1-1-2017

Allen v. Bryers: The Missouri Supreme Court's 2016 Decision Adds Clarity (and Confusion) to Insurers' Duty and Right to Defend Their Insureds

Jeffrey E. Thomas
University of Missouri - Kansas City, School of Law

Allen v. Breyers: the Missouri Supreme Court's 2016 Decision Adds Clarity (and Confusion) to Insurers' Duty and Right to Defend their Insureds

by Jeffrey E. Thomas
University of Missouri – Kansas City School of Law

Introduction

Last year I spoke and wrote about the consequences of an insurer's breach of the duty to defend[1] under Missouri law in light of the Missouri Supreme Court opinion in *Columbia Casualty Co. v. HIAR Holding LLC*.[2] Under that case, the insurer that "wrongfully refuses to defend is liable for the underlying judgment as damages."[3] Upon a careful reading of *HIAR Holdings* and the authority upon which it relied, I reached the conclusion that Missouri had adopted a forfeiture-type rule similar to the one proposed in an early draft for the Principles of the Law of Liability Insurance (which has since evolved into a Restatement project) for breach of the duty to defend.[4] I suggested that an insurer's breach of the duty to defend waived its policy defenses, including the policy limits.

This year, I am here to tell you that I was wrong, at least in part. The Missouri Supreme Court clarified Missouri law regarding the consequences of the breach of the duty to defend in *Allen v. Bryers*,[5] decided December 20, 2016. From the Missouri Supreme Court's opinion, it is clear that a waiver of an insurer's policy limits requires a finding that the insurer acted in "bad faith" in addition to breaching the duty to defend.[6] What follows is a description of the *Allen* decision and an analysis of its implications for

---

[1] *See* Jeffrey E. Thomas, Consequences of an Insurer's Breach of the Duty to Defend: *Columbia Casualty Co. v. HIAR Holdings, LLC*, in the Context of the ALI Retatement of the Law of Liability Insurance (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2801627.

[2] 411 S.W.3d 258 (Mo. 2013).

[3] 411 S.W.3d at 265 (citing Schmitz v. Great American Assur. Co., 337 S.W.3d 700, 708-709 (Mo. 2011)).

[4] The forfeiture-type rule was articulated as follows: "A liability insurer that breaches the duty to defend a claim loses the right to defend the claim, the right to assert any control over the settlement of the claim and the right to contest coverage for the claim." Principles of the Law of Liability Insurance § 58(1) (Preliminary Draft No. 3, Feb. 8, 2012). For the analysis of how *HIAR Holdings* supports this forfeiture approach, see *supra* n.1.

[5] 512 S.W.3d 17 (2016). While the official citation was available at the time of the writing of this paper, the official pagination was not available. As a result, the pinpoint citations will be to the slip opinion, available at http://cases.justia.com/missouri/supreme-court/2016-sc95358.pdf?ts=1482260548.

[6] *See* Slip Opinion at 31-32 (holding that while the insurer "wrongfully refused to defend" the insured, the insurer's liability was limited to the policy limits stated in the policy because there had not been "any explicit finding that Insurer acted in bad faith").

Missouri law regarding the breach of the duty to defend. The last section of this paper puts Missouri's treatment of the breach of the duty to defend into the context of the current Restatement of the Law, Liability Insurance (which has been approved in its constituent parts by the American Law Institute in May 2017).[7] In that section I show that while the Missouri approach represented by *Allen* moved away from the forfeiture-type rule, it is closer to the forfeiture rule than the Restatement approach and it provides substantial additional protection for insureds.

