SUPREME COURT OF LOUISIANA

DOCKET NO. 2014-CQ-1921

DANNY KELLY, Appellant

VERSUS

STATE FARM FIRE & CASUALTY COMPANY, Appellee

CIVIL ACTION

On Certified Questions from the United States Court of Appeals for the Fifth Circuit, Docket No. 12-31064; United States District Court for the Middle District of Louisiana, Docket No. 09-619-BAJ-SCR, Honorable Brian A. Jackson, Judge Presiding

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AMICUS BRIEF ON BEHALF OF UNITED POLICYHOLDERS

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(1) Can an insurer be found liable for a bad-faith failure-to-settle claim under Section 22:1973(A) when the insurer never received a firm settlement offer?

From the *amicus's* perspective, this issue can be restated as follows:

(1) Has an insurer breached its "*affirmative duty* to . . . *make a reasonable effort* to settle claims" when it undertakes to handle claims on behalf of its insured and, thereafter, fails to:

(a) timely explore settlement possibilities to protect its insured from excess exposure; and/or

(b) acknowledge and act on a claimant's invitation to engage in settlement negotiations to protect its insured from excess exposure?

(2) Can an insurer be found liable under Section 22:1973(B)(1) for misrepresenting or failing to disclose facts that are not related to the insurance policy's coverage?

From the *amicus's* perspective, this issue can be restated as follows:

(1) Has an insurer knowingly misrepresented "pertinent facts" when it undertakes to handle claims on behalf of its insured and, thereafter, knowingly fails to:

(a) Disclose facts establishing a likelihood that the insured will face significant personal liability; and /or

(b) Keep its insured reasonably informed of the status of settlement negotiations?

STATEMENT OF THE CASE[1]

On November 21, 2005, Danny Kelly ("Kelly") was involved in an automobile collision with Henry Thomas, Jr. ("Thomas"). Thomas and Kelly were driving opposite directions when Thomas initiated a left turn and collided with Kelly. The accident caused severe injuries to Kelly, who underwent surgery within hours of the collision to repair a fractured femur. Kelly's hospital stay lasted approximately six days and cost $26,803.17.

Thomas was insured by State Farm Fire & Casualty Company ("State Farm") under a $25,000 per person liability insurance policy. Based upon the entries in the claims file, State Farm determined as early as December 21, 2005 that Thomas was at fault.[2] On January 4, 2006, State Farm paid 100% of Kelly's property damage to his car, which was a "total loss" as a result of the collision.[3]

On January 6, 2006, Kelly's attorney mailed a letter and copies of Kelly's hospital records to State Farm. The letter stated:

> Please find enclosed a copy of Danny Kelly's Medical Summary with attached medical records/reports and bills concerning his hospital treatment for the above referenced incident involving your insured. I will recommend release of State Farm Insurance Company and your insured, Henry Thomas, Jr., for payment of your policy limits.
>
> Please give me a call in the next ten (10) days to discuss this matter.
>
> ("January 2006 letter").

State Farm **never** responded to the January 2006 letter. Over two months later, on March 22, 2006, State Farm attempted to settle the case for its $25,000 policy limit. Kelly's attorney rejected that offer. Rather than informing Thomas of the January 2006 letter, the total loss to Kelly's vehicle, the extent of Kelly's medical bills, State Farm's March 22 offer to Kelly, and Kelly's rejection of State Farm's offer, State Farm sent Thomas the following cryptic letter:

> Dear Mr. Thomas:
>
> It is our duty to inform you that due to the circumstances surrounding the above accident, it is possible the injuries claimed against you may be in excess of the protection afforded by this policy. State Farm will do everything possible to protect you within those limits, however, you may be held personally responsible for any judgment above those limits.

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[1] Unless otherwise noted, all facts are taken from *Kelly v. State Farm Fire and Cas. Co.*, 582 Fed. App'x 290 (5th Cir. 2014). Citations to the Fifth Circuit Record are indicated by "USCA" followed by the page number.
[2] USCA 366, 368, 379-380.
[3] USCA 356, 364.

> In view of your personal liability, it will be agreeable with the company for you, if you so elect, to employ attorneys of your own choosing, at your own expense, to represent you personally in this matter. . . .[4]

Kelly filed suit against State Farm and Thomas on March 28, 2006.[5] At trial, Thomas was found liable for the accident, and judgment was rendered against him for $176,464.07, plus interest. State Farm paid Kelly $25,000 and relied on Thomas to fulfill the remainder of the judgment.

