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# Rogers v. Robson: Increased Malpractice Liability for Insurance Defense Counsel, 14 J. Marshall L. Rev. 589 (1981)

Martha Bruns Weiss

# *ROGERS v. ROBSON*:* INCREASED MALPRACTICE LIABILITY FOR INSURANCE DEFENSE COUNSEL

The Biblical maxim that "no man can serve two masters"[1] does not necessarily control the frequently occurring ethical dilemma encountered by the insurance defense attorney—that of representing both the insurance company and the insured.[2] In today's society, a majority of the population enters into insurance contracts seeking indemnification from possible liability arising out of various types of lawsuits.[3] The typical liability insurance contract includes a provision by which the insurance company is obligated to hire and pay a defense attorney to represent the insured[4] in matters of claims arising under the policy,[5] even if the claims alleged are groundless, false or fraudulent.[6] Generally the duty to defend gives the insurer the

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* 81 Ill. 2d 201, 407 N.E.2d 47 (1980).

1. *Matthew* 6:24.

2. G. HAZARD, ETHICS IN THE PRACTICE OF LAW 34-35 (1978). *See also* R. MALLEN & V. LEVIT, LEGAL MALPRACTICE 355 (1977 & Supp. 1980) [hereinafter cited as MALLEN].

3. In 1979, over thirty billion dollars worth of liability insurance was written in the United States. A. M. BEST CO., BEST'S AGGREGATES AND AVERAGES — PROPERTY AND CASUALTY 6 (41st annual ed. 1980). In Illinois alone, this figure came to over two billion dollars for the same period. A. M. BEST CO., EXECUTIVE DATA SERVICE, SERIES B (1980 ed.).

4. "Liability insurance policies generally contain a standardized provision that requires the insurer to defend the insured against all suits alleging bodily injury or property damage covered by the terms of the policy. . . ." Comment, *Liability Insurer's Duty to Defend:* American Policyholders' Ins. Co. v. Cumberland Cold Storage Co., 30 ME. L. REV. 295 (1979). For a general discussion of the insurer's duty to defend, see 7C J. APPELMAN, INSURANCE LAW AND PRACTICE § 4682 (1979); 14 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 51:32 (2d ed. 1965); Note, *Liability Insurance Policy Defenses and the Duty to Defend*, 68 HARV. L. REV. 1436 (1955).

5. The obligation of a liability insurer under a policy provision requiring it to defend an action brought against the insured by a third party is to be determined by the allegations of the complaint or petition in such action, and it is generally held that an insurer is under a duty to defend a suit against the insured where the petition or complaint in such suit alleges facts within the coverage of the policy.

14 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 51:40 (2d ed. 1965). *See, e.g.*, Sheppard, Morgan & Schwaab, Inc. v. United States Fidelity & Guar. Co., 44 Ill. App. 3d 481, 358 N.E.2d 305 (1976) (insurer has duty to defend when complaint has been filed against insured setting forth allegations sufficient to bring case either within, or potentially within, policy coverage).

6. "In addition, in Illinois the [insurer's] duty [to defend] is not an-

right to control the litigation,[7] as well as the power to negotiate settlements.[8]

It is well settled that the attorney selected by the insurance company to defend the insured represents the interests of both clients.[9] The relationship between the attorney and the insured is in no way altered by the fact that the insurer actually employs and pays the attorney.[10] Thus, the attorney owes the insured

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nulled by the knowledge of the insurer that the allegations are untrue." Thorton v. Paul, 74 Ill. 2d 132, 144, 384 N.E.2d 335, 339 (1979).

7. "By the terms of the insurance policy the control of the defense of the action is turned over to the insurer. . . ." Ivy v. Pacific Auto. Ins. Co., 156 Cal. App. 2d 652, 660, 320 P.2d 140, 146 (1958).

8. This is perhaps the most important element of control for the insurance company, since the overwhelming majority of tort suits are settled before trial. Note, *Liability Insurance Policy Defenses and the Duty to Defend*, 68 HARV. L. REV. 1436, 1448 (1955).

9. [A]n attorney undertaking the defense of the case covered by the [insurance] policy is an attorney for both the insurer and the insured and owes to each a duty of good faith and due diligence in the discharge of his duties. The rights of one cannot be subordinated to those of the other.

Imperiali v. Pica, 338 Mass. 494, 499, 156 N.E.2d 44, 47 (1959). *See also* Henke v. Iowa Home Mut. Cas. Co., 249 Iowa 614, 87 N.W.2d 920 (1958) (where automobile liability insurer was obligated under terms of its policy to defend actions brought against insured, attorney represents both insurer and insured). *But see* Schwartz v. Sar Corp., 19 Misc. 2d 600, 666, 195 N.Y.S.2d 496, 503 (Sup. Ct.), *order reversed*, 9 A.D.2d 910, 195 N.Y.S.2d 819 (1959) ("The court may not close its eyes to the obvious. The prime interest of these attorneys is the insurance company, in whose behalf they defend many cases year after year."); Schumm v. Long Island Lighting Co., 56 Misc. 2d 913, 914, 290 N.Y.S.2d 423, 424 (D. Ct. 1968) ("It is clear to this Court that it is beyond all bounds of ethical conduct to require counsel to continue to represent a party to an action when, in all candor, *his first loyalty is to* his retainor, *the insurance company*.") (emphasis added in part).

