

# Prejudgment “Bashor” Agreements: Where Are We Going and Where Have We Been?

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## Introduction

Since 1913, the public policy of this state has required “that all persons having to do with insurance services to the public be at all times actuated by good faith in everything pertaining thereto, and abstain from deceptive or misleading practices. . .”<sup>1</sup> Over the years, the Colorado Supreme Court has expounded on this duty on numerous occasions. It began with the landmark decision in *Farmers Group, Inc. v. Trimble*,<sup>2</sup> where the court held that a liability insurer’s breach of the duty of good faith and fair dealing will give rise to a separate cause of action in tort. It continued through its decision in *Goodson v. American Standard Insurance Co. of Wisconsin*,<sup>3</sup> where the court held that an insured need not establish a substantial economic loss in order to recover emotional distress and other non-economic damages caused by the insurer’s bad faith conduct.

While the tort of bad faith is predicated on intentional conduct, in the third-party context, the insurer’s liability is determined based on general principles of negligence.<sup>4</sup> The tort is established upon proof that the insurer acted “unreasonably under the circumstances.”<sup>5</sup> Because most liability insurance policies cede to the insurer the right to control the defense and settlement of third-party lawsuits, the Colorado Supreme Court

has held that a liability insurer stands in a “position of trust” with regard to its insured and has characterized the relationship between insurer and insured as “quasi-fiduciary” in nature.<sup>6</sup> A liability insurer may breach its duty of good faith and fair dealing in various ways, including, *inter alia*, by failing to defend its insured on a covered claim or by refusing to settle a claim within the insurance policy limits when it has the opportunity to do so.<sup>7</sup>

Given that insureds “enter into insurance contracts for the financial security obtained by protecting themselves from unforeseen calamities and for peace of mind, rather than to secure commercial advantage,”<sup>8</sup> they typically have no ability to control the defense or settlement of lawsuits arising out of such calamities. They may find themselves in dire straits when their insurers unreasonably fail to defend or settle lawsuits filed against them. The question may thus arise: What can an insured permissibly do, without voiding coverage under the insurance policy, to protect itself in the event its liability insurer unreasonably fails to defend or settle a third-party lawsuit?

One way that an insured may seek to protect itself in such a situation is through a contractual agreement whereby it assigns its claims against its insurer to the injured plaintiff in exchange for a covenant not to execute against the

defendant’s personal assets. The Colorado Supreme Court has recognized the propriety of such an agreement when entered into following a trial on the merits,<sup>9</sup> but it has not yet addressed whether the same type of agreement is permissible when entered into prior to a trial on the merits. Having granted certiorari in *Ross v. Old Republic Ins.*,<sup>10</sup> however, the court now appears poised to decide this issue<sup>11</sup> and to clear up the uncertainty created by the court of appeals’ decision in *Ross*, as well as two prior decisions, *Serna v. Kingston Enterprises*<sup>12</sup> and *American Manufacturers Mutual Insurance Co. v. Seco/Warwick Corp.*,<sup>13</sup> which collectively raised questions as to the effectiveness and validity of so-called “prejudgment Bashor agreements.”<sup>14</sup>

This article will analyze the common features of prejudgment agreements, discuss the treatment such agreements have received in the State of Colorado, and in the process explain why a blanket prohibition on their use is unwarranted.

## The Prejudgment Agreement

Most prejudgment agreements that attempt to resolve litigation without the consent of the liability insurance carrier involve three components: (1) an assignment of the insured’s rights against its liability insurer to the injured party; (2) the injured party’s agreement not to

execute against the insured's assets; and (3) a judgment establishing the insured's liability and the injured party's damages.<sup>15</sup> Insurers have attacked each of these components in challenging prejudgment agreements, though "the legal architecture of the agreements has been validated by the majority of courts."<sup>16</sup>

## A. The Assignment.

While prejudgment agreements come in many different shapes and sizes, they share the assignment of the insured's rights to the injured party. In some instances, the insured may agree to prosecute a lawsuit against the insurer and to assign the proceeds, if any, collected in the action to the injured party. In other cases, the parties may agree that the injured party will prosecute the lawsuit in the insured's name pursuant to an assignment of rights.

Most courts that have considered the issue have concluded that assignments of this nature are permissible,<sup>17</sup> though some have held that the insured may only assign the right to collect the judgment, and not personal claims for emotional distress and punitive damages.<sup>18</sup> In Colorado, it is permissible for an insured, following entry of an excess judgment in a contested trial, to agree to prosecute an action against its liability insurer and to assign to the injured party the proceeds, if any, recovered in the action in order to satisfy the judgment.<sup>19</sup> Further, in *Olmstead v. Allstate Ins. Co.*,<sup>20</sup> the U.S. District Court for the District of Colorado concluded that a cause of action for failure to settle may be assigned directly to the injured party for prosecution following the entry of judgment.

Logically, if the insured may assign the proceeds collected in an action brought against its carrier, it would also seem that the insured may assign its claim against the insurer directly to the injured party. Indeed, as noted in *Olmstead*, this is the prevailing majority rule.<sup>21</sup> In a similar vein, because it is permissible for an insured to assign its rights against its insurer to the injured

party, it should not matter whether the assignment technically takes place before or after the entry of judgment.<sup>22</sup> It is axiomatic that principles of contract law, and, in particular, the law of assignments, apply equally to all contracts, regardless of when they are made. Moreover, prejudgment agreements can, and usually do, provide for the assignment to take place after the judgment enters, which would seem to obviate any technical problem that a court might have with the timing of the assignment.

## B. The Covenant Not To Execute.

Prejudgment agreements also share a promise by the injured party not to execute against the insured's personal assets. Insurers challenging prejudgment agreements have argued that the covenant not to execute relieves the insured of liability, with the result that the insurer has no obligation to indemnify the insured under the terms of the policy.<sup>23</sup> In effect, this argument is an attempt by the insurer to benefit from the insured's bargain with the injured party, despite the fact that the agreement was negotiated not to confer a benefit on the insurer, but rather, to hold it responsible for allegedly unreasonable conduct. As a stranger to the agreement, the insurer should not be allowed to benefit from its terms.

Indeed, the overwhelming majority of jurisdictions, including Colorado in the postjudgment context,<sup>24</sup> recognize that a covenant not to execute is not a release that extinguishes the insured's liability to the injured party; it is merely a promise, the breach of which may give rise to a claim for damages as between the parties to the agreement (*i.e.*, the insured and the injured party).<sup>25</sup> While the Colorado Supreme Court has not addressed the significance of a covenant not to execute in the prejudgment context, there is no reason that it should have a different effect than in a postjudgment agreement, as principles of contract law should apply equally to all contracts regardless of when made. Because a covenant not to execute does not extinguish the insured's liability when entered into after a judgment, it follows that

it should not be deemed to do so when made prior to the entry of judgment.

