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Holding Liability Insurers Accountable for Bad Faith Litigation Tactics with the Tort of Abuse of Process

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HOLDING LIABILITY INSURERS ACCOUNTABLE FOR BAD FAITH LITIGATION TACTICS WITH THE TORT OF ABUSE OF PROCESS

*Francis J. Mootz III**

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INTRODUCTION

A person injured by the negligent acts of another party might find that an old vaudeville gag best captures the situation in which she finds herself: "the good news is that the wrongdoer has insurance; the bad news is that the wrongdoer has insurance." It is easy to understand why the news is good: the existence of liability insurance means that the claim will be handled professionally and that money will be available to compensate the injured person. This may be of paramount importance, because injuries caused by the wrongdoer can have a devastating effect on the injured person's life. Medical bills quickly can threaten to bankrupt her, and obtaining adequate care may be difficult without the resources to pay for that care. She may be unable to work for an extended period of time, and her loss of income can soon cause severe financial distress that leads to emotional distress. Finally, she might suffer property loss, as would be the case if her car is totaled in an automobile accident caused by the wrongdoer. If the injured person is prudent and has the resources to pay the premiums, she will own first-party insurance products—such as health insurance, disability insurance, and property insurance—that can mitigate these losses. But if she does not own applicable first-party insurance policies, or if her coverage is insufficient to make her whole, she will be looking to the wrongdoer for compensation.¹ The wrongdoer's third-party liability insurance can make receiving such compensation as straightforward as making and documenting a claim.

However, the fact that the wrongdoer has insurance can also be bad news for the injured party. Because liability insurance policies generally give the insurer the sole right to settle a claim and to withhold coverage if the insured fails to cooperate in the defense of the action, the injured party can receive compensation only if the liability insurer decides to make a payment. In other

1. In a case where the injured party has received compensation from her insurers, they likely will be subrogated to her claims against the wrongdoer and, therefore, the injured party's insurance carrier will be pressing the claims with the wrongdoer's insurance carrier. My guess is that an empirical study (if it is feasible to conduct such a study) would reveal that liability insurers adopt an entirely different approach when they deal with other insurers, even if their focus on decreasing payouts remains paramount. Given the lack of financial and emotional leverage over another insurance company, I would expect that liability insurers would not incur the costs (including attorneys fees) associated with stonewalling tactics. Of course, one would expect that legitimate disputes over coverage or damages would be equally hard-fought.

words, even if the wrongdoer recognizes his liability and wishes to compensate the party he injured, the wrongdoer can be precluded from doing so by a recalcitrant liability insurer. The presence of insurance will be bad news for the claimant if the liability insurer refuses to settle a properly documented claim, forcing her to bring suit and engage in protracted and expensive litigation. The liability insurer loses very little by delaying payments for as long as possible, but it might gain a great deal. To the extent that the injured party is experiencing physical, emotional and financial problems as a result of the accident, delay in receiving compensation will exacerbate these pressures and will lead her to accept a lower settlement out of necessity.

Liability insurers are relatively free under current law to refuse to settle legitimate claims made by injured parties and to use the costly and time-consuming litigation process to wear them down until they accept low settlements. Although such behavior might violate the state's unfair insurance practices statute and, in extreme cases, be subject to administrative investigation and sanction, the injured party would have no basis for asserting a claim against the liability insurer for the additional losses caused by this wrongful behavior. In a recent article, I argued that considerations of public policy justify holding insurers liable in tort for their bad faith practices in settling claims filed against their insureds.² That proposal provides a comprehensive response to the problem of liability insurers refusing to deal with injured parties honestly and fairly, and by virtue of its comprehensiveness it directly challenges time-honored common law rules that effectively insulate liability insurers from any liability to third-party claimants.

In the present Article, I advocate the less radical, but also less comprehensive, strategy of holding liability insurers accountable for bad faith litigation tactics under the tort of abuse of process. Liability insurers that use the litigation process to strong-arm more favorable settlements with third-parties often utilize civil process in a manner that should be regarded as tortious under well-established principles. Although my thesis is relatively narrow and is not premised on any fundamental changes in legal doctrine, the case is not easily made. I begin by describing, in Part I, the background common law rule that absolves liability insurers of any contract obligations or

2. Francis J. Mootz III, *The Sounds of Silence: Waiting for Courts to Acknowledge That Public Policy Justifies Awarding Damages to Third-Party Claimants When Liability Insurers Deal with Them in Bad Faith*, 2 NEV. L.J. 443 (2002).

tort duties owed to injured third-party claimants. In Part II, I outline the strong public policy considerations, as articulated by state legislatures and recognized in judicial decisions, that demand that liability insurers act fairly and reasonably in settling claims by injured third parties. Against this public policy backdrop, in Part III, I argue that liability insurers who use motion practice and discovery primarily for the purpose of avoiding their obligation to make fair and timely payments to injured parties should be subject to liability for abuse of process. I note the doctrinal and practical difficulties confronting a third-party claimant seeking damages for abuse of process, but conclude that recent decisions point the way toward a reasonable application of the tort of abuse of process in this setting.

I conclude that abuse of process can play an important, even if limited, role in the battle against liability insurers who act contrary to public policy and thereby cause additional harm to injured third-party claimants. In light of strong public policy considerations, courts might legitimately choose to construe the elements of abuse of process in a manner favoring liability against insurance carriers in the insurance defense setting. However, even a straightforward application of the tort should provide grounds for imposing liability in a number of cases that involve paradigmatic insurer bad faith. By holding liability insurers accountable under the tort of abuse of process, courts might increase the odds that the existence of insurance will prove to be good news for injured parties.

I. CURRENT LAW GENERALLY INSULATES LIABILITY INSURERS FROM CLAIMS BY THIRD PARTIES THAT THE INSURER FAILED TO HANDLE A LEGITIMATE CLAIM AGAINST THE INSURED IN GOOD FAITH

A long-standing and virtually unchallenged doctrinal rule provides that a liability insurance carrier owes no duties in tort or contract to a third-party claimant injured by its insured. The absence of any duty to claimants stands in sharp contrast to the heightened duty of good faith that insurers owe to their insureds when they undertake the defense of claims. In a classic statement of this rule, the Georgia Court of Appeals explained:

While an automobile liability insurance company may be held liable for damages to its insured for failing to adjust or compromise a claim covered by its policy of insurance, where the insurer is guilty of negligence or of fraud or bad faith in failing to adjust or compromise the claim to the injury of the insured . . . it does not follow that a person injured by the insured and who is not a party to the insurance contract may complain of the negligence or bad faith of the insurer towards

its policyholder in failing to adjust or compromise a claim against such policyholder, for the duty of the insurance company to use ordinary care and good faith in the handling of a claim against its insured arises out of the relationship between the insurer and the insured created by the contract or policy of insurance, and there is no fiduciary relationship or privity of contract existing between the insurer and a person injured by one of its policyholders.³

A decision of the Appellate Court of Illinois, *Scroggins v. Allstate Insurance Co.*,⁴ provides a succinct illustration of the real world effects of the current state of the law.⁵ The case was brought by two pedestrians who suffered injuries when Allstate's insured saw an acquaintance walking down the sidewalk and decided to "goof off" by increasing his speed and directing

3. *Francis v. Newton*, 43 S.E.2d 282, 284 (Ga. Ct. App. 1947). The California Court of Appeals noted that the insurance bad faith cases make no mention "of a duty to the adversary in the litigation between the injured party and the insured to settle the former's claim against the latter," and concluded that the claimant has no "right to require the insurer to negotiate or settle with him prior to the establishment of the insured's liability." *Zahn v. Can. Indem. Co.*, 129 Cal. Rptr. 286, 288 (Ct. App. 1976). The California Supreme Court later explained in a unanimous opinion that an insurer's bad faith refusal to settle a claim ultimately works to the claimant's advantage:

Unlike a failure to investigate the representations of the insured, a breach of the duty to settle does not involve the risk that a person injured by a negligent motorist will fail to receive the compensation called for by [financial responsibility laws]. Breach of the duty to settle will, if anything, allow the injured party to recover the amount of the offered settlement, perhaps an additional sum to the extent of the policy limits, and sums in excess of those limits from the negligent motorist. Because an insurer's refusal to accept a reasonable settlement does not diminish the injured claimant's recovery, the policy of compensating persons injured by a negligent motorist is not frustrated.

Murphy v. Allstate Ins. Co., 553 P.2d 584, 589 (Cal. 1976).

Not only is company without any duty to claimant to accept claimant's reasonable settlement offer, but also, if there is a sizable disparity between the settlement offer and the amount of the judgment obtained in the trial which follows refusal of the offer, claimant is benefited rather than harmed by company's refusal to settle.

Robert E. Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1176 (1954).

4. 393 N.E.2d 718 (Ill. App. Ct. 1979).

5. The following facts were alleged by the plaintiffs and were accepted as true for purposes of the motion to dismiss for failure to state a cognizable claim. *Id.* at 719-20, 725.

his car towards her.⁶ The driver lost control of his car when he swerved at the last minute to avoid his friend, causing him to run into the two plaintiffs who were standing on the other side of the street.⁷ The plaintiffs submitted copies of statements by witnesses regarding the accident and itemized their special damages.⁸ However, Allstate offered an unreasonably low settlement despite the clear evidence of liability and damages.⁹ The plaintiffs alleged that they suffered embarrassment at being unable to pay their medical expenses, that they were forced to incur the additional costs of a lawsuit to seek proper recovery, and that they suffered emotional distress.¹⁰ The claim was predicated on a straightforward rationale: Allstate had no reasonable, good faith reason to avoid paying the claims in light of the clear evidence of fault and damages, and its refusal to pay the claim caused additional injuries to the victims of the automobile accident.¹¹

The court affirmed the dismissal of the action, holding that Allstate owed no duties to the plaintiffs to settle their claims in good faith, even if Allstate's actions constituted a breach of the duty of good faith that Allstate owed to its insured. The court reasoned:

In the instant case . . . plaintiffs are suing in their own right, as third party claimants against the insured, for the insurer's allegedly wrongful refusal to settle their claim. Even assuming *arguendo* that they have adequately alleged a breach of the duty of good faith and fair dealing on the part of the insurer, that duty is one which the insurer owes to its insured, not to third parties. Yet it is elementary that in an action founded on a breach of duty, the plaintiff must allege facts showing a breach of a duty owed to him. Thus, the rule in Illinois and nearly all jurisdictions is that in the absence of statutory or contractual language sanctioning a direct action, an injured third party has no action against the insurer for breach of the duty to exercise good faith or due care by virtue of his standing as judgment creditor of the insured. For the same reason, because the duty is intended to benefit the insured and

6. *Id.* at 719.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

not third parties, actions by injured claimants founded on third party beneficiary principles have not been permitted.¹²

The court noted that the legislature had “increasingly broadened the duties imposed on insurers in the Insurance Code” to treat claimants fairly and in good faith, but concluded that this legislative development could not “justify quasi-legislative extension of those duties, and creation of new duties, by the judiciary.”¹³ What is painfully missing from the opinion is any justification for the practical effect of the holding, which recognizes no common law rights in innocent injured parties who suffer additional losses when they are treated unfairly by the tortfeasor’s liability insurer.

As a matter of doctrinal consistency and logic, the traditional rule expressed in these two cases makes perfect sense. The liability insurer has no contractual relationship with the injured claimant.¹⁴ Moreover, because the

12. *Id.* at 720–21 (citations omitted).

13. *Id.* at 724. A similar justification for the traditional rule that insurers owe no duty of good faith to third-party claimants was voiced by the Wisconsin Supreme Court:

These cases stress a constant theme: an insurer owes no duty to the third-party claimant to settle or to negotiate in good faith. It is clear in the instant case that the injury for which the petitioner seeks compensation is . . . for whatever injuries result from an insurer’s refusal to settle when the claimant thinks it should, for the distress caused by what the claimant thinks are unfair tactics, and for the deprivation of the funds to which the claimant thinks he is entitled. To declare the existence of a cause of action in favor of the claimant against the insurer for these injuries would be to expose an insurer to liability for failing to satisfy a claim before the fundamental predicate to its duty to do so has been established—the determination of the insured’s legal liability. . . . The insurer’s duty of good faith and fair dealing arises from the insurance contract and runs to the insured. No such duty can be implied in favor of the claimant from the contract since the claimant is a stranger to the contract and to the fiduciary relationship it signifies. Nor can a claimant reasonably expect there to be such a duty, inasmuch as the insurer and the insured are aligned in interest against the claimant. In the absence of any such duty, the third-party claimant cannot assert a claim for failing to settle his claim, and we therefore decline to recognize such a claim for relief under common law tort principles.

Kranzush v. Badger State Mut. Cas. Co., 307 N.W.2d 256, 265 (Wis. 1981) (following these seemingly self-evident premises and affirming the dismissal of a claim maintained by the claimant’s administrator, despite allegations that the insurer used meaningless discovery and other delay tactics because it knew the claimant was dying of cancer). For Justice Abrahamson’s critique of this majority opinion, see *infra* notes 37–41 and accompanying text.

14. Claimants have argued that they are a third party intended beneficiary of the insurance contract, but the courts consistently find that the insurance contract is intended to benefit only

liability insurer steps into the shoes of the tortfeasor during the claims process (and thereby has an adversarial relationship with the claimant) it appears nonsensical to claim that the insurer owes a duty of good faith to the claimant.¹⁵ Following this seemingly unimpeachable logic, courts consistently have held that liability insurers are entitled to minimize their payments on claims by acting as aggressively and strategically as the insured tortfeasor would be permitted to act, at least until the judgment against the tortfeasor becomes final.¹⁶

II. CLEARLY ESTABLISHED PUBLIC POLICY DEMANDS THAT LIABILITY INSURERS ACT FAIRLY AND REASONABLY TOWARD THIRD-PARTY CLAIMANTS

Although the logic and consistency of the doctrinal rule that insurers owe no duties to third-party claimants is popular and appealing, it is deceptive. Liability insurers are contractually obligated to defend their insureds, but it is a conceptual abstraction to equate them with their insureds and conclude that they have the right to maximize their own financial well-being by refusing to pay on legitimate claims. Even if the law countenances the legal right of self-insured corporate defendants to vigorously fight every claim brought against them with the single-minded goal of minimizing expenses, it is a different

the insured, and that the claimant becomes a beneficiary of the insurance policy only when the insured suffers a judgment in favor of the claimant. *See, e.g.,* Page v. Allstate Ins. Co., 614 P.2d 339, 340 (Ariz. Ct. App. 1980); Chapell v. LaRosa, CV990552801, 2001 WL 58057, at *2-*4 (Conn. Super. Ct. Jan. 5, 2001).

15. In the words of one court, "[a]n insurer can hardly have a fiduciary relationship both with the insured and a claimant because the interest of the two are often conflicting." O.K. Lumber Co., Inc. v. Providence Wash. Ins. Co., 759 P.2d 523, 526 (Alaska 1988). Simply put, "[t]he insurer has a fiduciary duty to the insured but an adversary relationship with the victim." Chapell, 2001 WL 58057, at *4 n.2 (quoting Long v. McAllister, 319 N.W.2d 256, 262 (Iowa 1992)). Thus the insurer has the "right" to force the claimant to prove his or her case at trial before becoming obligated to make a payment, even if the insurer allegedly is employing hardball litigation tactics. *See* Linscott v. State Farm Mut. Auto. Ins. Co., 368 A.2d 1161, 1163-64 (Me. 1977).

16. *See* Mootz, *supra* note 2, at 448-56, 464-71 (describing the courts' reluctance to permit third parties to recover under a variety of theories, except under the most extreme circumstances). Jeff Stempel suggested that my argument against the traditional rule fits well with a more general theme in the insurance law literature, a theme that Peter Swisher has characterized as a movement by courts in certain instances away from formalism and toward functionalism. *See, e.g.,* Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting off the Formal for the Function*, 52 OHIO ST. L.J. 1037 (1991).

matter entirely when a liability insurance carrier is controlling the claims and litigation process pursuant to its duty to defend the tortfeasor. The most obvious difference is the greater impact that insurers will have on the public interest in compensating injured parties. A large liability insurer that withholds payment for compensable injuries and uses all available means to coerce low settlements obviously will interfere with the strong public policy of making injured parties whole to a much greater degree than a single tortfeasor pursuing the same strategy. More importantly, although a tortfeasor might legitimately argue that it should be entitled to defend its limited assets, even as to unquestionably valid claims, until these claims have been reduced to a binding judgment, liability insurers charge regulated premiums that have been approved at a level that ensures a fair profit after they have paid all valid claims against their insureds. To state the obvious, it is the very business of liability insurers to pay claims.

