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Liability Insurance and Contractual Aspects of Settlement

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ABSTRACT

Most civil litigation settles. Many settlements are paid by liability insurers following the negotiation of settlement agreements by the parties' lawyers. Settlement agreements are contracts, and their interpretation and enforcement are therefore governed by contract law principles. The essential elements of a contract are offer, acceptance, and consideration. In the liability insurance context as elsewhere, contract disputes connected to settlements typically center on either offer or acceptance. To be valid, a settlement offer must be capable of acceptance. The offer must be definite, and its material terms must be reasonably certain. When it comes to accepting a settlement offer, the "mirror image" rule applies in this context as it does in other contract formation scenarios. Under this rule, an attempted acceptance that does not mirror the settlement offer in material respects becomes a counteroffer. If the claimant declines the counteroffer, there is no settlement. This turn of events can be enormously consequential if the insured's potential liability exceeds its policy limits and litigation ensues.

The importance of achieving enforceable settlement agreements is difficult to overstate. The law and public policy strongly favor the settlement of disputes, and courts would be overwhelmed if most cases went to trial. This Article examines contractual aspects of settlement in the liability insurance context, concentrating on the elements of offer and acceptance. It additionally addresses insurers' ability to reject settlement offers that are intended to facilitate later bad faith litigation without incurring extracontractual liability.

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I. INTRODUCTION

In federal courts, only around two percent of cases go to trial.[1] In state courts, only about three percent of civil cases go to trial.[2] As these statistics indicate, most civil litigation settles.[3] Certainly, most tort cases settle.[4] The settlements in many civil cases are paid by liability insurers.[5] Standard liability insurance policies grant the insurance company the right to settle a lawsuit against an insured as the insurer deems expedient.[6] An insurance company may opt to settle a lawsuit against an insured for several reasons. For example, the insurer may favor settlement because it estimates that the cost of defending the litigation will exceed the cost of settlement; because its investigation of the underlying accident revealed that the insured likely will bear substantial liability for the accident and the plaintiff's claimed damages are within the liability limits of the insured's policy; or because there is a reasonable probability of a verdict against the insured in excess of the policy limits and an equal chance that the insured will be held liable for the plaintiff's damages.[7]

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[1] CIVIL LITIGATION MANAGEMENT MANUAL 69 (2d ed. 2010) [hereinafter CIVIL LITIG. MGMT. MANUAL].

[2] LYNN LANGTON & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005 9 (Oct. 2008 rev. Apr. 2009), *available at* https://bjs.ojp.gov/content/pub/pdf/cbjtsc05.pdf [https://perma.cc/8LC3-C2E2].

[3] *See* Balducci v. Cige, 223 A.3d 1229, 1245–46 (N.J. 2020) (noting that "most cases are resolved by settlement"); CIVIL LITIG. MGMT. MANUAL, *supra* note 1, at 69 ("Only a small percentage of federal civil cases are resolved by trial. Many of the remaining cases settle.").

[4] WILLIAM T. BARKER & RONALD D. KENT, NEW APPLEMAN INSURANCE BAD FAITH LITIGATION § 2.03[1], at 2-13 (2d ed. 2014 & Supp. 2021).

[5] *See generally* William T. Barker, *Insurer Control of Defense: Reservations of Rights and Right to Independent Counsel*, 71 DEF. COUNS. J. 16, 17 (2004) ("In a sample of litigated cases, researchers found that insurance was involved in 80 percent, with lawyers on both sides agreeing that the claim was completely covered in 59 percent. . . . Even when there is a genuine risk of exposure beyond the policy's coverage, cases are normally resolved without any payment by the insured.").

[6] *See, e.g.*, INS. SERVS. OFFICE, INC., COMMERCIAL GENERAL LIABILITY COVERAGE FORM (CG 00 01 04 13), at 1 (2012) (on file with author) [hereinafter ISO CGL Policy] ("We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result.").

[7] If an insurer unreasonably fails to settle a lawsuit against an insured within its policy limits and there subsequently is a judgment against the insured in excess of the policy limits, the insurer may be liable for the full amount of the judgment and other damages under the law of bad faith. *See* Pinto v. Farmers Ins. Exch., 276 Cal. Rptr. 3d

Of course, settlements are achieved by agreement between the parties.[8] Settlement agreements are contracts.[9] Their interpretation and enforcement are therefore governed by contract law principles.[10]

The essential elements of a contract are offer, acceptance, and consideration.[11] In the liability insurance context as elsewhere in litigation, contract disputes connected to settlements typically center on

13, 21 (Cal. Ct. App. 2021) ("An insurer's duty to accept a reasonable settlement offer is not absolute. . . . An *unreasonable* refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits."). Courts do not presume, however, that settlement is always the preferred strategy. Dairyland Ins. Co. v. Herman, 954 P.2d 56, 61 (N.M. 1997). An insurance company is not required to accept every policy limits settlement offer. *See* Huang v. Brenson, 7 N.E.3d 729, 741 (Ill. App. Ct. 2014) ("An insurance company need not always cede to the demands of its insured to settle."). An insurer need not submit to extortion; it may reject an unreasonable settlement offer within its policy limits without automatically incurring extracontractual liability. *Id.* (quoting LaRotunda v. Royal Globe Ins. Co., 408 N.E.2d 928, 935–36 (Ill. App. Ct. 1980)). "An insurer does not act in bad faith where it honestly believes and has cause to believe that any probable liability will be less than the policy limits." Nat'l Union Fire Ins. Co. v. Markel Ins. Co., No. CV 18-456-R, 2018 WL 5095267, at *2 (C.D. Cal. Sept. 27, 2018); *see also* Gruber v. Est. of Marshall, 482 P.3d 612, 619 (Kan. Ct. App. 2021) ("The insurer does not act in bad faith if it honestly believes, and has good cause to believe, that any probable liability will be less than policy limits."). The reasonableness of an insurer's decision not to settle cannot be judged in hindsight; rather, the court must consider only the information that was available to the insurer when it rejected the settlement offer. *Nat'l Union*, 2018 WL 5095267, at *2 (citing Hodges v. Std. Accident Ins. Co., 18 Cal. Rptr. 17, 24 (Ct. App. 1961)). Concentrating solely on the information available to the insurance company at the time it declined to settle is essential because "no one can predict what any particular jury will do." *Hodges*, 18 Cal. Rptr. at 24.

[8] In the liability insurance context, the insurance company typically negotiates (frequently through defense counsel) and agrees to pay any settlement on the insured's behalf consistent with its policy terms. *See* ISO CGL Policy, *supra* note 6, at 1 ("We may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result.").

[9] Pack v. Middlebury Cmty. Schs., 990 F.3d 1013, 1017 (7th Cir. 2021) (applying Indiana law); Ryan Contracting Co. v. O'Neill & Murphy, LLP, 883 N.W.2d 236, 249 (Minn. 2016); Lund v. Swanson, 956 N.W.2d 354, 358 (N.D. 2021); State *ex rel.* Lee v. Village of Plain City, 102 N.E.3d 10, 14 (Ohio Ct. App. 2017).

[10] Platinum Supplemental Ins., Inc. v. Guarantee Tr. Life Ins. Co., 989 F.3d 556, 563 (7th Cir. 2021) (applying Illinois law); Prop. Cal. SCJLW One Corp. v. Leamy, 236 Cal. Rptr. 3d 500, 506 (Ct. App. 2018); Avery v. Comm'r, N.H. Dep't of Corrs., 248 A.3d 1179, 1189 (N.H. 2020).

[11] Myers v. Myers, 955 N.W.2d 223, 229 (Iowa Ct. App. 2020); Carruthers v. Serenity Mem'l Funeral & Cremation Serv., LLC, 576 S.W.3d 301, 306 (Mo. Ct. App. 2019).

either offer or acceptance.[12] For instance, to be valid, a settlement offer must be capable of acceptance.[13] Thus, a settlement offer that requires the insurer to produce copies of the declarations pages of every insurance policy that covers the insured for the subject accident – including policies issued by other insurance companies – is not valid because the insurer has no ability, authority, or right to produce other insurance companies' records.[14] Alternatively, consider a case that involves a progressive occurrence, such as the plaintiff's exposure to asbestos or toxic chemicals over a period of years, such that multiple insurers may be obligated to indemnify the insured. An offer by the plaintiff to one of them to settle for the limits of all applicable insurance policies is not capable of acceptance by the single insurer to which the offer is made because that insurer does not have the authority to bind the other insurers; it can only offer its own policy limits in settlement.[15]

When it comes to accepting a settlement offer, the "mirror image" rule applies in this context as it does in other contract formation scenarios.[16] The mirror image generally holds that "[a]n acceptance of a settlement offer must be a 'mirror image' of the offer in all material respects. Otherwise, it will be considered a counteroffer that rejects the original offer."[17] So, for example, an insurer that sends a claimant a settlement check accompanied by a proposed release that is materially broader than the release the claimant said she would agree to may in some jurisdictions convert the attempted acceptance of the claimant's settlement

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[12] *See, e.g.*, Camacho v. Nationwide Mut. Ins. Co., 13 F. Supp. 3d 1343, 1360 (N.D. Ga. 2014) (holding that the plaintiffs' "policy-limits demand when read in its entirety was a legally acceptable offer, susceptible to Nationwide's prompt response, and thus that settlement was possible"); Davis v. Tex. Farm Bureau Ins., 470 S.W.3d 97, 105 (Tex. App. 2015) (concluding that an accident victim's demand to settle for policy limits was a counteroffer to the insurer's settlement offer and thus terminated the victim's power to subsequently accept the insurer's offer).