One author has suggested the possibility that the parties agree to a relationship whereby the attorney hired by the insurer represents the insured only in matters of defense of the claim. If this is the case, the attorney must make it clear to the insured that he is representing only the company with respect to settlement decisions. Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1168-71 (1954).

10. Parsons v. Continental Nat'l Amer. Group, 113 Ariz. 223, 550 P.2d 94 (1976) (fact that attorney also represents insurer in no way alters obligations to insured); Allstate Ins. Co. v. Keller, 17 Ill. App. 2d 44, 149 N.E.2d 482 (1958) (an insurer's attorney is bound by the same high standards which govern all attorneys, whether or not privately retained); Henke v. Iowa Home Mut. Cas. Co., 249 Iowa 614, 87 N.W.2d 920 (1958) (fact that another selects and pays an attorney does not control relationship between attorney and client); Newcomb v. Meiss, 263 Minn. 315, 116 N.W.2d 593 (1962) (attorney owes policyholder same undeviating and single allegiance that he would owe to policyholder if retained and paid by him); Mallen, *Insurance Counsel: The Fine Line Between Professional Responsibility and Malpractice*, 45 INS. COUNSEL J. 244 (1978) (defense counsel owes the insured the same unqualified loyalty as if he had been personally retained by the insured).

the same high duty of care[11] as if he was hired directly by the insured.[12]

The relationship that develops from the insurance contract is normally harmonious,[13] with the insurer, insured, and attorney all sharing the common goal of defeating or settling a third party's claim.[14] However, the attorney faces an ethical problem when a conflict of interest develops between the insurer and the insured.[15]

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11. The court in Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968), stated that the attorney hired by the insurance company to defend the insured has obligations and duties which are governed by the general standard of care described in the *Lucas v. Hamm* and *Ishmael v. Millington* cases (described *infra*). *Id.* at 149, 65 Cal. Rptr. at 415.

Lucas v. Hamm, 15 Cal. Rptr. 821, 825, 364 P.2d 685, 689 (1961), *cert. denied*, 368 U.S. 987 (1962), held that an attorney, by accepting employment to render legal services, impliedly agreed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and he may be liable for damages resulting from failure to do so.

In Ishmael v. Millington, 241 Cal. App. 2d 520, 528, 50 Cal. Rptr. 592, 597 (1966), the court held that the attorney representing two parties with divergent interests must disclose all facts and circumstances which are necessary to enable his client to make free and intelligent decisions regarding the subject matter of the representation.

12. *E.g.*, Ivy v. Pacific Auto. Ins. Co., 156 Cal. App. 2d 652, 320 P.2d 140 (1958) (an attorney who represents both the insurance company and the insured owes a high duty of care to both clients).

13. "The insertion in the insurance policy of the provision requiring the insured to permit the insurance company's lawyer to defend claims insured against, is consent in advance by the insured" to the employment of the attorney for the defense of claims. H. DRINKER, LEGAL ETHICS 114 (1953).

14. [T]he attorney has two clients whose primary, overlapping and common interest is the speedy and successful resolution of the claim and litigation. . . . The three parties may be viewed as a loose partnership, coalition or alliance directed toward a common goal, sharing a common purpose which lasts during the pendency of the claim or litigation against the insured.

American Mut. Liab. Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 592, 113 Cal. Rptr. 561, 571 (1974).

15. Typical conflict of interest cases which involve attorney malpractice actions include representation of husband and wife in matrimonial proceedings, of insured and insurer, and of debtor and creditor. Annot., 28 A.L.R.3d 389, 392 (1969). *See generally* Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807 (1977) for a discussion of the aforementioned types of conflicts and others including representation of multiple criminal defendants, interests adverse to a former client, labor unions, etc.

This casenote will focus on the conflict involved when an attorney represents the interests of an insurance company and an insured simultaneously. For a thorough discussion of conflicting interests arising from the simultaneous representation of multiple clients, *see generally* MALLEN, *supra* note 2, at 146; Shadur, *Lawyers' Conflicts of Interest: An Overview*, 58 CHI. B. REC. 190 (1977).

For a specific discussion of the duties and dilemmas of the insurance defense counsel, *see* Brodsky, *Duty of Attorney Appointed by Liability Insurance Company*, 14 CLEV.-MAR. L. REV. 375 (1965); Corboy, *Defending Insurance Companies and the Insured—Can Two Masters Be Served?*, 55 CHI. B. REC. 102 (1973); Ford, *The Insurance Contract: The Conflicts of Interest it Breeds*, 36 INS. COUNSEL J. 610 (1969); Gallagher, *The Problems of Defense*

The American Bar Association (ABA) provides a working definition to determine when a "conflict of interest" between clients arises: "[A] lawyer represents conflicting interests, when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."[16] Although it was not the intention that the ABA Code of Professional Responsibility define standards for civil liability of lawyers arising from their professional conduct,[17] the courts rely heavily on the Code to establish such standards.[18] One recent Illinois decision[19] held that the code of ethics establishes minimum guidelines for professional conduct, and an attorney may be disciplined for not observing them.[20] Thus, codes of professional ethics must be examined to determine what duties an attorney owes to his clients in a conflict of interest situation.