In addition to arguing that a covenant not to execute releases the insured of liability, insurers also assert that an insured protected by a covenant not to execute can suffer no damages, as a matter of law, because it will never be required to pay the judgment. As the argument goes, because the insured will never have to pay the judgment, the insurer should not be required to indemnify either the insured or the insured's assignee. In support of this "no damages" argument, insurers often cite the so-called "payment rule," which dictates that an insurer may be held liable for a judgment in excess of policy limits only if the insured has paid part or all of the judgment.<sup>26</sup> The rationale underlying this rule is that where an insured does not pay any money in satisfaction of an excess judgment, the insured is not harmed and thus may not collect damages.<sup>27</sup>

While a few courts have adopted the payment rule, the overwhelming majority of jurisdictions have rejected it. Courts in these latter jurisdictions instead follow the "judgment rule," which recognizes that the "entry of judgment . . . alone is sufficient damages for an insured to sustain a recovery from an insurer for its breach of duty."<sup>28</sup> They have found significant the fact that the insurance policies in question insured against *liability*, not *reimbursement*.<sup>29</sup> Thus, these courts have concluded that the insured's actual payment of an excess judgment, and its ability to pay the excess judgment,<sup>30</sup> are irrelevant considerations when examining whether the insurer may be held responsible to pay the judgment.<sup>31</sup> Indeed, the Colorado Supreme Court embraced this principle in both the *Bashor*<sup>32</sup> and *Trimble*<sup>33</sup> decisions.

The rationale behind allowing full recovery to an insured who has not paid the excess judgment "is to prevent bad-faith practices in the insurance industry by eliminating the insurer's ability to hide behind the financial status of its

insured.”<sup>34</sup> It has also been noted that the judgment rule prevents an insurer from benefiting from the poverty of an insured who has a meritorious claim but cannot first pay the judgment imposed upon him.<sup>35</sup> If payment or demonstration of ability to pay a judgment were the rule, then an insurer would be encouraged to refuse to settle a claim merely because the insured is insolvent, which would impair the use of insurance by the poor.<sup>36</sup> In adopting the judgment rule in a case involving an excess judgment entered against an insolvent estate, the Tenth Circuit explained:

Where, as here, the decedent tortfeasor had no funds, the insurer who failed to settle should not be allowed to successfully assert that it is not liable despite its breach of duty because the decedent tortfeasor was without funds. Such a rule would encourage the insurer to avoid its duty in many cases. It would balance the risk in every case knowing that it had an escape hatch. Refusal to settle within the policy limits would be the rule.

Such a course would impair the use of insurance for a poor man. The fullness or the emptiness of an insured’s purse should be irrelevant. It is a poor measure of liability by the insurer under its contract.<sup>37</sup>

The fact is that courts permitting prejudgment agreements coupled with covenants not to execute do so “because it is thought that an insured that has been placed at economic risk by its insurer’s breach should be allowed to protect itself by shifting the risk to the breaching insurer without first subjecting itself to potential financial ruin.”<sup>38</sup> Given that the covenant not to execute is a centerpiece of any pre or postjudgment agreement, allowing insurers to use the covenant to argue that the insured has sustained no damages would deprive the insured of the only means it may have to protect itself when its insurance carrier has acted improperly. A blanket prohibition on the use of pre-judgment agreements containing covenants not to execute would result in more cases going to trial, resulting in economic hardship to insureds; an injured party would be loathe to enter into such an agreement if the covenant not to execute precluded its enforcement, while an insured would have little incentive to enter into the agreement if it did not contain a covenant protecting the insured’s assets. Thus, assuming the judgment is not the product of fraud or collusion,<sup>39</sup> discussed below, the use of a covenant not to execute in a prejudgment agreement provides no basis on which to hold the agreement unenforceable.<sup>40</sup>

## C. The Judgment

The linchpin of any prejudgment agreement entered into without the insurer’s consent is a judgment establishing the insured’s liability and the injured party’s damages.<sup>41</sup> Even where courts focus on the assignment or covenant not to execute, their real concern appears to be not the assignment or covenant standing alone, but the potential for fraud and collusion when the judgment to which they apply results from something less than a full, adversarial trial.<sup>42</sup> Indeed, the division in *Ross* made specific reference to the fact that the judgment did not result from a contested proceeding in concluding that it was not binding on the insurer.<sup>43</sup>

There are at least three ways in which a judgment creating liability on behalf of the insured can be obtained: (1) a stipulated or consent judgment; (2) an actual judgment by a judge following an adversarial trial or the insured’s default; or (3) a judgment entered by a court following a judicial or quasi-judicial proceeding (e.g., arbitration) confined to certain issues or otherwise limited in the manner or scope of presentation of evidence. The manner in which the judgment creating liability is obtained may be a significant factor in determining whether it should be binding on the insurer; it may lend

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credibility to the outcome of the process or, on the other hand, it may cause a court to question the result.<sup>44</sup>

In some Colorado cases, a consent or stipulated judgment, when coupled with a covenant not to execute, has been viewed with a skeptical eye.<sup>45</sup> By contrast, a judgment entered following a contested trial or a damages hearing held after the entry of a default judgment seems unassailable.<sup>46</sup> Given the potential for abuse that exists when courts enter judgment following something less than a contested trial or a default damages hearing, many courts allow the insurer to attack the judgment on grounds that it was procured through fraud or collusion.<sup>47</sup> Some courts note, however, that there is nothing *inherently* fraudulent or collusive about a prejudgment agreement.<sup>48</sup>

Nor is there is anything inherently fraudulent or collusive about a stipulated or consent judgment. For instance, a stipulated or consent judgment in the amount of \$2.0 million may be quite reasonable if the insured's own expert witness or lawyer placed likely damages in this range, or even higher, and advised the insurer that its insured had a 90% chance of being found liable at trial. By contrast, a stipulated judgment in that same amount may not seem reasonable if the insured's lawyer or expert evaluated the case and gave the insured only a 10% chance of losing at trial and indicated that the damages would likely be in the range of \$300,000.

In determining issues of fraud or collusion, or deciding whether a given settlement is reasonable, courts in other jurisdictions have fashioned various procedures to address the competing interests of the insurer and the insured. In Arizona, for instance, the procedure employed to determine whether a judgment is binding on an insurer depends on the nature of the insurer's misconduct. When the insurer denies its defense obligations, and is subsequently found to have done so wrongfully, it will not be permitted to question the reasonableness of the judgment amount, whether it

was stipulated to or reached by any other mechanism.<sup>49</sup> However, when the insurer refuses to settle a case while defending under a reservation of rights, and it is later determined that coverage exists, the insurer will be bound by a judgment when: (1) the insurer is fairly notified by the insured of its intent to enter into a prejudgment agreement; (2) the agreement is created fairly; and (3) is not the result of fraud or collusion.<sup>50</sup> Further, even when these factors are established, the insured will bear the burden of establishing that the settlement was "reasonable and prudent."<sup>51</sup>

The Iowa Supreme Court uses a similar test when determining whether an insurer is liable for a stipulated judgment:

[I]n settlements like the one here, an insurer, relying on fraud or collusion, must plead and prove these defenses. If either defense is proven, the settlement is invalid and unenforceable against the insurer. The injured party, however, has the burden to prove by a preponderance of the evidence that (1) the underlying claim was covered by the policy, and (2) the settlement which resulted in the judgment was reasonable and prudent. The test the fact finder must apply on this issue is what a reasonable and prudent person in the position of the defendant . . . would have paid to settle the plaintiff's . . . claim. In applying this test, the fact finder must consider facts bearing on the liability and damage aspects of the claim as well as the risks of going to trial.<sup>52</sup>

While judicial approaches vary, the majority of courts have recognized that the "risk of collusion and fraud can be lessened . . . if not avoided altogether by placing a requirement upon the plaintiff to prove that the settlement it reached with the insured was reasonable before that settlement can have any binding effect upon the insurer."<sup>53</sup> Despite the abundance of authorities approving of prejudgment agreements in instances where an insurer wrongfully refuses to defend or settle a third-party lawsuit, Colorado's approval of these agreements

remains uncertain, particularly considering the *Serna, Seco/Warwick*, and *Ross* decisions.<sup>54</sup> The Colorado Supreme Court may or may not clear up the confusion when it renders its opinion in *Ross*.<sup>55</sup>

## Colorado's Response to Prejudgment Agreements

Ironically, it was a non-insurance case, *Serna v. Kingston Enterprises*,<sup>56</sup> which served as the catalyst for the insurance industry's attack on prejudgment agreements in Colorado. Although no insurer misconduct was involved, language from the opinion has been repeatedly cited, at both the trial and intermediate appellate court levels, as a basis for refusing to enforce prejudgment agreements in the insurance context.