[13] *See* Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC, 127 F. Supp. 3d 156, 171 (S.D.N.Y. 2015) ("[T]he term 'offer' necessarily implies something that is capable of being accepted."); Wallace v. Allstate Ins. Co., No. C 97-3806 MJJ, 1999 WL 51822, at *2 (N.D. Cal. Jan. 29, 1999) ("[T]he insurer must be given a reasonable opportunity to settle within the policy limits and any offer must be capable of acceptance on the part of the insurer.").

[14] Whitney v. State Farm Mut. Auto. Ins. Co., 258 P.3d 113, 118–19 (Alaska 2011).

[15] This position assumes that the other insurers have not authorized the insurer to which the settlement offer was made to settle on their behalf.

[16] Grant v. Sears, 379 S.W.3d 905, 915 (Mo. Ct. App. 2012) (quoting Reppy v. Winters, 351 S.W.3d 717, 721 (Mo. Ct. App. 2011)).

[17] Breger v. Robshaw Custom Homes, Inc., 264 So. 3d 1147, 1150 (Fla. Dist. Ct. App. 2019).

offer into a counteroffer.[18] If the claimant declines the counteroffer, there is no settlement.[19] This turn of events can be enormously consequential if the insured's potential liability exceeds its policy limits and litigation ensues.[20] If there is a judgment in excess of the insurance policy limits, the insurer may be liable for the full amount of the judgment and possibly other damages under the law of bad faith for failing to settle the case within policy limits.[21] In fact, adherence to the mirror image rule in cases of potential excess liability can encourage bad faith litigation:

> It has become clear that, to a plaintiff whose injuries greatly exceed the available coverage, a policy-limits settlement can be less valuable than a rejected offer and consequent bad-faith claim—however dubious the claim. In the context of proceedings to enforce purported settlements, plaintiffs sometimes structure offers not to reach settlements, but rather to elicit rejections.[22]

The importance of achieving enforceable settlement agreements is difficult to overstate. The law and public policy strongly favor the settlement of disputes, and courts would be overwhelmed if most cases went to trial.[23] This Article examines contractual aspects of settlement in the liability insurance context, concentrating on the elements of offer and acceptance. Part II discusses the requirements of a valid settlement offer. In short, settlement offerors are masters of their offers and offers must be definite and include material terms that are reasonably certain. Part III analyzes the second step in the contracting process—acceptance. Here the

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[18] *See, e.g.*, Pena v. Fox, 198 So. 3d 61, 64 (Fla. Dist. Ct. App. 2015) (concluding that there was no meeting of the minds and thus no settlement agreement on these facts).

[19] *Id.*

[20] *See* Freeman v. Leader Nat'l Ins. Co., 58 S.W.3d 590, 598 (Mo. Ct. App. 2001).

[21] *See id.* at 598 ("An insurer's right to control settlement and litigation . . . creates a fiduciary relationship between insurer and insured. . . . Thus, an insurer owes a duty to exercise good faith in evaluating and negotiating third-party claims against its insured, and the insurer may be held liable in tort for a third-party judgment in excess of policy limits if it fails to perform its fiduciary obligation in good faith.").

[22] Wright v. Nelson, 856 S.E.2d 421, 425 (Ga. Ct. App. 2021) (McFadden, C.J., concurring).

[23] *See* J.W. v. Indiana, 113 N.E.3d 1202, 1206 (Ind. 2019) ("Indiana's judicial policy strongly favors agreements to settle litigation. . . . Our judicial system counts on such settlements to occur in the lion's share of . . . cases. Otherwise, with more than a million cases filed in our trial courts each year, the system would grind to a halt."); Appleyard v. Tigges, 114 N.Y.S.3d 627, 628 (App. Div. 2019) (asserting that "the courts could not function if every dispute resulted in a trial").

principal impediment to settlement is the mirror image rule, although that rule presents less of an obstacle if its application is confined to the material terms of the offer. Finally, Part IV briefly addresses insurers' ability to reject settlement offers that are intended to facilitate later bad faith litigation without incurring extracontractual liability as a result.

II. THE SETTLEMENT OFFER

For parties to reach a settlement agreement there must first be a definite offer to settle.[24] Under established contract law, "[a]n offer cannot be vague."[25] If an offer is vague, there is no intent on the offeror's part to be bound.[26] In addition, an offer must also be certain with respect to its material conditions and terms.[27] In short, even if parties intend to contract, there will be no enforceable agreement if the material terms of the contemplated agreement are not reasonably certain.[28] A valid offer does not, however, require the offeror to use "any specific terms of art."[29]

A. Illustrative Cases

American Family Mutual Insurance Co. v. Browning illustrates how a settlement offer can come up short. In *Browning*, David Browning was injured when he wrecked his car after he swerved to avoid hitting Kyle Himmelberg's car.[30]

Himmelberg was insured under an American Family personal auto policy with per person bodily injury liability limits of $50,000.[31] The policy also included an "additional payments" provision with a "first aid clause" that provided American Family would "'pay in addition to [its] limit of liability . . . expenses incurred by an insured person for first aid to

[24] Sumerel v. Goodyear Tire & Rubber Co., 232 P.3d 128, 133 (Colo. App. 2009); Smith v. King, 953 N.W.2d 258, 274 (Neb. Ct. App. 2020).

[25] Jones v. Capella Univ., No. 19-2521, 2020 WL 6875419, at *6 (D. Minn. Nov. 23, 2020).

[26] Magnusson Agency v. Pub. Entity Nat'l Co.-Midwest, 560 N.W.2d 20, 26 (Iowa 1997).

[27] *Id.* Uncertainty as to non-essential terms, however, will not prevent a court from enforcing a settlement agreement. BP Prods. N. Am., Inc. v. Oakridge at Winegard, Inc., 469 F. Supp. 2d 1128, 1133 (M.D. Fla. 2007) (applying Florida law).

[28] JOSEPH M. PERILLO, CONTRACTS 47–48 (7th ed. 2014).

[29] Shockley v. PrimeLending, 929 F.3d 1012, 1017 (8th Cir. 2019) (applying Missouri law)

[30] 621 S.W.3d 619, 621 (Mo. Ct. App. 2021).

[31] *Id.*

others at the time of an auto accident involving your insured car.'"[32] Browning was treated by medical professionals at the accident scene, in the ambulance en route to the hospital, and in the hospital emergency room, but Himmelberg never rendered first aid to him.[33]

In a letter to American Family offering to settle his claims against Himmelberg, Browning "agreed 'to unconditionally release Kyle Himmelberg from all present and future liability under RSMo. § 537.058 . . . in exchange for all applicable policy limits and payments.'"[34] Browning further wrote that he was making his settlement offer "'under RSMo. § 537.058 and intend[ed] th[e] offer to comply with that section.'"[35] The Missouri statute to which Browning referred provided in pertinent part:

> A time-limited demand to settle any claim for personal injury, bodily injury, or wrongful death shall be in writing, shall reference this section, shall be sent certified mail return-receipt requested to the tort-feasor's liability insurer, and shall contain the following material terms:
>
> (1) The time period within which the offer shall remain open for acceptance by the tort-feasor's liability insurer, which shall not be less than ninety days from the date such demand is received by the liability insurer;
>
> (2) The amount of monetary payment requested or a request for the applicable policy limits;
>
> (3) The date and location of the loss;
>
> (4) The claim number, if known;
>
> (5) A description of all known injuries sustained by the claimant;
>
> (6) The party or parties to be released if such time-limited demand is accepted;
>
> (7) A description of the claims to be released if such time-limited demand is accepted; and

[32] *Id.* at 297.
[33] *Browning*, 621 S.W.3d at 621.
[34] *Id.* (quoting Browning's letter).
[35] *Id.* (quoting Browning's letter).

> (8) An offer of unconditional release for the liability insurer's insureds from all present and future liability for that occurrence under section 537.060.[36]

Browning left his offer open for ninety-one days from the date American Family received his letter.[37]

American Family timely responded by letter and stated "that it was 'meeting the demand of all applicable policy limits which [are] $50,000 for this claim.'"[38] Browning's lawyer replied that American Family's response was a counteroffer rather than an acceptance of Browning's settlement offer because American Family did not include amounts allegedly due under the first aid clause in Himmelberg's policy.[39]

The parties thereafter agreed that American Family would file a declaratory judgment action to determine whether Browning was owed more than the $50,000 per person bodily injury limit of Himmelberg's policy.[40] In its declaratory judgment petition, American Family alleged that (1) Browning's letter did not mention first aid expenses allegedly incurred by Himmelberg, such that it had no duty to include first aid coverage in its letter attempting to accept Browning's settlement offer; and (2) Himmelberg did not incur any first aid expenses, such that it could have no duty to pay them in response to Browning's offer.[41] The trial court awarded American Family summary judgment on the basis that Himmelberg incurred no first aid expenses.[42] Browning appealed.[43]

The Missouri Court of Appeals sidestepped the parties' arguments over the applicability of American Family's first aid clause because Browning "did not, in fact, request payment of his first aid expenses in his demand letter."[44] Browning's letter stated that he would absolve Himmelberg of all liability "'in exchange for all applicable policy limits and payments.'"[45] Browning argued that his "inclusion of 'and payments' in his settlement offer constituted a demand that, in addition to paying the

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[36] MO. REV. STAT. § 537.058.2(2) (2020).