Allen v. Bryers

The dispute in *Allen v. Bryers* arose out of a shooting that occurred on June 10, 2012, at an apartment building managed by Bryers, an employee of the insured. As Bryers was removing claimant Allen from the premises, Bryers handgun discharged and the bullet severed Allen's spinal cord, rendering him a paraplegic. The insurer reserved its rights as to several issues: 1) whether Bryers was insured under the policy, which required that he be acting in the scope of his employment when the shooting took place, 2) whether the shooting was an "accident" within the meaning of the policy, 3) and whether the Allen's injury was excluded as an "expected or intended" injury or whether the injury resulted from "the use of reasonable force to protect persons or property."[8]

After some initial negotiations, on December 4, 2012, Allen filed a petition alleging negligence on the part of Bryers. The insurer retained counsel for Bryers, but reserved its rights that there was no coverage under the policy. Bryers, however, refused to consent to the defense under a reservation of rights, so the retained counsel withdrew from the case. Bryers entered into a section 537.065

[7] The applicable section for this analysis is section 19, Consequences of the Breach of the Duty to Defend, which was approved in the 2016 annual meeting. *See* Restatement of the Law, Liability Insurance at xii (Proposed Final Draft, Mar. 28, 2017) (noting that sections 10-30 were approved at the 2016 Annual Meeting).
[8] Slip Opinion at 2-3.

agreement with Allen and consented to an entry of judgment against him. A bench trial was held in April 2013 at which Bryers allowed Allen to present his claim to the court without objection and without cross-examination. Allen's counsel requested $20 million in damages, but the court awarded $16 million after finding that Allen was injured as a result of Bryers' negligence while acting in the course of his employment. The court found that Bryers was under the influence of alcohol at the time of the shooting, that the discharge was accidental, and that Bryers' use of force during the incident was reasonable.[9]

Prior to the petition being filed by Allen, on October 22, 2012, the insurer filed a declaratory judgment action seeking a declaration that Allen's claim was not covered by its policy.[10] After the insured rejected the tendered defense under a reservation of rights, the insurer sought to intervene in the action brought by Allen to seek a stay of the underlying action until the declaratory judgment action could be resolved. The court overruled the motion because the insurer had denied coverage for Bryers and therefore did not have authority to contest the terms for the 537.065 agreement. The insurer did not appeal this ruling.[11] After Allen initiated garnishment proceedings in the case against Bryers, the insurer made a second motion to intervene nearly a year after final judgment was entered. This motion to intervene sought to set aside the judgment on the basis of fraud. The trial court rejected this motion.[12]

Allen initiated garnishment proceedings on the insurance policy in the action against Bryers under Rule 90 and chapter 525. The insurer was identified as the garnishee, and responded to interrogatories by denying indemnity coverage. Allen filed exceptions to the answers alleging that the

[9] Slip Opinion at 4-8.
[10] Slip Opinion at 4. This declaratory judgment action was dismissed after Allen filed his own declaratory judgment action in state court. *Id.* n. 3.
[11] Slip Opinion at 6.
[12] Slip Opinion at 9-10.

insurer wrongfully refused to defend Bryers, that the insurer acted in bad faith by failing to settle, that the insurer acted in bad faith in refusing to defend, that the insurer was bound by the terms of the 537.065 agreement, and that the insurer was precluded from asserting policy defenses in a garnishment action. The insurer in response denied the allegations in the exceptions and raised several affirmative defenses, including that the 537.065 agreement was fraudulent or collusive. Allen filed for summary judgment on the garnishment petition, and the trial court granted that motion.[13]

The Missouri Supreme Court affirmed the decision of the trial court, but reduced the amount of damages to $1 million, the limits of the insurance policy.[14] It found that the trial court's award of $16 million "exceeded its authority . . . because Allen was only entitled to the $1 million policy limits per *Landie*."[15] The passage relied upon from *Landie* provides: "[A]n insurance company is liable ***to the limits of its policy*** plus attorney fees, expenses and other damages where it refuse to defend an insured who is in fact covered."[16] The court distinguished its previous decision in *Columbia Casualty Co. v. HIAR Holding LLC*[17] on the ground that it was a declaratory judgment case, not a garnishment action, and that the trial court in *HIAR Holding* "explicitly found the insurer engaged in bad faith when it both refused to defend and to settle the claim" which "was not challenged on appeal."[18] Thus, the Missouri Supreme Court held that to obtain damages beyond the policy limits, the claimant must show that the insurer acted in bad faith.