Ms. Serna was fifteen years old when her employer, Kingston Enterprises ("Kingston"), instructed her to drive from one of its franchise locations to another. While performing this task, Serna's car collided with another automobile, resulting in serious bodily injuries to the passengers in the other car. The passengers sued Serna and Kingston for negligence and *respondeat superior*, respectively. The passengers settled with Kingston for \$850,000 before electing to serve process on Serna.<sup>57</sup>

The passengers then approached *Serna* with a settlement proposal that she promptly accepted. Pursuant to the terms of the settlement, Serna agreed to: (1) allow entry of a \$1.5 million judgment against her; (2) employ the passengers' attorney to sue Kingston in an indemnity action; (3) permit the passengers to make all decisions with respect to her lawsuit against Kingston; (4) refuse to settle with Kingston without the passengers' prior approval; and (5) pay monies recovered from defendant to the passengers. In return, the passengers accepted \$40,000 from Serna's personal liability insurance carrier, agreed not to execute on the remainder of the \$1.5 million judgment, and promised to pay Serna half the

monies recovered from Kingston in excess of \$1.0 million.<sup>58</sup>

Consistent with the agreement, Serna brought an indemnity action against Kingston. Prior to trial, the district court granted summary judgment against Serna, finding that her claim was barred by the exclusivity provisions of the Workers Compensation Act ("WCA")<sup>59</sup> and by the Uniform Contribution Among Tortfeasors Act ("UCATA").<sup>60</sup> Serna appealed.

Despite the fact that the enforceability of the prejudgment agreement did not form the basis for the trial court's grant of summary judgment, it became the centerpiece of the division's opinion. After concluding that neither the WCA nor the UCATA barred Serna's claims, the division noted that Kingston could defend the judgment on any grounds and proceeded to address Kingston's argument that the indemnity claim failed because there was "no realistic prospect of the passengers executing on the judgment entered against her."<sup>61</sup> In accepting Kingston's argument, the division distinguished the assignment agreement from the one permitted in *Bashor*, remarking:

In the reported Colorado cases to date, *Bashor* agreements have been used only in cases involving allegations of a breach of an insurer's contractual duty to indemnify an insured. Further, the shared recovery contemplated by *Bashor* encompasses only the return, on a full or pro rata basis, of the amount of money a *Bashor* defendant had already paid to the injured party.

Here, any duty on defendant's part to indemnify Serna arose not under contract but under common law. Further, Serna's agreement with the passengers was more akin to a profit-sharing agreement; her share of any recovery against defendant was not limited to recouping only the losses she or her insurance company sustained. . . .

Finally, and perhaps most important, unlike the *Bashor* situation,

there has never been a judgment enforceable against Serna; indeed, the only judgment against her is one to which she stipulated, along with conditions virtually ensuring that it would never be enforced against her.

Because, under the particular circumstances of this case, we discern no danger that Serna will ever sustain a monetary loss or otherwise be subjected to an enforceable judgment against her, we affirm the trial court's dismissal of her indemnification claim against defendant.<sup>62</sup>

Less than one year later, in *American Manufacturers Mutual Insurance Co. v. Seco/Warwick Corp.*,<sup>63</sup> a visiting Wyoming federal district court judge cited *Serna* with approval in refusing to enforce a prejudgment agreement entered into following the failure of two different insurers to settle a liability claim against their insured.<sup>64</sup> While defending their insured under a reservation of rights, the insurers, which had issued liability insurance policies containing \$4.0 million in combined limits, rejected the plaintiff's \$1,985,000 settlement demand and refused to offer more than \$300,000. Confronted with the possibility of an excess or uncovered judgment, the insured entered into a prejudgment agreement with the plaintiff. Pursuant to the terms of the settlement, the insured agreed to pay \$5,000 to the plaintiff, admit its liability, and assign to the plaintiff all of its rights to seek indemnity against the insurer. The plaintiff, in turn, agreed that it would not seek further funds from the insured, and the parties submitted the issue of damages to arbitration. After the arbitrator awarded the plaintiff more than \$3.6 million in damages, the plaintiff and the insured stipulated to the entry of a judgment in the amount of the award and the plaintiff served writs of garnishment on the insurers. The insurers responded by filing a declaratory judgment action, asserting that their insurance policies did not afford coverage for the losses on account of various policy exclusions, and further, that they should not be

bound by the judgment because it was procured through improper means.<sup>65</sup>

On these facts, the court held that there was no coverage under the policies for the damages awarded. While the court could and should have stopped here, it continued to address, in *dicta*, the enforceability of the prejudgment agreement. Citing to *Serna*, without acknowledging its non-insurance origin, and with no mention of any of the numerous authorities upholding prejudgment agreements in the insurance context, the court stated:

Where, as here, the party claiming a right to indemnity enters into a stipulated judgment with the claimant, and enters an agreement that absolves itself of further liability, the claimant has no right of action against the supposed indemnitor.<sup>66</sup>

While the federal district court's statements were *dicta*, and the decision is not binding on Colorado trial courts in any event, the language is troubling because it applied *Serna* in the context of an insurer's failure to settle – one of the situations in which courts in other jurisdictions have found prejudgment agreements enforceable. The *Seco/Warwick* Court's failure to acknowledge or address the numerous authorities<sup>67</sup> validating prejudgment agreements, coupled with the fact that the court did not need to reach the question of the agreement's enforceability in the first place, renders the opinion of dubious precedential value.

Finally, in *Ross v. Old Republic Ins. Co.*,<sup>68</sup> the court of appeals purported to apply Colorado law to a prejudgment agreement. As noted earlier, the Colorado Supreme Court has granted *certiorari* review of the case, and one of the issues under consideration is whether the agreement comported with the *Bashor* decision. Given the peculiar facts involved in *Ross*, however, the Court may end up resolving the case without deciding the enforceability question.