[37] *Browning*, 621 S.W.3d at 623.

[38] *Id.* at 621.

[39] *Id.*

[40] *Id.*

[41] *Id.* (referring to Browning's settlement offer as a "demand").

[42] *Id.* at 621–22.

[43] *Id.* at 622.

[44] *Id.*

[45] *Id.* at 623 (quoting Browning's letter).

policy limits, American Family pay his first aid expenses," but the *Browning* court disagreed.[46]

First, Browning did not state in his letter that the "payments" he now claimed described first aid expenses incurred by Himmelberg were any such thing.[47] Indeed, he never mentioned "first aid" in his letter, nor did he inform American Family that he had received first aid and had accumulated related expenses.[48] For that matter, nothing in his letter to American Family even hinted that he was looking to recover first aid expenses.[49]

Second, the statute under which Browning offered to settle required him to state in his letter "'[t]he amount of monetary payment requested or a request for the applicable policy limits.'"[50] Yet, the only identifiable monetary payment Browning requested was the $50,000 per person bodily injury limit listed on the declarations page of the American Family policy.[51] If Browning was seeking a sum other than the policy limits, the statute made clear that he needed to specify that amount.[52]

At bottom, when Browning chose to make a time-limited settlement demand under the Missouri statute, he accepted responsibility for complying with the statute's provisions.[53] Those provisions included the requirement that he specify the amount of monetary payment requested in settlement or request the applicable insurance policy limits.[54] His argument that his request for "payments" satisfied this requirement and accordingly obligated American Family "to choose whether to accept his demand to pay an unknown amount for unmentioned first aid expenses" was unsupportable.[55] The *Browning* court therefore affirmed the trial

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[46] *Id.*

[47] *Id.*

[48] *Id.* Again, it would not have mattered even if Browning had received first aid because the first aid clause in American Family's policy provided Himmelberg with first-party coverage; the clause was not intended to benefit Browning and Browning had no standing to seek payment under the clause. Richmond, *supra* note 32, at 294.

[49] *Browning*, 621 S.W.3d at 623. At the risk of sounding like a broken record, it would not have mattered even had Browning sought coverage under the first aid clause in American Family's policy because he had no standing to assert the clause and no right to recovery thereunder. Richmond, *supra* note 32, at 294.

[50] *Browning*, 621 S.W.3d at 623 (quoting MO. REV. STAT. § 537.058.2(2) (2020)).

[51] *Id.*

[52] *Id.* at 622.

[53] *Id.* at 623.

[54] *Id.* at 623–24.

[55] *Id.* at 624.

court's declaratory judgment that American Family owed nothing under its first aid clause.[56]

First Acceptance Insurance Company of Georgia, Inc. v. Hughes is another recent case in which a settlement offer was found wanting.[57] In that case, Ronald Jackson caused a multi-vehicle accident in which he was killed.[58] Jackson was insured by First Acceptance under an auto policy with liability limits of $25,000 per person and $50,000 per accident.[59] At least five people were hurt in the accident, including Julie An and her daughter, Jina Hong.[60]

First Acceptance engaged counsel to try and achieve a global settlement of the five known accident victims' injury claims.[61] Toward that goal, First Acceptance's lawyer proposed that the parties schedule a joint settlement conference or mediation.[62] In response, An and Hong's lawyer faxed two letters (described by the court as the June 2 Letters) to First Acceptance's lawyer.[63] In the first letter, An and Hong's lawyer stated that his clients would like to resolve their claims within First Acceptance's policy limits and expressed their interest in attending a joint settlement conference.[64] Then, after referring to An and Hong's UM policy limits, the lawyer wrote:

> Of course, the exact amount of UM benefits available to my clients depends upon the amount paid to them from the available liability coverage. Once that is determined, a release of your insured from all personal liability except to the extent other insurance coverage is available will be necessary in order to preserve my clients' rights to recover under the UM coverage and any other insurance policies. In fact, if you would rather settle within your insured's policy limits now,

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[56] *Id.*

[57] 826 S.E.2d 71, 73 (Ga. 2019). *First Acceptance* attracted notable attention in the insurance law community when the decision came down. *See, e.g.*, Jeff Sistrunk, *Ga. High Court Ruling Curbs "Gotcha" Bad Faith Cases*, LAW360 (Mar. 12, 2019, 9:47 PM EDT), https://www.law360.com/articles/1137760 [https://perma.cc/HRJ3-ABH8] (reporting lawyers' and observers' reactions to the opinion); Jeff Sistrunk, *Insurer Not Liable for $5.3M Crash Award, Ga. Justices Say*, LAW360 (Mar. 11, 2019, 8:28 PM EDT), https://www.law360.com/articles/1137760 [https://perma.cc/9U8M-2SYJ] (describing the case as "closely watched").

[58] *First Acceptance*, 826 S.E.2d at 73.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.* at 74.

[64] *Id.* at 76.

> you can do that by providing that release document with all the insurance information as requested . . . along with your insured's available bodily injury liability insurance proceeds.[65]

In the second letter, the lawyer asked First Acceptance to "'provide, within thirty days of the date of this letter,' certain insurance information."[66] The letter later stated: "'Any settlement will be conditioned upon [the attorney's] receipt of all the requested insurance information.'"[67]

First Acceptance's lawyer read the June 2 Letters but did not interpret them as making any sort of time-limited settlement demand.[68] Unfortunately, the June 2 Letters got misplaced and First Acceptance's lawyer did not respond to An and Hong's lawyer.[69] Forty days later, An and Hong sued Jackson's estate.[70] Soon thereafter, An and Hong's lawyer faxed a letter to First Acceptance's lawyer in which he wrote that he had heard nothing in response to the June 2 Letters and that his clients' settlement offer was revoked.[71] First Acceptance's lawyer attempted to coax the lawyer and his clients into attending a global settlement conference to no avail.[72] First Acceptance then tried to settle An and Hong's claims for the combined policy limit of $50,000 but failed.[73] An and Hong instead took their case to trial and won a $5.3 million judgment against Jackson's estate.[74] Robert Hughes, the administrator of Jackson's estate, then sued First Acceptance for negligence and bad faith in failing to settle Hong's claim within Jackson's policy limits.[75]

First Acceptance prevailed at summary judgment in the trial court, but the Georgia Court of Appeals reversed.[76] First Acceptance then appealed to the Georgia Supreme Court, which was initially interested in "whether an insurer's duty to settle arises when it knows or reasonably should know settlement with an injured party within the insured's policy limits is possible or only when the injured party presents a valid offer to

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[65] *Id.*
[66] *Id.* (quoting the letter) (alteration in original).
[67] *Id.* (quoting the letter) (alteration in original).
[68] *Id.* at 74.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*

settle within the insured's policy limits."[77] The court quickly clarified that "an insurer's duty to settle arises when the injured party presents a valid offer to settle within the insured's policy limits."[78] The question thus became whether An and Hong made a valid settlement offer that First Acceptance wrongfully failed to timely accept.[79] This was an issue of law for the court applying traditional rules of contract construction.[80]

The *First Acceptance* court carefully studied the June 2 Letters.[81] The court found the letters to be mostly clear:

> An and Hong, through their attorney, express[ed] a willingness to participate in the proposed settlement conference with other claimants. Alternatively, they express[ed] their willingness to settle their claims upon receipt of three items: (1) a release of the insured from all personal liability except to the extent other insurance coverage is available, (2) the requested insurance information, and (3) the insured's available bodily injury liability insurance proceeds. *The offer to settle [was] not, at least expressly, subject to a time limit for acceptance. Nor [did] An and Hong state an express time limit on their willingness to attend the settlement conference*.[82]

Even so, Hughes argued that the June 2 Letters established a thirty-day deadline to settle An and Hong's injury claims that First Acceptance failed to meet.[83] Naturally, First Acceptance disputed Hughes's characterization of the June 2 Letters as constituting a time-restricted settlement offer.[84] According to First Acceptance, the June 2 Letters were at best vague:

> The offer at issue [was] expressly subject to First Acceptance's provision of "all the insurance information as requested in the attached." The phrase "as requested" could simply refer to the insurance information. Under that interpretation of the offer, if First Acceptance submitted all the insurance information requested in the second letter, it would have satisfied the condition. On the other hand, "as requested" could mean in the manner requested in the second letter,

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[77] *Id.* at 73.
[78] *Id.* at 75 (footnoted omitted).
[79] *Id.* (footnote omitted).
[80] *Id.*
[81] *See id.* at 76 (describing the content of the June 2 Letters).
[82] *Id.* (emphasis added).
[83] *Id.*
[84] *Id.*