[13] Slip Opinion at 8-10.
[14] Slip Opinion at 32-33.
[15] Slip Opinion at 32. *Landie* is *Landie v. Century Indemity Co.*, 390 S.W.2d 558 (Mo. Ct. App. 1965).
[16] Slip Opinion at 31 (quoting *Landie v. Century Indemity Co.*, 390 S.W.2d 558, 562 (Mo. Ct. App. 1965)) (emphasis supplied).
[17] 411 S.W.3d 258 (Mo. 2013).
[18] Allen v. Bryers, Slip Opinion at 30-31.

The court disposed of the insurer's intervention arguments on procedural grounds. The first motion to intervene, which was made to seek a stay of the litigation to allow the declaratory judgment action to proceed to trial, was abandoned when the insurer failed to appeal from the ruling after the judgment was entered.[19] The second motion to intervene, made after entry of judgment in an effort to set aside the judgment as fraudulent, was too late. The trial court only retained control over the judgment for thirty days after it became final, making the insurer's second motion untimely.[20]

The court also disposed of the motion to set aside the judgment on procedural grounds. While a motion to set aside a judgment may be made within a year after the judgment is entered, the right to set aside the judgment is limited to those who are parties.[21] Because the insurer was not successful in its motion to intervene, it was not a party and therefore did not have standing to challenge the judgment. The court dismissed the portion of the insurer's appeal regarding the motion to set aside the judgment.[22]

The Missouri Supreme Court affirmed the trial court determination that the insurer was liable pursuant to the garnishment proceeding. It found that the insurer had the opportunity to participate in the underlying litigation, but refused to do so without a reservation of rights. Under Missouri law, it is "well-settled that an insured has the right to reject a reservation of rights defense."[23] Where an insurer chooses not to participate, it is bound by all facts actually litigated and determined in the underlying suit.[24] Consequently, the insurer was bound by the finding that Bryers acted negligently in handling the

[19] Slip Opinion at 11
[20] Slip Opinion at 11-12.
[21] Slip Opinion at 13-14 (citing *State ex rel. Wolfner v. Dalton*, 955 S.W.2d 928, 930 (Mo. 1997)).
[22] Slip Opinion at 14.
[23] Slip Opinion at 18 (citing State Farm Mut. Auto. Ins. Co. v. Ballmer, 899 S.W.2d 523, 527 (Mo. 1995)).
[24] Slip Opinion at 20.

handgun, thereby precluding a finding that that he acted intentionally.[25] The court rejected the insurer's contention that it could not be bound by the factual findings of the underlying case because of an inherent conflict of interest between it and its insured, Bryers. The court found that there was no conflict of interest because the petition did not allege that Bryers had acted intentionally, and there was no collateral proceeding (such as a criminal case) finding that Bryers had acted intentionally.[26]

The court also rejected the insurer's affirmative defenses raised in the garnishment proceedings, some of which were a second attempt to litigate coverage issues foreclosed by the factual findings of the trial court. As for the insurer's claim of misrepresentation by the insured, the court found that the insurer failed to meet its burden of proof of material misrepresentations. Similarly, the court found that the insurer failed to make any showing of fraud or collusion in obtaining the judgment. The fact that Bryers asserted his Fifth Amendment privilege against self-incrimination during his deposition was not sufficient without some affirmative evidence of misconduct. Furthermore, the trial court heard evidence and made a decision in support of the judgment (and awarded $4 million less than what plaintiff requested); there was no evidence that the trial court was complicit in a fraudulent or collusive scheme. The insured's alleged breach of the cooperation clause was excused by the insurer's wrongfully refusing to provide a defense.[27]

Implications for Missouri Law Regarding the Duty to Defend

[25] Slip Opinion at 21.