A recent first-party bad faith case provides a set of facts that vividly demonstrate the disastrous effects that can result when an insurer acts in its own economic interests rather than settling legitimate claims against its insureds. In *Campbell v. State Farm Mutual Automobile Insurance Co.*,¹⁷ the Utah Supreme Court affirmed a verdict of \$1 million in compensatory damages and \$145 million in punitive damages, awarded to an insured for State Farm's malicious and reprehensible behavior while adjusting and litigating a claim against the insured.¹⁸ In the underlying tort action, the jury determined that Mr. Campbell's negligence was solely responsible for an accident that killed one driver and disabled another.¹⁹ State Farm defended Mr. Campbell pursuant to his automobile policy, but refused to settle the claims against Mr. Campbell for the policy limit of \$25,000, despite repeated offers by the claimants both before and after the trial commenced,²⁰ and despite State Farm's knowledge that Mr. Campbell was responsible for their injuries.²¹ Mr. Campbell suffered an excess verdict, and he believed that his personal assets would need to be liquidated to satisfy the \$160,000 excess

17. No. 981564, 2001 WL 1246676 (Utah Oct. 19, 2001), *cert. granted*, 122 S. Ct. 2326 (2002). The Supreme Court granted certiorari to consider Allstate's claim that the award of punitive damages is unconstitutional because it was imposed in part to punish Allstate for actions occurring outside Utah, and also that the award was grossly excessive.

18. *Id.* at *1.

19. *Id.* at *2.

20. *Id.* at *1.

21. *Id.* at *2 (describing State Farm's efforts to alter and hide its own investigator's conclusions about Mr. Campbell's responsibility for the accident).

judgment,²² until some six years later when State Farm (facing an assignment of Mr. Campbell's bad faith claims to the injured parties) paid the entire verdict against Mr. Campbell once the judgment against him became final.²³ Mr. Campbell then sued State Farm for bad faith, fraud and intentional infliction of emotional distress, notwithstanding State Farm's belated satisfaction of the entire judgment against him.²⁴

Mr. Campbell's litigation revealed that State Farm's behavior was not isolated, but rather was the "result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide,"²⁵ according to which "State Farm specifically calculated and planned to avoid full payment of claims, regardless of their validity."²⁶ The court concluded that the large punitive damages award was justified, in part, by State Farm's egregious and malicious nationwide scheme of fraudulent claims handling:

First, State Farm repeatedly and deliberately deceived and cheated its customers via the PP & R scheme ["Performance, Planning and Review"]. For over two decades, State Farm set monthly payment caps and individually rewarded those insurance adjusters who paid less than the market value for claims. Agents changed the contents of files, lied to customers, and committed other dishonest and fraudulent acts in order to meet financial goals. For example, a State Farm official in the underlying lawsuit in Logan instructed the claim

22. *See id.* The court's report of State Farm's post-verdict behavior toward its insured is chilling:

In light of [defense counsel] Bennett's numerous reassurances to both Mr. and Mrs. Campbell that their assets were safe, that they had no liability for the accident, that he would represent their interests, and that they did not need to procure separate counsel, the Campbells were utterly dismayed. To their expressions of dismay, Bennett responded by telling the Campbells that "[y]ou may want to put for sale signs on your property to get things moving," making it clear that State Farm did not intend to pay the excess judgment against the Campbells. Furthermore, State Farm declined to post a supersedeas bond on appeal in excess of their \$25,000 policy limit. The Campbells immediately acquired other counsel and learned that their situation was indeed grave.

Id.

23. *Id.* at *3.

24. *Id.*

25. *Id.*

26. *Id.* at *10.

adjuster to change the report in State Farm's file by writing that [third-party claimant] Ospital was "speeding to visit his pregnant girlfriend." There was no evidence at all to support that assertion. Ospital was not speeding, nor did he have a pregnant girlfriend. The only purpose for the change was to distort the assessment of the value of Ospital's claims against State Farm's insured. As the trial court found, State Farm's fraudulent practices were consistently directed to persons—poor racial or ethnic minorities, women, and elderly individuals—who State Farm believed would be less likely to object or take legal action.

Second, State Farm engaged in deliberate concealment and destruction of all documents related to this profit scheme. State Farm's own witnesses testified that documents were routinely destroyed so as to avoid their potential disclosure through discovery requests. Such destruction even occurred while this litigation was pending. Additionally, State Farm, as a matter of policy, keeps no corporate records related to lawsuits against it, thus shielding itself from having to disclose information related to the number and scope of bad faith actions in which it has been involved.

Third, State Farm has systematically harassed and intimidated opposing claimants, witnesses, and attorneys. For example, State Farm published an instruction manual for its attorneys mandating them to "ask personal questions" as part of the investigation and examination of claimant in order to deter litigation. Several witnesses at trial, including Gary Fye and Ina DeLong, testified that these practices had been used against them. Specifically, the record contains an eighty-eight page report prepared by State Farm regarding DeLong's personal life, including information obtained by paying a hotel maid to disclose whether DeLong had overnight guests in her room. There was also evidence that State Farm actually instructs its attorneys and claim superintendents to employ "mad dog defense tactics"—using the company's large resources to "wear out" opposing attorneys by prolonging litigation, making meritless objections, claiming false

privileges, destroying documents, and abusing the law and motion process.²⁷

Based on these factual findings, the justification for the award of damages—including large punitive damages—in favor of Mr. Campbell is clear. But it is equally clear that numerous innocent claimants across the country suffered even more grave harm as a result of State Farm's odious conduct. After having been disabled or killed in an automobile accident for which legal responsibility was reasonably clear, State Farm's scheme meant that innocent claimants would be forced to wait for years before receiving any compensation, during which time they (and their families) would be facing obvious financial pressures. Although Mr. Campbell was sophisticated enough to pursue his bad faith action and ensure that the excess verdict was paid by State Farm, countless third-party claimants undoubtedly were pressured by financial exigency to settle their cases against other State Farm insureds for a substantial discount rather than continue to fight against State Farm's unreasonable "mad dog" tactics. Even if they persisted in suing for adequate compensation, the baseline doctrinal rule that insurers owe no duties to third party claimants means that they would have no recourse against State Farm for the additional losses suffered as a result of its tactics.

If Mr. Campbell were self-insured and chose to defend the claims against him vigorously despite their merit, this would certainly have an impact on the unfortunate two persons he injured, who would face an expensive and emotionally draining battle to secure appropriate compensation through litigation. However, when State Farm refused to pay valid claims on a nationwide basis, there can be little doubt that thousands of claimants were precluded from recovering full and timely compensation for their injuries. Simply due to the magnitude of its behavior, State Farm substantially interfered with the important public policy goal of making injured persons whole. As the trial judge concluded in upholding the punitive damages verdict: "[t]he harm is minor to the individual [policyholder], but massive in the aggregate."²⁸ Moreover, there is no countervailing justification for this self-interested behavior when an insurer is involved, since State Farm has

27. *Id.* at *9–*10 (citations omitted).

28. *Id.* at *11.

been permitted to charge premiums that provide sufficient resources to pay valid claims.²⁹

It is not revolutionary to argue that liability insurers should be regulated to advance the public interest in compensating persons who have suffered injuries or losses. The question is whether courts will acknowledge their legitimate and necessary role in this regulatory endeavor through the application of general tort concepts. The law expressly and plainly recognizes the vitally important role that liability insurers play by making payments to those who suffer losses that otherwise could cause them and their families financial distress. Perhaps the most prominent example is the common practice by states to require owners of automobiles to maintain minimal levels of liability insurance. These requirements are not motivated primarily by concern for the financial health of the vehicle owner, but instead represent the strong public interest in ensuring that some funds are available to compensate those who may suffer injuries or property damage due to the negligent operation of the vehicle.³⁰

29. The court emphasized that State Farm's fraudulent behavior "created market disadvantages for other honest insurance companies" by unfairly increasing its profits, thereby placing pressure on other insurers to adopt equally reprehensible tactics. *Id.* at *12.

30. Numerous cases support this obvious proposition in a variety of contexts. For example, the Oklahoma Supreme Court recently has explained that otherwise valid defenses against an insured under a liability policy are unenforceable to the extent that they will operate to preclude statutorily mandated coverage that benefits injured third parties.

First, the court held that public policy considerations override coverage defenses that are based on the insured's misrepresentations to the insurer during the application process. *Harkrider v. Posey*, 24 P.3d 821, 830 (Okla. 2000) (holding that a misrepresentation in the application cannot defeat the third party victim's right to receive compensation). The court reasoned:

Under Oklahoma's mandatory automobile liability insurance scheme, liability insurance is not issued simply to protect the assets of the insured in the event liability for an accident is incurred, but also, if not primarily, to protect members of the public from the potentially disastrous financial consequences of using the roadways in our automobile-dependent society. To effectuate this policy, the legislature has required the purchase and maintenance of insurance as a precondition for vehicle registration and has prohibited the operation of uninsured vehicles on Oklahoma's roads. The enactment of mandatory liability insurance has, in effect, transformed what was a private insurance arrangement into a quasi-public obligation. To permit post-loss rescission of a voidable policy of liability insurance would render a registered vehicle uninsured for a period of time in the past with no opportunity for the vehicle's owner or operator to remedy the absence of insurance. The innocent victim's statutory protection would be thwarted. It

Critics might object that compulsory insurance laws primarily are intended to ensure that funds are available to satisfy tort verdicts, arguing that these laws do not place any restrictions on vigorous defense tactics used by insurers during both the claims handling and litigation of the dispute. After all, many financial responsibility laws permit individuals to self-insure if they have sufficient personal funds to cover potential liabilities, suggesting that the states are concerned more with satisfying judgments rather than encouraging

is inconceivable that the legislative policy expressed in our mandatory insurance regime might be so easily defeated.

Id. at 829–30 (internal citations omitted). *See also* Fisher v. N.J. Auto. Full Ins. Underwriting Ass'n, 540 A.2d 1344, 1347 (N.J. Super. Ct. App. Div. 1988) (holding that insured's failure to register automobile rendered insured ineligible for insurance under the Automobile Full Insurance Availability Act but that insurer could not avoid liability to passenger for PIP coverage by declaring policy "null and void after accident").

In the following year, the court held that otherwise valid policy exclusions also are trumped by the public policy favoring compensation. *Hartline v. Hartline*, 39 P.3d 765, 773 (Okla. 2001) (invalidating the "named insured exclusion" when it leaves injured resident family member parties with no recovery). The court reasoned:

The principal purpose of law-mandated liability insurance is the protection of the public from the financial hardship which may result from the use of automobiles by financially irresponsible persons This clearly articulated public policy overrides contrary private agreements that restrict coverage where the contractual strictures do not comport with the purpose of the Act. Extant jurisprudence consistently holds that insurance policy clauses which operate to deny coverage to the general public are void as contrary to statutorily articulated public policy.

Id. at 771–72. *See also* Marcus v. Hanover Ins. Co., 740 So. 2d 603, 608–09 (La. 1999) (holding that invalidation of business use exclusion required the insurer to provide coverage up to statutory minimum).

Although certainly not a unanimous rule, some jurisdictions have gone so far as to hold that the public policy of compensating victims of negligence as embodied in compulsory insurance laws outweighs even the strong public policy against the moral hazard of permitting insurance coverage for intentional acts. *See, e.g.,* Nationwide Mut. Ins. Co. v. Roberts, 134 S.E.2d 654, 659 (N.C. 1964):

The primary purpose of compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by the negligence of financially irresponsible motorists. Its purpose is not, like that of ordinary insurance, to save harmless the tortfeasor himself. Therefore, there is no reason why the victim's right to recover from the insurance carrier should depend upon whether the conduct of its insured was intentional or negligent.

See also State Farm Fire & Cas. Co. v. Tringali, 686 F.2d 821, 824 (9th Cir. 1982), *implicit overruling noted by* State Farm Mut. Auto. Ins. Co. v. Pichay, 834 F. Supp. 329 (D. Haw. 1993); Milwaukee Mut. Ins. Co. v. Butler, 615 F. Supp. 491, 495 (D. Ind. 1985).

good faith settlement behavior. However, liability insurers generally are directly regulated by statute with respect to their claims handling and litigation conduct. Virtually all states have enacted versions of the Model Unfair Claims Settlement Practices Act developed by the National Association of Insurance Commissioners.³¹ The Unfair Claims Settlement Practices Act clearly establishes that liability insurers owe duties to third-party claimants during the claims and litigation process. The most recent version of the Model Act (April 2002) provides, in relevant part:

§4. Unfair Claims Practices Defined

Any of the following acts by an insurer, if committed in violation of Section 3, constitutes an unfair claims practice:

A. Knowingly misrepresenting to claimants and insureds relevant facts or policy provisions relating to coverages at issue;

....

C. Failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims arising under its policies;

D. Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear;

E. Compelling insureds or beneficiaries to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them;

F. Refusing to pay claims without conducting a reasonable investigation; [and]

....

L. Failing in the case of claims denials or offers of compromise settlement to promptly provide a reasonable and accurate explanation of the basis for such actions[.]

Under these rules, it is clear that insurers are not free to dispute claims on pretext, or to force claimants to litigate valid claims to judgment in the hope of wearing them down to accept a settlement for less than the value of the losses.

31. The NAIC reports that the following jurisdictions (including only four states) have not adopted a version of the Model Act: Alabama, Guam, District of Columbia, Illinois, Iowa, Mississippi, and the Virgin Islands. See Nat'l Ass'n of Ins. Comm'rs, NAIC 900-05 (2002).

The only question, then, is whether courts should enforce this clear statement of legislative policy through the development of common law causes of action. Although the obligations of the Unfair Claims Practices Act are subject to administrative enforcement by the state agency charged with regulating the business of insurance, nothing in the Act provides that administrative enforcement is the exclusive remedy for violations of the Unfair Claims Practices Act. In its infamous *Royal Globe*³² decision, the California Supreme Court implied a cause of action for third-party claimants under its state Unfair Claims Practices Act,³³ only to reverse this decision nine years later as being unsupported by the statutory scheme of the Act.³⁴ But in holding that third-party claimants had no implied right under the Act to sue liability insurers for violating the provisions of the Act, the court emphasized that it was not precluding third-parties from suing insurers under common law theories:

Moreover, apart from administrative remedies [available against insurers for violating provisions of the Act], the courts retain jurisdiction to impose civil damages or other remedies against insurers in appropriate common law actions, based on such traditional theories as fraud, [and] infliction of emotional distress Punitive damages may be available in actions not arising from contract, where fraud, oppression or malice is proved. In addition, prejudgment interest may be awarded where an insurer has attempted to avoid a prompt, fair settlement.³⁵

Unless specifically precluded by the state's Unfair Claims Practices Act,³⁶ courts should be free to develop common law remedies that advance this

32. *Royal Globe Ins. Co. v. Superior Court*, 592 P.2d 329 (Cal. 1979), *overruled by* *Moradi-Shalal v. Fireman's Fund Ins. Co.* 758 P.2d 58 (Cal. 1988).

33. *Royal Globe*, 592 P.2d at 332.

34. *Moradi-Shalal*, 758 P.2d at 75.

35. *Id.* at 68-69.

36. To my knowledge, in the post-*Royal Globe* era no state legislature has amended its insurance code to expressly insulate liability insurance carriers from common law theories of recovery.

Three states responded to the judiciary's reluctance to imply a cause of action by expressly amending the insurance code to provide a private right of action in favor of third-party claimants. See MONT. CODE ANN. § 33-18-242 (2001) (providing that insureds and third-party claimants may recover actual damages for a violation of certain provisions of the unfair claims practices act without having to prove that the violations were so frequent as to indicate a general business practice; but precluding common law actions alleging bad faith), N.M. STAT.

ANN. § 59A-16-30 (Michie 2002) (permitting any person injured by a violation to bring an action for actual damages, in addition to any available common law remedies), *and* LA. REV. STAT. ANN. § 22:1220 (West 1995) (providing a cause of action for certain defined bad faith actions in settling third party claims). My argument that courts should use the tort of abuse of process to provide remedies to third-party claimants in certain circumstances obviously is superfluous as to jurisdictions that have expressly granted statutory rights to third-party claimants.

Some state legislatures amended their code to provide an express cause of action only for insureds. *See, e.g.*, NEV. REV. STAT. ANN. 686A.310(2) (Michie 1997) (establishing cause of action for insureds) *and* *Gunny v. Allstate Ins. Co.*, 830 P.2d 1335, 1336 (Nev. 1992) (holding that the statutory cause of action is limited to insureds and is not available to third-party claimants). Consequently, the question of the rights of third-party claimants remains unanswered in the statute and is left to common law development.

A number of states have amended their insurance codes in a variety of ways to state expressly that there is no private cause of action under the Unfair Claims Practices Act, leaving open the question of the extent to which injured parties can recover under common law theories. Some states parallel the holding of *Moradi-Shalal* by stating that the unfair claims practices act has no effect on whatever rights a claimant might otherwise have under common law. *See* MD. CODE ANN. § 27-301(b)(2) (2002) ("This subtitle does not provide or prohibit a private right or cause of action to, or on behalf of, a claimant or other person in any state."). This clearly leaves courts free to develop common law remedies for aggrieved parties. Many states simply have amended their statutes to state clearly that there is no private right of action under the unfair claims practices act. *See, e.g.*, ALASKA STAT. § 21.36.125(b) (Michie 2002) ("The provisions of this section do not create or imply a private cause of action for a violation of this section."); ARIZ. REV. STAT. § 20-461(D) (2002):

Nothing contained in this section is intended to provide any private right or cause of action to or on behalf of any insured or uninsured resident or nonresident of this state. It is, however, the specific intent of this section to provide solely an administrative remedy to the director for any violation of this section or rule related thereto.