> which include[d] a request that the insurance information be submitted within 30 days of the date of that letter.[85]

As the *First Acceptance* court saw things, "the most reasonable construction of the June 2 Letters, when considered as a whole," was that they did not impose a thirty-day deadline for accepting An and Hong's settlement offer.[86] An and Hong's offer to settle for Jackson's policy limits was proposed as an alternative to their participation in the global settlement conference that First Acceptance hoped to arrange.[87] There was no date set for the settlement conference, however, nor did the June 2 Letters impose a time limit on An and Hong's willingness to attend a settlement conference or fix a deadline to settle beforehand.[88] The request in the second letter that First Acceptance provide the desired insurance information within thirty days was "not logically consistent with a requirement that acceptance of the settlement offer must occur within 30 days."[89] Of course, an agreement that is capable of being construed more than one way will be construed against the drafter—here, against An and Hong.[90]

The *First Acceptance* court concluded that An and Hong's settlement offer in the June 2 Letters did not impose a thirty-day deadline for acceptance.[91] An offer that is silent as to the time allowed for acceptance remains open for a reasonable time.[92] Consequently, First Acceptance was entitled to summary judgment on Hughes's claims.[93] Because An and Hong's settlement offer was not time-limited, First Acceptance could not know that its failure to accept the offer by any certain time would be considered a rejection of the offer.[94] Furthermore, given that the June 2 Letters reflected An and Hong's clear desire to participate in a global settlement conference, First Acceptance could not have reasonably known that it needed to respond to the June 2 Letters within thirty days to avoid

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[85] *Id.*

[86] *Id.*

[87] *Id.* at 76–77.

[88] *Id.* at 77.

[89] *Id.*

[90] *Id.* (quoting Hertz Equip. Rental Corp. v. Evans, 397 S.E.2d 692, 694 (Ga. 1990)).

[91] *Id.*

[92] *Id.* (quoting Simpson & Harper v. Sanders & Jenkins, 60 S.E. 541, 543 (Ga. 1908)).

[93] *Id.*

[94] *Id.*

exposing Jackson's estate to an excess judgment.[95] All that being so, the *First Acceptance* court reversed the judgment of the Georgia Court of Appeals.[96]

B. Lessons from Browning *and* First Acceptance

Browning and *First Acceptance* reflect the contract law aphorism that the offeror is the master of his or her offer.[97] If Browning intended his settlement offer to include the money allegedly due him under American Family's first aid clause, he should have expressly (1) identified the first aid clause in his letter and (2) specified the sum to be paid for first aid. He did neither.[98] If An and Hong meant for their settlement offer to expire after thirty days, their lawyer should have clearly stated that term in the June 2 Letters. The lawyer did not do so.[99] If settlement on the alleged terms was the claimants' goal in either case, the indefiniteness of their offers was a fatal shortcoming.

Far more likely, however, the alleged terms of the settlement offers in these cases were merely elements of litigation strategies. Browning, An, and Hong never wanted to settle for the insurance policy limits. Rather, Browning's lawyer surely was hoping that American Family's response to his settlement offer would omit any mention of the first aid clause, so he could say that American Family had counteroffered instead of agreeing to settle within policy limits and thereby position American Family for a bad faith claim. An and Hong's lawyer used First Acceptance's alleged failure to accept their settlement offer within thirty days as an excuse to sue Jackson's estate in order to try and collect the anticipated excess judgment from First Acceptance on a bad faith theory.[100] Indeed, both *Browning* and *First Acceptance* exemplify one judge's observation that where a plaintiff's damages "greatly exceed the available [insurance] coverage, a policy-limits settlement can be less

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[95] *Id.*

[96] *Id.* at 78.

[97] Olsen v. Johnston, 301 P.3d 791, 794 (Mont. 2013); Fast Ball Sports, LLC v. Metro. Ent. & Convention Auth., 835 N.W.2d 782, 790 (Neb. Ct. App. 2013); Brown v. Between Dandelions, Inc., 849 S.E.2d 67, 70 (N.C. Ct. App. 2020) (quoting MacEachern v. Rockwell Int'l Corp., 254 S.E.2d 263, 265 (N.C. Ct. App. 1979)); Stavron v. SureTec Ins. Co., No. 02-19-00125-CV, 2019 WL 6768125, at *4 (Tex. App. Dec. 12, 2019).

[98] Am. Fam. Mut. Ins. Co. v. Browning, 621 S.W.3d 619, 621–24 (Mo. Ct. App. 2021).

[99] *First Acceptance*, 826 S.E.2d at 76.

[100] *Id.* at 74.

valuable than a rejected offer and consequent bad-faith claim—however dubious the claim."[101] As almost certainly was true in *Browning* and *First Acceptance*, "plaintiffs sometimes structure offers not to reach settlements, but rather to elicit rejections."[102] In other words, Browning, An, and Hong, as masters of their offers, were simply aiming for rejection rather than acceptance in structuring their settlement offers as they did.

III. ACCEPTANCE OF THE SETTLEMENT OFFER

A firm offer alone is not sufficient to achieve a settlement because, after all, a settlement agreement is a bilateral contract.[103] To create a bilateral contract, the offeree must communicate its acceptance of the offer to the offeror.[104] Generally, "for an offer and an acceptance to constitute a contract, the acceptance must meet and correspond with the offer in every respect."[105] This is the "mirror image" rule,[106] also known less commonly as the "ribbon matching" rule.[107] Under a strict application of the mirror image rule, "[a]n acceptance which varies the terms of the offer is considered a rejection and operates as a counteroffer," which the original offeror may then accept or reject.[108] A mere inquiry as to whether

[101] Wright v. Nelson, 856 S.E.2d 421, 425 (Ga. Ct. App. 2021) (McFadden, C.J., concurring).

[102] *Id.* (McFadden, C.J., concurring).

[103] Kannaday v. Ball, 234 P.3d 826, 832 (Kan. Ct. App. 2010); Rawald v. Dormitory Auth. of N.Y., 2021 WL 627958, at *4 (N.Y. Sup. Ct. Feb. 17, 2021), *rev'd on other grounds*, 156 N.Y.S.3d 201, 202 (App. Div. 2021).

[104] *See, e.g.*, Powerhouse Custom Homes, Inc. v. 84 Lumber Co., L.P., 705 S.E.2d 704, 706 (Ga. Ct. App. 2011) (explaining that because the defendant did not communicate its acceptance of the plaintiffs' proposal that amounted to a settlement offer, it followed that no settlement agreement was reached).

[105] Downs v. Radentz, 132 N.E.3d 58, 67 (Ind. Ct. App. 2019).

[106] *Id.*

[107] PERILLO, *supra* note 28, at 90.

[108] *Downs*, 132 N.E.3d at 67; *see also* Nomanbhoy Fam. Ltd. P'ship v. McDonald's Corp., 579 F. Supp. 2d 1071, 1092 (N.D. Ill. 2008) ("Under Illinois law, a response to an offer to enter into a contractual relationship that does not comply strictly with it—that is, that is not the 'mirror image' of the offer—is not an acceptance, but a counteroffer. It matters not how minor the deviation."); Kemper v. Brown, 754 S.E.2d 141, 143 (Ga. Ct. App. 2014) ("To establish a contract, the offer must be accepted unequivocally and without variance of any sort. . . . A purported acceptance of an offer that varies even one term of the original offer is a counteroffer.") (citation omitted).

the offeror will modify the terms of the offer, however, does not constitute a rejection of the offer or create a counteroffer.[109]

Insurers' acceptance or attempted acceptance of plaintiffs' settlement offers are frequent sources of dispute.[110] The mirror image rule is at the core of many of these cases.[111] The overarching issue often is whether a failed settlement based on the insurer's failure to comply with the mirror image rule will support subsequent bad faith litigation against the insurer for failing to settle within its policy limits.[112]

A. Representative Acceptance Cases

Pena v. Fox "invoke[d] a hornbook tenet of contract law: the symmetry needed between an offer and an acceptance to establish an

[109] Rios v. State, 974 A.2d 366, 375–76 (Md. Ct. Spec. App. 2009); Muilenberg, Inc. v. Cherokee Rose Design & Build, L.L.C., 250 S.W.3d 848, 852 (Mo. Ct. App. 2008).

[110] *See, e.g.*, Lee v. Chmielewski, 290 So. 3d 531, 535–36 (Fla. Dist. Ct. App. 2019) (concluding that the insurer accepted the settlement offer by faxing a letter after normal business hours and sending a representative with a check to the plaintiff's lawyer's offices on the evening of the day set as the deadline for acceptance; although the letter was faxed and the representative arrived at the lawyer's office after normal business hours, the acceptance was still effective because the plaintiff's offer did not state a specific time that it would expire that day).