Illinois has adopted a code of professional responsibility[21] modeled on the ABA Code.[22] The canons contained in the Illinois Code are statements of axiomatic norms, which express in general terms the standards of professional conduct expected of

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*Counsel Negotiating Settlements in Cases Involving a Potential Excess Judgment*, 37 INS. COUNSEL J. 506 (1970); Maines, *Overview of Some Basic Legal and Contractual Relationships in Insurance Liability Defense Cases*, 37 INS. COUNSEL J. 498 (1970).

16. ABA CANONS OF PROFESSIONAL ETHICS No. 6. Many courts have adopted this definition, *e.g.*, Florida Bar v. Moore, 194 So. 2d 264 (Fla. 1967).

17. "The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct." ABA CODE OF PROFESSIONAL RESPONSIBILITY, PREAMBLE AND PRELIMINARY STATEMENT 1C (1976).

18. *E.g.*, Crest Inv. Trust, Inc. v. Comstock, 23 Md. App. 280, 327 A.2d 891 (1974) (when an attorney chooses to act for both sides in a business transaction, he incurs the risk of violating the ABA CANONS OF PROFESSIONAL ETHICS No. 5).

19. *In re* Taylor, 66 Ill. 2d 567, 363 N.E.2d 845 (1977).

20. *Id.* at 571, 363 N.E.2d at 847. Although the Illinois Supreme Court did not formally adopt the Illinois Code of Professional Responsibility until June 3, 1980, this 1977 case indicated that the court was moving in that direction. For implications of this case on attorney discipline and the Code, see 66 ILL. B. J. 540 (1978).

21. The Illinois Code of Professional Responsibility was adopted by the Board of Governors of the Illinois State Bar Association on May 1, 1970. The Illinois Supreme Court adopted the Code on June 3, 1980.

22. The committee commentary to the Illinois Code of Professional Responsibility states that the ABA Code was their model, but they initially determined not to include the "ethical considerations" contained in the ABA Code. These ethical considerations are aspirational and the committee viewed them as useful in providing additional guidance to lawyers, but not necessary to a judicially sanctioned body of rules used as a basis for discipline. Thus, the Illinois Code is very similar to the ABA Code, absent the ethical considerations. ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY, COMMITTEE COMMENTARY 3 (1980).

attorneys.[23] The Illinois Code of Professional Responsibility also includes disciplinary rules which are mandatory in character; they state a minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.[24]

Canon 5 of the Illinois Code states that "[a] lawyer should exercise independent professional judgment on behalf of a client."[25] Disciplinary Rule 5-105 commands that a lawyer must decline employment or, if already employed, discontinue multiple employment, if the exercise of his independent professional judgment is likely to be affected by the representation of another client, except as permitted under Disciplinary Rule 5-105(C).[26] The permitted exception requires that three conditions be met: (1) the attorney can adequately represent the interest of each client, and (2) the clients consent to the representation after (3) a *full disclosure* of the possible effect of such representation has been made to them.[27]

Traditionally, the frequency of attorney disciplinary actions involving conflict of interest complaints has been low;[28] today, attorneys must be increasingly conscious of potential conflict of interest problems for another reason—the possibility of legal malpractice liability.[29] The attorney's duty to fully disclose to his clients his representation of adverse interests, as mandated by the codes of ethics,[30] has been the basis for imposing legal malpractice liability in a growing amount of litigation.[31]

The 1968 California decision, *Lysick v. Walcom*,[32] clearly defined the liability of an insurance defense attorney in a conflict

23. ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY, PREAMBLE AND PRELIMINARY STATEMENT 3 (1977).

24. *Id.*

25. ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY, CANON 5.

26. ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A), (B).

27. ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C). This duty of full disclosure is likewise found in the ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C).

28. A 1976 study compiled statistics from several jurisdictions and found conflict of interest problems ranged from a low of less than 1% to a high of 5% of all complaints received by the respective disciplinary agencies. Shadur, *Lawyers' Conflicts of Interest: An Overview*, 58 CHI. B. REC. 190 (1977).

29. *Id.* at 191.

30. *See* text accompanying note 28 *supra*.

31. *E.g.*, Woodruff v. Tomlin, 616 F.2d 924 (6th Cir. 1980) (attorney representing several family members in a personal injury action held to a duty to disclose to one member that she had a potential claim against her sister); Ishmael v. Millington, 241 Cal. App. 2d 528, 50 Cal. Rptr. 592 (1966) (attorney was held liable when, in representing both husband and wife in an uncontested divorce proceeding, he did not disclose the limitations of his representation to the wife or suggest to her that she seek her own counsel to protect her interests).