After trial, Thomas entered into a settlement with Kelly. Thomas assigned Kelly his rights to pursue any action he had against State Farm in connection with the handling of his claim or the lawsuit. In exchange, Kelly promised not to enforce the judgment against Thomas's personal assets.

On July 6, 2009, Kelly filed suit in the 18th Judicial District Court, Iberville Parish, asserting Thomas's bad faith claims against State Farm. The Petition for Damages alleged that State Farm was liable for its failure to negotiate a settlement in a good faith and timely manner ("Failure to Negotiate Claim"), and its failure to timely communicate the status of Kelly's claim and settlement negotiations to Thomas ("Failure to Inform Claim") (collectively, "Claims").

The case was removed to the Middle District of Louisiana. State Farm filed a Motion for Summary Judgment seeking to dismiss the Claims. Ultimately, the district court granted summary judgment to State Farm on both Claims, finding that State Farm could not be liable for bad faith where Kelly did not submit an "actual offer to settle".[6] Kelly appealed.

On March 12, 2014, the Fifth Circuit issued an opinion granting summary judgment to State Farm on the Failure to Negotiate Claim,[7] and denying State Farm summary judgment on the Failure to Inform Claim.[8] With respect to Kelly's Failure to Inform Claim, the Court noted:

> An insurer also has 'an *independent* duty to keep its insured informed of the status of settlement negotiations[.]' This includes a duty to inform the insured about offers to settle that are made and received, offering input on the settlement decision, and generally keeping the insured apprised of those facts necessary for the insured to make a decision that is in their own personal interest.[9]

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[4] USCA 120.
[5] USCA 16 - 19.
[6] *Kelly v. State Farm Fire & Cas. Co.*, 2012 WL 4498884, at *3 (M.D. La. 2012).
[7] Though Kelly made clear that his Failure to Negotiate Claim was made under Section 22:1973(A), the Fifth Circuit's original opinion analyzed the Failure to Negotiate Claim under La. R.S. §§ 22:1973(B)(5) and 22:1892(A)(1) and (2).
[8] *Kelly v. State Farm Fire & Cas. Co.*, 559 F. App'x 316 (5th Cir. 2014), *withdrawn and superseded on reh'g by* 582 Fed. App'x 290 (5th Cir. 2014).
[9] *Id.* at 321–22.

Kelly and State Farm both filed petitions for rehearing. The Fifth Circuit granted rehearing and withdrew its previous opinion.[10] On rehearing, the Fifth Circuit analyzed Kelly's Failure to Negotiate Claim as one "for a generalized breach of [State Farm's] duty of good faith and fair dealing" under La. R.S. § 22:1973(A), and the Failure to Inform Claim as one alleging a violation of La. R.S. § 22:1973(B)(1).[11]

With respect to the Failure to Negotiate Claim, the Court noted that "the Supreme Court of Louisiana and the Louisiana intermediate appellate courts have never held that a firm settlement offer is required for a bad-faith failure-to-settle claim," and remarked that:

> Section 22:1973(A)'s imposition of an affirmative duty to make a reasonable effort to settle claims suggests that insurers must do more than simply rest on their laurels and wait for claimants to submit firm settlement offers.[12]

With respect to the Failure to Inform Claim, the Court began with the language of La. R.S. § 22:1973(B)(1),[13] which provides that an insurer breaches its duties if it knowingly "[m]isrepresent[s] pertinent facts or insurance policy provisions relating to any coverages at issue." The Fifth Circuit noted that Louisiana courts were split on the issue of whether a failure to communicate the status of a claim constituted an actionable misrepresentation.[14] While some Louisiana courts held that an insurer could only be liable under Section 22:1973(B)(1) if the insurer misrepresents a "coverage issue" (*i.e.*, facts about the policy itself, such as the amount of coverage, lapse or expiration of the policy, or exclusions from coverage), others have held that an insurer can be liable for a misrepresentation of facts that do not relate to the policy itself (*e.g.*, failure to communicate the nature and extent of the claimant's injuries, the status of potential settlement, or the status of claims).[15] Accordingly, the Fifth Circuit certified, and this Court accepted, the following two questions:

> (1) Can an insurer be found liable for a bad-faith failure-to-settle claim under Section 22:1973(A) when the insurer never received a firm settlement offer?
>
> (2) Can an insurer be found liable under Section 22:1973(B)(1) for misrepresenting or failing to disclose facts that are not related to the insurance policy's coverage?[16]