The *Ross* case arose out of an October 10, 1995, airplane crash in which the pilot and two passengers, Colt. H. Ross and John Dirk Ross, were killed. A wrongful death action was subsequently filed by the heirs of the two passengers against the pilot's estate, the company that owned the airplane and employed the pilot, Durango Air Service, Inc. ("DAS"), and the president of DAS, Donley E. Watkins.<sup>69</sup> At the time of the accident, DAS was listed as the named insured on two separate liability insurance policies issued by Old Republic Insurance Company ("Old Republic"): an aviation policy with limits of \$700,000 and a commercial general liability (CGL) policy with limits of \$1.0 million.<sup>70</sup> Watkins and the pilot's estate were also insured under the policies issued to DAS.<sup>71</sup>

Old Republic acknowledged coverage for the accident under the aviation policy and agreed to defend the insureds under a reservation of rights. Old Republic claimed that no coverage existed under the CGL policy, however, on account of a so-called "Airport Exclusion."<sup>72</sup> In addition, Old Republic asserted that the limits of coverage under the aviation policy were capped at \$100,000 per passenger killed, for a total of \$200,000.<sup>73</sup>

Old Republic maintained throughout the litigation that its exposure under the policy was \$200,000 and refused to offer more than that amount toward a settlement.<sup>74</sup> Facing exposure to a judgment well in excess of their insurance policy limits, be they \$200,000 or \$1.7 million, the insureds attempted to protect themselves through a prejudgment agreement with the decedents' heirs. While not mentioned in any of the written opinions generated in connection with this dispute, the heirs stated in their cross-petition for certiorari that Watkins' defense counsel (selected and paid for by Old Republic) proposed the prejudgment agreement approximately one month prior to the liability trial.<sup>75</sup> The heirs claim that six days after the lawyer suggested the pre-

judgment agreement, they offered to settle for \$800,000 or to enter into a prejudgment agreement in which Watkins and DAS would confess judgment in the amount of \$4.0 million and assign to the heirs their rights to pursue collection of the judgment from Old Republic.<sup>76</sup> In exchange, the heirs would agree not to pursue collection of the judgment from Watkins or DAS.<sup>77</sup>

According to the heirs, Watkins' counsel faxed a letter to Old Republic ten days prior to trial requesting permission to allow Watkins and DAS to confess judgment in the amount of \$2.0 million each. In response to this inquiry, counsel for Old Republic faxed a letter to Watkins' counsel stating, in part:

On behalf of Old Republic, we can assure you and your clients that, if your clients wish to resolve the litigation as you suggested, Old Republic has no objection to that and will agree to indemnify your insureds, but only to the extent of the determined insurance coverage.<sup>78</sup>

The trial was vacated, and shortly thereafter, Old Republic filed a declaratory judgment action in federal court seeking a determination that its coverage was limited to \$200,000, and the heirs filed a counterclaim for bad faith breach of insurance contract. While the federal court action was pending, the prejudgment agreement was finalized on the following terms: (1) Watkins and DAS agreed to confess judgment of \$2.0 million each, plus interest; (2) Watkins agreed to sign a promissory note in the amount of \$50,000, for which he would be reimbursed if the heirs recovered more than the amount of the consent judgment; (3) Watkins and DAS agreed to prosecute claims against Old Republic fully; (4) Watkins and DAS agreed to be represented by the heirs' lawyers and to waive any potential conflicts of interest; (5) the heirs reserved the right to approve any settlement reached with Old Republic; (6) the parties agreed to share any compensatory or punitive damages recovered beyond the amount of the consent

judgment; and (7) the heirs agreed not to execute on the judgment provided Watkins and DAS faithfully performed their obligations under the prejudgment agreement. The trial court subsequently entered judgment against Watkins and DAS in the wrongful death case in the amount of \$4.0 million, plus interest.<sup>79</sup> Old Republic then paid \$200,000 to the heirs in partial satisfaction of the judgment, and proceeded to litigate the coverage issues in the declaratory judgment action.<sup>80</sup>

After hearing cross-motions for summary judgment on the coverage issues, the federal district court concluded that the Old Republic insurance policies provided coverage for the accident in the total amount of \$1.7 million. Old Republic appealed.<sup>81</sup>

During oral argument, the Tenth Circuit panel questioned whether it had jurisdiction to resolve the controversy because the trial court's order had not disposed of the insurance bad faith counterclaims in the declaratory judgment action. Confronted with the possibility of further appellate delay, Watkins and DAS, at the heirs' request, decided to dismiss the bad faith counterclaims and to look solely to the available insurance policy limits to satisfy the judgment.<sup>82</sup> After the formality of dismissing the counterclaims was completed, the Tenth Circuit affirmed the trial court's order, concluding that Watkins and DAS were entitled to \$700,000 in coverage under the aviation policy and \$1.0 million under the CGL policy.<sup>83</sup> Old Republic subsequently paid \$1.5 million to the heirs, taking a credit for the \$200,000 it had previously paid.<sup>84</sup>

A dispute then arose between Old Republic and the heirs as to whether Old Republic was required to pay interest over and above the \$1.5 million. Under the heading "Supplementary Payments," the CGL policy provided that Old Republic would pay, "in addition to the applicable limit of liability: . . . all interest on the entire amount of any judgment therein which accrues after entry of judgment and before the

company has paid or tendered or deposited in court that part of the judgment which does not exceed the limits of the company's liability thereon.”<sup>85</sup> Thus, the heirs argued that Old Republic was contractually obligated to pay postjudgment interest on the amount of the consent judgment from the date it was entered until Old Republic, years later, paid the remaining \$1.5 million owing under the policy. When Old Republic refused to pay the interest, the heirs filed writs of garnishment in state court to collect the unpaid interest.

In the garnishment action, the trial court concluded that Old Republic was indeed required to pay interest because Old Republic had agreed to the consent judgment and was barred by the doctrine of *res judicata* from challenging the judgment.<sup>86</sup> In fact, the trial court awarded attorney's fees to the heirs based on its conclusion that Old Republic's challenge to the enforceability of the judgment was groundless.<sup>87</sup> Against

this backdrop, the case made its way to the Colorado Court of Appeals.

On appeal, the heirs argued that Old Republic consented to the underlying judgment, and that it was barred under the doctrines of waiver, estoppel, *res judicata*, and collateral estoppel from attacking the judgment. After rejecting each of these arguments, the division proceeded to analyze whether Old Republic could be bound by the judgment. Citing to *Serna*, the division concluded that the agreement in question was not a true *Bashor* agreement, noting that: (1) it was entered into prior to the entry of judgment; (2) it was more akin to a profit-sharing agreement; and (3) the heirs were seeking to utilize it to collect in a garnishment proceeding, as opposed to a tort action for bad faith.<sup>88</sup> Then, after stating that an enforceable judgment against the insureds never existed apart from the confessed judgment to which they stipulated, the division cited *Miller v. Byrne*<sup>89</sup>

and concluded that the judgment was not binding on Old Republic because it was entered without an evidentiary hearing and without Old Republic's participation. The division went on to hold, however, that the plaintiffs were entitled to statutory interest pursuant to C.R.S. § 5-12-102, and remanded the case to the trial court to determine the amount of interest owing under the statute.<sup>90</sup>

From review of the opinions that have been generated in connection with this now 12 year-old dispute, as well as the briefs of the parties, the Colorado Supreme Court may well decide that it need not reach the “*Bashor*” issue, included among the questions accepted for review. The underlying settlement agreement was entered into as a consequence of Old Republic's failure and refusal to settle the Rosses' claims against its insureds within policy limits, and specifically contemplated the prosecution of a bad faith action against Old Republic to recover damages arising



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from the insurance carrier's conduct, including the amount of the judgment against the insureds, other compensatory damages, punitive damages, interest, and costs. Subsequently, however, the Rosses abandoned their bad faith claims against Old Republic, and instead sought only interest on their judgment in a garnishment proceeding.