32. 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968).

of interest situation when the duty to disclose is breached.[33] The *Lysick* court held that an attorney is liable to a client who suffers loss due to the attorney's failure to disclose.[34] This theory of liability, as applied to the insurance defense counsel, has been adopted by the Illinois courts and further expanded in the recent Illinois Supreme Court decision of *Rogers v. Robson*.[35]

### *ROGERS V. ROBSON*

In February 1972, a malpractice action was commenced against James D. Rogers, M.D., alleging negligence in the care and treatment of one of his former patients. Pursuant to its obligations under the insurance contract,[36] Dr. Rogers' insurance carrier retained the law firm of Robson, Masters, Ryan, Brumund & Belom to represent him in the action. The insurance policy did not require the consent of Dr. Rogers, as a "former insured,"[37] to settle any claims alleged against him.[38]

During the pendency of the malpractice action, Dr. Rogers informed the law firm that he was free from any negligence and that he opposed any settlement of the claim.[39] Without Dr. Rog-

33. For an explanation of this case, *see* text accompanying notes 65-67 *infra*.

34. Lysick v. Walcom, 258 Cal. App. 2d 136, 148, 65 Cal. Rptr. 406, 414 (1968).

35. 81 Ill. 2d 201, 407 N.E.2d 47 (1980).

36. The policy of insurance, under which Dr. Rogers was insured for professional liability, was issued by Commercial Union Assurance Co. and imposed the following duties upon the insurer: "[T]he company shall have the right and duty to defend any suit against the insured seeking such damages, even if any of the allegations of the suit are groundless, false, or fraudulent, and may make such investigation and . . . such settlement of any claim or suit as it deems expedient. . . ." Rogers v. Robson, 74 Ill. App. 3d 467, 469-70, 392 N.E.2d 1365, 1369 (1979).

The corresponding duties of the insured under the policy were stated as follows: "The insured shall cooperate with the company, and upon the company's request, assist in making settlements, in the conduct of suits. . . ." Brief for Defendant-Appellant at 8, Rogers v. Robson, 81 Ill. 2d 201, 407 N.E.2d 47 (1980).

37. The policy involved in this case covered claims which arose out of events during the period of June 1, 1970 through June 1, 1971. After June 1, 1971, Dr. Rogers was no longer insured by this insurer, and thus was characterized as a "former insured" at the time the malpractice action was commenced in February 1972. 74 Ill. App. 3d 467, 469, 392 N.E.2d 1365, 1368-69 (1979).

38. The pertinent section of the policy reads as follows: "[N]or shall the written consent of a former insured be required before the company may make any settlement of any claim or suit even if such claim or suit was made, proferred or alleged while such former insured was an insured under this policy." *Id.* at 470, 392 N.E.2d at 1369.

39. Rogers stated in his personal affidavit that he repeatedly advised the defense attorney that he did not consent to a settlement of the claim, and

ers' knowledge or consent, the malpractice suit was settled in September 1974; the insurance carrier paid a nominal sum[40] to the former patient in exchange for a covenant not to sue.[41] The covenant contained an express denial of any liability on Dr. Rogers' part.[42]

Rogers initiated a tort action against Robson,[43] alleging that the defendant wrongfully settled the malpractice action without his permission or knowledge.[44] The circuit court allowed a summary judgment in favor of the defendant and Dr. Rogers appealed.[45]

The Illinois Appellate Court reversed the decision of the lower court,[46] although they agreed with the lower court's holding that, as a matter of law, the insurance contract authorized the settlement of the malpractice action without the consent of a former insured.[47] Because the plaintiff had informed the defendant that he was opposed to a settlement of the case, the court held that a conflict of interest arose between the insured and the insurer which prevented the defendant attorney from further representing both parties without making a full disclosure of the circumstances to them.[48] The court stated that this

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that the attorney assured him the case would be defended. One letter to the attorney, dated Dec. 8, 1972, stated: "Accordingly, I refuse to participate any further with [my former patient's] absurd accusations. . . . I trust you can dispose of this problem quickly and with little difficulty." Brief for Defendant-Appellant at 9-10, Rogers v. Robson, 81 Ill. 2d 201, 407 N.E.2d 47 (1980).

40. $1,250. Rogers v. Robson, 74 Ill. App. 3d 467, 469, 392 N.E.2d 1365, 1368 (1979).

41. A covenant not to sue is a promise "by one who had a right of action at the time of making it against another person, by which he agrees not to sue to enforce such right of action." BLACK'S LAW DICTIONARY 438 (4th ed. 1968).

42. Rogers v. Robson, 74 Ill. App. 3d 467, 469, 392 N.E.2d 1365, 1368 (1979).

43. Rogers filed this suit pro se. A year prior to initiation of the suit involved in this case, Rogers filed a similar action against Robson, and the trial court dismissed the action on its own motion because of a deficiency in the ad damnum request for damages. The appellate court upheld the dismissal, but declared it without prejudice.

44. The damages that Rogers alleged were: deprivation of an opportunity to pursue a malicious prosecution action against his former patient, loss of both direct and referred surgical patients, substantial increase in professional liability insurance premiums, legal fees and related costs, and diminution of the amount of policy coverage for future suits involving the policy period. Brief for Plaintiff-Appellee at 5, Rogers v. Robson, 81 Ill. 2d 201, 407 N.E.2d 47 (1980).

45. 74 Ill. App. 3d at 468, 392 N.E.2d at 1368.

46. *Id.* at 476, 392 N.E.2d at 1373.

47. Plaintiff had alleged that the insurance contract contained an ambiguity and therefore its interpretation was a question to be decided by the trier of fact. Brief for Plaintiff-Appellant at 5-9, Rogers v. Robson, 74 Ill. App. 3d 467, 392 N.E.2d 1365 (1979).