[26] Slip Opinion at 21-22. The court distinguished two cases finding a conflict of interest, Cox v. Steck, 992 S.W.2d 221 (Mo. Ct. App. 1999), and James v. Paul, 49 S.W.3d 678 (Mo. 2001), on the grounds that in *Cox* the victim alleged assault in his petition, not negligence, and in *James* the insured had been charged in a criminal proceeding with first-degree assault and had entered a guilty plea. In *Allen*, the victim alleged only negligence and Bryers was not charged with any criminal offense. *Id*.

[27] Slip Opinion at 24-26.

The Missouri Supreme Court's decision in *Allen v. Bryers* clarifies Missouri law regarding the breach of the duty to defend. While the court's opinion in *HIAR Holdings* could be construed as supporting a forfeiture-type rule for breach of the duty to defend which would include waiver of the policy limits,[28] *Allen* makes it clear that the waiver of policy limits only applies upon a finding of bad faith.

In addition, the court provides additional clarity regarding the availability of other coverage defenses after the breach of the duty to defend. An insurer that breaches its duty to defend does not waive its policy defenses, but instead is bound by the factual findings in the underlying case that the insurer should have defended. The binding effect of the facts is similar to the test use for issue preclusion: "[t]he insurer is precluded from relitigating any facts that actually were determined in the underlying case and were necessary to the judgment."[29] Thus, for example, where the underlying litigation determines that a shooting was accidental, the insurer cannot raise the defense based on the policy exclusion for intended or expected injury.[30]

On the other hand, to the extent that a defense is not resolved by facts were determined in the underlying litigation, the insurer can raise and litigate such defenses. For example, the court did not preclude the insurer in *Allen* from raising a defense based on misrepresentation by the insured in applying for the policy. That defense was not successful, but not because the insurer failed to defend.

---

[28] *See* Thomas, *supra* n.1.

[29] Slip Opinion at 20-21 (quoting Assurance Co. of America v. Secura Ins. Co., 384 S.W.3d 224, 233 (Mo. Ct. App. 2012)). "[T]he established rule [for issue preclusion] is that the judgment in the prior adjudication operates only as to the issues, points, or questions actually litigated and determined and not as to matters not litigated in the former action even though such maters might properly have been determined there." American Polled Hereford Assoc. v. Kansas City, 626 S.W.2d 237, 241 (Mo. 1982) (citing Schmitt v. Pierce, 379 S.W.2d 548 (Mo. 1964)).

[30] *See* Slip Opinion at 21 (finding that Allen's prevailing on the negligence claim precluded defenses based on intentional harm, assault and battery, and the use of unreasonable force).

Rather, it was not successful because the insurer failed to meet its burden of proof to show each of the required elements of the defense. The court found that the insurer had failed "to plead any factual basis" for the defense and that its "conclusory statement [did] not meet Insurer's burden of proving the policy was void due to a material misrepresentation."[31]

While the court provided some additional clarity for breach of the duty to defend, it also created some confusion regarding the bad faith standard. Because *HIAR Holdings* did not explicitly require a finding of bad faith, it implied that such a finding was not necessary in a claim for breach of the duty to defend. *Allen* specifically requires a finding of bad faith, but does not give any guidance as to how to satisfy the bad faith requirement in a claim based on the breach of the duty to defend. The court endorsed a passage from *Zumwalt v. Utilities Ins. Co.*[32] as the standard for bad faith conduct: "the intentional disregard of the financial interest of [the] insured in the hopes of escaping the responsibility imposed upon [the insurer] by its policy."[33] While this is a second endorsement of this standard by the Missouri Supreme Court,[34] a careful reading of *Zumwalt* creates some doubt about whether this statement represents the test articulated and used there.[35]

Assuming that this "intentional disregard of the financial interest of the insured" is the correct standard, the court gives no direction on how to apply the standard to the breach of the duty to defend. The court provided examples of bad faith,[36] but all of the examples are in situations where the insurer

