*

When considering the possibility of an assignment of defendant’s right, the first step in the process is to consider how the assignment would manifest in the course of a case. Perhaps the most illustrative case in the area of assignment of a claim is *Gallegos v. Malco Enterprises of Nevada, Inc.*<sup>147</sup> In *Gallegos*, Nevada recognized the assignability of the tortfeasor’s bad faith claim against his own insurer to the third-party plaintiff.<sup>148</sup> Gallegos, the driver of a rental car, was

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142. *Skipper v. ACE Prop. & Cas. Ins. Co.*, 775 S.E.2d 37, 38 (S.C. 2015).

143. *Edens Techs., LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75, 79 (D.D.C. 2009).

144. *Skipper*, 775 S.E.2d at 38.

145. *Fowler v. Hunter*, 697 S.E.2d 531, 535 (S.C. 2010).

146. *See id.* at 534-35.

147. 255 P.3d 1287 (Nev. 2011).

148. *Id.* at 1288.

injured by a tortfeasor in an automobile accident.<sup>149</sup> He sued the tortfeasor who subsequently defaulted.<sup>150</sup> The court entered a default judgment in favor of the Gallegos.<sup>151</sup> Gallegos attempted unsuccessfully to collect the judgment.<sup>152</sup> Finding no satisfaction of his judgment through traditional means, Gallegos then asked the court to assign the rights of the tortfeasor against the insurer to him under the Nevada judgment collection statute.<sup>153</sup> The court involuntarily assigned the right to Gallegos under the statute.<sup>154</sup> As a result, Gallegos then could step into the shoes of the first-party insured tortfeasor and pursue his bad faith claim against the insurer.<sup>155</sup> The assignment provided a remedy to Gallegos where he had no other. When Gallegos attempted to collect his judgment against a tortfeasor who could not pay, he had a right, but no remedy. The court utilized the collection statute by interpreting the right of action as property.<sup>156</sup> After the assignment, Gallegos then brought a bad faith action against the insurer.<sup>157</sup> In response, the insurer filed a Motion for Summary Judgment, challenging the earlier assignment to Gallegos.<sup>158</sup> The new trial court granted the defendant's Motion and Gallegos appealed.<sup>159</sup>

The Nevada Supreme Court held that not only was the assignment of the bad faith claim proper, but also found assignment of any suit was appropriate under the statute as a remedy for the plaintiff/collector.<sup>160</sup> Further, the court held an involuntary post-judgment assignment to be equally as effective as a voluntary assignment to transfer the debtor's rights, including those for bad faith.<sup>161</sup> The court based its decision on whether Nevada law "permitted 'a judgment creditor [to] execute upon a judgment debtor's cause of action against its insurer.'"<sup>162</sup> Finding that the third-party plaintiff was entitled to the involuntary assignment of the tortfeasor's rights as a first-party insured and claims against the insurer for bad faith provided the plaintiff with a remedy where he had no other.<sup>163</sup>

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149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 1289.

157. *Id.* at 1288.

158. *Id.*

159. *Id.*

160. *Id.* at 1289.

161. *A Nevada Court Can Judicially Assign a Judgment Debtor's Bad Faith Rights Against His Insurance Carrier to the Plaintiff Via Post Judgment Execution*, NEV. COVERAGE L. (Sept. 28, 2011), <http://nevadacoveragelaw.com/a-nevada-court-can-judicially-assign-a-judgment-debtors-bad-faith-rights-against-his-insurance-carri/> [<https://perma.cc/DWK3-XNQF>].

162. *See Gallegos*, 255 P.3d at 1289 (quoting *Denham v. Farmers Ins. Co.*, 262 Cal. Rptr. 146, 151 (Ct. App. 1989)).

163. *Id.* at 1289.

Prior to the *Gallegos* decision, the Nevada courts laid the groundwork for judicial assignment of bad faith claims in early cases, which contemplated the Nevada statutes.<sup>164</sup> In *Greene v. Eighth Judicial District Court of Nevada ex rel. County of Clark*,<sup>165</sup> the issue of the case focused on whether the district court exceeded its jurisdiction, but the court was instructive as to how a judge can order property toward satisfaction of the judgment.<sup>166</sup> The court noted the statute provides that a judge may order “any property of the judgment debtor to be applied toward satisfaction of the judgment.”<sup>167</sup> It is this language that is so instrumental to a judicial assignment. The court relies on this language in applying judicial assignment of a tortfeasor’s bad faith claim to the third-party plaintiff who wishes to step into the shoes of the insured and pursue the bad faith claim against the insurer, when either the tortfeasor is unavailable or unwilling to make such an assignment.