See also GA. CODE ANN. § 33-6-37 (1998) ("Nothing contained in this article shall be construed to create or imply a private cause of action for a violation of this article."); ME. REV. STAT. ANN. tit. 24-A, § 21-64-D(8) (West 2000) ("This section may not be construed to create or imply a private cause of action for violation of this section."); TENN. CODE ANN. § 56-8-104(8) (2002) ("[A] private right of action shall not be maintained under this subdivision . . ."). Other states make clear that actions under the statute may be initiated only by the insurance commissioner. *See, e.g.*, HAW. REV. STAT. § 431:13-107 (1993) ("All remedies, penalties and proceedings set forth in this article are to be invoked solely and exclusively by the commissioner."). Some states provide only that injured parties may file a complaint with the commissioner. *See, e.g.*, IND. CODE § 27-4-1-5.6(a) (1999) ("A person who believes the person has been adversely affected by an unfair claim settlement practice . . . may file a complaint with the commissioner."); OHIO REV. CODE ANN. § 3901.22(A) (Anderson 2002) ("Any person aggrieved with respect to any act that the person believes to be an unfair or deceptive act or practice in the business of insurance . . . may make written application to the superintendent for a hearing to determine if there has been a violation . . .").

legislative statement of public policy, especially since the importance of this public policy is reinforced by compulsory insurance laws and other indications of the important public interest in providing insurance payments to injured parties.

Finally, the facile doctrinal conclusion that a third-party claimant cannot be owed any duties because the insurer owes contractual and fiduciary duties to its insured falls apart on closer inspection. Twenty years ago, Justice Shirley Abrahamson of the Wisconsin Supreme Court persuasively argued that insurers should owe duties to third-party claimants, although she concurred in the majority's determination that the claimant in the case before the court had not stated a cause of action.³⁷ Because her analysis carefully uncovers the public interests that support imposition of tort duties on liability insurers, it merits lengthy quotation.

Justice Abrahamson begins by rejecting the simplistic notion that the absence of a direct contractual relationship between the parties precludes the existence of a duty:

Finally, some state legislatures have considered adding an express private cause of action to their Unfair Claims Practices Act, but have declined to do so, leading courts to interpret this as a legislative decision to preclude private rights of action. *See, e.g., Allstate Ins. Co. v. Watson*, 876 S.W.2d 145, 149 (Tex. 1994). In *Watson*, the court noted that "in 1991, the legislature deleted a provision from H.B. 2 that would have provided a private cause of action . . . to any 'claimant' for unfair claim settlement practices," and concluded:

[W]e cannot ignore the legislature's refusal to create a statutory private cause of action for unfair claim settlement practices for third party claimants . . . [and therefore] [w]e will not construe [the statutory cause of action for unfair competition and unfair business practices] to permit, indirectly, a third party claimant to sue an insurer for unfair claim settlement practices . . . where she may not do so directly and where the legislature has specifically refused to create such a cause of action.

Id. Although legislative inaction typically is unreliable guidance for interpreting a previously enacted statute, it seems plausible that, when faced with similar circumstances, courts may choose not to permit common law recovery for activity regulated under the state Unfair Claim Practices Act if it concludes that the legislature considered and rejected the idea that claimants should recover damages.

37. *Kranzush v. Badger State Mut. Cas. Co.*, 307 N.W.2d 256, 271 (Wis. 1981) (Abrahamson, J., concurring) (the rationale in the majority opinion is quoted above, *supra* note 13). The plaintiff's administrator alleged that Badger delayed settling the plaintiff's claims for injuries caused by Badger's insured, knowing that the plaintiff was dying of cancer. *Id.* at 258. Given her willingness to impose duties on liability insurers in their dealings with third-party claimants, it is not clear from her concurring opinion why Justice Abrahamson agreed with the majority that the plaintiff's allegations did not state a claim for relief. *Id.* at 273.

For the majority to assert that the duty does not exist because there is no privity of contract is simply to restate the question presented to the court as a conclusion. . . .

[I]n my view the insurance contract places the insurer in such a relationship with the victim that the victim is a third-party beneficiary of the insurance contract. . . .

Our society regards the victim as a beneficiary of the insurance contract. . . .

Legislative endorsement of this societal construction of insurance is shown by the enactment of direct action statutes, compulsory automobile liability insurance laws, and financial responsibility laws. These laws are predicated on the theory that the third-party victim is a third-party beneficiary of the insurance contract.³⁸

In short, Justice Abrahamson takes a broader view of the insurance contract and rejects the narrow application of intended beneficiary principles.³⁹

Even if courts refuse to impose a duty of good faith on insurers by recognizing that claimants are the intended beneficiaries of liability insurance contracts, Justice Abrahamson argues that there is good reason to find that insurers owe tort duties directly to third-party claimants. She reasons:

The equitable principles of conscience and good faith are not by their nature limited to contractual relationships; these principles govern other relationships as well. Thus the question presented in this case is whether these concepts of fair dealing and public policy dictate that the court impose a duty of good faith on the insurer while negotiating with the third-party victim and liability for the tortious breach of the duty. . . .

There are public policy reasons justifying the recognition of the insurer's duty of good faith to the third-party victim. Society has an interest in the just settlement of insurance claims, and this societal interest is substantially the same whether the injured party is the insured or a third-party.

A third-party victim seeking recovery from the insurer is, as I see it, in substantially the same position as the first-party insured seeking benefits under a casualty policy. Both parties

38. *Id.* at 272–73.

39. As indicated in note 14, *supra*, courts have regularly rejected the claim that third-party claimants are the intended beneficiaries of liability insurance policies.

have been injured and both parties look to the insurance company for payment. When seeking payment under the policy both parties are in an adversarial relation with the insurance company. Both parties are generally in a relatively weaker bargaining position than the insurance company. Both parties can suffer as a result of the insurer's bad faith in settlement practices, and both parties may incur additional damage if payment of the claim is delayed. I recognize that the insured does buy the policy and pay the premiums and that the insurer and insured have obligations to each other under the contract which they do not have to the victim and which the victim does not have to them. Although the majority apparently takes the opposite view, I do not believe that the mutual obligations of the insurer and the insured are inconsistent with imposing on the insurer a duty to negotiate with the third-party victim in good faith.

I conclude that the interests of the insured and the third-party victim as to the settlement practices of the insurer are largely the same and that the public has an interest in the settlement practices of the insurer whether the insurer is dealing with the insured or with a third-party victim. Insurance holds an important place in our industrial society. Insurance is recognized by the insured, the victim, the legislature and the public as a system for compensating the third-party victim for injuries caused by another. Imposing a duty on the insurer to negotiate in good faith with the third-party victim is consistent with the intent of the first-party insured and of the legislature and with the popular concept of insurance which views the third-party victim as an intended third-party beneficiary of the insurance contract.⁴⁰

Justice Abrahamson acknowledges "that there are significant countervailing public policy considerations," but she notes that "these same arguments against third-party victims' bad faith claims are applicable to the court-recognized first-party insured's bad faith suit, and to the court-recognized employee workers compensation bad faith claim."⁴¹

40. *Kranzush*, 307 N.W.2d at 274-75 (Abrahamson, J., concurring in the judgment).

41. *Id.* at 275 (citation omitted). Justice Abrahamson rejects the undefended decision by the majority to distinguish third-party claimants who are similarly situated to these other classes

In summary, there are strong reasons grounded in well-articulated considerations of public policy to reject the uniform doctrinal rule that third-party claimants are owed no duties by liability insurers. Given the unanimity of this rule and its seemingly inescapable logic, however, it is unlikely that courts will choose to impose a broad duty of good faith on liability insurers in the absence of a decision by the legislature to create an express statutory cause of action for third-party claimants.⁴² However, more narrow tort theories,

of persons for all practical effects, notwithstanding the absence of a contract or a special statutory scheme of exclusive compensation for injured workers. *Id.* at 274–75.

42. After *Royal Globe* was reversed by *Moradi-Shalal*, consumer interest groups successfully lobbied the California legislature to provide a statutory cause of action for third-party claimants. Despite seemingly long odds, in 1999 the California legislature enacted the Fair Insurance Responsibility Act of 2000 (FAIR). 1999 Cal. Stat. 720 (S.B. 1237). The Act was signed into law by Governor Davis on October 10, 1999, to become effective on January 1, 2000. FAIR survived the legislative process only because it was a compromise bill crafted with the assent of several large insurance carriers. See Henry B. LaTorraca, *Collision Course*, 23 L.A. LAW. 50, 52 (Mar. 2000) (“The final compromise legislation was supported by the Consumer Attorneys of California, Mercury Insurance Group, and several commercial lines insurers including AIG, Travelers, and the American Insurance Association.”). FAIR did not fully restore the rights created by *Royal Globe*, but it did provide for direct actions by third-party claimants in certain circumstances.

However, FAIR did not survive long. The remaining industry opponents of the law gathered enough signatures to submit the new statute to the voters by referendum. See CAL. CONST. art. II, § 9(b). Subsequently, FAIR was rejected by a margin slightly exceeding 2–1. See *California Rejects Bad Faith Laws*, INS. ACCT., Mar. 13, 2000, available at 2000 WL 8649961. As might be expected, the sophisticated insurance lobby ran a well-financed campaign to defeat the Act, leading some newspaper editorial pages to charge that the insurers were engaging in deceptive tactics to avoid being held accountable for bad faith practices. See, e.g., *California Propositions—from 1A to 31*, S.F. EXAM’R, Mar. 6, 2000, at A17 (“Out-of-state insurance companies are spending \$50 million trying to defeat [FAIR]. Their front organizations say a ‘no’ would save Californians from higher auto premiums. That is misleading drivel.”); Paul Gullixson, *Vote Yes to Say No to This Scheme*, SANTA ROSA PRESS DEMOCRAT, Mar. 5, 2000, at G1:

The worst example [of ‘hyperbole—if not bare-faced lying’ in] this [election] has been the campaign ads in opposition to [FAIR]. . . . [Insurers have] raised more than \$50 million to make sure they win. All of this to defeat a state law designed to hold them accountable for following fair business practices.

Discerning a lesson in this tangled political storyline is difficult, to say the least. Although the legislature reacted favorably to the arguments by FAIR’s proponents, it remains doubtful that there will be additional legislative action in light of the unsuccessful voter referendum. Other than a few states that already have enacted a private right of action as part of the state’s unfair insurance claims practices act, *supra* note 36, it seems unlikely that there will be legislative action that obviates the need for a common law remedy.

when interpreted in the context of the public policies at stake in the liability insurance setting, should provide some measure of relief for tort victims who suffer a second injury at the hands of a liability insurer seeking to maximize its profitability by refusing to settle valid claims. In the remainder of this Article, I argue that the relatively obscure tort of abuse of process might effectively be used to police some of the more egregious forms of bad faith by liability insurers.

III. A CONSERVATIVE PROPOSAL FOR VINDICATING THE IMPORTANT PUBLIC POLICY FAVORING GOOD FAITH HANDLING OF THIRD-PARTY CLAIMS: USING THE TORT OF ABUSE OF PROCESS TO HOLD LIABILITY INSURERS ACCOUNTABLE FOR BAD FAITH LITIGATION TACTICS DESIGNED TO FRUSTRATE LEGITIMATE CLAIMS BY THIRD-PARTY CLAIMANTS

Abuse of process provides a viable cause of action only for some of the extreme cases of insurer bad faith in the settlement of claims, and will not reach all instances in which an insurer refuses to deal fairly and expeditiously with a claimant solely for the insurer's financial gain. For example, an insurer that strings along an injured third-party claimant for many months without having any intention of offering a reasonable settlement until the claimant brings suit, and solely for the purpose of frustrating the claimant and motivating a reduced settlement, might be acting contrary to public policy but would not be abusing legal process in the course of this conduct. Similarly, an insurer would not be abusing legal process by aggressively investigating the third-party claimant's background for the purpose of causing embarrassment and distress, although certainly this conduct might violate important public policies.⁴³ Consequently, I characterize abuse of process as a "conservative" tool for vindicating the underlying public policy.

Beyond the limited scope of abuse of process generally, there are more specific doctrinal rules that make it a somewhat cumbersome tool in this setting. First, courts have attempted to narrow the tort by requiring some positive act beyond simply using legal process with an improper motive. Although this doctrinal position may be waning, it would pose serious problems for a claimant attempting to use abuse of process in a typical scenario of insurer bad faith. Additionally, liability insurers act in the context

43. See generally *Kirchner v. Greene*, 691 N.E.2d 107, 117 (Ill. App. Ct. 1998) (holding that there can be no abuse of process where no court process is involved).

of providing a defense for their insured in the underlying dispute with the claimant, and courts generally have been wary of permitting the tort of abuse of process to thwart a defendant's right to mount a vigorous defense. Finally, the strong doctrinal rule that insulates liability insurers from tort liability for their bad faith claims settlement practices inevitably shapes the application of abuse of process in this setting. Courts are likely to be reluctant to permit claimants to use abuse of process to undermine the longstanding rule that liability insurers owe no duties to claimants. After discussing each of these doctrinal difficulties in turn, I conclude that abuse of process can and should play an important role in policing insurer conduct.

A. The Elements of the Tort of Abuse of Process

As defined in the *Restatement (Second) of Torts*, a party is liable for an abuse of process if that party uses civil or criminal process "against another primarily to accomplish a purpose for which [the process] is not designed."⁴⁴ The comment explains that the gravamen of the action is misusing properly obtained legal process to pursue improper objectives, rather than improperly securing the process itself. "Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them."⁴⁵ The party's liability rests on a "perversion" of the otherwise properly secured process.⁴⁶

44. RESTATEMENT (SECOND) OF TORTS § 682 (1977).

45. *Id.* at comment a. See also *Friedman v. Dozork*, 312 N.W.2d 585, 594–95 (Mich. 1981).

46. In the words of one court, "in addition to ulterior motive, one must . . . prove that there has been a perversion of the judicial process and achievement of some end not contemplated in the regular prosecution of the charge." *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. 1980). See also *D.D. v. C.L.D.*, 600 So. 2d 219, 221 (Ala. 1992) (stating that "it is the malicious perversion of a regularly issued process to accomplish a purpose whereby a result not lawfully or properly obtainable under it is secured."); *Younger v. Solomon*, 113 Cal. Rptr. 113, 118 (Cal. Ct. App. 1974) (explaining that liability attaches for "an act done under the authority of the court for the purpose of perpetrating an injustice, i.e., a perversion of the judicial process to the accomplishment of an improper purpose."); *Cisson v. Pickens Sav. & Loan Ass'n*, 186 S.E.2d 822, 826 (S.C. 1972) (explaining that "it is the malicious misuse or perversion of the process for an end not lawfully warranted by it that constitutes the tort known as abuse of process."). This characterization of the tort was acknowledged by the Supreme Court in *Heck v. Humphrey*, 512 U.S. 477, 486 n.5 (1992) (recognizing that the "gravamen of [the] tort is not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends.").

This tort would seem to encompass the use of legitimate process by liability insurers for an improper purpose, as would be the case if the insurer initiated extensive discovery and filed excessive motions primarily to wear down the third party claimant and induce a discounted settlement rather than for the purpose of obtaining relevant information regarding the dispute. However, this seemingly straightforward basis for imposing tort liability has been obscured in the case law. Courts have specified more detailed "elements" of the tort in order to narrow its application and prevent every lawsuit from endlessly cycling through subsequent litigation attacking the conduct of one's opponent in the previous litigation. In particular, many jurisdictions have required some act additional to the issuance of process before liability will attach. This additional requirement typically is expressed in the following manner:

To recover upon a theory of abuse of process, a plaintiff must prove (1) an ulterior purpose and (2) an act in the use of process which is improper in the regular prosecution of the proceeding. An example of a meritorious abuse of process claim is where the defendant has used a proper legal procedure for a purpose collateral to the intended use of that procedure. A bad motive alone will not establish an abuse of process. Rather, there must be some corroborating act that demonstrates the ulterior motive.⁴⁷

This leads courts to conclude that when "nothing more than carrying out the process to its authorized conclusion has occurred, no cause of action for abuse of process exists."⁴⁸ Consequently, it "is frequently said that an additional

47. *Schohl v. Lodge & Shipley Co.*, No. 180137, 1997 Mich. App. LEXIS 1479, at *12-*13 (June 13, 1997) (citations omitted). *See also* *Brishky v. State*, 479 N.W.2d 489, 494 (S.D. 1991); *Thompson v. Beecham*, 241 N.W.2d 163, 166 (Wis. 1976).