48. 74 Ill. App. 3d at 474, 392 N.E.2d at 1372.

duty existed apart from any considerations arising from the insurance policy.[49] Citing *Lysick v. Walcom*,[50] the court held that, due to the defendant's continued dual representation without the requisite disclosure, he would be liable to the plaintiff for any loss caused by the lack of disclosure.[51] The defendant appealed.[52]

In a brief opinion, the Illinois Supreme Court affirmed the appellate court's decision based upon the following reasons: (1) Dr. Rogers was a client of the defendant and as such he was entitled to a full disclosure of the intent to settle the malpractice action against his express instructions to the contrary; (2) the duty to disclose stemmed from the attorney/client relationship and was not affected by the insurer's authority to settle without the plaintiff's consent; and (3) the record did not preclude the possibility that the plaintiff suffered some damage as a result of the defendant's failure to make the requisite disclosure.[53]

## ANALYSIS

The Illinois Supreme Court, in holding that the defendant owed a duty of disclosure to the plaintiff, did not explain how they arrived at that conclusion. They cited two recent Illinois decisions[54] as authority for the principle that Rogers, as well as the insurer, was the defendant's client.[55] Without reference to supporting cases, they further held that the plaintiff "was entitled to a full disclosure of the intent to settle the litigation without his consent and contrary to his express instructions."[56] One can only infer that the court imposed the duty to disclose because the defendant was aware that the insurer wanted a settle-

49. *Id.*

50. 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968).

51. 74 Ill. App. 3d at 474, 392 N.E.2d at 1372.

52. Judge Alloy, in his dissent, theorized that the motion for summary judgment was properly allowed. He based his dissent on the belief that Rogers failed to properly state a cause of action alleging that he sustained damages proximately caused by the defendant's failure to inform him of the proposed settlement arrangement. The judge felt that Dr. Rogers only alleged speculative damages, and that he was never deprived of any rights or benefits afforded him under the insurance contract. *Id.* at 479, 392 N.E.2d at 1375.

53. Rogers v. Robson, 81 Ill. 2d 201, 205-06, 407 N.E.2d 47, 49 (1980). The court stated that they did not have to speculate what recourse, if any, the plaintiff had under the insurance policy or whether the plaintiff could prove damages which proximately resulted from the defendant's breach of the duty of disclosure.

54. Thornton v. Paul, 74 Ill. 2d 132, 384 N.E.2d 335 (1978); Maryland Cas. Co. v. Peppers, 64 Ill. 2d 187, 355 N.E.2d 24 (1976).

55. 81 Ill. 2d at 205, 407 N.E.2d at 49.

56. *Id.*

ment of the claim, even though Rogers opposed such action. The court stated, again without citation to supporting cases, that the defendant's duty was not altered by the insurer's authority under the insurance contract to settle a claim without Rogers' consent.[57]

In reaching their decision, the supreme court accepted the appellate court's line of reasoning. The three cases[58] which the appellate court cited will be examined to ascertain the precedent for the supreme court's decision that a conflict of interest exists in *Rogers*.

### *Peppers, Lysick, and Ivy*

The first case the appellate court cited in regard to the attorney's duty in representing conflicting interests was *Maryland Casualty Co. v. Peppers*,[59] a 1976 Illinois Supreme Court decision. The insurance contract in that case covered liability for negligent, but not intentional acts, and the complaint against the insured alleged both. The court found that an unresolved conflict between the insured and the insurer existed, since a determination of whether the insured acted intentionally or not would necessarily decide the coverage question as well.[60] The insured would want to be found to have acted negligently because the insurance company would then have to pay the judgment; the insurer would want a finding that the insured acted intentionally, thus relieving the insurer of any obligation to pay. Therefore, the court held that an attorney furnished by the insurer must make a full disclosure to the insured in order for him to decide whether to retain his own counsel.[61]

*Peppers* is an example of a conflict of interest case which may be characterized as a "willful act" case.[62] In this type of case there is no question that the insured's pecuniary interest, as to whether he is afforded coverage under the policy, is an interest which the courts have consistently held requires protection.[63]

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57. *Id.* at 205-06, 407 N.E.2d at 49.

58. Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968); Ivy v. Pacific Auto. Ins. Co., 156 Cal. App. 2d 652, 320 P.2d 140 (1958); Maryland Cas. Co. v. Peppers, 64 Ill. 2d 187, 355 N.E.2d 24 (1976).

59. 64 Ill. 2d 187, 355 N.E.2d 24 (1976).

60. *Id.* at 197, 355 N.E.2d at 30.

61. *Id.* at 197, 355 N.E.2d at 31.

62. MALLEN, *supra* note 2, at Supp. § 311.15.

63. *E.g.*, Thorton v. Paul, 74 Ill. 2d 132, 384 N.E.2d 335 (1979) (insurer was obligated to provide insured with a defense even though the insurer felt that the claim alleged intentional acts which were excluded from the policy).