Traditionally, courts may assign property of a defendant/judgment debtor to the third-party plaintiff/judgment creditor in satisfaction of the debt.<sup>168</sup> Extending this existing right to include the bad faith action as property was somewhat novel. The definition of property includes choses in action of the defendant/debtor.<sup>169</sup> The question of whether a court can judicially assign a bad faith cause of action depends upon the language of the state’s collection statute. For example, South Carolina has long recognized that causes of action in tort “survive both to and against the personal or real representative [of the injured party or tortfeasor] . . . any law or rule to the contrary notwithstanding.”<sup>170</sup> Logically, courts in South Carolina have extended this, and adopted the general rule, to hold that this survivability statute authorizes the assignment of a cause of action in tort.<sup>171</sup> Thus, the law also allows the assignment of choses in action by statutory provision.<sup>172</sup> Specifically, the South Carolina statute provides:

Property Which May be Ordered to be Applied to Execution:  
The judge may order *any* property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person or due

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164. See, e.g., *Greene v. Eighth Judicial Dist. Court of Nev. ex rel. Cty. of Clark*, 900 P.2d 184 (Nev. 1999).

165. *Id.*

166. *Id.* at 186.

167. *Id.*

168. *State Farm Mut. Auto. Ins. Co. v. Estep*, 873 N.E.2d 1021, 1034 (Ind. 2007) (“[The] court has the power to compel a judgment debtor to assign the debtor’s potential causes of action against third parties.”).

169. *Id.* at 1035.

170. S.C. CODE ANN. § 15-5-90 (2016), *previously* S.C. CODE ANN. § 10-209 (1962); see also *Doremus v. Atl. Coast Line R.R. Co.*, 130 S.E.2d 370, 377 (S.C. 1963); *Bultman v. Atl. Coast Line R.R. Co.*, 88 S.E. 279, 280 (S.C. 1916).

171. See generally *McWhirter v. Otis Elevator Co.*, 40 F. Supp. 11, 15 (W.D.S.C. 1941); *Hair v. Savannah Steel Drum Corp.*, 161 F. Supp. 654, 655 (E.D.S.C. 1955); *Bultman*, 88 S.E. at 280.

172. S.C. CODE ANN. § 15-39-410 (2016).

to the judgment debtor, to be applied toward the satisfaction of the judgment, *except* that the earnings of the debtor for his personal services cannot be so applied.<sup>173</sup>

South Carolina has long recognized a chose in action as property.<sup>174</sup> Therefore, choses in action for bad faith and breach of contract are subject to judicial assignment.

When considering the assignment of a bad faith claim, the court need only consider whether the defendant has choses in action against his insurer, including but not limited to bad faith and breach of contract. These choses in action can be defined as property held by the defendant under statutory provisions of a judgment collection statute.<sup>175</sup> As such, property, including choses in action, should be available for assignment to fulfill, at least in part, the plaintiff's judgment against the first-party defendant tortfeasor insured. These claims, defined as property, are excepted from the plain language of such statutes or any subpart and do not qualify as earnings for personal services.<sup>176</sup> Thus, the causes of action are assignable as a right by the court to the third party as any other property of the debtor would be.<sup>177</sup> Additionally, when the third-party plaintiff is considering a strategy that may involve assignment of the insured's bad faith action, the plaintiff must carefully analyze how the state defines property pursuant to its statutory scheme. Therefore, it is important to review and understand the state's specific language in the debtor statutes addressing the availability of property for assignment in satisfaction of a debt. Property is broadly defined in the legal context as "[n]ot only money and other tangible things of value, but also . . . any intangible right considered as a source or element of income or wealth."<sup>178</sup> The issue that must be addressed is whether the state's definition of property includes possible choses in action or potential claims.

In an example of the judicial assignment of property pursuant to the statute, South Carolina contemplated its provision in the following case regarding a creditor who sued a debtor to recover an account due.<sup>179</sup> The court issued an order

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173. *Id.* (emphasis added).