[31] Slip Opinion at 25.
[32] 228 S.W.2d 750 (Mo. 1950).
[33] Slip Opinion at 31 (quoting Zumwalt v. Utilities Ins. Co., 228 S.W.2d 750, 754 (Mo. 1950)).
[34] *See* Scottsdale Ins. Co. v. Addison Ins. Co., 448 S.W.3d 818, 828 (Mo. 2014). For a somewhat dated, but still relevant, analysis of the standard for bad faith in Missouri, see Jeffrey E. Thomas, *A Case Study of Bad Faith Refusal to Settle: A Doctrinal, Normative and Practical Analysis of Missouri Law*, 64 UMKC LAW REV. 695 (1996).
[35] *See* Thomas, *supra* note 32, at 699-704.
[36] "Examples of bad faith include: failing to investigate fully a third-party claimant's injuries or recognize their severity; ignoring that a verdict could exceed policy limits; refusing to consider a settlement offer; and not keeping

provided a defense. One could argue that every failure to defend case is "an intentional disregard of the financial interests of the insured." In declining to defend, an insurer typically acts intentionally and is protecting its own financial interest of avoiding the cost of defense. The decision disregards the interest of the insured in having a defense paid for by the insurer. The Supreme Court, however, implicitly rejected this argument by not finding that the insurer's failure to defend was bad faith in *Allen* and by failing to hold that the breach of the duty to defend is categorically "an intentional disregard of the financial interests of the insured."

An additional layer of confusion comes from the court's attempt to perpetuate the distinction between negligence and bad faith. The court notes that bad faith liability "cannot be predicated upon negligence, but, rather, there must be a showing of a lack of good faith."[37] This is another reference to *Zumwalt*,[38] a case decided in 1950, when insurance bad faith law was first developing. The court also approvingly quoted a passage from a 1965 Missouri Court of Appeals decision, *Landie v. Century Indemnity Co.*,[39] which associates bad faith with unreasonable conduct. After the passage saying that an insurer is liable for "the limits of its policy plus attorney fees, expenses and other damages where it refuses to defend,"[40] the court quotes *Landie's* statement that "[t]his is true even though the company acts ***in good faith*** and has ***reasonable ground*** to believe there is no coverage under the policy."[41] Thus,

---

an insured inf0ormed of settlement offers or the risks of an excess judgment." Slip Opinion at 31-32. This first example, failure to investigate, could be applied to the breach of the duty to defend in the sense that the failure to defend is a total failure to investigate on behalf of the insured. But the court does not apply that example to the breach of the duty to defend in *Allen*. Moreover, the failure to investigate example is directed to the "claimant's injuries," *id.*, suggesting that this is a failure to settle scenario where the insurer undervalues the case and the insured is left with liability for a judgment in excess of the policy limits.

[37] Slip Opinion at 32 (citing *Zumwalt*, 228 S.W.2d at 755).

[38] *Id*.

[39] 390 S.W.2d 558 (Mo. Ct. App. 1965).

[40] Slip Opinion at 31 (quoting Landie v. Century Indem. Co., 390 S.W.2d 558, 552 (Mo. Ct. App. 1965)).

[41] *Id*. (emphasis supplied).

an insurer that acts in good faith and with reasonable grounds is liable for its policy limits, but one that acts in bad faith and without reasonable grounds subjects the insurer to additional liability. One could conclude that an insurer that **unreasonably** denies a defense has acted in bad faith.[42] The problem with that conclusion is that unreasonable conduct sounds very much like negligence, which the court has said is not enough.

So where does this leave Missouri law regarding breach of the duty to defend? If an insurer breaches the duty to defend, it "is liable [for the underlying judgment] to the limits of its policy, attorney fees, expenses and other damages."[43] For an insurer to be liable for more than its policy limits, there must be a finding of bad faith, which the court defined as "the intentional disregard of the financial interest of [the] insured in hope of escaping the responsibility imposed upon [the insurer] by its policy."[44] What actions will constitute "intentional disregard of the financial interest" of the insured remains to be seen. Apparently, a simple denial of a defense is not enough. It must be more than "just an erroneous denial of coverage"[45] and more than "negligence."[46] The determination of "[w]hether an insurer acted in bad faith is generally a fact question for the jury."[47]

Breach of the Duty to Defend and the Restatement of the Law, Liability Insurance

To have a better understanding of the Missouri rule, this paper compares it to the approach taken by the Restatement of the Law, Liability Insurance, which represents a kind of national

[42] An alternative reading would be that the act must be both unreasonable and in bad faith. This is consistent with the rule for third-party bad faith liable proposed by the Restatement of the Law, Liability Insurance § 50 (Proposed Final Draft, Mar. 28, 2017).