48. *Humphrey v. Herridge*, 653 A.2d 491, 494 (Md. App. 1995). *See also* *Wells v. Orthwein*, 670 S.W.2d 529, 533 (Mo. Ct. App. 1984) (explaining that "no liability is incurred when the defendant has done nothing more than pursue the lawsuit to its authorized conclusion regardless of how evil his motive may be."); *Toltec Watershed Improvement Distrib. v. Johnston*, 717 P.2d 808, 811 (Wyo. 1986):

Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.

(citations and internal quotations omitted). *See generally*, FOWLER V. HARPER, FLEMING JAMES JR., & OSCAR S. GRAY, 1 THE LAW OF TORTS § 4.9 at 4:89-4:105 (3d ed. 1996 & Supp. 2002) [hereinafter LAW OF TORTS].

willful act is required, after the issuance of the process, an act not proper in the normal course of execution or conduct of the process and in furtherance of the collateral objective.”⁴⁹

The motivation for this requirement is clear: given that the process was legally issued, if courts did not require an additional act (such as a threat to institute or maintain the process unless the victim agrees to an unrelated concession) the tort would amount to punishing bad motives and conceivably could lie with respect to every civil case. The classic explanation offered by courts makes clear the intent to free parties from potential liability based on alleged hidden motives of ill will:

It is not enough that the actor have an ulterior motive in using the process of the court. It must further appear that he did something in the use of the process outside of the purpose for which it was intended. Every one has a right to use the machinery of the law, and bad motive does not defeat that right. There must be a further act done outside the use of the process—a perversion of the process.⁵⁰

But even within this classic statement, the court immediately goes on to acknowledge that the requirement of an “additional act” might be satisfied solely by the party’s use of the process to achieve an aim that is not the legitimate purpose of the process:

If he uses the process of the court for its proper purpose, though there is malice in his heart, there is no abuse of the process. . . . As soon as the actor uses the process of the court, not to effect its proper function, but to accomplish *through it* some collateral object, he commits this tort.⁵¹

49. LAW OF TORTS, *supra* note 48, at 4:90. See *Friedman*, 312 N.W.2d at 595 (explaining that the court need not determine whether the defendant acted with an ulterior purpose, “since it is clear that the plaintiff clearly has failed to allege that the defendants committed some irregular act in the use of process.”); *Reynolds v. McEwen*, 416 So. 2d 702, 706 (Ala. 1982) (stating that an ulterior purpose must be accompanied by “a willful act in the use of the process not proper in the regular conduct of the proceeding.”).

50. *Hauser v. Bartow*, 7 N.E.2d 268, 269 (N.Y. 1937) (citations omitted), *quoted in* LAW OF TORTS, *supra* note 48, at 4:89–90, n.19.

51. *Id.* (emphasis added). Similarly, after stating the requirement of an additional act, one court hastened to note:

We add that where there is a genuine issue as to whether a defendant’s “further acts” were maliciously intended as an abuse of process, the plaintiff may demonstrate that defendant had secured issuance of the process without

Read in its entirety, the statement of the rule seems to suggest that using process to achieve a collateral (and wrongful) objective should give rise to liability notwithstanding the required additional act.

As argued in the recently revised Harper, James & Gray treatise, *Law of Torts*, the requirement of an act additional to the process itself may be a misleading and inaccurate requirement, since the actor may achieve an improper goal simply by initiating process and letting it play out in the ordinary course.⁵² This reasoning challenges the traditional rule as defended in Prosser and Keeton's treatise,⁵³ and has been adopted in some jurisdictions.

The Iowa Supreme Court has expressly jettisoned the traditional requirement of an additional act:

We do not believe the tort requires any subsequent action. . . . Such activity may be very probative in determining the intent to abuse; however, there need not be such a subsequent action to commit the tort. To rule otherwise would protect the tortfeasor when the abuse is most effective—where the issuance of the process alone is sufficient to accomplish the collateral purpose.⁵⁴

reason or probable cause as evidence that his ultimate intent was to use it for a purpose ulterior to the one for which it was designed.

Tedards v. Auty, 557 A.2d 1030, 1035 (N.J. Super. Ct. App. Div. 1989).

52. As they explain:

Process could be issued with the primary objective of achieving an improper collateral purpose through its normal application, although a formally correct ostensible purpose is pursued incidentally. If the process is thus used for both a proper and an improper purpose, but it can be proved that the user's motivation is primarily the attainment of the latter, misuse would appear to be inherent in the normal use of the process itself. . . . [I]t is by no means clear why in such a case the actor must do something "in the use of the process outside the purpose for which it is intended." A "further act done outside the use of the process" is hardly necessary to establish "perversion of the process."

LAW OF TORTS, *supra* note 48, at 4:90-91 n.21 (quoting *Hauser*, 7 N.E.2d at 269, discussed in text accompanying note 50, *supra*).

53. *Id.* at 4:91 n.21 (challenging analysis in W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS 898 (5th ed. 1984)).

54. *Mills County State Bank v. Roure*, 291 N.W.2d 1, 5 (Iowa 1980).

Other courts have endorsed this reasoning and grounded the imposition of liability on the use of process for an illegitimate purpose, rather than requiring an act in addition to the process itself.⁵⁵

55. See *Givens v. Mullikin*, 75 S.W.3d 383, 403 (Tenn. 2002) (quoting *Mills*, 291 N.W.2d at 5); *Richardson v. Rutherford*, 787 P.2d 414, 421 (N.M. 1990) (quoting *Mills*, 291 N.W.2d at 5); *Vittands v. Sudduth*, 730 N.E.2d 325, 332 (Mass. App. Ct. 2000):

The essential elements of the tort of abuse of process are “(1) ‘process’ was used; (2) for an ulterior or illegitimate purpose; (3) resulting in damage.” . . . Further, “the ulterior motive may be shown a direct demand for collateral advantage; or it may be inferred from what is said or done about the process.”

Id. at 332 (citations omitted); *Bd. of Educ. of Farmingdale Union Free Sch. Dist. v. Farmingdale Classroom Teach. Ass’n*, 343 N.E.2d 278, 283 (N.Y. 1975) (specifying that the three essential elements of the tort are: “regularly issued process,” by a person “moved by a purpose to do harm,” by “seeking some collateral advantage of corresponding detriment to the plaintiff which is outside the legitimate ends of the process.”).

A case decided earlier this year exemplifies the state of flux on this doctrinal point. In *Food Lion, Inc. v. United Food & Commercial Workers Int’l Union*, 567 S.E.2d 251 (S.C. Ct. App. 2002), the court affirmed the dismissal of a claim of abuse of process brought by a grocery chain alleging that a union had funded and directed employment litigation against the grocer for collateral purposes, holding that the grocer had not sufficiently pleaded a “willful act” in the use of process beyond the mere issuance of process. The court’s reasoning appears to endorse the traditional requirement of an “additional act” beyond mere ulterior motive:

Food Lion’s argument is premised on its belief that alleging the Union undertook the acts “for collateral purposes” sufficiently alleges the improper nature of the acts. We disagree. An allegation of an ulterior purpose or “bad motive,” standing alone, is insufficient to assert a claim for abuse of process.

...

Furthermore, although an ulterior purpose may be inferred from an improper willful act, “the inference is not reversible and it is not possible to infer [improper] acts from the existence of an improper motive alone.”

Id. at 255 (quoting W.PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, § 121 at 899 (5th ed. 1984)). However, the court was merely reaffirming that liability attaches only if the process is issued *primarily* for purposes other than its legitimate purpose of the process, emphasizing that liability cannot lie if the plaintiff merely alleges an improper motive in connection with the issuance of the process and does not allege further that the party was not using the process for its legitimate purpose. *Id.* at 256. Because the union was funding lawsuits by individual employees seeking redress for wrongful termination and other employment-related causes of action, the majority quite properly found that Food Lion would have to allege that the suits and related process were not pursued for their stated purpose (to secure compensation for wronged employees), but rather were primarily issued for the collateral and illegitimate goal. *Id.*

Accordingly, liability exists not because a party merely seeks to gain a collateral advantage by using some legal process, but because the collateral objective was its sole or paramount reason for acting:

In addition to the movement in some jurisdictions to reject explicitly the "additional act" requirement, there has also been a more general movement by some courts away from technical requirements limiting the scope of the tort. There has always been an overlap between abuse of process and its "kissing cousin,"⁵⁶ malicious prosecution. In fact, abuse of process developed as a means of overcoming the doctrinal limitations of malicious prosecution.⁵⁷

For the cause of action to exist, there must be a use of the process for an *immediate* purpose other than that for which it was designed. There is no abuse of process, however, when the process is used to accomplish the result for which it was created, regardless of an incidental or *concurrent* motive of spite or ulterior purpose. . . . It therefore follows that . . . the ulterior purpose allegation must be accompanied by an allegation that the process was misused by the undertaking of the alleged act, not for the purpose for which it was intended but for the primary purpose of achieving a collateral aim.

Id. at 256 (citing *Scozari v. Barone*, 546 So.2d 750, 751 (Fla. Dist. Ct. App. 1989) (emphasis added)). In other words, the fact that the union may have an ulterior motive of causing Food Lion to incur costs and to suffer business disruptions does not transform an appropriate use of legal process in employment litigation into tortious behavior.

This holding does not preclude a finding of liability if a third-party claimant could prove that an insurer filed extensive discovery requests and motions for the primary purpose of wearing down the claimant rather than for the purpose of the process (i.e., obtaining information or evidence relevant to the litigation, or clarifying the pleading). Such an allegation of facts could meet the test of pleading a "willful act," defined by the court as "(1) a 'willful' or overt act 2) 'in use of the process' 3) that is improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective." *Id.* at 254. It is a mistake to conflate the court's reasoning to conclude that an additional act is required, beyond the issuance of the process, to establish that the process was abused.

56. See *Berman v. Karvounis*, 518 A.2d 726, 726 n.1 (Md. 1987) (quoting R.P. GILBERT, P.T. GILBERT & R.J. GILBERT, MARYLAND TORT LAW HANDBOOK § 5.0 (1986)).

57. *Brownsell v. Klawitter*, 306 N.W.2d 41, 44 (Wis. 1981) ("The tort of abuse of process was developed to provide a remedy in situations where malicious prosecution failed."); *Clark Equip. Co. v. Wheat*, 154 Cal. Rptr. 874, 885 (Cal. Ct. App. 1979) ("The tort evolved as a 'catch-all' category to cover improper uses of the judicial machinery that did not fit within the earlier established *but narrowly circumscribed*, action for malicious prosecution.") (emphasis in original); *Italian Star Line v. United States Shipping Bd. Emergency Fleet Corp.*, 53 F.2d 359, 361 (2d Cir. 1931):

It has been observed by the courts on several occasions that the elements vital to an action for abuse of process are not clearly defined, either by the cases or by writers on the subject. . . . The reason apparently is that the term has been used as a label for a variety of dissimilar situations which have in common only the fact that actionable injury was inflicted in connection with the use of judicial process and under circumstances such that the narrowly circumscribed action of malicious prosecution was inapplicable.

Many of the cases dealing with the doctrinal requirements of abuse of process are motivated by an effort to distinguish these two closely related torts.⁵⁸ More recently, however, some courts have recognized that this line-drawing is counterproductive because it obscures the principled policy reasons for imposing liability, leading them to do away with the distinction altogether in favor of a single cause of action that returns to the core focus of abuse of process: the use of otherwise properly issued process to cause injury to another.⁵⁹ Thus, the New Mexico Supreme Court explained that the new tort of “malicious abuse of process” could be triggered by a litigant misusing “the law primarily for the purpose of harassment or delay,”⁶⁰ reaffirming its earlier rejection of the “additional act” requirement under the old tort of abuse of process.⁶¹

Whether an additional act is a necessary element of abuse of process is likely to be determinative when a claimant is seeking to apply the tort to a liability insurer in the insurance defense setting. In the typical insurance bad faith scenario where a claim of abuse of process might lie, an insurer would

For a description of how abuse of process evolved out of the tort of malicious prosecution, and its early articulation under New York law, see *Bd. of Educ. of Farmingdale Union Free Sch. Dist. v. Farmingdale Classroom Teach. Ass'n*, 343 N.E.2d 278, 281–82 (N.Y. 1975).

58. See *Tedards v. Auty*, 557 A.2d 1030, 1035 (N.J. Super. Ct. App. Div. 1989):

To preserve the distinction between the two torts, we have emphasized that process has not been abused unless after its issuance the defendant reveals an ulterior purpose he had in securing it by committing “further acts” whereby he demonstrably uses the process as a means to coerce or oppress the plaintiff.

As to the recognition by courts that the torts need to be more carefully distinguished, see generally *Simon v. Navon*, 71 F.3d 9, 15 (1st Cir. 1995) (“The torts of abuse of process and malicious prosecution frequently are confused because of their close relationship.”); *Bd. of Educ. of Farmingdale*, 343 N.E.2d at 280–81 (noting that the two torts are “frequently confused.”).

59. See *Devaney v. Thriftway Mktg. Corp.*, 953 P.2d 277, 283 (N.M. 1997) (“we conclude that these torts should be restated as a single cause of action, which shall be known as ‘malicious abuse of process.’”); *Yost v. Torok*, 344 S.E.2d 414, 417 (Ga. 1986) (recognizing a single tort of abusive litigation); LAW OF TORTS, *supra* note 48, at 4:107 (arguing that courts should acknowledge that they “themselves facilitate wrongdoing in litigation by the proliferation of unnecessarily detailed ‘rules’ and ‘elements’ in their attempt to define [and thereby distinguish] these torts.”).

60. *Devaney*, 953 P.2d at 287.

61. *Id.* at 285 (reaffirming the holding of *Richardson v. Rutherford*, 787 P.2d at 421–22 (N.M. 1990) and concluding that the overt act necessary for imposition of liability can be satisfied by the improper or irregular use of process to cause delay or harassment, or as a means of extortion).

seek to induce a below-market settlement by endlessly delaying the proceedings and forcing the third-party claimant to contend with voluminous discovery requests and motions that are motivated primarily by the collateral goal of wearing down the claimant financially and emotionally. If a jurisdiction continues to adhere to a requirement of some additional act beyond the issuance of process, it might be difficult to allege abuse of process in such typical circumstances because the insurance carrier accomplishes its ulterior objective solely by allowing the legally issued process to play itself out. On the other hand, if courts confront this scenario in which the abuse of process requires no act beyond the issuance of the process itself to obtain the illegitimate result, they might be motivated to acknowledge the overly narrow approach to abuse of process in the traditional formulation.

In addition to the doctrinal uncertainty about the elements of abuse of process, there are independent limitations on the scope of the tort. For example, the First Amendment constitutional guarantee of freedom of speech might require the plaintiff to meet a higher burden of proof to avoid dismissal of an action for abuse of process.⁶² Although first amendment considerations might not apply to the standard insurance defense scenario, a related limitation on abuse of process actions might make it more difficult for claimants to recover against insurers. A number of states have adopted a "litigation privilege" that insulates parties from liability for communicative acts during the course of litigation, with the obvious goal of preventing an endless cycle of lawsuits. California's statutory litigation privilege has been read quite broadly by the courts and expressly trumps an otherwise valid claim of abuse of process.⁶³ In *Doctor's Co. Insurance Services v. Superior Court*,⁶⁴ a victim

62. See *Protect Our Mountain Env't, Inc. v. Dist. Ct.*, 677 P.2d 1361, 1369 (Colo. 1984) (en banc) (suit alleging that environmental group brought an administrative appeal to delay and harass a developer must be dismissed unless "the defendant's administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion," in addition to other criteria). See also *Oregon Natural Res. Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991) (applying the "sham exception" to the *Noerr-Pennington* constitutional doctrine). Several states have passed statutes designed to prevent strategic lawsuits against public participation (anti-SLAPP statutes) that extend this doctrine. See generally *Baker v. Parsons*, 750 N.E.2d 953, 961-62 n.19 (Mass. 2001) (describing the heightened showing necessary under various state anti-SLAPP statutes to avoid dismissal of tort claims).