174. *Moore v. Weinberg*, 644 S.E.2d 740, 745 (S.C. Ct. App. 2007) ("The interest in the property assigned can be present, future, or contingent; it may represent contract rights to money, property, or performance, or rights to causes of action.") (citing 5 S.C. JUR. *Assignments* § 2 (2006)); *Ball v. Ball*, 430 S.E.2d 533, 534-35 (S.C. Ct. App. 1993) ("This right of action is a chose in action, an interest which, as we noted, South Carolina courts include in the definition of the term 'property.'").

175. S.C. CODE ANN. § 15-39-410 (2016); *Ball*, 430 S.E.2d at 534-35.

176. S.C. CODE ANN. § 15-39-410 (2016).

177. *Id.*

178. BLACK'S LAW DICTIONARY, *supra* note 69, at 1335 (explaining property is "[t]he right to possess, use, and enjoy a determinate thing (either a tract of land or chattel); the right of ownership," and "[a]ny external thing over which the rights and possession, use, and enjoyment are exercised").

179. *See generally Johnson v. Serv. Mgmt., Inc.*, 459 S.E.2d 900 (S.C. Ct. App. 1995).

directing the bank, in which the judgment debtor had a general deposit account, to deliver up sums in the account in satisfaction or partial satisfaction of creditor's judgment.<sup>180</sup> In the case, the court described the process of enforcing judgments as follows, "If a judgment is unsatisfied, the judgment creditor may institute supplementary proceedings to discover assets."<sup>181</sup> The court further noted that in addition to their discovery functions, supplementary proceedings provide a means of reaching property beyond "the reach of an ordinary execution, such as choses in action."<sup>182</sup> The court then addressed property that can be applied to the execution.<sup>183</sup> The court, in applying the statute, stated that the trial court may order "non-exempt property of the judgment debtor in the hands of a third party or owed to the judgment debtor to be applied toward satisfaction of the judgment."<sup>184</sup> Therefore, in assigning the deposits of the debtor to the creditor, the creditor was granted a remedy to satisfy his judgment, or a remedy to his right in obtaining the judgment.<sup>185</sup>

South Carolina is not alone. Other states that permit assignability of bad faith actions also have judgment collector statutes.<sup>186</sup> The question remains as to whether the language of the statute provides for a definition of property to include an action in chose. This appears to be instrumental in the permissibility of judicial assignment of a bad faith action. Thus, it is instructive to review the particular language of statutory provisions similar to those of Nevada and South Carolina in order to determine if a state might provide an avenue to judicial assignment of a bad faith claim.

#### *B. States with Debtor Creditor Statutes*

Review of debtor statutes is an important step in determining the availability of judicial assignment. Nevada and South Carolina are not alone with regard to judgment debtor statutes. Most states have some form of statutory language for the protection of a creditor against a debtor. There are a number of other states with similar statutory provisions regarding assignment of debtor claims. California is one such state. California has two statutes involving the satisfaction of debts.<sup>187</sup> Specifically, the California code provides:

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180. *Id.* at 901.

181. *Id.* at 902 (citing S.C. CODE ANN. §15-39-310 (2016)).

182. *Id.* (citing *Lynn v. Int'l Bhd. of Firemen & Oilers*, 90 S.E.2d 204, 206 (S.C. 1955) (explaining choses in action belonging to judgment creditor may be reached through supplementary proceedings)); *see also* *Deer Island Lumber Co. v. Va.-Carolina Chem. Co.*, 97 S.E. 833 (S.C. 1919) (judgment creditor may reach funds in the hands of a third party through supplementary proceedings).

183. *Johnson*, 459 S.E.2d at 902.

184. *Id.*

185. *Id.*

186. *Hooser v. Sup. Court of San Diego Cty.*, 84 Cal. App. 4th 997, 1002 (Ct. App. 2000).

187. CAL. CIV. PROC. CODE § 699.040 (2016) (authorizing court to issue order directing transfer of possession of property or possession of documentary evidence of title to property or debt



- (a) Except as provided in subdivision (b), at the conclusion of a proceeding pursuant to this article, the court may order the judgment debtor's interest in the property in the possession or under the control of the judgment debtor or the third person or a debt owed by the third person to the judgment debtor to be applied toward the satisfaction of the money judgment if the property is not exempt from enforcement of a money judgment. Such an order creates a lien on the property or debt.<sup>188</sup>

Additionally, the California code provides:

- (b) If a third person examined pursuant to Section 708.120 claims an interest in the property adverse to the judgment debtor or denies the debt and the court does not determine the matter as provided in subdivision (a) . . . , the court may not order the property or debt to be applied toward the satisfaction of the money judgment but may make an order pursuant to subdivision (c) or (d) . . . forbidding transfer or payment to the extent authorized by that section.<sup>189</sup>

In reviewing other California statutes that address satisfaction of debt, such as California Code Section 699.040,<sup>190</sup> the statutes provide:

- (a) If a writ of execution is issued, the judgment creditor may apply to the court ex parte, or on noticed motion . . . for an order directing the judgment debtor to transfer to the levying officer...
- (b) The court may issue an order pursuant to this section upon a showing of need for the order.<sup>191</sup>

Therefore, California requires detailed examinations of multiple statutes to determine what property might be available to the creditor for satisfaction of the debt. Debtor examinations are intended "to allow the judgment creditor a wide scope of inquiry concerning property and business affairs of the judgment debtor."<sup>192</sup> California permits such inquiries conceivably for the purpose of allowing the debtor to look for and attach any appropriate property in satisfaction of the debt. It would not seem overreaching then to include bad faith claims as possible rights or actions that a court may order in satisfaction of the debt by determining such actions to be property available for assignment in satisfaction of the judgment.

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owed; service; notice); *id.* § 708.205 (authorizing court to issue order for satisfaction of money judgment or forbidding transfer or payment).

188. *Id.* § 708.205.

189. *Id.*

190. *Id.* § 699.040.

191. *Id.*

192. *Hooser v. Sup. Court of San Diego Cty.*, 84 Cal. App. 4th 997, 1002 (Ct. App. 2000).

A recent California case contemplated the application of this statute not only to property and assets currently owned by the debtor, but also to future proceeds of a judgment debtor.<sup>193</sup> In the case, plaintiffs moved to enforce their default judgment against an individual defendant, M.C. Hammer a.k.a. Stanley Burrell (“Burrell”).<sup>194</sup> Plaintiffs sought an order under this section of the California Code “assigning all or part of any right to payment due, or to become due to Burrell, arising out of his activities as an entertainer.”<sup>195</sup> The court noted that assignment from a third-party obligor is appropriate “where a judgment creditor can identify a person or entity which is obligated to make payment to the judgment debtor, and where that right to payment is assignable.”<sup>196</sup> To determine whether an assignment is appropriate, the court may consider all relevant factors.<sup>197</sup> Further, in applying the statute, the court held “Section 708.510 allows a judgment creditor to reach a judgment debtor’s assignable property, such as payments that are due or will come due, but there must be ‘some degree of concreteness to the expected payment’ for Section 708.510 to apply.”<sup>198</sup> Thus, it would seem reasonable to permit a court to assign a debtor’s bad faith action against its insurer in the same manner. The opportunity for future payment is not the value of property, rather it is the claim itself, which has value because it allows the third party a remedy to pursue satisfaction of the judgment.

Similarly, other states have provisions to protect creditors and provide pathways for the satisfaction of debt.<sup>199</sup> North Carolina has creditor statutes that address assignment of property. Specifically, the North Carolina statute provides:

The court or judge may order any property, whether subject or not to be sold under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands of the judgment debtor . . . , to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services . . . cannot be so applied.<sup>200</sup>

Thus, review of the statutory provisions is important in evaluating judicial assignment of a bad faith claim. Once analysis of the availability of assignment of property for satisfaction of debt is complete, the next issue to consider when contemplating judicial assignment is the availability of pursuing a bad faith claim itself. Not every state permits an insured to bring a bad faith action against its

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193. *Icho v. Packetswitch, Inc.*, No. CV-1-20858-LHK (PSG), 2012 U.S. Dist. LEXIS 135602 (N.D. Cal. 2012).

194. *Id.* at \*1.

195. *Id.* at \*2.

196. *Id.* at \*3.

197. *Id.* at \*4.

198. *Id.* at \*5 (quoting *Passport Health, Inc. v. Travel Med, Inc.*, No. 2:09-cv-01753-GEB-JFM, 2012 U.S. Dist. LEXIS 53343, at \*9 (E.D. Cal. Apr. 13, 2012)).