The next conflict of interest case cited by the appellate court was *Lysick v. Walcom*.[64] This case involved a $450,000 personal injury claim against the insured's estate whose policy coverage was limited to $10,000. Although the attorney was given authority by the insurance company to settle the case within the policy limits, he did not communicate this fact to the insured until it was too late to settle.[65] The case proceeded to trial and resulted in a $225,000 judgment against the insured. In the suit against the attorney the court held that, as a matter of law, the attorney's conduct violated the general standard of professional conduct in that he considered his duty to the insurance company to be paramount to his duty to the insured.[66]

*Lysick* is illustrative of the most common type of conflict of interest case involving settlement of claims—where an uninsured portion of the claim constitutes a liability exposure to the insured in the event of a judgment in excess of the policy limits.[67] In such cases, the insurer's interest is to settle for less than the policy limits and it may withhold settlement for that reason.[68] The insured's interest is in having the case settled within policy limits, so that there is no possibility of a verdict in excess of the policy amount, thus exposing him to a judgment against his personal assets.[69] This, too, is an interest of the insured that the courts have repeatedly protected.[70]

In the third case cited by the appellate court, *Ivy v. Pacific Automobile Insurance Co.*,[71] the attorney furnished by the insurer clearly acted adversely to the interest of the insured. The damages sought were in excess of the insured's policy limits.

64. 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968).

65. The attorney for the insured's estate repeatedly demanded that the insurer settle within policy limits. The insurer stood its ground on an offer of $9,500 until it reluctantly told defense counsel to offer $10,000 at a "propitious moment." *Id.* at 143, 65 Cal. Rptr. at 411.

66. *Id.* at 152-53, 65 Cal. Rptr. at 417.

67. MALLEN, *supra* note 2, at Supp. § 314.

68. The insurer may feel that, in its evaluation, liability or damages exposures do not warrant settlement for full policy limits. Another possibility is that the insurer recognizes that the value of the case exceeds the policy limits, but it does not offer the full amount in hopes of saving a portion of the face amount of the policy if the verdict at trial turns out to be less than the policy limits. *Lysick* is an example of the latter tactic where the insurer offered $9,500 of a $10,000 policy to settle a wrongful death action.

69. In the *Lysick* case, the insurer's refusal to settle for $10,000 resulted in a $225,000 judgment against the insured's estate. Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968).

70. For an examination of judicial protection of insureds' interests in cases involving excess judgments, *see* Gallagher, *The Problems of Defense Counsel Negotiating Settlement in Cases Involving a Potential Excess Judgment*, 37 INS. COUNSEL J. 506 (1970).

71. 156 Cal. App. 2d 652, 320 P.2d 140 (1958).

Without investigating the facts, or advising the insured, the attorney stipulated to a judgment in excess of policy limits.[72] The court held that the plaintiff's substantive rights were prejudiced by the attorney's actions in that the plaintiff was not given the opportunity to consent to the personal judgment entered against him in excess of the policy limits.[73] This case is one in which the attorney clearly placed the insurer's interests above his client's financial well-being.[74]

### *Comparison of the Conflict in Rogers*

The three cases cited by the appellate court in reference to conflicts of interest between the insured and insurer all involved possible financial loss to the insured.[75] In *Rogers v. Robson*,[76] Dr. Rogers brought an action against the attorney hired by the insurer, even though the nominal settlement of his medical malpractice action did not result in any direct cost to him.[77] Robson argued that, because the settlement was authorized under the insurance contract and did not result in any direct financial loss to the plaintiff, he should not be held liable for settling the case.[78]

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72. The attorney representing the insurer and insured stipulated to a judgment of $75,000, of which the insurer would pay $25,000 in partial satisfaction of judgment. The claimant, in exchange, signed a covenant not to execute on the judgment, and agreed to pursue another insurance company for the balance of $50,000. Since the limits on the policy issued by the first insurer were $50,000, this meant a $25,000 savings to that insurer. The court felt that the attorney put the interests of the insurer above those of the insured—they held that the covenant not to execute did not fully protect the plaintiff. *Id.* at 662-63, 320 P.2d at 147-48.

73. *Id.* at 663, 320 P.2d at 148.

74. "The obligation of fair dealing and the duty to act in good faith rest equally upon the insurance company and the attorney. The attorney's actions in the present case prejudicially affected Ivy's substantive rights." *Id.*

75. In Maryland Cas. Co. v. Peppers, 64 Ill. 2d 187, 355 N.E.2d 24 (1976), the insured was denied coverage because the complaint alleged, and the insurer's investigation concluded, that the insured had acted intentionally.

In Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968), the insured incurred a $225,000 judgment against him because the attorney failed to obtain a settlement within policy limits when he had the opportunity to do so.

In Ivy v. Pacific Auto. Ins. Co., 156 Cal. App. 2d 652, 320 P.2d 140 (1958), the attorney stipulated to a $75,000 personal judgment against the insured when the policy limits were only $50,000.

76. 81 Ill. 2d 201, 407 N.E.2d 47 (1980).

77. It must be noted, however, that among his damages, Rogers claimed an indirect loss of patients and a substantial increase in professional liability insurance premiums. Brief for Plaintiff-Appellee at 5, Rogers v. Robson, 81 Ill. 2d 201, 407 N.E.2d 47 (1980).