[43] Slip Opinion at 31 (quoting Landie v. Century Indem. Co., 390 S.W.2d 558, 552 (Mo. Ct. App. 1965)).
[44] Slip Opinion at 31 (quoting Zumwalt v. Utilities Ins. Co., 228 S.W.2d 750, 754 (Mo. 1950)).
[45] Slip Opinion at 31 (quoting Shobe v. Kelly, 279 S.W.3d 203, 211-12 (Mo. Ct. App. 2009)).
[46] Slip Opinion at 32 (quoting Zumwalt v. Utilities Ins. Co., 228 S.W.2d 750, 755 (Mo. 1950)).
[47] Slip Opinion at 32 (quoting Zumwalt v. Utilities Ins. Co., 228 S.W.2d 750, 754 (Mo. 1950)).

benchmarking on the issue. Although the Restatement is still subject to final approval by the membership of the American Law Institute, each of the parts has been approved by the membership individually. The current version of section 19, which addresses the consequence of breach of the duty to defend, was approved at the 2016 annual meeting of the American Law Institute.[48] Missouri's movement away from what appeared to me to be the forfeiture approach back to one that requires bad faith for extra contractual liability moves closer to the middle-ground approach used in the Restatement, but it imposes a kind of strict liability for breach of the duty to defend that retains some of the forfeiture aspect of the more aggressive rule.

The Restatement addresses the breach of the duty to defend in section 19, which is included with the Comments and Reporters' Note as an appendix to this paper for the reader's reference. The black-letter provides:

§ 19. Consequences of Breach of the Duty to Defend

> **(1) An insurer that breaches the duty to defend a legal action loses the right to assert any control over the defense or settlement of the action.**
>
> **(2) An insurer that breaches the duty to defend without a reasonable basis for its conduct must provide coverage for the legal action for which the defense was sought, notwithstanding any grounds for contesting coverage that the insurer could have preserved by providing a proper defense under a reservation of right pursuant § 15.**

[48] *See* Restatement of the Law, Liability Insurance at xii (Proposed Final Draft, Mar. 28, 2017) (noting that sections 10-30 were approved at the 2016 Annual Meeting).

For the purpose of comparison to the Missouri rule, the key passage is the statement that "[a]n insurer that breaches the duty to defend without a reasonable basis for its conduct must provide coverage for the legal action for which the defense was sought."[49] For liability to apply, this approach requires that the breach of the duty to defend must be "without a reasonable basis." If it is, then the insurer "must provide coverage for the legal action for which the defense was sought."

This rule is different from the Missouri rule in that it considers whether there was a ***reasonable basis*** for the failure to defend. The liability for breach of the duty to defend only applies where there was not a reasonable basis for the insurer refusing to defend. In Missouri, an insurer that breaches the duty to defend is liable ***even if there was a reasonable basis*** for its decision not to defend. The *Allen* court noted that an insurer is liable up to policy limits "***even though the company acts in good faith and has reasonable ground[s] to believe there is no coverage*** under the policy."[50] Thus, the breach of the duty to defend exposes the insurer to a kind of strict liability up to the limits of the policy and with regard to coverage defenses pertaining to facts necessarily determined in the underlying case which the insurer failed to defend.