199. N.C. GEN. STAT. § 1-362 (2016).

200. *Id.*

insurer.<sup>201</sup> The approach of states to the opportunity to bring a bad faith claim is almost as varied as the states themselves. Some states consider the action only as a contract claim, while others consider the claim as both a tort and a contract claim.<sup>202</sup> Still other states allow for a claim under common law, while a few states provide a statutory scheme for the bad faith action.<sup>203</sup> For example, while North Carolina permits assignment of property for satisfaction of a debt, it has a somewhat complicated history and path for a claimant to bring a bad faith action. In 1976, the North Carolina Supreme Court in *Newton v. Standard Fire Insurance Company*<sup>204</sup> reviewed the judicial history of attempts to obtain punitive damages in breach of contract cases and affirmed the trial court's dismissal of the punitive damages claim, reasoning:

The breach of contract represented by defendant's failure to pay is not alleged to be accompanied by either fraudulent misrepresentation or any other recognizable tortious behavior . . . . [T]he allegations in the complaint of oppressive behavior by defendant in breaching the contract are insufficient to plead any recognizable tort. They are, moreover, unaccompanied by any allegation of intentional wrongdoing other than the breach itself even were a tort alleged. Punitive damages could not therefore be allowed even if the allegations here considered were proved.<sup>205</sup>

In other words, the court ruled that the plaintiff must show something more than a mere refusal to pay in order to recover punitive damages—the plaintiff must show: (1) a refusal to pay after recognition of a valid claim; (2) bad faith; and (3) aggravating or outrageous conduct.<sup>206</sup> Generally, an insurer acts in bad faith when its refusal was “not based on honest disagreement or innocent mistake.”<sup>207</sup> The court indicated that something more was needed than simply a refusal to pay.<sup>208</sup> “Aggravation” has been defined to include fraud, malice, to such a degree of negligence that indicates a reckless indifference to plaintiff's rights, oppression, insult, rudeness, caprice, and willfulness.<sup>209</sup> Thus, under North Carolina law, a bad faith refusal to provide the coverage or to pay a warranted claim may give rise to a claim for punitive damages.<sup>210</sup> A plaintiff satisfies the aggravation requirement by sufficiently pleading specific instances of willful or reckless conduct accompanying the breach of contract and the purported bad

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201. See, e.g., *Safeco Ins. Co. v. Butler*, 823 P.2d 499 (Wash. 1992).

202. See *Anastopoulos*, *supra* note 2.

203. *Id.*

204. 229 S.E.2d 297 (N.C. 1976).

205. *Id.* at 302.

206. *Michael v. Metro Life Ins. Co.*, 631 F. Supp. 451, 455 (W.D.N.C. 1986).

207. *Dailey v. Integon Gen. Ins. Corp.*, 331 S.E.2d 148, 155 (N.C. Ct. App. 1985).

208. *Michael*, 631 F. Supp. at 456.

209. *Newton*, 229 S.E.2d at 301.

210. *Von Hagel v. Blue Cross & Blue Shield of N.C.*, 370 S.E.2d 695, 698-99 (N.C. Ct. App. 1988).

faith.<sup>211</sup>

Thus, in addition to the potential avenues of recovery that rest primarily upon common law, the North Carolina General Statutes provide a mechanism by which wronged insureds can recover for the bad faith committed by their insurers.<sup>212</sup> Working together, the Unfair Claim Settlement Practices Act,<sup>213</sup> and the Unfair Trade or Deceptive Practices Act (UTPA)<sup>214</sup> create a private right of action that allows a plaintiff to reference the behaviors outlawed by the Unfair Claim Settlement Practices Act in a claim brought pursuant to the UTPA. Therefore, North Carolina law allows a plaintiff harmed by an insurer engaging in actions outlawed by the Unfair Claim Settlement Practices statute to pursue a claim by filing a private right of action alleging violations of the UTPA.<sup>215</sup> The allegations must be pled properly pursuant to the statutory provisions.<sup>216</sup> Thus, a benefit to bringing a bad faith claim under the statute is that a successful plaintiff may seek both treble damages and attorneys' fees.<sup>217</sup>

North Carolina is just one example of the divergent approaches states have taken to bad faith claims. While seemingly a state with a statutory path, North Carolina actually utilizes a combination statutory and common law approach. Therefore, examining a state's approach to bad faith claims is an important step in the analysis before proceeding to a determination as to the availability of judicial assignment.