[111] *See, e.g.*, McReynolds v. Krebs, 725 S.E.2d 584, 588 (Ga. 2012) (explaining that the insurance company's added condition regarding the resolution of liens—as compared to a mere request for confirmation that no liens existed—resulted in a counteroffer rather than an acceptance of the plaintiff's offer, such that no settlement agreement was formed); Hansen v. Doan, 740 S.E.2d 338, 341–43 (Ga. Ct. App. 2013) (stating that the insurer's request for confirmation of the plaintiff's medical bills and lost wages was not a counteroffer under a Georgia statute, explaining that sending a form release that the plaintiff's lawyer could modify as he saw fit—including deleting any unacceptable language—was not a counteroffer even though it contained language that the plaintiff's lawyer had said would be unacceptable, and concluding that the insurer accepted the plaintiff's settlement offer unequivocally and without variation); Reppy v. Winters, 351 S.W.3d 717, 721–22 (Mo. Ct. App. 2011) ("Because Winters's . . . letter, by its plain language, added to Reppy's original offer a term requiring Reppy's counsel to indemnify Winters, his insurer, and his attorney for any type of lien, it was not a mirror image of the original offer and was not an unequivocal acceptance.").

[112] *See, e.g.*, Eres v. Progressive Am. Ins. Co., 998 F.3d 1273, 1279–81 (11th Cir. 2021) (rejecting a bad faith claim rooted in the insurer's alleged failure to satisfy the mirror image rule); Grayson v. Allstate Ins. Co., 650 F. App'x 320, 322–23 (9th Cir. 2016) (explaining why Allstate's inclusion of an overly broad release with its letter accepting the plaintiff's settlement offer may have constituted a counteroffer but was not an act of bad faith).

enforceable agreement."[113] The plaintiff there, Diana Pena, was injured in an auto accident with Matthew Fox.[114] Rather than immediately suing Fox, Pena's lawyer presented a policy limits settlement offer to Fox's insurer, USAA Casualty Insurance Co. (USAA).[115] The settlement offer provided that Pena would release Fox from all claims related to the accident and anticipated that USAA would furnish a release for Pena to execute, but it set certain conditions on the release's terms.[116] Specifically, the offer stated that Pena would not accept or sign a release that included hold harmless language or an indemnity agreement, would not release her claims against anyone other than Fox, and would not release anyone's claim other than her own.[117] The offer firmly expressed Pena's position that USAA's delivery of a release that included hold harmless language or an indemnity agreement, released anyone other than Fox, or released any claim other than Pena's claim, would "act as a rejection" of the settlement offer.[118]

In response, USAA sent a check for its policy limits and a proposed release to Pena's lawyer.[119] USAA's proposed release contained the following language:

> I/We further state that while I/we hereby release all claims against *Releasee(s), its agents, and employees*, the payment hereunder does not satisfy all of my/our damages resulting from the accident. . . . I/We further reserve my/our right to pursue and recover all unpaid damages from any person, firm, or organization who may be responsible for payment of such damages, including first party health and automobile insurance coverage, but such reservation does not include the *Releasee(s), its agents, and employees*. . . .[120]

Pena considered the "Releasee(s), its agents, and employees" language to be an effort to expand the release to include USAA in addition to Fox and thus a rejection of her settlement offer.[121] She then sued Fox,

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[113] 198 So. 3d 61, 62 (Fla. Dist. Ct. App. 2015).
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* (emphasis added).
[121] *Id.*

who moved to enforce the settlement.[122] The trial court granted Fox's motion and dismissed Pena's complaint.[123] Pena promptly appealed.[124]

The *Pena* court began its analysis of the parties' positions by noting that settlement agreements are governed by contract law.[125] For there to be a contract under Florida law, "the acceptance must be a 'mirror image' of the offer in all material respects, or else it will be considered a counteroffer that rejects the original offer."[126] A party's attempt to accept an offer can become a counteroffer through the addition of new or different terms or by not meeting the original offer's terms.[127] USAA's proposed release touched both bases: it added parties to be released beyond Fox — in particular, his agents and employees — and it materially departed from the limitations plainly set forth in Pena's offer.[128]

While "the incongruity in terms may have been nothing more than boilerplate migrating across computer-generated files," the fact remained that USAA's attempted acceptance on Fox's behalf did not mirror Pena's offer.[129] Nor did it matter that USAA was not trying to pull a fast one in proposing the offending release language:[130] "The words are what matter because they will control who will, or will not, be released. . . . Mr. Fox's proposed acceptance would release additional parties, Mr. Fox's agents and employees, which Ms. Pena's offer would not. His acceptance did not mirror her offer."[131]

It was apparent after comparing Pena's settlement offer with Fox's acceptance (through USAA) that the parties' minds never met and, consequently, there was no settlement agreement to enforce.[132] The *Pena* court therefore reversed the trial court's dismissal of Pena's complaint and remanded the case for further proceedings.[133]

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[122] *Id.*

[123] *Id.*

[124] *Id.* at 63.

[125] *Id.*

[126] *Id.*

[127] *Id.* (quoting Grant v. Lyons, 17 So. 3d 708, 711 (Fla. Dist. Ct. App. 2009)).

[128] *Id.* at 63–64.

[129] *Id.*

[130] *See id.* at 64 ("While we share the circuit court's view that the inclusion of Mr. Fox's agents and employees within the release was not the product of nefarious motives, USAA's intention when it drafted this document, whatever it might have been, was irrelevant to the issue at hand.").

[131] *Id.* (citations omitted).

[132] *Id.*

[133] *Id.*

More recently, a Georgia appellate court enforced the mirror image rule in *White v. Cheek*,[134] which involved a rigid and exacting settlement offer by the plaintiff. The case arose out of a car wreck.[135] Walter Cheek was a passenger in a car driven by Stephan White; Cheek was injured in the accident and sued White.[136] White was insured by GEICO.[137] After Cheek sued White, Cheek's lawyer sent GEICO a letter that contained a settlement offer governed by a Georgia statute, § 9-11-67.1.[138] The offer stated:

> 1. The time period within which the material terms pursuant to OCGA § 9-11-67.1 (a) must be accepted is *thirty-five (35) days* from your receipt of this offer;
>
> 2. The amount of monetary payment is *GEICO's liability policy limit of $25,000*. . . .;
>
> 3. The party that Mr. Cheek will release is Stephan D. White;
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> 4. The type of release that Mr. Cheek will provide to Mr. White is a General Release that releases "all personal and bodily injury claims of Mr. Cheek," . . . ;
>
> 5. The claims to be released by Mr. Cheek pursuant to a General Release are "all personal and bodily injury claims of Mr. Cheek," . . . ;
>
> Pursuant to OCGA § 9-11-67.1 (b), acceptance of the material terms made pursuant to OCGA § 9-11-67.1 (a) is to be made by providing written acceptance of the material terms outlined immediately above pursuant OCGA § 9-11-67.1 (a) in their entirety.
>
> Providing written acceptance of the material terms outlined immediately above pursuant to OCGA § 9-11-67.1 (a) in their entirety is *necessary* to form a binding settlement contract, but it is *not sufficient* to form a binding settlement contract. In addition to the above . . . the following *ACTS* are material to acceptance and must be completed to form a binding settlement contract, and completion of each and every one of the following *ACTS* without a variance of any sort is required as a *material term* of this written offer of compromise

[134] 859 S.E.2d 104, 108–09 (Ga. Ct. App. 2021).
[135] *Id.* at 106.
[136] *Id.*
[137] *Id.*
[138] *Id.*

> in addition to the material terms stated above pursuant to OCGA § 9-11-67.1 (a):
>
> 1. Pursuant to OCGA § 9-11-67.1 (g), payment is required within fifteen (15) days after the written acceptance of this offer of compromise. . . .
>
> 2. Your insured must provide a sworn and notarized statement that there is no other insurance coverage available to him that could pertain to this loss. . . .
>
> 3. All communications to this firm initiated by or on behalf of your insurance company or your insured relating to this offer of compromise *must be made in writing*. If a communication to this firm relating to this offer of compromise is initiated by or on behalf of your insurance company or your insured in any form other than writing, that will be a rejection of this offer of compromise. . . . *Any offer to resolve this case by Mr. Cheek will be made in writing. Any acceptance of this offer must be made through performance of the acts required in this offer of compromise in addition to written acceptance of the material terms of this offer made pursuant to OCGA § 9-11-67.1 (a) in order for this firm and Mr. Cheek to agree that a binding agreement has been formed. Specifically, this offer of compromise cannot be accepted by a mere statement of unconditional acceptance of this offer; instead acceptance of this offer requires full performance of all ACTS required herein without variance of any sort in addition to written acceptance of the material terms of this offer made pursuant OCGA § 9-11-67.1 (a). If any condition or requirement is not met by the specified deadline or if any additional terms, conditions, or representatives are requested of Mr. Cheek or included in the release by GEICO, then there has been no acceptance and no agreement, and this offer will be immediately and automatically withdrawn.*
>
> 4. Since GEICO will require Mr. Cheek to sign a release of its insured, that release must fully comply with each and every term and condition of this offer. . . .[139]

In the letter that contained the settlement offer, Cheek's lawyer also stated that if GEICO needed more information to evaluate White's liability or Cheek's damages, the company should put its request in writing.[140]

Despite the clear requirement in the settlement offer for all communications to be in writing, a GEICO adjuster soon left a voicemail

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[139] *Id.* at 106–07 (alterations in original).