The cogency of the prejudgment agreement in this context is uncertain. For instance, if the supreme court were to decide that, consistent with the court of appeals' ruling, Old Republic agreed to indemnify its insureds "to the extent of the determined insurance coverage,"<sup>91</sup> and Old Republic must pay interest on the \$1.5 million amount from the date this agreement was made until the date when the limits were paid, there may be no need to consider whether the agreement was valid. That is, the court could find, irrespective of the judgment, that Old Republic bound itself in November 1998 to indemnify its insureds "to the extent of the determined insurance coverage," and that it therefore owes interest on that amount until payment was ultimately made in May 2002. Alternatively, the court could hold that, by payment of insurance proceeds totaling \$1.7 million, Old Republic acknowledged the validity and propriety of the judgment to the extent of its payment, such that Old Republic remains liable for postjudgment interest due under the comprehensive general liability policy's Supplementary Payments provision. Again, the court could reach this conclusion based solely on its evaluation of Old Republic's actions, without ruling on the enforceability question.

In sum, it is concerning that *Serna's* sweeping language has been extended into the insurance arena with no discussion or analysis of the numerous, contrary authorities from other jurisdictions that have approved the use of prejudgment agreements. Even more alarming is the fact that the extension has taken place without any discussion of the legitimate interest that an insured has in protecting itself from insurer misconduct. While *Ross* may not decide the question, when

the court does finally resolve the issue, the authors expect that Colorado will join the majority of jurisdictions that recognize the validity of prejudgment agreements in appropriate cases involving insurer misconduct.

**Bradley A. Levin and Michael J. Rosenberg are shareholders in the Denver-based law firm Roberts Levin Rosenberg PC, where they dedicate much of their practice to insurance coverage and insurance bad faith litigation.**

## Endnotes

- 1 C.R.S. § 10-1-101.
- 2 *Farmers Group, Inc. v. Trimble*, 691 P.2d 1138, 1141 (Colo. 1984).
- 3 *Goodson v. Am. Std. Ins. Co. of Wis.*, 89 P.3d 409, 417 (Colo. 2004).
- 4 See *Trimble*, 691 P.2d at 1142. ("While the conduct forming the basis of the claim will necessarily be an 'intentional act' by virtue of the necessity of a conscious decision on the part of the insurer to refuse to pay a claim, the standard applicable to establish the tort of bad faith remains one of reasonableness under the circumstances. . . . [E]vidence of intent, such as intentional misconduct, actual dishonesty, fraud, or concealment is not a prerequisite to recovery on a claim of bad faith breach of an insurance contract.")
- 5 *Am. Fam. Mut. Ins. Co. v. Allen*, 102 P.3d 333, 342 (Colo. 2004).
- 6 *Goodson*, 89 P.3d at 414-415.
- 7 *Aetna Cas. & Sur. Co. v. Kornbluth*, 471 P.2d 609, (Colo. App. 1970), *cert. denied*; see also *Miller v. Byrne*, 916 P.2d 566 (Colo. App. 1995) (insurer's rejection of settlement offer without discussing it with insured was evidence of bad faith), *cert. denied*; *Potomac Ins. Co. v. Wilkins Co.*, 376 F.2d 425, 427 (10th Cir. 1967) (applying Colorado law) ("It is well established that the law imposes upon the insurer the duty to exercise diligence, intelligence, good faith, and honest and conscientious fidelity to the common interest of the insured as well as itself in determining whether to accept or reject an offer of settlement" by a third-party claimant.)
- 8 *Goodson*, 89 P.3d at 414.
- 9 *Northland Ins. Co. v. Bashor*, 494 P.2d 1292 (Colo. 1972).
- 10 *Ross v. Old Republic Ins. Co.*, 134 P.3d 505 (Colo. App. 2006).
- 11 The court held oral argument in *Ross* on October 24, 2007. During the argument, justices posed certain questions indicating that the Colorado Supreme Court may avoid ruling on the prejudgment *Bashor* issue, and instead decide the case on alternative grounds, as urged by CTLA in its *amicus curiae* brief.
- 12 *Serna v. Kingston Enter.*, 72 P.3d 376 (Colo. App. 2002), *cert. denied*.
- 13 *Am. Mfrs. Mut. Ins. Co. v. Seco/Warwick Corp.*, 266 F. Supp.2d 1259 (D. Colo. 2003).
- 14 The enforceability of prejudgment agreements is also at issue in *Nunn v. Mid-Century Ins. Co.*, currently pending in the Colorado Court of Appeals (Case No. 06CA954). Oral argument in the case was held on September 10, 2007, and a decision from the court should be forthcoming. Of note, the court permitted CTLA to participate in oral argument as *amicus curiae*.
- 15 John K. DiMugno, *Consent Judgments*

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*and Covenants Not to Execute: Good Deals or Too Good to be True? Part II: Practical Concerns About Collusion and Fraud*, 25 No. 1 INS. LITIG. REP. 5 (2003).

<sup>16</sup> Steven Plitt, *The Evolving Boundaries of Damron/Morris Agreements: A Search for the Missing Link, A Judicial Determination of the Length of a Reasonable Person's Arm, and Other Progressive Issues*, 35 ARIZ. ST. L. J. 1331, 1339 (2003).

<sup>17</sup> Justin A. Harris, *Judicial Approaches to Stipulated Judgments, Assignments of Rights, and Covenants Not to Execute in Insurance Litigation*, 47 DRAKE L. REV. 853 n. 31 & accompanying text (1999) ("Most courts . . . allow both prejudgment and postjudgment assignments of claims.").

<sup>18</sup> *Murphy v. Allstate Ins. Co.*, 553 P.2d 584 (Cal. 1976).

<sup>19</sup> *Bashor*, 494 P.2d at 1293.

<sup>20</sup> *Olmstead v. Allstate Ins. Co.*, 320 F. Supp. 1076, 1077 (D. Colo. 1971) (applying Colorado law) (permitting insured's assignee to bring suit against insurer for failure to settle in order to collect amount of judgment owing in excess of the insurance policy limits, and noting the general rule that "if a cause of action is of such a nature that on the death of the party entitled to sue, the right of action would survive to his personal representative, it may be assigned").

<sup>21</sup> *Id.*; see also Harris, *supra* note 17, at 853 n.1 & accompanying text.

<sup>22</sup> *Kobbeman v. Oleson*, 574 N.W.2d 633, 639 (S.D. 1998) ("[S]o long as one ultimately obtains a judgment in the underlying action to establish the loss before proceeding to trial on the assigned claim, it is not crucial whether the judgment precedes or follows the assignment.").

<sup>23</sup> Most liability insurance policies are written to provide that the insurer will indemnify the insured for those sums that the insured is "legally obligated to pay" as damages. *Hoang v. Assur. Co. of Am.*, 149 P.3d 798, 802 (Colo. 2007) (CGL policy); *Colonial Ins. Co. of Calif. v. Am. Hardware Mut. Ins. Co.*, 969 P.2d 796, 798 (Colo. App. 1998) (automobile policy); *Allstate Ins. Co. v. Juniel*, 931 P.2d 511, 513 (Colo. App. 1996) (homeowner's policy).

<sup>24</sup> *Bashor*, 494 P.2d at 1293. For the same reasons discussed in the preceding section concerning assignments, there is no reason to treat covenants not to execute differently depending on whether they are made before or after the judgment enters.