### *C. Pre-requisite: Excess Judgment*

The path for a plaintiff to seek judicial assignment of the bad faith action requires careful planning and analysis not only by the court but also by the third-party plaintiff. Consideration of the viability of the availability of the bad faith action is only the first step for the third-party plaintiff when contemplating an approach that utilizes an assignment of the claim. Another crucial step in the process appears to be the obtainment of the judgment itself or the act of creating the debt owed that provides the pathway to the debtor creditor statute.<sup>218</sup> For there can be no assignment in satisfaction of a judgment without the third-party plaintiff obtaining a judgment against the insured tortfeasor. A judgment in excess of the policy limits is the vehicle by which a third party creates the debt, then utilizes the debtor statutes to obtain a judicial assignment to satisfy that

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211. *Payne v. N.C. Farm Bureau Mut. Ins. Co.*, 313 S.E.2d 912, 913 (N.C. Ct. App. 1984).

212. *See* N.C. GEN. STAT. § 58-63-15(11) (2016); *see also id.* § 75-1.1.

213. *Id.* § 58-63-15(11).

214. *Id.* § 75-1.1.

215. *See Gray v. N.C. Ins. Underwriting Ass'n*, 529 S.E.2d 676, 683 (N.C. 2000); *Johnson v. First Union Corp.*, 496 S.E.2d 1, 6 (N.C. Ct. App. 1998); *Hardy v. Toler*, 211 S.E.2d 809, 812-13 (N.C. Ct. App. 1975).

216. *Highland Paving Co. v. First Bank*, 742 S.E.2d 287, 294 (N.C. Ct. App. 2013)

217. *See* N.C. GEN. STAT. §§ 75-16, 75-16.1 (2016); *see also Marshall v. Miller*, 276 S.E.2d 397, 404 (N.C. 1981).

218. *See generally* N.C. GEN. STAT. § 1-362 (2016).

debt.<sup>219</sup> Therefore the judgment, and it must be an excess judgment, against the tortfeasor is a prerequisite to the application to the court for assignment of the bad faith claim.<sup>220</sup> The excess judgment is important because it functions to expose the insured to a portion of the debt that may not be covered by insurance. Insurance purchases are driven by the fear of insureds that a judgment against them will result from some fortuitous act creating liability and that a judgment will create a financial burden on the insured.<sup>221</sup> It is this fear that partially drives the insurance market.<sup>222</sup>

#### IV. CONCEPTS AND APPLICATION

We turn now to an actual case to explore the concepts and consequences of judicial assignment of a bad faith claim and how it might work in practice. In *Bales v. Martinez*, the tortfeasor was an undocumented foreign national living and working in the United States.<sup>223</sup> He had a driver's license and had purchased automobile insurance through Northbrook Insurance Company for liability coverage.<sup>224</sup> The plaintiff<sup>225</sup> was operating a motorcycle.<sup>226</sup> As the plaintiff proceeded through an intersection, the tortfeasor continued through the same intersection, striking the plaintiff who died at the scene from his injuries.<sup>227</sup>

The plaintiff contended that liability was not at issue under the facts.<sup>228</sup> Plaintiff filed a wrongful death action but the defendant failed to answer and default was entered subsequently.<sup>229</sup> A default judgment was entered in the amount of \$1.9 million.<sup>230</sup> Defendant's insurance company then filed a motion to set aside the default judgment.<sup>231</sup> The court granted the defendant's motion to set aside the default judgment and the matter was tried in the defendant's absence.<sup>232</sup>

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219. See *supra* Parts II.B, III.A.

220. See *Comunale v. Traders & Gen. Ins. Co.*, 328 P.2d 198, 201-02 (Cal. 1958).

221. See *supra* note 24 and accompanying text.

222. *Id.*

223. *Bales v. Martinez*, No. 2010-CP-10-8631, 2012 WL 2376992 (S.C. Com. Pl. Mar. 1, 2012); Allyson Bird, *\$1.9M Verdict; Driver Vanishes*, POST & COURIER (Apr. 1, 2012), [http://www.postandcourier.com/archives/m-verdict-driver-vanishes/article\\_ae62bbfb-2274-5f37-b9b0-9b48d4a68804.html](http://www.postandcourier.com/archives/m-verdict-driver-vanishes/article_ae62bbfb-2274-5f37-b9b0-9b48d4a68804.html) [<https://perma.cc/46PZ-GJAK>].

224. Memorandum of Law in Support of Plaintiff's Motion for Assignment of Claims to Fulfill Judgment, *Bales v. Martinez*, No. 2010-CP-10-8631, 2013 WL 7086890 (S.C. Com. Pl. July 23, 2013).