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[10] *Kelly*, 582 F. App'x 290.
[11] *Id.* at 294 ("In his petition for rehearing, Kelly explicitly disclaims any reliance on Louisiana Revised Statutes §§ 22:1892 and 22:1973(B)(5). He also emphasizes that he is only pursuing Thomas's claims against State Farm. Thus, we only consider Thomas's claims under Section 22:1973(A) and (B)(1).").
[12] *Id.* at 295.
[13] *Id.*
[14] *Id.* at 296.
[15] *Id.*
[16] *Id.*

LAW AND ARGUMENT

Before reaching the certified questions, it is necessary to explore the nature of the duties owed by insurers when handling claims on behalf of their insureds, for it is only through this lens that Kelly's Claims are properly viewed. Next, this Court must distinguish the claims for which only general damages are available from those for which the statutory penalties of La. R.S. § 22:1973(C) may be imposed. Once these matters have been sufficiently traversed, the certified questions can be properly answered.

I. Insurers Owe a "High Fiduciary Duty" When Handling Claims on Behalf of their Insureds

Louisiana jurisprudence has long recognized that insurers must act in good faith when handling claims on behalf of their insureds.[17] In *Smith v. Audubon Ins. Co.*, this Court stated:

> [A] liability insurer is the representative of the interests of its insured, and the insurer, when handling claims, must carefully consider not only its own self-interest, but also its insured's interest so as to protect the insured from exposure to excess liability. Thus, a liability insurer owes its insured the duty to act in good faith and to deal fairly in handling claims.[18]

Under Louisiana law, "in every case, the insurance company is held to a **high fiduciary duty** to discharge its policy obligations to its insured in good faith."[19] This "high fiduciary duty" derives, in part, from the insurers':

> [S]tatus as purveyors of a vital service labeled quasi-public in nature. Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interest in maximizing gains and limiting disbursements . . . (A)s a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage. The obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary.[20]

The insurer's duty to handle claims on behalf of its insured is often tested when an opportunity for settlement approximates the limit of coverage, as it may be tempting for the insurance company to gamble on the outcome of a trial, its exposure not being considerably affected by a verdict in excess of coverage. However, Louisiana courts have made clear that "the insurer is the champion of its insured's interests; that **the interests of the insured are paramount to those of the insurer**, and that the insurer may not gamble with the funds and

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[17] *Holtzclaw v. Falco, Inc.*, 355 So. 2d 1279, 1283–84 (La. 1977) ("an insurer must carefully consider the interests of its insured, instead of only consulting its own self-interests, when **handling *and*** settling claims in order to protect the insured from exposure to excess liability.") (emphasis added).
[18] *Smith*, 95-2057, pp. 7-11 (La. 9/5/96), 679 So. 2d 372, 376 (footnote omitted).
[19] *Pareti v. Sentry Indem. Co.*, 536 So. 2d 417, 423 (La. 1988) (emphasis added).
[20] *Egan v. Mut. of Omaha Ins. Co.*, 620 P. 2d 141, 146 (Cal. 1979).

resources of its policyholders."[21] Thus, liability insurers may not play "fast and loose" with an injured party during settlement negotiations to the detriment of their insureds. And, "where, as in the present case, any adverse verdict at trial is likely to exceed the policy limit, the boundaries of good faith become more compressed in favor of the insured, and the carrier can justly serve its interests and those of its insured only by treating the claim as if it alone might be liable for any verdict which may be recovered."[22]

Insurers' duties of good faith and fair dealing encompass more than simply making reasonable efforts to settle claims on behalf of their insureds. "Even if a liability insurer is not in bad faith in its evaluation of a claim or in refusing to settle a claim, it may still be found to be in bad faith for failure to keep its insured informed of the status of settlement negotiations and other developments affecting his excess exposure."[23] Thus, in *Roberie v. Southern Farm Bureau Casualty Insurance Company*,[24] this Court held an insurer liable for a judgment in excess of policy limits where the insurer failed to fully inform its insured of compromise negotiations and offers. The *Roberie* Court remarked:

> We agree with the Court of Appeal that there was no bad faith on the part of the Insurance Company in not compromising the claims filed against it in the Pitre case. It acted within the terms of its insurance contract in proceeding to trial, and, under the facts *supra*, its actions could not be considered arbitrary, *i.e.*, it preferred litigation to compromise. However, the insured, Roberie, was kept in the dark; he was never apprised of the offers of compromise nor warned of his potential liability; he was ignored. He needed information and advice on the point of his potential liability, which he was not given by his representative, his insurer. A conflict of interest arose between the insurer and the insured. The insurer failed to discharge its duty towards its insured, thereby precluding any decisive action on his part. We find that the actions of Southern Farm Bureau Casualty Insurance Company towards Roberie were more than negligent; they were in bad faith and in utter disregard of Roberie's natural desire to protect himself from financial loss.[25]

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[21] *Cousins v. State Farm Mut. Auto. Ins. Co.*, 294 So. 2d 272, 275 (La. App. 1 Cir. 1974), *writ refused*, 296 So. 2d 837 (La. 1974) (emphasis added).