63. California law provides that a "privileged publication or broadcast is one made . . . in any . . . judicial proceeding." CAL. CIV. CODE § 47(b) (West 1982 & Supp. 2003). The courts have interpreted this privilege to have a wide scope, in the interest of promoting the effectiveness and finality of judicial proceedings. See *Silberg v. Anderson*, 786 P.2d 365, 372-

of medical malpractice sued the tortfeasor's liability insurer, alleging that the insurer hid the insured doctor's admitted liability for three years in an effort to browbeat her into settling her claim, going so far as to suborn perjured deposition testimony by the insured and another doctor.⁶⁵ Although the Court acknowledged that these allegations stated a viable cause of action,⁶⁶ it concluded that the claimant's suit was barred by the absolute litigation privilege because the insurer's role in the litigation effectively made it a "participant" for purposes of the statutory protection.⁶⁷ Although the reported law dealing with the insurance defense context under California law is scarce, and the few cases from other jurisdictions are mixed,⁶⁸ it is reasonable to

73 (Cal. 1990). All doubts as to whether the privilege applies are to be resolved in favor of applying it, *Morales v. Coop. of Am. Physicians, Inc.*, 180 F.3d 1060, 1062 (9th Cir. 1999), and the privilege extends even to an act committed fraudulently or with malice, *O'Keefe v. Kompa*, 100 Cal. Rptr.2d 602, 605 (Ct. App. 2000). Consequently, the absolute privilege extends beyond actions for defamation and precludes suits for abuse of process that relate to "communicative acts" such as filing a lien for an improper purpose. *See, e.g., Honea v. Bank of Am. Corp.*, 2001 WL 1649229 (Cal. Ct. App. Dec. 21, 2001) (filing an abstract of judgment as a lien before the verdict became final may be an abuse of process, but it is protected by the absolute privilege); *Brown v. Kennard*, 113 Cal. Rptr. 2d 891, 899 (Ct. App. 2002) (wrongful levying on exempt funds is protected by litigation privilege; the court held that "the policy underlying the litigation privilege of encouraging free access to the courts by discouraging derivative litigation simply outweighs the policy of providing [the plaintiff] with a tort remedy for an allegedly wrongful enforcement of a judgment."); *Microsoft Corp. v. BEC Computer Co., Inc.*, 818 F. Supp. 1313, 1319 (C.D. Cal. 1992) (holding that even the filing of improper or meritless pleadings, with an ulterior and wrongful motive, is privileged and does not constitute an abuse of process).

64. 275 Cal. Rptr. 674 (Ct. App. 1990).

65. *Id.* at 676-77.

66. *Id.* at 678. The plaintiff alleged intentional infliction of emotional distress rather than abuse of process because she was seeking to come within the opening provided by *Moradi-Shalal* when, in the course of reversing *Royal Globe*, the court acknowledged that claimants might still have a viable common law cause of action for infliction of emotional distress. *Id.* *See Moradi-Shalal v. Fireman's Fund Ins. Co.*, 758 P.2d 58, 69 (Cal. 1998).

67. *See Doctor's Co.*, 275 Cal. Rptr. at 680.

68. *Compare Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 2002 WL 376923, at *4 (E.D. Pa. Feb. 28, 2002) (holding that claim of abuse of process against insurance defense counsel for "abusive discovery tactics and improper motion practice in order to gain a litigation advantage" is overcome by the absolute litigation privilege, requiring dismissal of the abuse of process count) *with Am. Nat'l. Title & Escrow of Fla. v. Guar. Title & Trust Co.*, 810 So. 2d 996, 998 (Fla. Dist. Ct. App. 2002) (holding that litigation privilege does not insulate a party from liability for claims of abuse of process and malicious prosecution founded on allegations that it gave false information for the malicious purpose of inducing a wrongful arrest, distinguishing an earlier opinion in the same case (748 So.2d 1054 (Fla. Dist. Ct. App. 1999))

conclude that if a court reads the litigation privilege broadly, it will likely curtail the effective use of abuse of process against liability insurers acting in bad faith in the settlement and litigation of claims by third parties.

In summary, the “additional act” requirement and the potential applicability of the litigation privilege might pose problems for holding liability insurers responsible for abuse of process when they use the machinery of civil litigation to harass and wear down claimants. However, even where these potential doctrinal problems exist, they need not be disabling. There is some indication that courts might use the context of a lawsuit against a liability insurer to rethink the doctrinal elements and to acknowledge the viability of abuse of process even in face of the litigation privilege, in line with recent decisions. Even so, it will likely be a rather circumscribed set of cases that can successfully be addressed with abuse of process.

that precluded recovery for abuse of process from defense counsel acting pursuant to a duly issued court order placing certain corporate records into receivership).

A recent New Jersey case exemplifies the complex issues raised when a defendant seeks to overcome an abuse of process claim by relying on the litigation privilege. In *Baglini v. Lauletta*, 717 A.2d 449 (N.J. Super. 1998), *rev'd and remanded* 768 A.2d 825 (N.J. Super. Ct. App. Div. 2001), the trial court entered judgment on a jury verdict for abuse of process against a defense attorney and his clients. The trial judge reasoned “that at its core, an abuse of process claim is inherently inimical to a litigation privilege and taken to its logical extreme, could emasculate the tort entirely,” and therefore concluded “that no reasonable basis exists to immunize attorneys from civil liability where it can be shown that they have abused process which has injured third persons,” since the litigation privilege insulates only communications intended to further the *legitimate* purposes of the litigation. *Id.* at 454–56. However, the Appellate Division reversed and vacated this judgement, finding that the defendants’ actions were shielded by the litigation privilege. *Baglini v. Lauletta*, 768 A.2d 825 (N.J. Super. Ct. App. Div. 2001). The Appellate Division did not reject the proposition that attorneys can be held liable for abuse of process; instead, the court found on the facts of the case that the defense attorneys were acting within the scope of the privilege. *Id.* at 834 (“The litigation privilege applies here because the ‘communications’ were made by the attorney for a litigant authorized to make them, were intended to achieve the objectives of the litigation, and had a logical relation to the [underlying] litigation . . .”). The clear lesson of this case is that allegations of abuse of process against defendants and their counsel will require a careful, fact-sensitive analysis in light of the litigation privilege.

Although no state appears to have interpreted its litigation privilege as broadly as California, this issue is likely to be a factor in litigation against liability insurers on account of their motion and discovery practice since most states simply have not considered whether such conduct would be protected by a litigation privilege.

B. The "Problem" of Holding Defendants Accountable for Abuse of Process

It is easy to conceive of situations in which the plaintiff in the underlying litigation might later be held liable in tort for an abuse of process. Although a plaintiff may properly secure a lien or attachment of property, the court might determine that the plaintiff is using this otherwise valid process to pursue collateral and illegitimate goals.⁶⁹ But it is less clear how a defendant in civil litigation might be abusing process, since the defendant has been dragged into the litigation and presumably should be afforded a wide berth to contest the claims against it vigorously. In a classic statement, the Illinois Supreme Court reasoned that

the defendant may present any defense to such action that he may have or that he may deem expedient, and in so doing he will not be subjecting himself to a second suit by the plaintiff based on the wrongful conduct of the defendant . . . in defending the action. The rule is the same even though the wrongful conduct of the defendant is willful, intentional, malicious or fraudulent.⁷⁰

In short, there is a strong presumption that a defendant should not incur potential tort liability for the manner in which it defends itself.

This presumption is manifest in the general refusal by courts to acknowledge a tort of "malicious defense" that would mirror the cause of action for malicious prosecution. The California Supreme Court has emphasized the distinction between defending an action and prosecuting an action, holding that a defendant may be held liable for maliciously prosecuting a cross-complaint or counterclaim, but cannot be held liable for maliciously

69. One court recently described typical abuse of process scenarios as offering to terminate a proceeding in return for a payment and filing a lien for the purpose of coercing the plaintiff to pay an unrelated debt. *Sands v. Living World Fellowship*, 34 P.3d 955, 960 (Ala. 2001). Similarly, a treatise describes the paradigm cases as involving the use of process to extort a payment of money. *LAW OF TORTS*, *supra* note 48, at 4:87–88 (illustrations include issuing a subpoena to cause inconvenience and thereby coerce payment of a debt, and excessive attachment to secure payment of a debt). *See also* *Wachter v. Gratech*, 608 N.W.2d 279, 287 (N.D. 2000) (stating that the "improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club.").

70. *Ritter v. Ritter*, 46 N.E.2d 41, 44 (Ill. 1943).

defending against claims asserted by the plaintiff.⁷¹ The result of this judicial attitude, two commentators note, is that “a defendant who . . . acts in bad faith for his financial gain or to injure a plaintiff for personal reasons, or who simply believes that this is how the litigation game is played, may use the litigation process for malicious and improper purposes without being held accountable.”⁷² Because this rule provides an important backdrop for any effort to impose liability for abuse of process on insurers who are defending the action, I begin by reviewing the near-unanimous rejection by courts of a general cause of action for “malicious defense.”

Courts generally justify their refusal to recognize a tort of malicious defense along two lines of analysis. First, courts are hesitant to impose liability on a party that vigorously defends itself after involuntarily being subjected to legal process, with involuntariness being the key distinguishing feature between a party who defends maliciously and a plaintiff who maliciously prosecutes an action:

71. *Bertero v. Nat'l. Gen. Corp.*, 118 Cal. Rptr. 184, 190–92 (1975) (In Bank). The court reasoned:

Defendants invoke a line of cases headed by *Eastin v. Bank of Stockton*, [4 P. 1106 (Cal. 1884)] in which various courts have refused to recognize a tort of malicious defense. . . . We do not propose to establish such a tort by our holding here. The *Eastin-Ritter* cases protect the right of a defendant, involuntarily haled into court, to conduct a vigorous defense. By seeking affirmative relief, however, defendants in the instant case did more than attempt to repel Bertero's attack; they took the offensive in attempting to prosecute a cause of action of their own. When such action is prompted by malice and is not based on probable cause, it is actionable as in the case of other affirmative, malicious prosecutions.

Id. at 191 (internal citations omitted). The Court later moved in this direction by recognizing a cause of action for tortiously denying the existence of a valid contract in *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, 686 P.2d 1158, 1167 (Cal. 1984) (In Bank), but eventually reversed this decision in *Freeman & Mills, Inc. v. Belcher Oil Co.*, 900 P.2d 668, 675–76 (Cal. 1995) (describing the confusion generated in the lower courts by limiting the cause of action to wrongful denial of the existence of a contract). Justice Mosk concurred in the judgment but dissented from the reasoning, arguing that there should be some cases in which tort liability is triggered, but he nevertheless noted that the Court has “consistently refused to recognize a tort of ‘malicious defense’ that would be equivalent to malicious prosecution. The refusal to recognize such a tort ‘protect[s] the right of a defendant, involuntarily haled into court, to conduct a vigorous defense.’” *Freeman & Mills*, 900 P.2d at 688 (Mosk, J. concurring in judgment and dissenting) (quoting *Bertero*, 118 Cal. Rptr. at 191).

72. Jonathan K. Van Patten & Robert E. Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation*, 35 HASTINGS L.J. 891, 899 (1984).

The malicious plaintiff in a civil action institutes proceedings without probable cause and with malice. Because the defendant is haled into court, all of the defendant's resulting financial, emotional, and reputational injuries are attributable to the plaintiff's malicious conduct. The malicious defendant, in contrast, raises or continues an ungrounded and malicious defense merely to resist the claim of a plaintiff already before the court. Unlike the defendant targeted by a malicious prosecution, the plaintiff who encounters a malicious defense voluntarily entered the judicial system and must be held to accept, to some degree, the costs and risks of litigation.

When this plaintiff ultimately prevails in the action, at best only a portion of the plaintiff's litigation costs and damages can be attributed to the malicious defense.⁷³

This reasoning is unpersuasive as a general matter,⁷⁴ but particularly so in the insurance defense context. If an injured party with clear evidence of liability and damages is forced to bring suit against a regulated liability insurer that has been paid to provide compensation and is statutorily obligated to do so in good faith, only then to endure ten years of harassing tactics and delay, it is difficult to conclude that the plaintiff should be held to have assumed the "risk" of this behavior merely by being forced to commence the litigation as a result of the insurer's stonewalling tactics. Although courts certainly should not circumscribe the ability of a party to defend against claims vigorously, there is a point where the defense becomes malicious rather than vigorous. "A line must be drawn between the vigorous and good faith assertion of defenses that may turn out to be wrong and the malicious and baseless assertion of defense which are clearly wrong," and the need to draw this line is no

73. *Aranson v. Schroeder*, 671 A.2d 1023, 1032 (N.H. 1996) (Thayer, J., dissenting).

74. For example, consider a typical business dispute in which the plaintiff pleads multiple claims and the defendant pleads multiple counterclaims. If the plaintiff defends against the counterclaims by maliciously abusing civil process, should this behavior really be treated differently for the purpose of imposing liability than if the plaintiff maliciously abuses process in the course of prosecuting its original complaint? What if the plaintiff's abuse of process in defense against the counterclaims is motivated by a desire to maximize its ability to prevail on the claims in its complaint? And is there a legitimate distinction, grounded in the concept of "voluntariness," between a plaintiff that maliciously defends against a counterclaim and a defendant that maliciously prosecutes that same counterclaim? Isn't it realistic to concede that defendants "are no more able to resist the temptations of excess advocacy than plaintiffs" and therefore to match the action for malicious prosecution with an action for malicious defense? Van Patten & Willard, *supra* note 72, at 893.

different than the same need to draw a line in the malicious prosecution context.⁷⁵

A second justification for refusing to recognize a cause of action for malicious defense is the fear of inviting never-ending litigation. For example, a plaintiff who prevails in the litigation but then finds the defendant judgment-proof would be tempted to sue the defendant's lawyers for malicious defense tactics; similarly, a plaintiff who loses the litigation might seek the proverbial "second bite at the apple" by attributing its loss to malicious defense tactics.⁷⁶

Moreover, if courts attempt to prevent a flood of secondary litigation with strict doctrinal rules, the result may be to undermine the effectiveness of the tort. For example, if courts limited the tort of malicious defense to those cases in which the aggrieved party prevailed in the underlying litigation, there would be a risk that the worst kind of malicious defense tactics will not be reached.

Thus, a defendant whose egregious conduct is unsuccessful in obtaining a defendant's verdict may be subject to a malicious defense action, but a defendant whose egregious conduct successfully defeats the plaintiff's suit is not liable. This unlikely result gives the remedies available through a malicious defense action only to those plaintiffs who least need it, i.e., those who prevailed despite the malicious defense.⁷⁷

Although never-ending litigation is a legitimate fear, it is no less a fear in the context of malicious prosecution. And efforts by courts to circumscribe a general tort of malicious defense with additional prerequisites, similar to requiring "additional acts" for an abuse of process, will likely undermine and obscure the ground for liability rather than clarifying it.

The weaknesses in the arguments supporting the traditional rule led the New Hampshire Supreme Court to recognize a new cause of action for malicious defense in a case in which defense counsel manufactured evidence and gave false testimony in previous litigation.⁷⁸ The court concluded that the potential for sanctions in the form of attorney's fees was insufficient to compensate the plaintiff for the entire range of emotional and financial losses

75. *Id.* at 934.

76. *Aranson*, 671 A.2d at 1032 (Thayer, J., dissenting).

77. *Id.* at 1033 (Thayer, J., dissenting).

78. *Id.* at 1027 ("Is a plaintiff less aggrieved when the groundless claim put forth in the courts is done defensively rather than affirmatively in asserting a worthless lawsuit for improper purposes? We think not.").

caused by the malicious defense.⁷⁹ The court's articulation of the elements of this new cause of action clearly would encompass typical forms of bad faith practices by liability insurers. The court imposed liability if a defendant knowingly defended an action without probable cause, and primarily for an improper purpose "such as to harass, annoy or injure, or to cause unnecessary delay or needless increase in the cost of litigation."⁸⁰ However reasonable it might be to apply the principles of malicious prosecution to the defense of a civil action, though, it appears likely that the longstanding unwillingness to apply malicious prosecution principles to defendants will continue.⁸¹

Even if courts have not embraced a general tort of malicious defense, abuse of process clearly encompasses behavior in which both plaintiffs and defendants in the underlying litigation might engage. Perhaps the most significant example is a party's use of discovery procedures to harass, intimidate or cause financial and emotional distress to the other party; activity that bears no relationship to the party's status as plaintiff or defendant. However, it is likely that the justifications offered for refusing to recognize an action for malicious defense may cause courts to be reluctant in holding defendants accountable for abuse of process.

A number of cases recognize that an abuse of discovery and motion practice can result in tort liability. In *Nienstedt v. Wetzel*,⁸² the Arizona Supreme Court held that liability for abuse of process is established if the plaintiff in the underlying litigation used pre-trial practice to harass the defendants "by purposely subjecting them to excessive legal fees in defending against [the plaintiff's] claims."⁸³ The court first made clear that the "process" subject to tortious abuse should be construed broadly:

79. *Id.* ("In adding malicious defense to our common law, we merely recognize that when a defense is commenced maliciously or is based upon false evidence and perjury or is raised for an improper purpose, the litigant is not made whole if the only remedy is reimbursement of counsel fees.").

80. *Id.* at 1028–29. The court also included an element that the plaintiff prevail in the prior litigation, but this element seems wrongheaded for the reasons advanced by the dissenting judge. See *supra* note 73 and accompanying quoted text.

81. See *Wilkinson v. Shoney's, Inc.*, 4 P.3d 1149, 1157 (Kan. 2000) (acknowledging the *Aranson* decision, but holding: "We are not prepared to adopt or recognize a new cause of action for malicious defense. If such is deemed desirable or needed, action by the legislature is required. This is especially true in light of our long-standing recognition of the law to the contrary.").