78. "In the present case . . . there is no doubt but that Dr. Rogers did receive precisely the coverage and defense provided by the policy of insurance and that Dr. Rogers was not exposed to any personal responsibility for

The *Rogers* case involves the imposition of the duty of disclosure in a novel setting—where an attorney settled an action expediently, for a nominal amount, and without out-of-pocket expense to the insured. This article will discuss the practical implications of the *Rogers* decision, and its effect on the insurance defense attorney's behavior.

### *Judicial Trend to Protect Insureds*

In delineating a new conflict of interest situation, in which the Illinois courts will impose liability on an attorney for failure to disclose, the *Rogers* court seems to be following a definite judicial trend of protecting the interests of insureds. A parallel trend is seen in the increasing liability of an insurer to its policyholders in similar conflict situations.[79]

Insurance contracts are generally adhesion contracts[80] where the insured is usually in a poorer bargaining position than the insurer.[81] Because of this, there is increasing judicial concern for the interests of the insured, evidenced by the expansion of liability of insurance companies for the tort of bad faith.[82] Formerly, the insured's recovery in bad faith cases against insurers was limited to the amount of the policy, plus interest.[83] Insurance companies can no longer feel secure that their liability for the tort of bad faith is restricted to the policy amount.[84]

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satisfaction of the settlement." Brief for Defendant-Appellant at 21, Rogers v. Robson, 81 Ill. 2d 201, 407 N.E.2d 47 (1980).

79. For an explanation of the development of conflict of interest situations where insurers are frequently experiencing liability in excess of their policy limits, see Haskall & Pope, *The Insurer's "Conflict of Interest" Dilemma*, 65 ILL. B. J. 220 (1976).

80. An adhesion contract is one "that is drafted unilaterally by the dominant party and then presented on a take it or leave it basis to the weaker party, who has no real opportunity to bargain about its terms." BALLENTINE'S LAW DICTIONARY 29 (3d ed. 1969).

81. The insured has an obvious lack of bargaining power to change any terms of the insurance contract since contracts are similar throughout the industry. Comment, *The Tort of Bad Faith: A Perspective Look at the Insurer's Expanding Liability*, 8 CUM. L. REV. 241 (1977).

82. The tort of bad faith is also known as wrongful refusal to settle, and is the theory upon which the insured may base a claim for relief against the insurance company. For explanations of the recent development of this tort, see Crawford, *Wrongful Refusal to Settle: The Implications of Grundy in Kentucky*, 65 KY. L. J. 220 (1976); Snow, *Excess Liability—Crisci and Lysick*, 36 INS. COUNSEL J. 51 (1969); Zurek, *First Party Insurance: Claims, Practices and Procedures in Light of Extra-Contractual Damage Actions*, 27 DRAKE L. REV. 666 (1977-78).

83. Comment, *The Tort of Bad Faith: A Perspective Look at the Insurer's Expanding Liability*, 8 CUM. L. REV. 241, 242 (1977).

84. The tort of bad faith now enables the insured to recover consequential damages such as emotional distress and punitive damages. *See, e.g.*, Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967) (insurer found not to have given as much consideration to the financial in-

The *Peppers*[85] decision represents another situation where the Illinois courts have altered the terms of liability insurance contracts. The insurance contract gives the insurer the right to control the defense of claims arising under the policy.[86] The *Peppers* decision abrogated that right and held that where an insurer has a conflict of interest with its insured, the insured is entitled to control the litigation through counsel of his own choice and at the insurer's expense.[87] This decision takes both the direction and cost of the litigation out of the insurer's hands, in direct contravention to the terms of the insurance contract.

Put in this perspective, *Rogers* seems to be a logical expansion of an attorney's obligations to fairly represent the insured's interests. Though at first glance the case may appear to place a heavy burden on an attorney in a potential conflict situation, the *Rogers* court must have felt the interest of the weaker party, the insured, required it. The fact that the insurance contract authorized the settlement without Rogers' consent did not in any way affect the defendant's duties to Rogers. Simply stated, an attorney may not rely on the argument that his conduct was not violative of the rights given the parties in the insurance contract.[88] The Illinois courts will look to the attorney/client relationship in a vacuum, and disregard any underlying contract considerations.[89] With this in mind the insurance defense counsel would be wise to re-examine his relationships with insureds.

## IMPLICATIONS

Under the *Rogers* decision, the attorney involved in insurance defense must be careful not to put the interests of his em-

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terests of its insured as it gave to its own interest in refusing to settle for less than policy limits; held liable to the insured not only for the amount of the excess verdict, but also for compensation for mental suffering).

85. Maryland Cas. Co. v. Peppers, 64 Ill. 2d 187, 355 N.E.2d 24 (1976).

86. *See* text accompanying notes 7-8 *supra*.

87. By reason of [the insurance company's] contractual obligations to furnish Peppers a defense it must reimburse him for the reasonable cost of defending the action. Also, [the insurance company] is entitled to have an attorney of its choosing participate in all phases of this litigation *subject to the control* of the case by Peppers' attorney.

Maryland Cas. Co. v. Peppers, 64 Ill. 2d 187, 199, 355 N.E.2d 24, 31 (1976) (emphasis added).