[22] *Rova Farms Resort, Inc., v. Investors Ins. Co. of Am.*, 65 N.J. 474, 493, 323 A.2d 495, 505 (1974); *see also Younger v. Lumbermens Mut. Cas. Co.*, 174 So. 2d 672, 675 (La. App. 3 Cir. 1965) ("'It is not sufficient for the insurer to consult its own self-interests. As a professional in the defense of suits, it must use a degree of skill commensurate with such professional standards. As the champion of the insured, it must consider as paramount his interest, rather than its own, and may not gamble with his funds. Its relationship is somewhat of a fiduciary one, and the liability is greater than indicated by some of the earlier holdings.").

[23] *Lafauci v. Jenkins*, 01–2960, pp. 13–14 (La. App. 1 Cir. 1/15/03); 844 So. 2d 19, 28–29, *writ denied*, 03–0498 (La. 4/25/03); 842 So. 2d 403; *Teague v. St. Paul Fire & Marine Ins. Co.*, 06-1266, p. 62 (La. App. 1 Cir. 4/7/09); 10 So. 3d 806, 845, *writ denied*, 09-1030 (La. 6/17/09); 10 So. 3d 722 ("Thus, a liability insurer has an *independent* duty to keep its insured informed of the status of settlement negotiations, apart from the professional duty of its appointed defense counsel to its insured.") (emphasis in original).

[24] 250 La. 105, 194 So. 2d 713 (1967).

[25] *Roberie*, 194 So. at 715.

In the instant case, State Farm owed Thomas a "high fiduciary duty" to consider Thomas's interests above its own and to treat the claim as if it alone might be liable for any verdict which may be recovered. State Farm clearly put its own interests ahead of Thomas's and breached its duties to Thomas when it failed to acknowledge and act on Kelly's invitation to engage in settlement negotiations, failed to timely explore settlement possibilities on Thomas's behalf, and kept Thomas "in the dark" as to the January 2006 letter, the total loss to Kelly's vehicle, the extent of Kelly's medical bills, State Farm's March 22 offer to Kelly, and Kelly's rejection of State Farm's offer.

II. An Insurer is Liable to its Insured for All Damages Sustained as a Result of a Breach of its Duty of Good Faith and Fair Dealing. If an Insurer Commits One of the Six Acts Delineated in 22:1973(B), Statutory Penalties may also be awarded.

Section 22:1973 provides, in pertinent part, as follows:

> A. An insurer . . . owes to his insured a duty of good faith and fair dealing. The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach.
>
> B. Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer's duties in Subsection A of the Section:
>
> (1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue; . . . .

Section 22:1973(C), in turn, authorizes penalties against an insurer "in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater."

In *Theriot v. Midland Risk Ins. Co.*, this Court concluded that "[t]he first sentence of Subsection A of the statute recognizes the jurisprudentially established duty of good faith and fair dealing owed to the insured, which is an outgrowth of the contractual and fiduciary relationship between the insured and insurer."[26] The Court further concluded that an insured's cause of action for Section 22:1973(C) *penalties* are limited to those instances where an insurer commits a breach delineated in Section 22:1973(B).[27] Notwithstanding that pronouncement, the Court kept intact all "rights and causes of action the insured may have directly against his own insurer for breach of the implied covenant of good faith and fair dealing arising out of the

[26] *Theriot*, 95–2895, pp. 5–6 (La. 5/20/97); 694 So. 2d 184, 187.
[27] *Id.*

contractual and fiduciary relationship between those parties."[28] Therefore, despite the unavailability of statutory penalties, an insured may, consistently with *Theriot* and Section 22:1973(A), sue its insurer based on a breach of the insurer's duty of good faith and fair dealing and recover "any damages sustained as a result of the breach".[29]