<sup>25</sup> *Bashor v. Northland Ins. Co.*, 480 P.2d 864 (Colo. App. 1970), *aff'd*, 494 P.2d 1292 (Colo. 1972); see also *Stone v. Satriana*, 41 P.3d 705, 708 n. 2 (Colo. 2002) ("A *Bashor* agreement is a settlement reached between opposing parties after a judgment has been obtained against the defendant. The prevailing party agrees not to execute on the judgment in exchange for the defendant's agreement not to appeal the judgment and instead to pursue claims against third parties (and share any recovery with the original plaintiff."); *Stateline Steel Erectors, Inc. v. Shields*, 837 A.2d 285, 290-91 (N.H. 2003) (covenant not to execute is distinguishable from a release and does not extinguish a cause of action); *Guillen ex rel. Guillen v. Potomac Ins. Co. of Ill.*, 785 N.E.2d 1, 14 (Ill. 2003); *Tip's Package Store, Inc. v. Commercial Ins. Mgrs.*, 86 S.W.3d 543 (Tenn. App. 2001) (covenant not to execute "did not extinguish the underlying liability of Tip's for compensatory damages"); *Kobbeman*, 574 N.W.2d 633 ("settlement which includes a covenant not to execute (as opposed to a release) in exchange for an assignment of a cause of action . . . is neither intrinsically collusive nor ineffective for lack of damages"); *Lageman v. Frank H. Furman, Inc.*, 697 So.2d 981 (Fla. Dist. Ct. App. 1997) (covenant not to execute is not a release and does not prevent the plaintiff from recovering); *McLellan v. Atchison Ins. Agency Inc.*, 912 P.2d 559, 565 (Haw. App. 1996) (noting that Hawaii follows the majority rule that a covenant not to execute on a stipulated judgment is not a release of liability); *Campione v. Wilson*, 661 N.E.2d 658, 659-63 (Mass. 1996) (release or covenant not to execute does not preclude cause of action against insurer); *Red Giant Oil. Co. v. Lawlor*, 528 N.W.2d 524, 529-533 (Iowa 1995) (same); *Wolff v. Royal Ins. Co.*, 472 N.W.2d 233, 235 (S. Dak. 1991) (same); *Gray v. Grain Dealers Mut. Ins. Co.*, 871 F.2d 1128, 1133 (D.C. Cir. 1989) (same); *Steinmetz for Bene. of Palmer v. Hall-Conway-Jackson, Inc.*, 741 P.2d 1054, 1056-57 (Wash. App. 1987) (same); *Luria Bros. & Co., Inc. v. Alliance Assur. Co., Ltd.*, 780 F.2d 1082, 1091 (2d Cir. 1986); (same); *Kagele v. Aetna Life and Cas. Co.*, 698 P.2d 90, 93 (Wash. App. 1985) (same); *Miller v. Shugart*, 316 N.W.2d 729 (Minn. 1982) (same); *Griggs v. Bertram*, 443 A.2d 163 (N.J. 1982); *Bishop v. Crowther*, 428 N.E.2d 1021, 1024 (Ill. App. 1981) (insurer's argument that insured no longer "legally obligated to pay" judgments against him,

and therefore insurer is released as well, fails because "[a]n agreement limiting execution to specific assets does not negate damages"); *LaRotunda v. Royal Globe Ins. Co.*, 408 N.E.2d 928 (Ill. App. 1980) (agreement not to collect against insured given in exchange for assignment of rights against insurer evidenced no collusion); *Am. Fam. Mut. Ins. Co. v. Kivela*, 408 N.E.2d 805 (Ind. App. 1980); *State Farm Mut. Auto. Ins. Co. v. Paynter*, 593 P.2d 948, 950-51 (Ariz. App. 1979) (assignment of rights under policy and \$500 in exchange for covenant not to execute future judgments against insured upheld as not "inherently fraudulent"); *Steedly v. London & Lancashire Ins. Co. Ltd.*, 416 F.2d 259, 262 (6th Cir. 1969); *Damron v. Sledge*, 460 P.2d 997, 999 (Ariz. 1969); *Zander v. Cas. Ins. Co. of Calif.*, 66 Cal. Rptr. 561, 568 (Cal. App. 1968) (settlement with insured does not release insurer because to do so penalizes insured for attempt to minimize damages); *Metcalf v. Hartford Acc. & Indem. Co.*, 126 N.W.2d 471, 475-76 (Neb. 1964); *Critz v. Farmers Ins. Group*, 230 Cal. App. 2d 788, 41 Cal. Rptr. 401, 404 (Cal. App. 1965) (assignment of chose of action in exchange for release from liability before judgment entered against insured not void against public policy because assignment's value is determined by bad faith of insurer); Harris, *supra* note 14, at 859 (the trend "seems to lean overwhelmingly toward the majority rule" that a "covenant not to execute is not a release" absolving the insurer of its obligation to indemnify its insured); *Assignability of Insured's Right to Recover Over Against Liability Insurer for Rejection of Settlement Offer*, 12 A.L.R.3d 1158 (1967).

<sup>26</sup> *Economy Fire & Cas. Co. v. Collins*, 643 N.E.2d 382, 385 (Ind. App. 1994).

<sup>27</sup> *Id.*; see also *Farmers Ins. Exch. v. Schropp*, 567 P.2d 1359 (Kan. 1977); *Bourget v. Gov't Employees Ins. Co.*, 456 F.2d 282 (2d Cir. 1972); *Shapero v. Allstate Ins. Co.*, 14 Cal. App. 3d 433 (Cal. App. 1971).

<sup>28</sup> *Jerry Mathison Const., Inc. v. Binsfield*, 615 N.W.2d 378, 381 (Minn. App. 2000) (quoting *Gray v. Grain Dealers Mut. Ins. Co.*, 871 F.2d 1128, 1131 (D.C. Cir. 1989)).

<sup>29</sup> Holmes' Appleman on Insurance 2d § 111.1, at 17 ("One of the characteristic differences between a contract of indemnity to reimburse the insured for any sustained loss and a contract to pay sums which the insured may become legally obligated to pay is that upon the former, an action can-

not be brought and recovery had until the liability indemnified against is discharged; while upon the latter, the cause of action is complete when liability attaches.”).

<sup>30</sup> Most liability insurance policies provide that the bankruptcy or insolvency of the insured or his or her estate will not relieve the insurance company of its obligations to the insured or to judgment creditors of the insured. Such liability insurance policies, by their own terms, are inconsistent with the payment rule.

<sup>31</sup> See e.g., *Great Divide Ins. Co. v. Carpenter ex rel. Reed*, 79 P.3d 599, 609-610

(Alaska 2003) (rejecting insurer’s argument that it had no obligation to pay a judgment because the insured had not been damaged on account of his having been given a covenant not to execute); *Williams v. Am. Fam. Mut. Ins. Co.*, 101 F. Supp. 2d 1337 (D. Kan. 2000); *Economy Fire & Cas. Co. v. Collins*, 643 N.E.2d at 384-386); *DiMarzo v. Amer. Mut. Ins. Co.*, 449 N.E.2d 1189 (Mass. 1983); *Torrez v. State Farm Mut. Auto. Ins. Co.*, 705 F.2d 1192, 1198-1201 (10th Cir. 1982); *Carter v. Pioneer Mut. Cas. Co.*, 423 N.E.2d 188 (Ohio 1981); *Moutsopoulos v. Am. Mut. Ins. Co.*, 607 F.2d 1185 (7th Cir.