The Missouri rule and the Restatement are consistent as to the scope of the damages: up to the policy limits for a covered settlement or judgment. The Restatement provides that the insurer that wrongfully breaches the duty to defend "must provide coverage."[51] While this is not as explicit as the Missouri rule, which provides after *Allen* that the insurer "is liable to the limits of its coverage,"[52]

[49] Restatement of the Law, Liability Insurance § 19(2).
[50] Slip Opinion at 31 (quoting Landie v. Century Indem. Co., 390 S.W.2d 558, 562 (Mo. Ct. App. 1965)) (emphasis supplied).
[51] Restatement of the Law, Liability Insurance § 19(2) (Proposed Final Draft, Mar. 28, 2017). All citations in this paper to the Restatement of the Law, Liability Insurance, are to this draft.
[52] Slip Opinion at 31 (quoting Landie v. Century Indem. Co., 390 S.W.2d 558, 562 (Mo. Ct. App. 1965)).

Comment i explains that "breach of the duty to defend does not ordinarily obligate the insurer to indemnify the insured for amount in excess of the policy limit."[53] The Restatement also is not as clear as the Missouri rule regarding the waiver of policy defenses pertaining to facts necessarily resolved in the underlying case, but the illustration 1 in the comments suggests that policy defenses are waived. Illustration 1 concerns a child who starts a fire. Liability coverage applies if the fire was accidental, but not if the fire was started on purpose. If the complaint alleges negligence, but an investigation by the insurer suggests that the fire was intentional, the insurer is liable for the settlement in the case if it refuses to defend in a jurisdiction that uses the complaint-allegation rule for the scope of the duty to defend.[54] Although the comment does not explicitly say that the coverage defense based on the exclusion for intentional harm has been waived, it concludes that "the insurer must reimburse the insured for the costs of defense and pay the settlement in addition to any other compensable damages."[55]

Illustration 2, by providing a contrast to illustration 1, also suggests that policy defenses are waived by the unreasonable breach of the duty to defend. Illustration 2 has the same facts as Illustration 1, a child who starts a fire, except that the insurer reserves its rights as to the intentional harm exclusion and provides a defense under a reservation of rights. By providing a defense (even though with a

[53] Restatement of the Law, Liability Insurance § 19, *comment i*. The insurer could be liable in excess of policy limits if the breach of the duty to defend "caused the excess verdict." *Id*. The Restatement treats the liability for policy limits as a remedy for breach of contract that is distinct from the remedy for breach of the duty to defend: "The insurer is also obligated to pay any covered judgment or the reasonable amount of any covered settlement, subject to the policy limits, but that obligation is part of the insurer's ordinary duty to pay covered claims, not part of the damages for breach of the duty to defend." *Id*.

[54] Restatement of the Law, Liability Insurance § 19, *comment i*. The complaint-allegation rule says that the allegations of the complaint are to be used to determine whether there is a duty to defend. So long as the complaint alleges allegations giving rise to a potential for indemnity coverage, the insurer has the duty to defend. *See* Restatement of the Law, Liability Insurance § 13, *comment a*.

[55] *Id*.

reservation of rights), the insurer fulfills its duty to defend, therefore "the insurer may refuse to pay the settlement and defend a breach-of-contract action on the basis of the reserved-coverage defense. The breach-of-contract action will be decided based on all the facts and circumstances, without granting any weight to the allegation of negligence in the complaint."[56] By providing this illustration as a contrast to illustration 1, the comment shows that providing the defense preserves the coverage issue, while failing to provide such a defense (without a reasonable basis) waives the coverage issue.

Illustration 2 emphasizes the importance of a defense under a reservation of rights, which is another significant difference with the approach in Missouri. Both illustration 2 and the black-letter suggest an insurer preserves coverage issues by providing a defense under a reservation of rights.[57] In Missouri, however, the insurer does not have the right to defend under a reservation of rights.[58] It may offer to do so, but if the reservation of rights is rejected by the insured, the insurer much choose between defending without a reservation of rights, withdrawing from representation so as to not provide a defense, or filing a declaratory relief action to determine the scope of coverage.[59]

When the Missouri rule on reservation of rights is combined with nearly strict liability (up to the policy limits) for the breach of the duty to defend, the Missouri rule is significantly more protective of the insured than the Restatement's middle ground approach. The insured can use the Missouri rule to reject a reservation of rights defense and put additional pressure on the insurer to waive its coverage

---

[56] *Id*.