82. *Nienstedt v. Wetzel*, 651 P.2d 876 (Ariz. 1982).

83. *Id.* at 880.

[The process should encompass] the entire range of procedures incident to the litigation process As applied to this case, we therefore consider as “processes” of the court for abuse of process purposes, the noticing of depositions, the entry of defaults, and the utilization of various motions such as motions to compel production, for protective orders, for change of judge, for sanctions and for continuances.⁸⁴

Noting that the gravamen of the action is that the party did not utilize this pre-trial practice for “its authorized purposes,” the court held that attempting to increase an opponent’s litigation fees in order to pressure a settlement is an unauthorized purpose for this process:

[T]here is no liability when the defendant has done nothing more than legitimately utilize the process for its unauthorized purposes, even though with bad intentions[.]

...

However, there is evidence from which a trier of fact could have concluded that in many instances the [plaintiff’s] ulterior or collateral purpose . . . to subject the [defendants] to excessive litigation expenses was in fact his primary purpose, and that his use of various legal processes was not for legitimate or reasonably justifiable purposes of advancing appellants’ interest in the ongoing litigation.⁸⁵

84. *Id.*

85. *Id.* at 881–82. The *Nienstedt* court cited several New York cases that involved similar abuses of pre-trial process designed to coerce a settlement:

Although our research has not revealed any cases in which liability for abuse of process has been imposed where the ulterior or collateral purpose involved has been to expose the injured party to excessive attorney’s fees and legal expenses, we can perceive no reason why general abuse of process principles should not apply to such circumstances. *Cf. Ginsberg v. Ginsberg*, 84 A.D.2d 573, 443 N.Y.S.2d 439 (1981) (abuse of process liability imposed when party repeatedly used subpoena processes for the purpose of exhausting the opponent’s financial resources); *Bd. of Educ. of Farmingdale Union Free School Dist. v. Farmingdale Classroom Teachers Ass’n, Inc.*, 38 N.Y.2d 397, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975) (involving the use of witness subpoena power for 87 teachers so as to impose financial hardship); *Dishaw v. Wadleigh*, 15 A.D. 205, 44 N.Y.S. 207 (1897) (involving assignment of collection claims to an associate in a distant part of the state, thereby purposely exposing debtors to the inconvenience and expense of attending a distant court).

The court emphasized that the plaintiff incurred liability only because the primary purpose of the pre-trial process was to cause the defendants additional attorneys fees, noting that there would be no liability if the party had used process primarily for its intended purposes, but then secretly enjoyed the collateral effect of creating a financial burden on the other party.⁸⁶

In a similar vein, the Second Circuit in *Alexander v. Unification Church*,⁸⁷ found that plaintiffs had properly stated a claim for abuse of process by alleging that the defendants had instituted process against them solely for the purpose of causing them to incur substantial attorneys fees.⁸⁸ The peculiar facts involved several “deprogrammers”—persons hired by parents attempting to dissuade their children from continuing their association with an alleged “cult”—who sued the Unification Church for using legal process as a means to drive them out of business.⁸⁹ Because the plaintiffs alleged that the primary purpose of the process was “not the purpose for which they may properly be instituted, namely to obtain damages for the Church members,” but rather was “to compel the appellants to cease their deprogramming activities by putting them to the trouble and expense of litigation,” the court found that dismissal of the abuse of process claim was improper.⁹⁰

Although it was the plaintiff in the underlying litigation that abused pre-trial process in both *Nienstedt* and *Alexander*, the same reasoning would apply with equal force against a defendant. *Board of Education of Farmingdale Union Free School District v. Farmingdale Classroom Teachers Ass’n Inc.*⁹¹

Id. at 882. It has long been held that creditors who knowingly file actions or attachments in an improper venue for the purpose of impairing the ability of the other party to defend itself are liable for an abuse of process. See *Barquis v. Merchants Collection Ass’n*, 7 Cal. 3d 94, 103–04 (1972) (In Bank) (Tobriner, J., writing for unanimous court); *Yu v. Signet Bank/Virginia*, 69 Cal. App. 4th 1377, 1390 (1999). The cases involving abuse of pre-trial process appear to fit well into this traditional example of abuse of process.

86. *Nienstedt*, 651 P.2d at 882.

87. *Alexander v. Unification Church of Am.*, 634 F.2d 673 (2d Cir. 1980), *abrogation on other grounds recognized in* *PSI Metals, Inc. v. Firemen’s Ins. Co. of Newark, N.J.*, 839 F.2d 42 (2d Cir. 1988).

88. 634 F.2d 675.

89. *Id.*

90. *Id.* at 678. The case was later abrogated because the tort of abuse of process, unlike the tort of malicious prosecution, cannot be founded on the original issuance of the complaint in the action. The plaintiffs in *Alexander* did not sue for malicious prosecution because they could not satisfy the element that the underlying litigation terminate in their favor. *Id.* at 678 n.7.

91. *Bd. of Educ. of Farmingdale Union Free School Dist. v. Farmingdale Classroom Teachers Ass’n*, 343 N.E.2d 278 (N.Y. 1975).

provides a good example of a court finding that a defendant's pre-trial actions constituted an abuse of process.⁹² In *Farmingdale*, a school district charged the teacher's union with orchestrating an illegal strike, leading to a hearing instituted by the Public Employees Relations Board.⁹³ In preparation for defending itself at the hearing, the teacher's union issued eighty-seven subpoenas for individual teachers to appear as witnesses, refusing the school district's request to stagger the times of the appearances as is customary to avoid needless waste of resources.⁹⁴ In the end, all eighty-seven teachers attended the full hearing, requiring the school district to hire seventy-seven substitute teachers for that day.⁹⁵ The school district, not a party to the hearing, brought an action for abuse of process, alleging that the teacher's union used the subpoenas to achieve the collateral aim of disrupting the district's planning for the day and causing the district to incur substantial costs.⁹⁶ The court found that the union's activities as a defendant in the hearing constituted an abuse of process:

The subpoenas here were regularly issued process, defendants were motivated by an intent to harass and to injure, and the refusal to comply with a reasonable request to stagger the appearances was sufficient to support an inference that the process was being perverted to inflict economic harm on the school district.

While it is true that public policy mandates free access to the courts for redress of wrongs . . . and our adversarial system cannot function without zealous advocacy, it is also true that legal procedure must be utilized in a manner consonant with the purpose for which that procedure was designed. Where process is manipulated to achieve some collateral advantage,

92. 343 N.E.2d 283 (Wachtler, J., writing for a unanimous court).

93. *Id.* at 280.

94. *Id.*

95. *Id.*

96. *Id.* The court rejected the argument that the school district could not recover for an abuse of process because it was not a party to the underlying hearing:

While it is true that plaintiff was not a party to that proceeding, it is equally true that they were not disinterested bystanders. More important the deliberate premeditated infliction of economic injury without economic or social excuse or justification is an improper objective which will give rise to a cause of action for abuse of process.

Id. at 283-84.

whether it be denominated extortion, blackmail or retribution, the tort of abuse of process will be available to the injured party.⁹⁷

The court concluded that the school district could be entitled to punitive damages, subject to proof at trial that the union acted with malice.⁹⁸

In summary, courts have been hesitant to impose liability on defendants for the manner in which they maintain their defense. This hesitancy is demonstrated most clearly by the refusal of virtually all jurisdictions to accept a cause of action for “malicious defense” that would mirror the traditional cause of action for malicious prosecution. However, the tort of abuse of process applies on its face to conduct by defendants no less than to conduct by plaintiffs. In particular, the typical abuses perpetrated by liability insurers and defense counsel—using pretrial motion practice and discovery to place economic and emotional pressure on third-party claimants rather than for their proper purposes—should give rise to liability for abuse of process.

C. Applying the Tort of Abuse of Process to the Liability Insurance Setting

Third-party claimants generally have not been successful in holding liability insurers accountable with the tort of abuse of process for bad faith claims settlement and litigation practices. This should come as no surprise, in light of the baseline common law rule that insurers owe no tort duties or contract obligations to third-party claimants, the traditional doctrinal rules that narrow the scope of abuse of process, and the general unwillingness to impede the rights of defendants to mount a vigorous defense. After examining several cases that have rejected claims of abuse of process against liability insurers by third-party claimants, I argue that courts should be more receptive to these claims and discuss a few recent cases that point in this direction. My argument is simple: the strong public policy favoring the fair and timely resolution of claims by liability insurers should guide courts to impose tort damages when liability insurers use the instruments of litigation—discovery, motion practice and pleadings—primarily to delay or evade payment of the claim. Although this approach runs counter to some traditional applications of the law of abuse of process, it is well within the articulated principles of the tort.

97. *Id.* at 283.

98. *Id.* at 284.

The problems facing third-party claimants alleging abuse of process are vividly demonstrated in an older case decided by the Maine Supreme Court. In *Linscott v. State Farm Mutual Automobile Insurance Co.*,⁹⁹ a resident of Maine sued a liability insurer after it offered a "less than nominal settlement" for damages arising out of an accident that occurred when a North Carolina driver struck his car while he was driving through Virginia.¹⁰⁰ The claimant alleged that the insurer was attempting to capitalize on the inconvenience caused by geographic distance for the purpose of inducing an unreasonably low settlement.¹⁰¹ Because the alleged wrongful conduct occurred prior to litigation, the claimant could not allege abuse of process; consequently the claimant was forced to make out a generalized claim of bad faith that ultimately was rejected by the court.¹⁰² This case dramatizes why abuse of process will not be an effective tool for addressing all forms of alleged bad faith by liability insurers. More importantly, the court clearly stated that the liability insurer was permitted to approach the claim and litigation as strategically as if it were the tortfeasor, working from the assumption that liability insurers are properly regarded as the adversary of the claimant:

In the instant case, defendant was entitled to rest on its right to defend against the claim in Virginia and delay settlement until the threat of suit appeared realistic. The adversary status of the parties precludes creation of a legal obligation to refrain from such a recognized technique of negotiating. The liability insurer of a tortfeasor, as the tortfeasor himself, may legally attempt to minimize the amount of a final settlement with an adversary by exploiting the geographical and economical difficulties which may confront the adverse claimant.¹⁰³

The court's message is unambiguous: liability insurers can defend as vigorously as any other party, even to the extent of taking advantage of the claimant's "economic difficulties."

Similarly, a recent federal district court opinion reaffirmed that insurers are free to act strategically in defense of claims made against their insureds,

99. 368 A.2d 1161 (Me. 1977).

100. *Id.* at 1163.

101. *Id.*

102. *Id.* at 1164. The court concluded that the "pre-trial negotiations, which may be conducted between a tort claimant and a defending insurance company are *adversary* in nature and, hence, will not give rise to a *duty* to bargain in good faith, as claimed by plaintiff." *Id.*

103. *Id.*

warning specifically against the potential for abuse of process suits to undermine the insurer's right to conduct a vigorous defense.¹⁰⁴ The claimant alleged that the insurer brought a declaratory judgment action challenging coverage, knowing that its insured would fail to appear and be defaulted, and solely for the purpose of exerting undue pressure on the claimant when the insurer suddenly withdrew from the case.¹⁰⁵ The court found that the insurer properly defended against contractual liability to its insured, and that there was no abuse of process even if the public policy embodied in the no-fault law would require the insurer to provide the statutorily mandated coverage notwithstanding valid contract defenses.¹⁰⁶ The court clearly articulated the insurer's right to act strategically in minimizing its exposure:

Absent a showing that Aetna used the declaratory action to accomplish an end not regularly or legally obtainable, liability will not lie. During the litigation that arose from the accident, all the actions Aetna took were intended to first escape coverage and liability. Once that was accomplished, Aetna paid for a lawyer who tried to defeat Tommy's claim against Jorge on its merits. Escaping coverage and trying to defeat Tommy were perfectly legitimate actions for Aetna, an insurance company, to take. To permit these actions to be the premise of liability expands the tort of abuse of process beyond recognition.

As this case shows, there can be no other rule. If every litigant could use his opponent's activities in litigation as the premise of a second action, litigation would never end because in every lawsuit there would be the seeds of a second lawsuit. Litigation would become like the Russian Doll in which there is a Russian Doll in which there is a Russian Doll *ad infinitum*.¹⁰⁷

And so, the court concluded that the insurer's actions were not tortious, even while noting that the strategic effort to disclaim coverage under the policy for its insured's liability might be overcome for reasons of public policy.¹⁰⁸

104. *Athridge v. Aetna Cas. & Sur. Co.*, 163 F. Supp. 2d 38 (D.D.C. 2001).

105. *Id.* at 54.

106. *Id.*

107. *Id.* at 54–55.

108. The court suggested that the claimant might re-plead the case as a direct action against the insurer for indemnification of the verdict, on the ground that public policy forbids the carrier from using an exclusion to void the statutory minimum policy coverage, although that

In addition to these cases in which courts have refused to find that liability insurers committed an abuse of process, courts have rejected attempts by claimants to hold liability insurers liable for a generalized tort of “malicious defense.” A Delaware trial court flatly rejected an attempt by a third-party to recover tort damages for malicious defense and entered summary judgment for the insurer, despite the insurer’s attempt to avoid liability under an exclusion by relying on witness statements that were inaccurate.¹⁰⁹ Noting that the “majority of courts have held that an insurer owes no duty to third parties to negotiate settlements in good faith” because the claimant and insurer are “adversaries,” the court concluded “as a matter of law that Hartford had no duty to deal with plaintiff in good faith, to settle her claim promptly or to refrain from ‘malicious defense’ of her claim, or to use reasonable care in the investigation and handling of plaintiff’s claim.”¹¹⁰

Similarly, the Delaware federal district court applied this reasoning in a case, *Rowlands v. Phico Insurance Company*,¹¹¹ in which the victim of medical malpractice sued the malpractice carrier. The claimant alleged that the insurer failed to notify the defendant doctor of the suit for the purposes of setting up a non-cooperation coverage defense when the doctor failed to show for trial, and then to cause the claimant to suffer emotional distress when the insurer announced on the eve of trial that it would be contesting coverage.¹¹² The court concluded that the well-established policy against recognizing liability for “malicious defense” when “a defendant adopts unfair or unreasonable litigation tactics in an effort to prejudice or harass an opponent”¹¹³ is particularly important in the insurance setting—given the adversarial relationship of the parties until such time as a verdict within

doctrine might not help the claimant because their own uninsured motorist coverage might fill the gap. *Id.* at 51–52. See *supra* note 30 for an explanation of this public policy argument. It is worth noting that the court found the claimant to be the dishonest and strategic party on these facts, which inevitably shaped its use of broad exculpatory language in describing the insurer’s rights. See *Athridge*, 163 F. Supp. 2d at 55 (describing the claimant’s factual allegations as being untrue and perhaps even dishonest, in light of privileged documents reviewed by the judge).

109. *Hostetter v. Hartford Ins. Co.*, 1992 WL 179423 (Del. Super. Ct. July 13, 1992).

110. *Id.* at *7–*8.

111. 2000 WL 1092134 (D. Del. July 7, 2000).

112. *Id.* at *1.

113. *Id.* at *2.

coverage occurs—since “any other result would lead to unending litigation.”¹¹⁴

These cases might best be explained by the hesitancy of courts to find that parties acted tortiously in defending themselves in civil litigation, and the presupposition that liability insurers can owe no duties to a claimant in light of the insurer’s fiduciary responsibility to the insured tortfeasor. However, these attitudes are at odds with the long-recognized and strong public policy favoring compensation for injuries, and the relatively recent move by legislatures to enact provisions requiring insurers to deal with claimants fairly and in good faith. Moreover, as some courts begin to clarify and streamline the elements of abuse of process, it should become clear that this tort encompasses at least some of the bad faith litigation tactics employed by insurers. Recent cases provided some indication that abuse of process might yet prove to be a viable cause of action for third-party claimants.

In *Vallance v. Brewbaker*,¹¹⁵ the Michigan Court of Appeals rejected the claimant’s allegation that the insurer abused the discovery process by securing an ex parte order extending the time for discovery of medical information, holding that the insurer was motivated solely by its legitimate need to obtain this information in order to defend its insured.¹¹⁶ However, the court acknowledged that abuse of process might lie

where the defendant has availed himself of a proper legal procedure for a purpose collateral to the intended use of that procedure, e.g., where the defendant utilizes discovery in a manner consistent with the rules of procedure, but for the improper purpose of imposing an added burden and expense on the opposing party in an effort to conclude the litigation on favorable terms.¹¹⁷

114. *Id.* at *4.

115. *Vallance v. Brewbaker*, 411 N.W.2d 808, 810–11 (Mich. Ct. App. 1987).

116. *Id.* at 810 (finding that there “is no hint of any purpose other than the need for discovery underlying defendants’ efforts to obtain the ex parte order in the instant case.”). *See also* *Blue Goose Growers, Inc. v. Yuma Groves, Inc.*, 641 F.2d 695, 697 (9th Cir. 1981) (The discovery request of certain business documents “was simply a proper request seeking information relevant to Yuma’s claims in the underlying suit. This formal use of the process is not sufficient to support an abuse of process claim.”).