1979); *Crabb v. Nat'l Indem. Co.*, 205 N.W.2d 633 (S. Dak. 1973); *Dumas v. State Mut. Auto. Ins. Co.*, 274 A.2d 781 (N.H. 1971); *Ammerman v. Farmers Ins. Exch.*, 450 P.2d 460 (Utah 1969); *Wolberg v. Prudence Mut. Cas. Co. of Chicago*, 240 N.E.2d 176 (Ill. App. 1968); *Gray v. Nationwide Mut. Ins. Co.*, 223 A.2d 8 (Pa. 1966); *Nat'l Farmers Union Prop. & Cas. Co. v. O'Daniel*, 329 F.2d 60 (9th Cir. 1964); *Sweeten v. Nat'l Mut. Ins. Co. of D.C.*, 194 A.2d 817 (Md. 1963); *Lee v. Nationwide Mut. Ins. Co.*, 286 F.2d 295 (4th Cir. 1961); *Am. Fire & Cas. Co. v. Davis*, 146 So.2d 615 (Fla. App. 1962); *Ala. Farm Bur. Mut. Cas. Ins. Co. v. Dalmryple*, 116 So.2d 924 (Ala. 1959).

<sup>32</sup> *Bashor*, 494 P.2d at 1294 (holding that the insured, against whom an excess judgment had entered, could appropriately collect the amount of the excess judgment from the insurer despite the fact that he would never be required to pay the judgment on account of his having been given a covenant not to execute from the judgment creditor in exchange for the insured’s agreement to pursue a bad faith claim against the insurer and to assign the proceeds, if any, awarded in the action to the judgment creditor).

<sup>33</sup> *Farmers Group, Inc. v. Trimble*, 691 P.2d 1138, 1142 (Colo. 1984) (rejecting the argument that, absent an actual exposure of an insured to a judgment in excess of policy limits, the insurer cannot be held liable for breach of the duty of good faith and fair dealing). In *Trimble*, the Colorado Supreme Court made clear that “it is the affirmative act of the insurer in unreasonably refusing to pay a claim and failing to act in good faith, and not the condition of nonpayment, that forms the basis for liability in tort.” *Id.* Thus, in assessing the propriety of prejudgment agreements, what is significant are the circumstances leading to the agreement, *i.e.*, the insurance carrier’s bad faith conduct in failing to protect its insured from a large judgment in excess of the policy limits, rather than the condition for payment of the ensuing judgment.

<sup>34</sup> *Economy Fire & Cas. Co.*, 643 N.E.2d at 385 (citing *So. Fire & Cas. Co. v. Norris*, 250 S.W.2d 785 (Tenn. App. 1952)).

<sup>35</sup> *Id.* at 385-386.

<sup>36</sup> *Id.*

<sup>37</sup> *Torrez*, 705 F.2d at 1199-1201.

<sup>38</sup> *Great Divide*, 79 P.3d at 608-609 (citing *Miller v. Shugart*, 316 N.W.2d 729 at 733-

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34 (Minn. 1982) ("If as here, the insureds are offered a settlement that effectively relieves them of any personal liability, at a time when their insurance coverage is in doubt, surely it cannot be said that it is not in their best interest to accept the offer. Nor, do we think, can the insurer who is disputing coverage compel the insureds to forgo a settlement which is in their best interest.").

<sup>39</sup> In the context of determining whether a settlement was made in "good faith" for purposes of the Uniform Contribution Among Tortfeasors Act, the Colorado Supreme Court adopted a definition of "collusion" that "requires more than mere confederacy." *Copper Mtn., Inc. v. Poma of Am., Inc.*, 890 P.2d 100, 108 (Colo. 1995) ("Any negotiated settlement involves cooperation, but not necessarily collusion. It becomes collusive . . . when it is aimed to injure the interests of an absent tortfeasor.") (citing *Stubbs v. Copper Mtn.*, 862 P.2d 978, 984 (Colo. App. 1993)) (internal quotations omitted). Similarly, prejudgment agreements are designed not to injure the insurance company, but rather, to hold them accountable for their misconduct and to protect the insured from suffering the adverse consequences of their improper decisions.

<sup>40</sup> See *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524 at 533 (Iowa 1995) (noting that enforcing prejudgment assignment agreements in the failure to defend context is "consistent with the general rule of indemnity that permits insureds to protect themselves against insurers who wrongfully refuse to defend").

<sup>41</sup> DiMugno, *supra* note 15, at Part I.C.

<sup>42</sup> *Id.*; see also *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 698 (Tex. 1996) (holding that an assignment is invalid if it is made prior to an adjudication of the plaintiff's claim against the insured in a fully adversarial trial).

<sup>43</sup> *Ross v. Old Republic Ins. Co.*, 134 P.3d 505 at 512 (Colo. App. 2006) ("Here, the consent judgment was entered without a hearing, and no evidence was adduced before the court that entered the stipulated judgment.").

<sup>44</sup> Harris, *supra* note 16, p. 855.

<sup>45</sup> See, e.g., *Miller v. Byrne*, 916 P.2d 566 (Colo. App. 1995) ("The real concern in this type of case is that the settlement between the claimant and the insured may not actually represent an arm's length

determination of the worth of the plaintiff's claim. In a situation where the insured actually pays for the settlement of the claim against him or where the case is fully litigated at trial before the entry of a judgment, the amount of the settlement or judgment can be assumed to be realistic. However, in a case involving a consent judgment with a covenant not to execute, the settlement figure is more suspect.")

<sup>46</sup> *Northland Ins. Co. v. Bashor*, 494 P.2d 1292, 1294 (1972).

<sup>47</sup> Harris, *supra* note 17, p. 855.

<sup>48</sup> *Red Giant Oil Co.*, 528 N.W.2d at 533 ("Pre-judgment assignments-like the one here-in return for covenants not to execute are not inherently collusive or fraudulent."); *Damron v. Sledge*, 460 P.2d 997, 999 (Ariz. 1969); *Critz v. Farmers Ins. Group*, 230 Cal.App.2d 788, 802 (Cal. 1964).

<sup>49</sup> *Damron*, 460 P.2d at 1001.

<sup>50</sup> *United Servs. Auto. Ass'n v. Morris*, 741 P.2d 246, 252 (Ariz. 1987).

<sup>51</sup> *Id.* at 253.

<sup>52</sup> *Red Giant Oil Co.*, 528 N.W.2d at 535.

<sup>53</sup> *Guillen v. Potomac Ins. Co.*, 785 N.E.2d 1, 14 (Ill. 2003); see *Red Giant Oil Co.*, 528 N.W.2d at 534-535; see also *Miller v. Shugart*, 316 N.W.2d 729, 734 (Minn. 1982); *Wolff v. Royal Ins. Co.*, 472 N.W.2d 233, 235 (S.D. 1991) ("As a general rule, when an insurer declines coverage, an insured may settle rather than proceed to trial to determine its legal liability. However, the amount must be reasonable in view of the size of possible recovery and degree of probability of claimant's success against the insured."); *Luria Bros. & Co. v. Alliance Assur. Co.*, 780 F.2d 1082, 1091 (2d Cir. 1986) ("[T]o recover the amount of the settlement from the insurer, the insured need not establish actual liability to the party with whom it has settled 'so long as . . . a potential liability on the facts known to the [insured] is shown to exist, culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree of probability of claimant's success against the [insured].').

<sup>54</sup> *Ross v. Old Republic*, 134 P.3d 505 (Colo. App. 2006) cert. granted; *Serna v. Kingston*

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<sup>56</sup> *Enter*, 72 P.3d 376 (Colo. App. 2002), *cert. denied*; *Am. Mfrs. Mut. Ins. Co. v. Seco/Warwick Corp.*, 266 F. Supp.2d 1259 (D. Colo. 2003).