88. Robson argued that Rogers had no right under the insurance contract to demand that he consent to the settlement. Robson claimed that he provided Rogers with precisely the insurance coverage and defense called for in the insurance policy. Brief for Defendant-Appellant at 20-21, Rogers v. Robson, 81 Ill. 2d 201, 407 N.E.2d 47 (1980).

89. The *Rogers* court stated: "*Apart from any considerations arising from the insurance policy* . . . defendant could not continue to represent both [clients] without a full and frank disclosure of the circumstances to its clients." Rogers v. Robson, 74 Ill. App. 2d 467, 474, 392 N.E.2d 1365, 1372 (1979) (emphasis added).

ployer, the insurer, above those of the insured.[90] The duty of disclosure must be seriously regarded not only in the obvious conflict of interest situation,[91] but also when a disgruntled insured voices an objection to settlement of a claim.

It is not clear from *Rogers* whether the attorney must have had notice of the insured's objection to settlement before the courts will conclude that a conflict of interest existed.[92] An insured who never voiced his opposition to a settlement of his case, perhaps because he was never aware that the possibility existed, may still feel his attorney owed him a duty to disclose the prospective settlement and may thus claim damages similar to Rogers'.[93] The attorney is now put into the situation of anticipating an insured's interests that may be adverse to the interest of the insurance company in obtaining a settlement.

Because the *Rogers* court did not narrowly define the conflict, one could speculate that conflicts may also arise if the insured objects to matters, other than settlement, pertaining to the defense of the case.[94] This area of possible conflict is left open by *Rogers*, requiring further judicial definition.

One possible method of avoiding liability in a *Rogers* type of conflict situation is for the attorney to adopt a standard procedure of notifying all insureds when there is an intent to settle, regardless of the type of policy coverage or whether the insured's consent is required under the terms of the contract. If the insured determines that settlement is not in his best interests, he could then, as the appellate court suggested, release the insurance company from its obligation to defend and proceed with the action at his own expense.[95]

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90. An attorney who does insurance defense work usually has a long-standing relationship with the insurance company and hopes to keep it as a client. The attorney's relationship with the insured, on the other hand, is usually brief. Mallen, *Insurance Counsel: The Fine Line between Professional Responsibility and Malpractice*, 45 INS. COUNSEL J. 244, 245 (1978).

91. Obvious conflict of interest cases include "willful act" cases, *see* text accompanying note 63 *supra*, as well as suits which involve excess liability exposure, *see* text accompanying note 68 *supra*.

92. The *Rogers* court stated that the plaintiff "was entitled to a full disclosure of the intent to settle the litigation without his consent and contrary to *his express instructions.*" Rogers v. Robson, 81 Ill. 2d 201, 205, 407 N.E.2d 47, 49 (1980) (emphasis added).

93. The damages that Rogers alleged, *see* note 44 *supra*, could be experienced by any insured as a result of a settlement rather than a verdict exonerating him of liability.

94. For instance, the insured may object to trial tactics used by the defense attorney. However, as one case indicated, clients are not often successful in suits where the cause of action alleges negligence in the attorney's choice of trial tactics or conduct of the case. Stricklan v. Koella, 546 S.W.2d 810 (Tenn. App. 1976).

95. Rogers v. Robson, 74 Ill. App. 2d 467, 475, 392 N.E.2d 1365, 1372 (1979).

A second possible solution is for the attorney to obtain an express agreement that he will represent both clients in the defense of the suit, but only the insurer in matters of settlement negotiations.[96] It is vital that the insured be clearly advised that the attorney will not be protecting his interests during the settlement negotiations.[97]

A third possibility is for the attorney to play no active part in settlement negotiations,[98] leaving that task to the insurer's personnel. The attorney would represent the insured solely in the defense of the case.

The insurance company in both of the latter solutions accepts full responsibility for protecting the insured's interests during settlement negotiations, thereby relieving the attorney of liability. These solutions are not exhaustive, and while they may effectively limit the attorney's liability, they do nothing to solve the conflicts the insurer faces, which are essentially the same as those faced by the attorney.

## CONCLUSION

Historically, courts have recognized that the standard of professional responsibility imposes a duty of full disclosure on attorneys who represent parties with adverse interests. This duty of disclosure has consistently been applied in conflict of interest cases involving the insurer/attorney/insured relationship. The *Rogers v. Robson* decision extended the duty of disclosure to a novel situation which opens up further possibilities of attorney liability.

In light of the *Rogers* decision, a review by the attorney of his conduct vis-a-vis the insured is recommended. The decision stands as a caveat to all insurance defense counsel to be increas-

96. *See* Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1168-71 (1954).

97. *Id.*

98. This possibility was discussed by one author who commented that this approach:

> [H]as the practical weakness of excluding from negotiations the one individual most knowledgeable, best prepared and best able to conduct them on behalf of the defense, both as respects the interests of the insured and the interests of the insurer. Particularly is this true of settlement negotiations carried on in the course of trial.

Gallagher, *The Problems of Defense Counsel Negotiating Settlement in Cases Involving a Potential Excess Judgment*, 37 INS. COUNSEL J. 506, 508 (1970).

ingly aware of the potential conflict of interest between their clients, and to consider carefully the interests of the insured.

*Martha Bruns Weiss*