225. A duly appointed personal representative brought the action on behalf of the decedent.

226. *Bales*, 2012 WL 2376992.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. Defendant's Memorandum in Support of Motion to Vacate Default, *Bales v. Martinez*, No. 2010-CP-10-8631, 2012 WL 2415302 (S.C. Com. Pl. Jan. 11, 2012).

232. *Bales v. Martinez*, No. 2010-CP-10-8631, 2014 WL 561875 (S.C. Com. Pl. Jan. 17,

During trial, the court granted the plaintiff's Motion for Directed Verdict as to the issue of the defendant's liability and the issue of damages went to the jury.<sup>233</sup> The jury returned a verdict awarding the plaintiff \$20 million in actual damages and \$30 million in punitive damages.<sup>234</sup> Both sides filed post-trial motions.<sup>235</sup> The plaintiff moved for assignment of the defendant's claims believing that defendant may have had causes of action against his insurance company for its failure to defend and to properly protect his interests in the action.<sup>236</sup> Importantly, before trial, the plaintiff offered to accept an assignment of these claims in exchange for entering into a covenant not to execute a judgment against the defendant personally.<sup>237</sup> Plaintiff suggested that the settlement for the assignment appeared to be in the best interest of the insured/tortfeasor as well as the plaintiff.<sup>238</sup> Therefore, she asserted, the assignment made sense for both sides.<sup>239</sup> However, attorneys hired by the insurer to defend the action against the insured were unable to communicate the offer to the defendant who had left the jurisdiction, and therefore the defense attorneys were unable to gain permission to accept the plaintiff's offer.<sup>240</sup>

Interestingly in the case, the facts indicate the insurer moved successfully to set aside the default judgment of \$1.9 million against the insured and requested a jury trial instead.<sup>241</sup> The insured/defendant could not be located at the time, thus the insurer seemingly took this action without his permission.<sup>242</sup> At trial, the plaintiff prevailed, and the jury rendered a verdict in the amount of \$50 million for which the insured/defendant along with his insurer were now responsible.<sup>243</sup>

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2014).

233. *Id.*

234. *Id.*

235. *See* Plaintiff's Memorandum in Support of Motion for Summary Judgment and for Sanctions, *Bales v. Martinez*, No. 2010-CP-10-8631, 2014 WL 271728 (S.C. Com. Pl. Jan. 13, 2014); *see also* Defendant Abel Martinez Martinez's Response to Plaintiff's Motion for Summary Judgment, *Bales v. Martinez*, No. 2010-CP-10-8631, 2014 WL 271729 (S.C. Com. Pl. Jan. 13, 2014).

236. Memorandum of Law in Support of Plaintiff's Motion for Assignment of Claims to Fulfill Judgment, *Bales v. Martinez*, No. 2010-CP-10-8631, 2013 WL 7086890 (S.C. Com. Pl. July 23, 2013).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. Defendant's Memorandum in Support of Motion to Vacate Default, *Bales v. Martinez*, No. 2010-CP-10-8631, 2012 WL 2415302 (S.C. Com. Pl. Jan. 11, 2012); Trial Order, *Bales v. Martinez*, No. 2010-CP-10-8631, 2012 WL 2376996 (S.C. Com. Pl. May 4, 2012).

242. Memorandum of Law in Support of Plaintiff's Motion for Assignment of Claims to Fulfill Judgment, *Bales v. Martinez*, No. 2010-CP-10-8631, 2013 WL 7086890 (S.C. Com. Pl. July 23, 2013).

243. *Bales v. Martinez*, No. 2010-CP-10-8631, 2014 WL 561875 (S.C. Com. Pl. Jan. 17, 2014).

Importantly for consideration of the judicial assignment, the question remains: How does the plaintiff now satisfy the judgment he obtained after a lengthy trial? Equally troubling was the fact that the insurer elected to set aside the default judgment of \$1.9 million without the consent of the defendant, then exposed him to a jury verdict in the amount of \$50 million, a difference of over \$48 million.<sup>244</sup> Without the defendant's presence, his attorneys could not agree to an earlier assignment despite the fact that it was in the best interest of both parties.