117. *Id.* at 810. However, the court reiterated the need for a “corroborating act,” which precludes liability in situations in which the defendant achieves its illegitimate ulterior motive by using legal process for its intended purpose. Thus, the court concluded that an attempt to obtain an ex parte discovery order for relevant medical evidence in a personal injury case

This recognition opens the possibility of applying abuse of process to the insurance defense setting, even if the facts alleged in *Vallance* were insufficient. Similarly, in the analogous setting of first-party uninsured motorist coverage, a Connecticut trial court held that an insurer can be liable for unfair trade practices for refusing to make any payment of benefits in certain types of cases regardless of the individual merits of the claim, since this conduct violates important public policies in a manner that amounts to an abuse of process.¹¹⁸

cannot be an abuse of process, since the process was used for its intended and legitimate purpose even if accompanied by an ulterior motive. *Id.*

In a similar vein, the California Court of Appeal in *Thornton v. Rhoden*, 245 Cal. App. 2d 80 (1966), assumed that the plaintiff stated a claim for abuse of process by alleging that the defendant noticed a deposition for the purpose of eliciting defamatory statements that could then be published by the press without fear of liability due to the litigation privilege, rather than for the purpose of discovering admissible evidence. The court did not decide this issue, however, because it determined that any claim for abuse of process was barred by the applicable one-year statute of limitations. *Id.* (concluding that it "is therefore academic whether the taking of the deposition and the transcribing thereof can be an abuse of process.").

118. In *Smith v. Allstate Indem. Co.*, No. CV 9803541375, 1999 WL 1212440, at *1 (Conn. Super. Ct. Nov. 30, 1999), the plaintiff-insured alleged that Allstate refused to deal fairly with his uninsured motorist claim pursuant to a company policy for dealing with "minimum damage/impact accidents." The court found that the insurer violated the public policy enunciated by the unfair trade practice statutes when it "offhandedly" denied its insured's claim pursuant to a generalized business practice rather than based on the merits of the claim. *Id.* at *3. The court specifically included third-party claimants in its discussion of the public policy issue:

The defendant's enforcement of a policy of no settlement in minimum impact cases forces insureds, *claimants and accident victims* to file suit to be compensated for any resulting losses sustained in such accidents. Passing this risk is an unconscionable advantage for the insurance company. This is because it received payment to undertake precisely such a risk. Therefore, in the absence of prior notice to its insured, it is contrary to public policy for an insurance company to forego the very nature of its existence and oppressively use its superior bargaining position to hold out on settlement or claims requests and force *the other parties* to absorb the loss or file suit and expend more just to obtain what they bargained for. . . .

Further, Connecticut and all states have a public interest in providing compensation for accident victims and preventing the wholesale liquidation of familial assets which must be sold in the event of an exigency arising from a specified loss or injury. The reasonable expectations of the insureds, and in some instances, *third-party beneficiaries*, should be protected. This is especially true when the rights asserted by the claimant are in accord with the applicable insurance contract, as in the instant case. . . . [I]t is against

Of greatest significance, a few cases have accepted the possibility that liability insurers can be found liable for abuse of process. A trial court recently held an insurer liable for abuse of process on account of its programmatic unfair settlement and litigation practices. In *Crackel v. Allstate Insurance Co.*,¹¹⁹ an Arizona jury awarded a third-party claimant \$15,000 in compensatory damages for the emotional distress caused by Allstate's hardball tactics in refusing to pay the emergency room charges for a minor-injury claim pursuant to a corporate policy to make no payment in minor injury cases when claimants are represented by counsel.¹²⁰ If this verdict is appealed and survives,¹²¹ it will be an important precedent establishing the viability of abuse of process as a means of attacking an express corporate policy to stonewall claimants and pursue a "scorched earth litigation strategy" in certain types of cases, rather than evaluating claims on their individual merits. In a previous suit against Allstate for employing a similar programmatic strategy, the Arizona Court of Appeals had affirmed the dismissal of the allegations that Allstate had breached a general obligation to deal with the claimant in good

public policy for an insurance company to allow a claimant, whether they be an insured or other person intended to receive benefits under the policy, to rely to their detriment on the representation that since they paid for coverage they will get coverage when a claim is made, when in fact they may get something less than they bargained for [as a result of a business policy].

Id. at *4-*6 (emphasis added). The court then noted that the insured could have vindicated these same public policy interests with the tort of abuse of process, although the plaintiff had not pleaded the cause of action:

The legal system was not designed to be used as a tool by insurers to delay or deny payment of all claims involving minimum property damage nor was it designed to help insurance companies avoid assuming liability when they are required by contract to do so. Although the plaintiff has not alleged such a tort violation, the defendant's practices amount to a violation of this policy. Thus such conduct is contrary to public policy and therefore the defendant has provided the plaintiff with alternative grounds for [an unfair trade practices] claim.

Id. at *7.

119. No. C-329946 (Ariz. Super. Ct. 2001).

120. See Rebecca Porter, *Jury Punishes Allstate for "Scorched-Earth" Tactics*, TRIAL, Dec. 2001, at 70; David Hechler, *Allstate Found Liable for Abuse of Process*, NAT'L. L. J., Oct. 22, 2001, at A15.

121. Allstate claimed victory after trial, since the claimant had sought \$500,000 damages. Hechler, *supra* note 120. The claimant's attorney stated that he might appeal the verdict on the ground that adverse pre-trial rulings had led to an inadequate monetary verdict, indicating his desire to have the unprecedented verdict "in the record books where other attorneys can review it and see that there's a remedy available." *Id.*

faith, and did not reach the question of whether the insurer could be liable for abuse of process when it refused to pay for soft-tissue injuries in cases involving minor property damage.¹²² The recent jury verdict represents the first successful claim of abuse of process against an insurer that bases claims payments on general criteria rather than the merits of the claim. This could prove to be significant, since insurers have begun to turn to such profit-maximizing devices with the belief that they are insulated from liability for the additional injuries that these strategies might inflict on individual third-party claimants.¹²³

Perhaps even more significant, in *Givens v. Mullikin*,¹²⁴ the Tennessee Supreme Court recently held that a claimant may sue a liability insurer for abuses of process committed by defense counsel “if the attorney’s tortious actions were directed, commanded, or knowingly authorized by the insurer.”¹²⁵ The court found that the claimant had stated a cause of action for abuse of process when she alleged that the counsel retained by Allstate had used extensive discovery procedures “to harass her, to cause her to suffer unnecessary expense, and to ‘weaken [her] resolve to pursue the suit to the extent that she [would] abandon it.’”¹²⁶ In particular, the claimant alleged that Allstate fired a responsible attorney and retained a new firm that immediately began abusing discovery procedures by filing hundreds of interrogatories seeking information already in its possession, deposing her a second time with intense questioning about her medical history and sexual life, and issuing more than seventy subpoenas to records custodians seeking complete medical files on the claimant.¹²⁷ Although Allstate argued that defense counsel is hired

122. *Leal v. Allstate Ins. Co.*, 17 P.3d 95 (Ariz. Ct. App. 2000), *review denied*, No. CV-01-0023-PR (Ariz. May 23, 2001).

123. These same claim settlement practices were at issue in *Smith*, 1999 WL 1212440, and *Leal* and *Smith* note that the evidence establishes that Allstate had implemented these practices on a nationwide basis.

124. *Givens v. Mullikin*, 75 S.W.3d 383 (Tenn. 2002).

125. *Id.* at 390.

126. *Id.* at 391.

127. *Id.* at 391–92. For example, the court described the absurdly overbroad production requests submitted to third parties in connection with the claimant’s suit for injuries suffered in an automobile accident as follows:

Further, the Richardson Firm is alleged to have issued more than seventy discovery subpoenas to various records custodians. Despite knowing that many of these records possessed no relevance to the issues in the plaintiff’s suit, the Richardson Firm is alleged to have sent subpoenas to (1) “every custodian for every healthcare professional who was suspected . . .

as an independent contractor that owes fiduciary duties to the insured, the court found that Allstate could be vicariously liable if it exercised control over defense counsel by directing or authorizing the tortious conduct.¹²⁸

to have rendered treatment to the plaintiff at any time during her life,” including her psychologist, her obstetrician/gynecologist, and others; (2) every “hospital in Memphis and Chattanooga (where the plaintiff once lived), even though in many instances[,] the Richardson Firm had no reason to believe that the Plaintiff had received treatment there;” (3) every employer for whom the plaintiff has ever worked; (4) every automobile repair agency to which the plaintiff’s automobile has ever been taken; and (5) every insurance company that has written a policy of insurance for the plaintiff.

Id.

128. The court looked to the reality of the underlying relationships rather than accepting the ethical and professional ideal that defense counsel maintain its independence in service to its client:

Consequently, although an insurer clearly lacks the *right* to control an attorney retained to defend an insured, we simply cannot ignore the practical reality that the insurer may seek to exercise *actual* control over its retained attorneys in this context. . . . To be clear, our recognition of the control exercised by insurers in this context does not condone this practice, especially when it works to favor the interests of the insurer over that of the insured; rather, we acknowledge this aspect of the relationship only because it would be imprudent for this Court to hold that attorneys are independent contractors vis-à-vis insurers, but then to ignore the practical realities of that relationship when it causes injury.

Id. at 395 (emphasis in original). The court emphasized that the plaintiff must plead and prove that the insurer in fact had insinuated itself into the attorney-client relationship by directing, commanding or knowingly authorizing the conduct that constitutes an abuse of process. *Cf.* Food Lion, Inc. v. United Food & Commercial Workers Int’l. Union, 567 S.E.2d 251, 252 n.1 (S.C. Ct. App. 2002) (holding that union may be liable for abuse of process even though it was not a party to the litigation if the plaintiff proves that the union knowingly participated, aided, abetted or ratified the abuse, and finding that plaintiff satisfied this test by alleging that the union directed and funded the underlying litigation). The *Givens* court emphasized the factual basis for its decision, opining that:

cases in which an insurer may be held liable under an agency theory will be rare indeed. We do not hold today that an insurer may be held vicariously liable for the acts or omissions of its hired attorney based merely upon the existence of the employment relationship alone. Nor do we hold that an insurer may be held liable for any acts or omissions resulting solely from the exercise of that attorney’s independent professional judgment, and in all cases, a plaintiff must show that the attorney’s tortious actions were taken partly at the insurer’s direction or with its knowing authorization.

Givens, 75 S.W.3d at 395–96. Following this same logic, the court held that the insured will be vicariously liable for the actions of defense counsel only if the insured exercised actual control,

The court carefully explained the basis for liability, working from the sparse precedents involving the abusive use of discovery procedures. First, the court found that using civil process strategically for the primary purpose of harassing and beating down one's opponent is an abuse of process, rejecting the supposition that defendants are free to defend themselves in any manner they choose with the following analysis:

In its most basic sense, therefore, an action for abuse of process is intended to prevent parties from using litigation to pursue objectives other than those claimed in the suit, such as using a court's process as a weapon "to compel [another party] to pay a different debt or to take some action or refrain from it." It is the use of process to obtain this "collateral goal"—a result that the process itself was not intended to obtain—that is the very heart of this tort. The essential question to be answered concerning the present claim, therefore, is whether the use of process to discourage the other party from continuing the litigation is a sufficiently "collateral goal" to give rise to tort liability.

Ordinarily, the lawful use of a court's process does not give rise to an abuse of process claim, and no claim of abuse will be heard if process is used for its lawful purpose, even though it is accompanied with an incidental spiteful motive or awareness that the use of process will result in increased burdens and expenses to the other party. However, a different case is presented when the *primary* purpose of using the court's process is for spite or other ulterior motive.¹²⁹

The court then discussed the opinions in *Nienstedt*,¹³⁰ *Farmingdale*¹³¹ and *Vallance*¹³² and developed a principled articulation of the application of abuse

noting that in the "unique" context of insurance defense litigation the client has little "practical authority to control" the conduct of defense counsel. *Id.* at 396–98.

In a companion case, *Trau-Med of America, Inc. v. Allstate Insurance Co.*, 71 S.W.3d 691 (Tenn. 2002), the court held that an insurer could be held vicariously liable under the same standard of liability when defense counsel tortiously interferes with the prospective business relationships between tort victims and a third-party medical center.

129. *Givens*, 75 S.W.3d at 400–01 (internal citations omitted).

130. *Nienstedt v. Wietzel*, 651 P.2d 876 (Ariz. 1982), analyzed *supra* notes 82–86 and accompanying text.

131. *Bd. of Educ. of Farmingdale Free Union Sch. Dist. v. Farmingdale Classroom Teachers Ass'n. Inc.*, 343 N.E.2d 278 (N.Y. 1975), analyzed *supra* notes 91–98 and accompanying text.

of process to situations involving discovery abuse by insurance defense counsel:

Broadly speaking, the aim of the civil discovery process is “to bring out the facts prior to trial so the parties will be better equipped to decide what is actually at issue,” . . . not to wear the mettle of the opposing party to reach a favorable termination of the cause unrelated to its merits. When the civil discovery procedures are used with the specific and malicious intent to weaken the resolve of the other party, then one may rightfully claim that the procedures are being used “to accomplish some end which is without the regular purview of the process.” Accordingly, we adopt the test first announced in *Nienstedt* and hold that abuse of process in the civil discovery context may lie when (1) the party who employs the process of a court specifically and *primarily* intends to increase the burden and expense of litigation to the other side; and (2) the use of that process cannot otherwise be said to be for the “legitimate or reasonably justifiable purposes of advancing [the party’s] interests in the ongoing litigation.”¹³³

Under this standard, the court found that the claimant’s allegations survived dismissal, and the case was remanded for further proceedings.¹³⁴

Although it is far too soon to predict with any accuracy, the *Givens* case might represent the first successful salvo by third-party claimants seeking to use the tort of abuse of process to police against defensive tactics by liability insurers designed to pressure injured parties to accept inadequate settlements. Courts have too long assumed that liability insurers must be insulated from any manner of liability to third-party claimants if they are to fulfill their fiduciary responsibilities to defend their insureds vigorously. The *Givens* case rejects such misplaced reasoning at the level of tort law doctrine, and does not even draw on the strong public policy arguments that favor holding liability insurers accountable when they seek to strong-arm inadequate settlements with injured parties. As jurisdictions begin to streamline abuse of process doctrine and to acknowledge and enforce the clearly articulated public policy favoring prompt and fair settlement of claims made by injured third parties,

132. *Vallance v. Brewbaker*, 411 N.W.2d 808 (Mich. Ct. App. 1987), analyzed *supra* notes 115–17 and accompanying text.

133. *Givens*, 75 S.W.3d at 402.

134. *Id.* at 413.

there is every reason to believe that the analysis in *Givens* will be accepted as an uncontroversial application of basic tort principles.

CONCLUSION

The tort of abuse of process might prove to be an important means of addressing some forms of bad faith behavior by liability insurers, even if it is not an appropriate vehicle for combating all forms of insurer misconduct toward third-party claimants. A claimant who sues a liability insurer for abuse of process may face several significant obstacles, including the traditional requirement of an "additional act" that corroborates the ulterior motive, the traditional hesitancy by courts to impose liability for the manner in which parties defend themselves, and the "shadow effect" of the general common law rule that liability insurers owe no contract or tort duties to third party claimants since their relationship is adversarial. These issues are made all the more difficult by the fact that the tort of abuse of process is "obscure," "rarely brought to the attention of courts," and "not clearly defined."¹³⁵ However, recent cases suggest that these issues can and should be resolved in a manner that does not preclude holding insurers liable in appropriate cases to third-party claimants for abuse of process.

The argument in favor of imposing liability can be made in even stronger terms. In light of the strong public policy that a liability insurer should promptly investigate and reasonably settle claims made by third-parties against its insured, it would follow that the behavior of liability insurers in insurance defense litigation should be subject to close scrutiny. Although a corporate defendant might be given relatively free reign to use the litigation process to postpone and minimize its liability, liability insurers have no basis for claiming that they can use legal process to achieve the same goals. Courts too often assume that it is a permissible for a defendant to use legal process to pursue all relevant motion and discovery practice with the goal of litigating the case aggressively and forcing the other party to marshal its evidence and meet its burden of proof. This assumption is revealed most clearly in the majority of jurisdictions that have refused to recognize a cause of action for "malicious defense." However misguided this assumption may be as a general matter, it plainly is not justified when an insurer is controlling the defense of the action. If liability and damages are reasonably certain, and the factual basis from which these conclusions can be drawn is reasonably clear, courts

135. *Bd. of Educ. of Farmingdale*, 343 N.E.2d at 280 (citations omitted).

should find that extensive use of motion practice and discovery by insurers simply for the purpose of putting the third-party claimant to her proof would be a tortious use of process. Put differently, courts should conclude that liability insurers cannot use legal process simply for the purpose of mounting a vigorous defense, but instead must show that they are seeking to discover relevant information or are filing motions for the purpose of fairly adjudicating the case. Unlike other defendants, liability insurers controlling litigation should not be permitted to regard litigation as a game in which the strategy is to avoid paying the other party for as long as possible by invoking all the “moves” of civil litigation.¹³⁶

136. I recognize that distinguishing insurance carriers from other defendants, and particularly self-insured corporate defendants, requires more detailed justification. If a self-insured corporation uses litigation as a weapon to avoid its liabilities to injured parties, this seemingly would implicate the same public policy concerns as an insurance carrier acting in the same manner. I thank John Duffy, Eric Kades and Alan Meese for pressing this point when I presented a related paper at a William and Mary faculty colloquium in November 2002, and forcing me to begin thinking about this question in greater depth. Because this issue is too broad to address properly in an article focusing on the application of abuse of process, in this note I provide only a brief overview of the lines of analysis that might justify the claim that insurance carriers should be held to a higher standard of litigation behavior than other defendants. I expect to return to this more general question in a future article.