[57] The black-letter states that an insurer that breaches the duty to defend "must provide coverage . . . notwithstanding any grounds for contesting coverage could have preserved by providing a proper defense under a reservation of rights." Restatement of the Law, Liability Insurance § 19(2). The clear implication of this rule is that failure to provide a defense under a reservation or rights waives the coverage issues, and that the "correct" course for an insurer to take is to provide a defense under a reservation of rights.

[58] *See* Slip Opinion at 18 ("[i]nsurers cannot force insureds to accept a reservation of rights defense") (quoting Ballmer v. Ballmer, 923 S.W.2d 365, 369 (Mo. Ct. App. 1996)).

[59] *See* Slip Opinion at 18-19 (quoting Kinnaman-Carson v. Westport Ins. Corp., 283 S.W.3d 761, 765 (Mo. 2009)).

arguments. If the insurer is not willing to waive the coverage issues at the time of the rejection of the defense under a reservation of rights, it must withdraw the defense, but in so doing the insurer takes the risk that it will be found to be in breach of the duty to defend with the consequence of liability up to its policy limits and waiver of coverage issues from the factual determinations in the underlying case. Although the insurer has a third option, seeking a declaratory judgment, that option is available for insurers outside of Missouri as well.

Conclusion

The Missouri Supreme Court in *Allen v. Bryers* has clarified the scope of the remedy for breach of an insurer's duty to defend. An insurer that wrongfully refuses to defend is liable for the underlying judgment, up to policy limits, as well as attorney's fees and costs, where the facts are those to which coverage applies.[60] The court also makes it reasonably clear that an insurer, while waiving coverage defenses that would require facts contrary to those found in the underlying case, may still raise defenses that are based on facts independent of the facts at issue in the underlying case.

To be liable for more than the policy limits, the insurer must have acted in bad faith. It is not clear what constitutes a bad faith breach of the duty to defend, although the standard endorsed by the court was the "intentional disregard of the financial interests of [the] insured in the hopes of escaping responsibility."[61] Bad faith requires more than negligence, and probably more than unreasonable conduct. While this may be difficult to determine, it is a question of fact for the jury. In addition,

[60] Slip Opinion at 31 (quoting Landie v. Century Indem. Co., 390 S.W.2d 558, 562 (Mo. Ct. App. 1965)).
[61] Slip Opinion at 31 (quoting Zumwalt v. Utilities Ins. Co., 228 S.W.2d 750, 754 (Mo. 1950)).

insureds who are not provided a defense as required can also raise other bad faith arguments giving rise to extra-contractual liability, such as, primarily, breach of the duty to settle.[62]

The Missouri approach after *Allen* is less of a forfeiture approach than what appeared to be the case in *HIAR Holdings*, but is still closer to a forfeiture than the middle ground approach contained in the current version of the Restatement. To be liable under the Restatement rule, the insurer must refuse to defend "without a reasonable basis." The liability under the Missouri approach applies regardless of the reasonableness of the insurer's position. In addition, the Restatement provides a safe harbor to insurers that provide a defense under a reservation of rights. Missouri law does not provide such a safe harbor. In fact, an insurer cannot provide a defense under a reservation of rights unless the insured consents. Consequently, an insurer could be liable in Missouri under both conditions that would prevent liability under the Restatement approach: 1) where an insurer reasonably refuses to provide a defense, and 2) where an insurer tries to provide a defense under a reservation of rights. The only respect in which this is not a forfeiture-type penalty is that the insurance policy limits still apply and the insurer can raise coverage defenses that are not foreclosed by the factual findings in the underlying litigation.

[62] One of the examples of bad faith given by the Missouri Supreme Court in *Allen* was "refusing to consider a settlement offer." Slip Opinion at 31. Where an insurer is not providing a defense, it is very likely that, if faced with a policy-limits settlement demand, it will refuse to consider that offer.