[140] *Id.* at 107.

message for Cheek's lawyer to see whether the lawyer would permit GEICO to take a recorded statement from Cheek.[141] Five days later, either the same or another GEICO adjuster left a voicemail message for Cheek's lawyer in which the adjuster noted the policy limits settlement offer, requested a recorded statement from Cheek, and asked the lawyer to explain the basis for his policy limits settlement offer given what GEICO considered to be White's dubious liability.[142]

Cheek's lawyer responded to the voicemail messages by writing to GEICO to say that the messages were an obvious rejection of Cheek's settlement offer.[143] A little while later, a lawyer for GEICO wrote back to accept Cheek's settlement offer and enclosed a $25,000 check with the acceptance letter.[144] Some four months later, Cheek's lawyer declined GEICO's offer of compromise in writing and returned the settlement check.[145] White then moved to enforce the parties' settlement.[146]

The trial court denied White's motion.[147] The court held that GEICO's acceptance of Cheek's settlement offer was conditioned on exclusively written communications between GEICO and Cheek's lawyer, and that the company's failure to satisfy that condition meant there was no settlement agreement.[148] White appealed the trial court's decision to the Georgia Court of Appeals.[149]

The *White* court agreed with the trial court.[150] Although the statute under which Cheek offered to settle provided that GEICO was entitled to seek clarification around his offer without those inquiries being held to constitute a rejection or counteroffer, nothing in the statute prevented Cheek as the master of his offer from insisting that such inquiries be in writing.[151]

Cheek's lawyer established in the settlement offer that all settlement-related communications had to be in writing.[152] He also unambiguously stated that any requests to clarify the settlement offer had to be in

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[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.* at 107–08.
[145] *Id.* at 108.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.* at 108–09.
[151] *Id.* at 109.
[152] *Id.*

writing.[153] The GEICO adjusters' telephone calls resulting in voicemail messages disregarded these conditions.[154] Because the GEICO adjusters acting as White's representatives "violated the express terms of the offer, the parties did not reach a binding settlement agreement."[155] Consequently, the *White* court affirmed the trial court judgment.[156]

A concurring Justice noted that as a result of the court's decision, Cheek would eventually be able to pursue a bad faith claim against GEICO.[157] The concurrence focused on the reasonableness of Cheek's offer, which was embedded in an incredibly long and excruciatingly detailed letter that was littered with warnings and threats, and which inflexibly mandated compliance with all of its terms.[158] At bottom:

> Examination of the offer leads inescapably to the conclusion that an undertaking to extract and comply with all of its requirements would require hours of work over and above the effort normally necessary to finalize a settlement. And having expended that effort, GEICO could not be certain of success. Indeed, Cheek's attorneys responded to the attempted acceptance with a declaration that they deemed it a rejection—and didn't come up with their reasons until three months later.[159]

According to the concurring Justice, Cheek's offer letter was "compelling, if not dispositive, evidence of a lack of intent to settle the claim and so of bad faith."[160] So, GEICO could reject the offer without exposing itself to bad faith liability.[161] The court as a whole, however, was dismissive of a related argument by White that the court's holding would set up insurers for bad faith claims.[162] As the *White* court saw matters, the case had nothing to do with insurance bad faith; rather, it had everything to do with "the basic contract principle that the offeror is the master of his offer."[163]

In contrast to the decisions in *Pena* and *White*, the court in *Youngs v. Conley* enforced a settlement agreement despite the insurer's alleged

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[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.* at 111 (McFadden, C.J., concurring).
[158] *Id.* (McFadden, C.J., concurring)
[159] *Id.* at 111 (McFadden, C.J., concurring).
[160] *Id.* at 112 (McFadden, C.J., concurring).
[161] *See id.* ("Per force, it is not bad faith to reject an offer made in bad faith.").
[162] *Id.* at 109 n.2.
[163] *Id.*

failure to adhere to the mirror image rule.[164] In doing so, the court recognized that the terms in dispute were not material to the parties' settlement agreement, so their inclusion in the related release did not convert the defendants' acceptance of the plaintiffs' offer into a counteroffer.[165]

Turning back the clock, Noah Conley was walking to school when John Youngs ran over him.[166] Youngs was insured by Viking Insurance Co. of Wisconsin ("Viking") under a policy with per person liability limits of $25,000.[167] Viking promptly wrote to the Conley family's lawyer to offer its policy limits in settlement.[168] The Conleys' lawyer responded with a letter in which he stated: "Please allow this letter to serve as a demand for the applicable insurance policy limits of $25,000.00. In exchange, my client(s) are willing to release and discharge your insured, John Youngs, for all past and future damages sustained in this motor vehicle accident."[169] Youngs's lawyer responded with a letter confirming the parties' settlement.[170] In that letter, Youngs's lawyer also indicated that he would prepare a release and send it to the Conleys' lawyer for his review and approval.[171]

Youngs's lawyer eventually sent the Conleys' lawyer a proposed release, which, in addition to releasing Youngs, released "Sentry Insurance Group, Sentry Select Insurance Company, Viking Insurance Company of Wisconsin, and Dairyland Insurance Company[.]"[172] When Youngs's lawyer did not hear back from the Conleys' lawyer, he followed up with an email message in which he stated: "Like in every case, if there is any provision or language in the draft release that you would like to change or if you have alternative proposed language that you believe better memorializes our settlement please let us know."[173] The Conleys' lawyer responded with an email message of his own:

> As you know, the parties to be released are a material term to any agreement to settle. Contrary to Plaintiff's demand, which very clearly spelled out who Plaintiff would agree to release and discharge, the

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[164] 505 S.W.3d 305, 317 (Mo. Ct. App. 2016).
[165] *Id.* at 315.
[166] *Id.* at 308.
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.* at 309.
[172] *Id.* at 310.
[173] *Id.* at 311.

> insurer chose to include itself (and affiliates) as "Released Parties" in the release document. While I do not know why the insurer varied a material term, thus presenting a counter offer, it is unacceptable to Plaintiff, and Mr. Youngs (and his insurer) may consider the counter offer rejected. We will proceed with litigation.[174]

This prompted Youngs's lawyer to try to get the settlement back on track.[175] As he wrote to the Conleys' lawyer:

> First, the release of an insured acts to release the liability insurance carrier from any obligation related to alleged negligent acts or omissions of that insured. In other words, a third party plaintiff retains no claim against the liability insurance company of an insured once claims against the insured have been released. . . .
>
> Second, as you know, it is routine and customary practice to include the insurance carrier that is paying settlement funds under a given policy as a released party in settlement documents that are drafted to memorialize a settlement agreement.
>
> Since the release of the insured acts to release the insurance carrier from any claim that a plaintiff may advance, the same result follows regardless of whether or not the insurance carrier is listed as released party. Therefore, we are happy to remove the insurance company as a named released party in the release. This is not a material term and does not alter our settlement agreement.
>
> The release that we circulated was intended to memorialize our settlement agreement in accord with your offer . . . and our acceptance. . . . Please provide us with any revisions you believe are needed to accurately describe our settlement.[176]

The Conleys' lawyer disagreed with Youngs's explanation and indicated that the Conleys would soon sue Youngs.[177] Youngs's lawyer again tried to keep the settlement on track by offering to delete any language in the release that the Conleys thought was inconsistent with the parties' settlement agreement, but got nowhere.[178] Youngs then filed a

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[174] *Id.*

[175] *Id.* at 312.

[176] *Id.*

[177] *Id.*

[178] *Id.* ("If you do not believe that the release we have proposed adequately conforms to our settlement agreement, we are willing to take out the draft language that you . . . do not believe is in conformity with the agreement. We have previously

petition to enforce the parties' settlement agreement and Noah Conley's mother sued Youngs on her son's behalf.[179] The trial court consolidated the cases, conducted an evidentiary hearing on Youngs's petition, enforced the settlement agreement, and dismissed the Conleys' suit with prejudice.[180] The Conleys responded by appealing.[181]

On appeal, the Conleys contended that the trial court erred in holding that the parties had an enforceable agreement because Youngs's purported acceptance created a counteroffer by adding the insurance companies as parties to the release.[182] But while Missouri law recognizes the mirror image rule,[183] and the parties to an agreement are a material term, the inclusion of the insurance companies in the release was not material to the Conleys' and Youngs's agreement.[184] Because Missouri law does not permit direct actions by an accident victim against a tortfeasor's liability insurer, the insurer will effectively be released upon the insured's release regardless of whether it is included in the agreement.[185] Furthermore, Youngs had deleted the insurers from the release when the Conleys asked him to do so.[186] This accommodation "show[ed] that the inclusion of the insurance carriers [was] not a material term and [did] not suggest a counteroffer."[187]

At the hearing on Youngs's motion to enforce the settlement, the Conleys' lawyer apparently made a slightly different argument regarding the release's construction as a counteroffer, namely that the Conleys never agreed to indemnify the insurers for any lien claims, yet the insurers had also been added to the release in that respect.[188] But Youngs's lawyer had also agreed to delete the lien indemnification language from the release and the trial court accordingly "held that the inclusion of the insurance carriers' names and the language regarding lien identification and

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requested that you provide alternative language that you believe is in conformity with our settlement agreement.").

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.* at 313, 315.