I begin by noting that it is not critical to my argument that insurance carriers be held to a higher standard than all other defendants. If my argument for holding insurance carriers to a higher standard makes sense for some self-insured defendants as well, I am not averse to extending the scope of the heightened duty. For present purposes, I believe that I am justified in arguing that liability insurers should be held to a higher standard of behavior than the traditional standard, while remaining agnostic as to whether other, (arguably) similarly-situated, defendants also should be held to this higher standard.

First, it is appropriate to distinguish insurers from other corporate entities because the very nature of the business of insurance implicates the public policy favoring compensation of injured parties: liability insurance is designed to fulfill precisely this function. In contrast, a self-insured corporation engaged in other profit-making ventures regards the payment of liability claims as a cost of pursuing its primary corporate functions. In other words, the term “self-insured” is really another way of saying that a corporation has chosen not to engage a specially regulated business to provide it with insurance, and instead is accepting risks as part of the cost of engaging in its primary business.

Second, insurance is a highly regulated industry because of the nature of its business. Once a covered event has taken place, it is impossible for an insured or third-party claimant to protect themselves by securing a new policy of insurance. Moreover, liability insurance carriers are particularly expert in sophisticated claims assessment and litigation and are constant repeat players in this realm. The purpose of the unfair claims practices act is self-explanatory when considered against this backdrop: liability insurers are in a position where they have the power to pursue their own interests at the expense of both their insured and third-party

claimants, given their expertise and their ability to spread risks over thousands of cases each year. An injured party may not want to pursue payment from a liability insurer through trial and appeal when the risk of losing the case and receiving no payment could be a devastating event for the claimant. On the other hand, a liability carrier might choose to engage in behavior that occasionally will result in a large tort verdict but that generally will prove to be a profitable business strategy by exacting thousands of below-market settlements. Pooling risks and spreading the exposure is the very nature of the business of insurance, and so states have deemed it appropriate to counteract these potentially adverse effects of the nature of insurance.

Third, beyond the specific articulations of public policy in statutes and regulations, the judiciary has always regarded the business of insurance to be distinct from ordinary commercial activity. Courts read insurance policies differently from other commercial contracts, with the express purpose of furthering public policy. There may be no pristine or logically compelling reason for this practice, but accepting the reality of time-honored practices is a legitimate basis for drawing distinctions. To put the matter differently, in response to critics who challenge whether there is any rational justification for treating insurance carriers differently from other businesses, I would suggest that the burden of proof rests on those who would overturn clear distinctions in legal practice and traditions. Against arguments that exposing insurance carriers to tort damages will result in overpayments and other uneconomic behavior, I would respond that closer analysis might reveal that longstanding practices in this area effectively internalize the cost of strategic behavior by liability insurers. This argument can be articulated more broadly in terms of the unique role of liability insurance in effectuating the compensation function of modern tort law, resting on the idea that permitting liability insurers to spend resources to avoid paying claims on the basis solely of their own economic advantage seriously undermines a more general economic function of tort law. In other words, I would insist that the critic must bear the burden of justifying why the law suddenly should begin to treat insurance carriers as if they are just like any other commercial enterprise despite clear and uniform practices to the contrary.

Finally, and perhaps most important, there are conceptual and historical explanations for the different treatment of insurance carriers by regulators and courts. An attempt to treat liability insurers like any other commercial enterprise moves radically away from the genesis and history of insurance in this country. Insurance is a social and communal undertaking, rooted in the friendly societies and developed through the mutual insurance corporation. The traditional reluctance to permit contracts of insurance was overcome only on the basis of this social understanding of insurance, an understanding that continues to be reflected in regulations and court decisions. My argument for holding liability insurers to a higher standard draws on this continuing legacy, not as a bald normative claim requiring justification about the way things ought to be, but as a descriptive claim about the essential nature of insurance as it in fact has developed. This history supports subsidiary claims about the reasonable expectations of members of society toward insurance carriers, as well as the reasonable expectations of insurance carriers that they will not be permitted to pursue their economic self-interest when they adjust and pay liability claims. These principles have been clouded in the third-party insurance setting not because courts believe that insurance carriers have no social obligations, but because they wrongly conclude that the paramount obligation of insurers to their insureds precludes any obligations to third-party claimants. The genesis and history of the business of insurance would lead to a more pointed challenge to those who would eliminate any distinction

Even if courts choose not to hold insurers to a higher standard of litigation behavior for reasons of public policy, liability insurers should be held accountable under the generally applicable requirements of the tort of abuse of process. The paradigm case of insurer liability for abuse of process would involve situations in which the insurer: (1) pursues extensive and time-consuming discovery that subjects the claimant to burdensome and invasive requests for information that is only pretextually related to the lawsuit and is actually designed to wear down the claimant, (2) utilizes pleading and motion practice to extend the proceeding for years for the purpose of putting financial and emotional pressure on the claimant to settle for a reduced amount, or (3) refuses to admit facts relating to liability or damages despite having no basis to do so. In these situations, the claimant would allege that the primary purpose for this legal process was not to litigate the case but rather to impose financial and emotional burdens on the claimant. In this regard, the *Givens*¹³⁷ case would be an important precedent, and the *Linscott*¹³⁸ case would be distinguished as an older case that adopted the discredited view that liability insurers are as free as any defendant to use civil process strategically for the sole purpose of avoiding payment on a legitimate claim.

Holding liability insurers accountable for abuse of process will raise a number of questions. First, some might question whether a non-party should be subjected to tort liability for the manner in which process is used during the course of the litigation. However, it is clear that opposing counsel, also a non-party, may be held directly liable for an abuse of process,¹³⁹ and the *Givens* case provides a compelling argument that liability insurers should be held vicariously liable for the actions of the defense counsel that they have retained to represent the insured to the extent that the insurers direct, command or authorize the conduct in question.¹⁴⁰ Liability insurers clearly play the primary role in decisions about defending actions brought against their insureds, and it would be purely a formalist abstraction to insulate them from

between the business of insurance and ordinary commercial transactions, revealing that by virtue of administrative and judicial regulation, insurance is a quasi-public enterprise that is permitted to be a profit-maximizing entity only in certain respects (e.g., developing a better investment strategy, increasing workforce productivity, and creating superior marketing approaches) and not others (e.g., paying claims and developing policy terms).

137. See *supra* notes 124–29 and accompanying text.

138. See *supra* notes 99–103 and accompanying text.

139. See *Giles v. Hill Lewis Marce*, 988 P.2d 143, 147 (Ariz. 1999) (citing jurisdictions that permit a cause of action for abuse of process against opposing counsel).

140. See *supra* note 128 and accompanying text.

liability for injuries caused by their exercise of this power. In some cases, it might even be appropriate to find the liability insurer directly liable rather than vicariously liable. For example, if the insurer lies to defense counsel about the results of its investigation and directs counsel to pursue extensive discovery to uncover these "facts," the attorney might use validly issued process for the legitimate purpose of such process, only to find later that he or she has been used unwittingly by the insurer to pursue the collateral goal of increasing the financial and emotional pressures faced by the claimant.¹⁴¹

Another important question is whether the claimant must prevail in the underlying litigation as a prerequisite to bringing an action for abuse of process against an insurer. The case law clearly provides that there is no such requirement to state a claim for abuse of process, noting that this is one of the principal differences between malicious prosecution (in which the party must prevail in the underlying litigation in order to establish that it was commenced without probable cause) and abuse of process.¹⁴² This rule makes perfect sense. The gravamen of the action is not that the position adopted by the party in the underlying litigation lacked merit, but rather the harm caused by utilizing process beyond its legitimate purposes. Consequently, a claimant might prevail against a liability insurer for abuse of process, even if the claimant proceeds to verdict in her suit against the insured and loses the case. The fact that a claimant brought a losing case should not free the insurer to abuse civil process and cause that claimant harm during the litigation. It follows that the claimant technically should be permitted to counterclaim for abuse of process by defense counsel and file a third party complaint against the liability insurer, although courts may determine that the abuse of process claims against opposing counsel are better tried in a separate action to avoid

141. I would expect such situations to be rare, since defense counsel would have a duty to ensure that its actions were appropriate and could not delegate this professional obligation to the liability insurer. However, it would appear to be conceptually possible that a liability insurer might be the party directly liable for abuse of process.

142. See generally LAW OF TORTS, *supra* note 48, at 4:85 (cases cited in n.3). For more recent cases, see *Greenberg v. Wolfberg*, No. 92-6023, 1995 WL 307582, at *4 (10th Cir. 1995) (The Oklahoma Supreme Court responded to a certified question by stating that a plaintiff "is not required to prove . . . that he/she prevailed in that proceeding. Neither is it necessary that the action, in which the abuse is alleged to have occurred, be concluded."); *Berman v. Karvounis*, 518 A.2d 726, 727 (Md. 1987); *Teefey v. Cleaves*, 73 S.W.3d 813, 817-18 (Mo. Ct. App. 2002) (contrasting requirements of malicious prosecution and abuse of process); *Read v. City of Fairview Park*, 764 N.E.2d 1079, 1081 (Ohio Ct. App. 2001) ("[P]roof of the successful termination of the underlying criminal case is an essential element of malicious prosecution; however, this is not true for presentation of a claim of abuse of process.").

confusion.¹⁴³ Because abuse of process is not tied to the resolution of the underlying litigation, it also would follow that the statute of limitations would begin to run at the time the process is perverted to an illegitimate purpose.¹⁴⁴ Thus, in many cases the claimant might be *required* to bring suit for abuse of process before the underlying litigation concludes, if the illegitimate purpose of prolonging the underlying litigation has succeeded.

Additionally, courts would need to clarify the relationship between sanctions available under rules of civil procedure and the inherent power of the court, and the availability of damages for abuse of process. At first glance it may appear that the claimant should allege that the insurer is abusing discovery or motion practice immediately in the form of a motion to the trial judge for sanctions and a protective order. If the claimant pursues sanctions and obtains a monetary recovery, she certainly will be precluded from receiving a double recovery for the same wrongful behavior. However, sanctions serve a different function than tort law. As one court noted recently in response to a claim that the injured party may only pursue judicial sanctions for abusive litigation tactics: "An abuse of process action is not designed to compel compliance with court procedures or to deter future misconduct. Rather the tort is intended to compensate a party for harm resulting from another's misuse of the legal system."¹⁴⁵ Thus, the availability of judicial sanctions for alleged wrongdoing does not preempt the tort cause of action for

143. See, e.g., *Devaney v. Thriftway Marketing Corp.*, 953 P.2d 277, 286 (N.M. 1997) (holding that because "we do not recognize favorable termination as an element of a cause of action for malicious abuse of process, we hold that such a claim may be raised by counterclaim," but imposing a "clear and convincing" evidentiary burden on plaintiffs who file claims as counterclaims); *Badger Cab Co. v. Soule*, 492 N.W.2d 375, 378–79 (Wis. Ct. App. 1992) (holding as a matter of law that a party may not join opposing counsel in a counterclaim alleging abuse of process in the instant litigation).

144. See *Read*, 764 N.E.2d, at 1082 (finding that claim for abuse of process was time-barred by two-year statute of limitations pertaining to actions against political subdivisions when plaintiff brought suit more than two years after the alleged abuse of process).

145. *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 567 S.E.2d 251, 255 n.5 (S.C. Ct. App. 2002). The dissent agreed with this assessment:

While sanctions under the FRCP are intended to deter abusive conduct, tort law is intended, at least in large part, to compensate the victims of abuse. . . . The tort is not aimed at procedural control of lawsuits, as the rules are, but at remedying abuses. The goal and focus of each are very different. Thus, I conclude that this abuse of process tort action is not preempted by federal law.

Id. at 259–60 (Stilwell, J., dissenting).

abuse of process.¹⁴⁶ This rule can be justified on a variety of conceptual and practical grounds that go beyond the different primary purposes of these avenues of relief. To name but a few examples: it is likely that judicial sanctions will be imposed only in egregious cases, a party might choose not to seek sanctions for each instance of abuse for fear of alienating the presiding judge, the ulterior motive and perversion of facially legitimate process might become clear only after a motion for sanctions is no longer timely, and the sanctions awarded by judges are unlikely to compensate the claimant fully for her injuries, particularly with regard to emotional distress and consequential losses.

Finally, there might be reluctance to permit a lawsuit founded on the conduct in a previous lawsuit for fear that the case would never come to conclusion. Critics might ask, "How can insurers settle a case with finality if immediately upon payment of the settlement proceeds the claimant can continue the claim under the guise of a suit for abuse of process?" However, this challenge would be premised on a fundamental misunderstanding of the nature of the action. If the claimant reaches a settlement agreement with an insurer regarding the liability of the insured wrongdoer and an appropriate payment of damages, that settlement will be final as to those parties on those questions. The claimant's allegations of abuse of process target entirely different conduct that causes different injuries. Thus, if a third-party claimant executes a general release in favor of the other party to the litigation, that release will be fully effective and enforceable, but it will not free opposing counsel from liability for his tortious conduct during the litigation.¹⁴⁷ If a claimant alleges that she was compelled by an insurer's abuse of process to settle for an inadequate recovery in the underlying litigation, she may seek as damages the amounts that she otherwise would have been able to obtain in the underlying litigation. But in this case the claimant is not reopening the underlying litigation; instead, she is using the inadequate settlement as a factual referent for the measure of the losses caused by the insurer's independent tortious behavior. This situation parallels the damages measure for legal malpractice, where a client's later claim that his attorney's

146. *Fumo v. Gallas*, No. CIV.A.00-CV-4774, 2001 WL 115460, at *3 (E.D. Pa. Feb. 6, 2001) (Rule 11 does not create a federal common law tort of wrongful use of civil process that preempts state law claims for abuse of process). *Cf. McShares, Inc. v. Barry*, 970 P.2d 1005, 1013 (Kan. 1998) (discussing the differences between Rule 11 sanctions and tort liability for malicious prosecution).

147. *See Van Blaricom v. Kronenberg*, 50 P.3d 266, 268–69 (Wash. Ct. App. 2002).

malpractice caused him to lose a case is not regarded as re-opening or prolonging the initial litigation, even though the attorney's liability is measured in part by the damages that the client should have received in the underlying litigation.¹⁴⁸

To recapitulate the foregoing argument: courts should permit third-party claimants to recover damages for abuse of process from a liability insurer if the claimant can prove that the insurer used civil process not for its intended purpose but rather to inflict financial and emotional costs on her in an effort to coerce her to accept an inadequate settlement. The "proper purpose" of the process in question should be determined with reference to the strong public policy articulated by the legislature and courts regarding the insurer's obligation to act promptly, fairly and reasonably in handling claims. The claimant could bring this action prior to the conclusion of the underlying litigation, and regardless of whether the claimant prevails in that action. A court's refusal to impose sanctions during the course of the underlying litigation for the behavior in question might be relevant evidence, but it would not be determinative as to tort liability. And finally, the claimant's damages would include any difference between the settlement amount and the amount that she would have obtained in the litigation if the insurer had not acted tortiously, and also any consequential losses (financial or emotional) proximately resulting from the tortious behavior. Admittedly, the doctrinal landscape generally remains inhospitable to my argument, but I have attempted to show that I am advocating nothing more than a straightforward application of tort doctrine in a manner that reinforces established public policy. If courts adopted this application of the tort of abuse of process, they would go a long way toward ensuring that when injured persons learn that the wrongdoer has insurance, they can safely assume that this is good news after all.

148. For the elemental proposition that the proper measure of damages in a legal malpractice case is the amount of damages that would have been collected but for the wrongful act or omission of the attorney, see, e.g., *Two Thirty Nine Joint Venture v. Joe*, 60 S.W.3d 896, 910 (Tex. Ct. App. 2001). For the mirror-image doctrinal rule that a client is entitled to recovery of the entire verdict as damages when she suffers a verdict she would have avoided in the absence of her attorney's malpractice, see *Scognamillo v. Olsen*, 795 P.2d 1357, 1361 (Colo. Ct. App. 1990).