III. The Failure to Negotiate Claim

Kelly's Failure to Negotiate Claim arises from State Farm's failure to acknowledge and timely act on Kelly's January 6, 2006 invitation to engage in settlement negotiations, and State Farm's failure to explore settlement possibilities on Thomas's behalf. The Failure to Negotiate Claim is **not** premised on a breach listed in Section 22:1973(B). Thus, no statutory penalties are available for this Claim, and there is no basis for narrowly circumscribing the duties owed by State Farm to its insured.[30] With the foregoing in mind, this Court must determine whether insurers are obligated, under Louisiana law, to protect their insureds from excess exposure by making a reasonable effort to settle claims, or whether they can "simply rest on their laurels and wait for claimants to submit firm settlement offers" before exploring settlement possibilities.[31] As the Fifth Circuit aptly noted, the answer to that question is found in the very language of Section 22:1973(A), which provides that "[t]he insurer has an *affirmative duty* . . . to *make a reasonable effort* to settle claims with the insured or the claimant, or both." Black's Law Dictionary defines an "affirmative duty" as "[a] duty to take ***a positive step*** to do something."[32] Thus, while the facts of each case may dictate whether a "reasonable effort" was made by the insurer, it is nevertheless clear that an insurer must, at a minimum, take some ***positive*** step to settle the case in order to avoid liability. Here, Kelly extended a clear and unequivocal invitation

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[28] *Theriot*, 694 So. 2d at 192, n. 15.

[29] La. R.S. § 22:1973(A) ("An insurer . . . owes to his insured a duty of good faith and fair dealing. . . . **Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach**.") (emphasis added). S*ee also Stanley v. Trinchard*, 500 F. 3d 411, 427 (5th Cir. 2007) ("The *Theriot* court took pains to make clear that '[i]t is the relationship of the parties that gives rise to the implied covenant of good faith and fair dealing' between the insurer and insured. Inasmuch as it is not the statute that creates the insured's cause of action against the insurer, the bases for an insured's cause of action for a breach of the implied covenant of good faith and fair dealing are not limited to the prohibited acts listed in La. R.S. 22:[1973](B)."") (citations omitted); *Burnett v. State Farm Fire & Cas. Co.*, 2012 WL 1678352, *3 (M.D. La. 2012), *judgment vacated pursuant to settlement* ("despite the unavailability of the statutory punitive damage provisions in this case, an insured may, consistently with *Theriot* and *French Market*, sue its insurer based on a breach of the insurer's fiduciary duty of good faith and fair dealing).

[30] *Cf. Theriot*, 694 So. 2d at 186 ("We have generally held that statutes subjecting insurers to penalties are to be considered penal in nature and should be strictly construed.").

[31] *Id.*

[32] BLACK'S LAW DICTIONARY (9th ed. 2009) (emphasis added).

to State Farm to negotiate and explore settlement, and State Farm made no effort to respond to protect Thomas's interests.[33]

Not only do the unambiguous terms of Section 22:1973(A) impose upon insurers "an *affirmative duty* . . . to *make a reasonable effort* to settle claims", but the imposition of that duty does not lead to absurd consequences.[34] Indeed, numerous other jurisdictions recognize an insurer's duty to explore settlement possibilities on behalf of its insured.[35] Those Courts typically hold that an insurer should "make inquiries to determine if settlement is possible within the policy limitations"[36] or "take the initiative and attempt to negotiate a settlement within the policy coverage,"[37] and have treated the lack of a firm settlement offer as evidence that a jury may consider in deciding the insurer's liability – not as a basis for denying an insured an action against its insurer.