<sup>55</sup> In *O'Dell v. Farmers Ins. Exch.*, 03-CV-2838, Jefferson County, Colorado District Court, Division 6, Judge R. Brooke Jackson found a prejudgment agreement enforceable, distinguishing the *Serna* and *Seco/Warwick* decisions and concluding that prejudgment agreements "must be analyzed on their own facts," with due consideration given to "the insured's conduct, the insurer's conduct, and the whole sequence of events" leading up to the execution of the agreement. *Id.* at 7. A copy of Judge Jackson's Order may be obtained through the Lexis/Nexis e-filing system, or by contacting the authors.

<sup>56</sup> *Serna*, 72 P.3d 376.

<sup>57</sup> *Id.* at 378.

<sup>58</sup> *Id.*

<sup>59</sup> C.R.S. §§ 8-40-101 *et seq.*

<sup>60</sup> C.R.S. §§ 13-50.5-102.

<sup>61</sup> *Serna*, 72 P.3d at 380.

<sup>62</sup> *Id.* at 380-381 (internal citations omitted).

<sup>63</sup> *Seco/Warwick Corp.*, 266 F. Supp.2d 1259.

<sup>64</sup> This federal diversity case is not binding on Colorado courts. *First Nat. Bank in Ft. Collins v. Rostek*, 514 P.2d 314, 316 (Colo. 1973) ("[I]t [is] well settled that a state court is not bound by federal court interpretation of state law.").

<sup>65</sup> *Id.* at 1263-64.

<sup>66</sup> *Id.* at 1268.

<sup>67</sup> See cases cited *supra* notes 25 and 30.

<sup>68</sup> *Ross v. Old Republic Ins. Co.*, 134 P.3d 505 (Colo. App. 2006).

<sup>69</sup> *Id.* at 508; *see also Old Republic Ins. Co. v. Durango Air Serv., Inc.*, 2000 WL 34012865, \*1 (D. Colo. 2000) (not reported in F.Supp.2d), *aff'd*, 283 F.3d 1222 (10th Cir. 2002).

<sup>70</sup> *Ross*, 134 P.3d at 508; *Durango Air Serv., Inc.*, 283 F.3d at 1223.

<sup>71</sup> *Durango Air Serv., Inc.*, 283 F.3d at 1223.

<sup>72</sup> *Ross*, 134 P.3d at 508; *Durango Air Serv., Inc.*, 283 F.3d at 1223.

<sup>73</sup> *Id.*

<sup>74</sup> *Durango Air Serv., Inc.*, 283 F.3d at 1223.

<sup>75</sup> See Cross-Petition for Certiorari filed May 4, 2006, p. 3.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 4; *Ross*, 134 P.3d at 508 (acknowledging the contents of the Old Republic letter).

<sup>79</sup> *Ross*, 134 P.3d at 508.

<sup>80</sup> *Id.*

<sup>81</sup> *Durango Air Serv., Inc.*, 2000 WL 34012865, \*4-5.

<sup>82</sup> Had the bad faith counterclaims not been dismissed, Old Republic could have eventually been found responsible for the entire amount of the judgment and not just the portion, if any, covered by the insurance policy.

<sup>83</sup> *Durango Air Serv., Inc.*, 283 F.3d at 1231.

<sup>84</sup> *Ross*, 134 P.3d at 508.

<sup>85</sup> Answer Brief Filed in the Court of Appeals, at 7.

<sup>86</sup> *Id.* It is noteworthy that the division in *Ross* did not mention the supplementary payments coverage in its opinion, and instead stated that the heirs had filed writs of garnishment for over \$5.7 million. *Ross*, 134 P.3d at 508. The heirs deny that they did so. Cross-Petition for Certiorari, p. 15 ("The Rosses never attempted to garnish \$5.7 million from Old Republic, and never attempted to garnish the 'full amount of the consent judgment' from Old Republic.").

<sup>87</sup> *Ross*, 134 P.3d at 513.

<sup>88</sup> *Id.* at 511.

<sup>89</sup> *Miller v. Byrne*, 916 P.2d 566 (Colo. App. 1995).

<sup>90</sup> The division's holding concerning statutory interest has been appealed by Old Republic.

<sup>91</sup> *Id.* at 508.



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# How to Videotape Lay Witnesses for “Day in the Life” Videos - Preparing and Shooting for the Edit

by Alan Michaelis

“A Day in the Life” video can provide a powerful way of presenting the damages of your case at a mediation or as part of a settlement brochure. The object of the video is to encourage settlement and provide enough information to validate the settlement amount you are seeking. This is your opportunity to show the adjustor how your lay witnesses will appear on the stand and how convincing they will be to a jury. Additionally, the video will humanize your case and put real faces on the witnesses before trial. Preparing for and shooting the video are the first two parts of the process. They lay the important foundation for the third part, editing the production. Shooting for the final edit will produce the best results in the least amount of time and at the least cost.

Your video editor, who often is not behind the camera during the shoot, has the responsibility to take all of the material you provide and build a short, compelling story to support the value of your case. Most professional editors can work magic even with bad material, but that can be inefficient, costly, time consuming and seldom produces the best results. So lay a good foundation!

## Getting started: The Interview

**Location, Location, location.** Most lay witnesses will be more comfortable if they are videotaped in their home or a family member’s home rather than a law

office conference room. Arrange for this with the family so they will have time to prepare their home. Gather many witnesses in the same location but isolate them from the interviews. If you don’t you will get answers like “as my brother just said” or you might get five witnesses with identical answers. Additionally you may get extraneous responses from off camera witnesses.

**Dress your witnesses for success.** Ask your witnesses to dress for the interview the same way you would want them to appear for the trial. Since the shots will be taken mid-chest and up, suggest to ladies that they not wear low cut tops that could possibly expose too much. Avoid “busy” print shirts and blouses. Solid and somewhat muted colors work well. Keep in mind that the videographer will need a to attach a microphone and need some way to hide the wire. Shirts and blouses with buttons and jackets work best.

Ladies should wear some makeup. It doesn’t have to be a lot but remember these are close up shots and everyone who watches these videos has seen a lifetime of beautiful people on television. One caution, however: avoid makeup under the eyes especially if you expect the witness to get emotional or cry. Black mascara running down a face is very distracting. Men should shave unless they have a beard, and have a neat haircut. Keep the “common sense”

jury instruction in mind when suggesting their appearance. If you get to the interview and their appearance is unflattering, try to get them to change even if they have to borrow something.

**Personal memorabilia.** Several days before videotaping, ask the lay witnesses to collect family photographs and memorabilia about the injured person or decedent. During the interview, let them hold the photos towards the camera and talk about their memories related to that photo or object. Take all of the photos used during the video with you after the shoot. The video editor will need to re-shoot them in the studio. Most likely, they will be dubbed in, providing a better and more steady view of the photos. Let the on-site videographer know the photos will be re-shot so that he is not zooming in and out on the witness during the shoot.

**Home movies.** If the family has home movies before the injury or death of the plaintiff, ask to borrow them. It is very labor intensive for an editor to go through home movies to find a few seconds of perfect video to cut in, but it is well worth the time and effort. Sometimes you will even find the decedent waving to the camera. That makes a powerful video clip, especially in slow motion when a spouse is talking about how much she misses her husband or child. A close-up of a warm smile or holding her young deceased daughter at