[183] *See id.* at 314 (explaining offer and acceptance under Missouri law).

[184] *Id.* at 315.

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *See id.* ("In addition, at the evidentiary hearing on Mr. Youngs's motion to enforce settlement, the only objections asserted by counsel for the Conleys to the proposed release were for the inclusion of the insurance carriers as released parties and the lien identification/indemnification language.").

indemnification were not material and, therefore, [did] not constitute a counteroffer."[189] The *Youngs* court agreed with the trial court on this point.[190]

The *Youngs* court concluded that an enforceable settlement agreement existed.[191] It therefore affirmed the trial court's judgment.[192]

B. Tying the Mirror Image Rule to Material Terms

Liability insurers must recognize the mirror image rule and strive to comply with it when accepting plaintiffs' settlement offers.[193] The essential mirror image rule issue, however, is for the courts. That is, which of the two possible mirror image rule approaches should they adopt? Is it the version of the rule enforced in some jurisdictions that any response to an offer that does not perfectly match the offer is not an acceptance but a counteroffer, no matter how minor the deviation?[194] Or, is it the version of the rule applied by the court in *Youngs* and courts in other jurisdictions that mirror image matters only insofar as material terms are concerned?[195]

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[189] *Id.*

[190] *See id.* at 316–17 (explaining why the indemnification provisions and adequate lien protection were not conditions of acceptance as highlighted during the evidentiary hearing).

[191] *Id.* at 317; *see also* Tillman v. Mejabi, 771 S.E.2d 110, 113 (Ga. Ct. App. 2015) (explaining that the mere presentation of a release unacceptable to the plaintiff does not constitute a rejection of a settlement offer; although the delivery of a release in a form acceptable to the plaintiff may be a condition of defendant's performance, it is not necessary for the acceptance of a settlement offer).

[192] *Youngs*, 505 S.W.3d at 317.

[193] An insurer's alleged failure to comply with the mirror image rule does not automatically translate into bad faith liability. *See, e.g.*, Eres v. Progressive Am. Ins. Co., 998 F.3d 1273, 1278–80 (11th Cir. 2021) (applying Florida law).

[194] *See, e.g.*, Nomanbhoy Fam. Ltd. P'ship v. McDonald's Corp., 579 F. Supp. 2d 1071, 1092 (N.D. Ill. 2008) (applying Illinois law); *see also* PERILLO, *supra* note 28, at 90 ("The common law rule is that a purported acceptance that adds qualifications or conditions operates as a counter-offer . . . even if the qualification or condition relates to a trivial matter.") (footnotes omitted).

[195] *Youngs*, 505 S.W.3d at 315; *see also* Ridenour v. Bank of Am., N.A., 23 F. Supp. 3d 1201, 1207 (D. Idaho 2014) ("An acceptance doesn't become a counteroffer unless it introduces a 'material variance' into the terms.") (quoting Suitts v. First Sec. Bank of Idaho, N.A., 867 P.2d 260, 266 (Idaho 1993)); Malone v. Saxony Co-op. Apts., Inc., 763 A.2d 725, 728 (D.C. 2000) ("[A] statement purporting to accept an offer which contains a new *material* term operates as a counteroffer and must be accepted by the original offeror in order to form a binding contract.") (emphasis added); Breger v. Robshaw Custom Homes, Inc., 264 So. 3d 1147, 1150 (Fla. Dist. Ct. App. 2019) ("An acceptance of a settlement offer must be a 'mirror image' of the

The trend is "to uphold acceptances that vary from offers in only immaterial details."[196] Given that courts "encourage and favor settlements between parties because they reduce demand for judicial resources,"[197] "there is a strong public policy favoring settlement of litigation,"[198] and the law "favors the validity and enforcement of settlement agreements,"[199] mandating mirror image acceptance only as to the material terms of a settlement offer is the superior approach. Indeed, to reason otherwise serves only to needlessly void many reasonable settlements and to burden courts with unnecessary litigation.

IV. SETTLEMENT TERMS INSURERS NEED NOT ACCEPT

In addition to offers that are intended to elicit rejections and acceptances that are dissected for minor violations of the mirror image rule, plaintiffs sometimes impose settlement terms that are intended to enable or enhance subsequent bad faith litigation against the insurance company.[200] The essential goal is to propose settlement terms that either (1) the insurer will reject, thereby positioning the plaintiff to allege that the insurer unreasonably failed to settle within its policy limits, such that

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offer in all *material* respects. Otherwise, it will be considered a counteroffer that rejects the original offer.") (emphasis added); Steele v. Harrison, 552 P.2d 957, 962 (Kan. 1976) ("Any expression of assent that changes the terms of the offer in any *material* respect may be operative as a counter-offer, but it is not an acceptance and constitutes no contract.") (emphasis added); Amedisys, Inc. v. Kingwood Home Health Care, LLC, 437 S.W.3d 507, 514 (Tex. 2014) ("[A]n *immaterial* variation between the offer and acceptance will not prevent the formation of an enforceable agreement.") (emphasis added); McGehee v. Endeavor Acquisitions, LLC, 603 S.W.3d 515, 522 (Tex. App. 2020) ("[A] purported acceptance that changes a *material* term of an offer results in a counteroffer rather than acceptance.") (emphasis added); Travis v. Tacoma Pub. Sch. Dist., 85 P.3d 959, 964 (Wash. Ct. App. 2004) ("Usually, a purported acceptance that changes the terms of the offer in any *material* respect operates only as a counteroffer and does not form a contract.") (emphasis added).

[196] PERILLO, *supra* note 28, at 90 (footnote omitted).

[197] Kazan v. Dough Boys, Inc., 201 P.3d 508, 514–15 (Alaska 2009); *see also* Appleyard v. Tigges, 114 N.Y.S.3d 627, 628 (Sup. Ct. 2019) ("Settlement agreements are highly favored because a negotiated compromise of any dispute avoids potentially costly, time-consuming litigation, and since the courts could not function if every dispute resulted in a trial, a settlement helps preserve scarce judicial resources.").

[198] Capparelli v. Lopatin, 212 A.3d 979, 991 (N.J. App. Div. 2019); *see also* Pearson v. Super. Ct., 136 Cal. Rptr. 3d 455, 458–59 (Ct. App. 2012) ("There is a strong public policy in the State of California to encourage the voluntary settlement of litigation.").

[199] Hill v. Washburne, 953 F.3d 296, 309 (5th Cir. 2020) (discussing Texas law).

[200] BARKER & KENT, *supra* note 4, § 2.03[6][d], at 2-126.23.

the insurer potentially becomes liable for bad faith failure to settle; or (2) the insurer will accept and, as a result, grant the plaintiff a strategic or tactical advantage in later bad faith litigation. Consider, for example, the following anonymized portion of a settlement agreement in a Missouri case where the defendant-insured's personal auto policy had $50,000 per person liability limits and the insurer paid those limits in settlement:

> For and in consideration of the mutual promises and covenants hereinafter recited, and by and between Plaintiff and Insured and Insurance Company, and in further consideration of Fifty Thousand Dollars ($50,000), plus accrued interest in the sum of $7,654.00 and court costs of $2,345.00 paid by Insurance Company to Plaintiff for and on behalf of Insured under the terms and conditions of its insurance contract with Insured, receipt of which is hereby acknowledged, it is hereby agreed by and between Plaintiff, Insured, and Insurance Company:
>
> Insured confesses judgment and has confessed judgment in the sum of One Million Five Hundred Thousand Dollars ($1,500,000) in favor of Plaintiff in a case now pending in the Circuit Court of Unnamed County, Missouri, in exchange for Plaintiff's promise that said payment and confession of judgment will fully resolve and settle Plaintiff's Dispute with Insured; and
>
> Insured agrees to pursue a claim against Insurance Company for bad faith . . . or to assign to Plaintiff any and all claims or choses in action . . . against Insurance Company which she may have against Insurance Company for . . . failing to settle Plaintiff's claim within the policy limits of the above referenced policy; and
>
> Insured agrees to fully cooperate in any suit (whether brought by herself or whether there is an assignment), claim, or cause of action against Insurance Company, including participating in and being named as a party plaintiff in any suit or cause of action brought against Insurance Company; and
>
> Plaintiff covenants and agrees that that she will levy no execution of said judgment upon the personal assets of Insured at any time, but will look to satisfaction of the judgment solely from any proceeds of a claim against Insurance Company for its negligence and/or bad faith in failing to resolve Plaintiff's claim within the policy limits [of Insured's policy]; and
>
> This settlement agreement is approved as to form and content by Insurance Company. Insurance Company covenants and agrees that this agreement will not in any way be used as a defense to, or in

> mitigation of, any claim for damages in connection with any claim or lawsuit asserted by Plaintiff and/or Insured for Insurance Company's negligence or bad faith in failing to settle Insured's claim within the policy limits of [the Insured's policy]. Insurance Company covenants and agrees not to challenge or contest any assignment of any part of the negligence and/or bad faith claim herein referred to, and further agrees not to assert, allege or contend that, because of any assignment, Insured has not sustained damage or that the judgment against Insured is not collectible as to her. Further, Insurance Company covenants and agrees not to claim this agreement is against the public policy of the State of Missouri and as a result is void and/or unenforceable.
>
> * * *
>
> Insurance Company agrees and understands and acknowledges that part of the consideration of this agreement will be that in a subsequent action . . . the jury in such subsequent action will be informed that a one million dollar judgment was entered against Insured but that the jury will not be informed of this agreement or of this compromise or of the fact that by reason of this agreement Insured is not personally exposed to liability for the judgment.[201]