This scenario is precisely when judicial assignment may be the most equitable and fair approach. By moving for judicial assignment of the defendant's bad faith action against the insurer, the plaintiff has the opportunity to step into the shoes of the insured and proceed to hold the insurer accountable for its handling or mishandling of the claim.<sup>245</sup> Therefore, the assignment provides a remedy, not for collecting the excess judgment, but for holding the insurer accountable for its actions towards its insured. If the insurer in this case had considered the possibility of a judicial assignment of the insured's claims for bad faith, would it have acted differently? Would the potential for assignment had deterred the insurer from seemingly acting only in its own interests? These are questions that can only be answered when third-party plaintiffs have the opportunity to utilize judicial assignment of the insured's bad faith claims. By employing existing statutes and laws, the plaintiff, who often has no other means to hold the insurer accountable for the handling of the claim, may potentially do so through judicial assignment.<sup>246</sup> Also, the insurer, knowing of the possibility for assignment, may have the incentive to act not only in its own interests, but also in those of the insured, even when that insured is absent. The *Bales* case offers a clear illustration of how the concept and the application of a potential assignment of the first-party bad faith action to the third-party plaintiff would work and how it could influence the actions of all the parties, including the defense attorneys, in achieving a resolution that is beneficial to all.<sup>247</sup>

#### CONCLUSION

Legal remedy is the means by which a court of law enforces a right.<sup>248</sup> The theory of legal remedies can take many different forms to ensure the right has value. When a party obtains a judgment, that party should be entitled to pursue a method to collect that judgment. The right to satisfaction through assignment is a long-held legal concept.<sup>249</sup> Judicial involuntary assignment of bad faith claims provides a needed remedy to the aggrieved third party who has suffered first at

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244. *Id.* (awarding \$50 million jury verdict); *Bales v. Martinez*, No. 2010-CP-10-8631, 2012 WL 2376992 (S.C. Com. Pl. Mar. 1, 2012) (awarding \$1.9 million default judgment).

245. *See supra* Part III.A.

246. *See id.*

247. *See supra* notes 223-44 and accompanying text.

248. *See, e.g., Granger v. Luther*, 176 N.W. 1019, 1020 (S.D. 1920); *Curtis v. Loether*, 415 U.S. 189, 193-94 (1974).

249. *See supra* Part II.B.

the hands of the tortfeasor, and second, by enduring a trial and obtaining a judgment that is uncollectable against the first-party defendant.<sup>250</sup> Permitting the third-party plaintiff to seek satisfaction of a judgment through assignment does not offend principles of equity and justice.<sup>251</sup> Rather, permitting such an action furthers these goals.<sup>252</sup> However, there are several steps along the way that a third party must pursue before seeking a judicial assignment. Before proceeding, the third party must first investigate the statutory scheme in order to determine how a state's statute defines property available for satisfaction of a judgment, whether the state permits bad faith actions, and whether the state provides for assignment.<sup>253</sup>

A plaintiff, who first sustains injury due to the negligence of a tortfeasor, then endures the rigors of litigation in order to obtain a judgment against the tortfeasor, only to have the judgment unenforceable due to the absence or inability of the tortfeasor to pay, is put in a position that is possibly more difficult than when he started the action. By permitting a court to assign the bad faith claim and the possible malpractice action against the defense attorney, the plaintiff is granted an avenue of recovery for his or her right, where there is little other chance of collecting on the judgment.<sup>254</sup> When the statute permits assignment, then the plaintiff is afforded another approach through which he can seek satisfaction of the judgment.<sup>255</sup> Judicial assignment permits the plaintiff opportunity to fully recover not only for the negligence caused by the tortfeasor, but also for a breach of the duty of good faith and fair dealing by the insurer and possibly for a breach by the defense attorney in the handling of the litigation of the claim.<sup>256</sup> Also, the threat of a possible assignment of the bad faith claim may act as a deterrent to ensure that the insurer acts reasonably and fairly with the plaintiff.<sup>257</sup> Additionally, the possibility of an assignment of the malpractice action may encourage defense attorneys to reasonably try to settle claims against their client, the tortfeasor, when it is in the interests of the insured.<sup>258</sup> Thus, judicial assignment seemingly furthers equity and justice, provides a remedy for a right, and is often in the best interest of both the third-party plaintiff and the insured/tortfeasor defendant.

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250. *See supra* Part III.A.

251. *See supra* Part II.B.

252. *See id.*

253. *See supra* Part III.A.

254. *See supra* Part II.B-C.

255. *See supra* Part III.A-B.

256. *See supra* Part III.

257. *See supra* Part II.B.

258. *See supra* Part II.C.