Or, consider the scenario outlined in *Columbia Insurance Co. v. Waymer*,[202] a recent case arising under South Carolina law. There, Mark Tinsley, the lawyer for the injured parties, the Reynoldses, claimed that Columbia Insurance Co. ("CIC") had failed to settle his clients' claims against CIC's insured, Christopher Waymer, within its policy limits.[203] Tinsley later "offered CIC a 'final chance' to settle the case" on the following terms:

> [T]he parties would litigate the extent of the Reynoldses' injuries as well as the existence of bad faith on CIC's part. If the jury found CIC liable in bad faith, then CIC would pay whatever the jury found the Reynoldses' damages to be—without any right to appeal that verdict as excessive. If the jury found CIC had not acted in bad faith, then CIC again would owe the $1 million policy limits. Under either option, CIC would have to waive certain defenses regarding the real

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[201] In Missouri, the agreement from which this language is adapted is sometimes called a *Noland v. Welch* agreement. Plaintiffs contend that such agreements are statutorily authorized. *See* MO. REV. STAT. § 537.065 (2021) (governing claimants' and tortfeasors' ability contract to limit recovery of an unliquidated claim for damages to specified assets or an insurance contract).

[202] 860 F. App'x 848 (4th Cir. 2021).

[203] *Id.* at 851.

> party in interest and the applicability of any release given by the Reynoldses.[204]

Can an insurance company be required to accept a settlement offer that obligates it to agree to a consent judgment as in the first example or to the limitations on its right to vindicate its interests as proposed in *Waymer*? If the insurer declines to accept a settlement offer containing such terms, does it face bad faith liability for unreasonably failing to settle the claim against its insured within its policy limits? The short and correct answer to both questions is no.[205] There are at least three good reasons for this answer.[206]

First, an insurer has no duty to agree to any of these terms or to take the demanded steps under standard insurance policy language.[207] An insurer cannot be liable for bad faith for failing to engage in some activity or perform some action that its policy does not require.[208] Second, when it comes to settlement, insurers have no duty to pay more than their applicable policy limits.[209] Yet, paying more than its limits is what the sort of terms discussed here effectively require of an insurer. Any argument by a claimant that an offer to settle within policy limits coupled with a consent judgment in excess of policy limits or some other term that exposes an insurer to extracontractual liability is, in fact, an offer to settle

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[204] *Id.* at 852.

[205] *See, e.g.*, *id.* at 854 (affirming the district court's grant of summary judgment to CIC on the related bad faith claim); Kwiatkowski v. Allstate Ins. Co., 717 F. App'x 910, 913 (11th Cir. 2017) (quoting Kropilak v. 21st Century Ins. Co., 806 F.3d 1062, 1068 (11th Cir. 2015)); *Kropilak*, 806 F.3d at 1068 (citing Berges v. Infinity Ins. Co., 896 So. 2d 665, 671 n.1 (Fla. 2004)); Dorroh v. Deerbrook Ins. Co., 223 F. Supp. 3d 1081, 1095 (E.D. Cal. 2016), *aff'd*, 751 F. App'x 980 (9th Cir. 2018) (stating that the insurer's refusal to stipulate to an excess judgment was not bad faith as a matter of law); Pasina v. Cal. Cas. Indem. Exch., No. 2:08-cv-01199-RCJ-RJJ, 2009 WL 10693522, at *7 (D. Nev. Nov. 4, 2009) (applying Nevada law); *Berges*, 896 So. 2d at 671 n.1 (rejecting such a claim as meritless); Allstate Ins. Co. v. Miller, 212 P.3d 318, 330–31 (Nev. 2009) (stating that the insurer "had no duty to accept a stipulated excess judgment").

[206] *See* ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 742–43 (6th ed. 2018) (sketching out these reasons).

[207] *Id.*

[208] Manu v. GEICO Cas. Co., 798 S.E.2d 598, 606 (Va. 2017).

[209] Am. Physicians Assur. Corp. v. Schmidt, 187 S.W.3d 313, 318 (Ky. 2006); *Miller*, 212 P.3d at 331; Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 849 (Tex. 1994); *see also* RESTATEMENT OF THE LAW LIAB. INS. § 24 cmt. h (AM. L. INST. 2019) (stating that the insurer's duty to make reasonable settlement decisions does not obligate it to make or accept settlement offers in excess of its policy limits).

within policy limits, is at best disingenuous.[210] Third, an insurer's duty of good faith and fair dealing cannot be stretched to compel acceptance of the sort of terms described here because the duty of good faith and fair dealing "cannot be used to create rights and duties not otherwise provided for in the contract, change the contract, or insert new terms in the contract."[211] Furthermore, and directly contrary to the type of settlement terms discussed here, an insurer's duty of good faith and fair dealing does not oblige it "to place the insured's interests above its own interests."[212] Or, as a Pennsylvania federal court once explained, the duty of good faith and fair dealing does not compel an insurer "actively to submerge its own interests."[213]

In *Waymer*, the court evaluated CIC's conduct in line with South Carolina's *Tyger River* doctrine,[214] which holds that "an insurance company must 'sacrifice its interests in favor of' those of the insured when a conflict of interest as to settlement arises."[215] Even under that seemingly demanding standard, however, CIC had no duty to accept a settlement offer that would channel bad faith litigation.[216] CIC's duty to sacrifice its own interests to protect Waymer under the *Tyger River* doctrine did not require CIC to subvert its interests to his, but merely distilled to the established requirement that it settle the Reynoldses' claim "if that was the reasonable thing to do."[217] But settling on Tinsley's terms was not a

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[210] *Kropilak*, 806 F.3d at 1068.

[211] JERRY & RICHMOND, *supra* note 206, at 743.

[212] Kim v. Allstate Ins. Co., 223 P.3d 1180, 1192 (Wash. Ct. App. 2009).

[213] Kosierowski v. Allstate Ins. Co., 51 F. Supp. 2d 583, 588 (E.D. Pa. 1999).

[214] *See* Tyger River Pine Co. v. Md. Cas. Co., 170 S.E. 346, 348 (S.C. 1933) ("If, in the effort to do this, [the insurer's] own interests conflicted with those of respondent, it was bound, under its contract of indemnity, and in good faith, *to sacrifice its interests in favor of those of the respondent*.").

[215] Columbia Ins. Co. v. Waymer, 860 F. App'x 848, 852 (4th Cir. 2021) (quoting Columbia Ins. Co. v. Reynolds, 438 F. Supp. 3d 614, 620 (D.S.C. 2020)).

[216] *Id.*

[217] *Tyger River*, 170 S.E. at 349; *see Waymer*, 860 F. App'x at 852 (quoting the district court using similar language). The Missouri Supreme Court has also described an insurer's duty of good faith and fair dealing as requiring it to sacrifice its own interests when weighing settlement within policy limits in a case of probable excess liability based on *Tyger River*. Zumwalt v. Utils. Ins. Co., 228 S.W.2d 750, 756 (Mo. 1950) (quoting *Tyger River*, 170 S.E. at 348). But this means only "that the insurer cannot elevate its own interests over the insured's; to the extent the insurer might be tempted to do so, it must 'sacrifice' its own interests so that they are back in balance with the insured's." JERRY & RICHMOND, *supra* note 206, at 734 n.284. Missouri caselaw after *Zumwalt* clarifies that this interpretation of the "sacrifice" requirement is correct. *See, e.g.*, Landie v. Century Indem. Co., 390 S.W.2d 558, 563 (Mo. Ct. App. 1965) ("[W]here the [insurance] company in good faith believes there is a valid

reasonable course of action. In fact, the terms that Tinsley proposed on the Reynoldses' behalf that would have subjected CIC to bad faith litigation with at least one hand tied behind its back provided CIC with an objectively reasonable basis for *refusing* the offer.[218] CIC therefore prevailed on Waymer's bad faith claim.[219]

V. CONCLUSION

Liability insurers routinely settle claims and lawsuits against their insureds. The settlement process follows a typical contract path of offer and acceptance leading to a settlement agreement. But plaintiffs' settlement offers are sometimes vague and in other cases intended acceptances may become counteroffers if the insurance company does not comply with the mirror image rule. In yet other cases, the plaintiff's focus is not on settlement of the case at hand but instead on crafting offers to facilitate subsequent bad faith litigation against the insurer. In any event, lawyers and litigants need to understand the contractual aspects of settlement because they are essential to the resolution of all cases and claims, as well as to the creation or avoidance of bad faith liability.

defense to the claim, even though the defense proves unsuccessful and results in a judgment against the insured above the policy limits, the company is not liable, because of such honest mistake, beyond the limits of its policy.").

[218] *Waymer*, 860 F. App'x at 855.

[219] *Id.* (affirming summary judgment for CIC).