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[33] *Kelly*, 582 F. App'x at 292 ("It does not appear that State Farm ever responded to [Kelly's January 2006] letter.").
[34] "When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." La. C.C. art. 9.
[35] *See, e.g.*, *Coleman v. Holecek*, 542 F.2d 532, 537 (10th Cir. 1976) (applying Kansas law and noting that "[t]he duty to consider the interests of the insured arises not because there has been a settlement offer from the plaintiff but because there has been a claim for damages in excess of the policy limits. This claim creates a conflict of interest between the insured and the carrier which requires the carrier to give equal consideration to the interests of the insured. This means that 'the claim should be evaluated by the insurer without looking to the policy limits and as though it alone would be responsible for the payment of any judgment rendered on the claim.' When the carrier's duty is measured against this standard, it becomes apparent that the duty to settle does not hinge on the existence of a settlement offer from the plaintiff. Rather, the duty to settle arises if the carrier would initiate settlement negotiations on its own behalf were its potential liability equal to that of its insured.") (citations omitted); *City of Hobbs v. Hartford Fire Ins. Co.*, 162 F.3d 576, 586 (10th Cir. 1998) (applying New Mexico law and finding that an insurer can be liable for a bad faith failure to settle even though a claimant has not submitted a firm reasonable offer); *Maine Bonding & Cas. Co. v. Centennial Ins. Co.*, 298 Or. 514, 519, 693 P.2d 1296, 1299 (Ore.1985) (under Oregon law, insurer's duty "may require that an insurer make inquiries to determine if settlement is possible within the policy limitations."); *Alt v. American Family Mut. Ins. Co.*, 71 Wis.2d 340, 350, 237 N.W.2d 706, 713 (Wis. 1976) ("All prior Wisconsin cases indicate that an insurance company has more than a passive role—that, in some circumstances at least it has an affirmative duty to seize whatever reasonable opportunity may present itself to protect its insured from excess liability."); *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 N.J. 474, 493, 323 A.2d 495, 506–07 (1974) ("it would be unrealistic to believe that [a firm offer] is a prerequisite for finding the insurer to have acted other than in good faith. . . . The better view is that the insurer has an affirmative duty to explore settlement possibilities. . . . At most, the absence of a formal request to settle within the policy is merely one factor to be considered in light of the surrounding circumstances, on the issue of good faith. . . . We . . . hold that an insurer . . . has a positive fiduciary duty to take the initiative and attempt to negotiate a settlement within the policy coverage. Any doubt as to the existence of an opportunity to settle within the face amount of the coverage . . . must be resolved in favor of the insured unless the insurer, by some affirmative evidence, demonstrates there was not only no realistic possibility of settlement within policy limits, but also that the insured would not have contributed to whatever settlement figure above that sum might have been available."); *State Auto. Ins. Co. v. Rowland*, 221 Tenn. 421, 433–34, 427 S.W.2d 30, 35 (1968) ("to hold as a matter of law that an [insurer] cannot be guilty of bad faith unless it received an offer . . . within the policy limits could most certainly lead to inequitable results. We see nothing, under such a holding, to prevent an insurance company, in a case where liability is certain and injury great, to simply decline negotiations with the injured party and later assert that there was no offer within the policy limits. We do not hold that the insurance company has an affirmative duty to negotiate with the injured claimant in all cases. We would only say that a refusal to discuss a settlement may be considered along with other evidence in determining the issue of bad faith."); *Cernocky v. Indem. Ins. Co. of N. Am.*, 69 Ill. App. 2d 196, 209, 216 N.E.2d 198, 205 (Ill. App. Ct. 1966) ("The fact that no offer was made by Marquardts to settle within the policy limits is merely one factor to be considered in light of the surrounding circumstances in determining whether the defendant was guilty of bad faith.").
[36] *Maine Bonding*, 298 Or. at 519 ("Due care may require that an insurer make inquiries to determine if settlement is possible within the policy limits.").
[37] *Rova*, 65 N.J. at 496.

Accordingly, the first certified question should be answered in the **affirmative**, with the caveat that the Failure to Negotiate Claim is really one for a "breach of the implied covenant of good faith and fair dealing", which is embodied in Section 22:1973(A),[38] rather than one "under Section 22:1973(A)".[39]

IV. The Failure to Inform Claim

Kelly's Failure to Inform Claim arises from State Farm's failure to advise Thomas of the January 2006 letter, the total loss to Kelly's vehicle, the extent of Kelly's medical bills, State Farm's March 22 offer to Kelly, and Kelly's rejection of State Farm's offer. As *Roberie* makes clear, an insurer is liable for an excess judgment where it fails to keep its insured fully informed of the status of settlement negotiations and other developments affecting his excess exposure.[40] Thus, from the *amicus's* perspective, the ultimate question on Kelly's Failure to Inform Claim is not whether State Farm ***can*** be held liable for its failure to inform Thomas but, instead, whether State Farm's failure to inform constitutes a violation of Section 22:1973(B)(1), for which statutory penalties can be assessed.

Section 22:1973(B)(1) provides that an insurer breaches its duty of good faith and fair dealing if it knowingly "[m]isrepresent[s] pertinent facts or insurance policy provisions relating to any coverages at issue." First, it must be noted that this rule is in the disjunctive, rather than the conjunctive, form. Thus, an insurer can be liable for either:

1. Misrepresenting **pertinent facts** (the "Pertinent Facts Clause"); ***OR***
2. Misrepresenting **insurance policy provisions** (the "Insurance Policy Provisions Clause").

State Farm takes the position that an insurer can only be liable for misrepresenting "facts about the policy itself, such as the amount of coverage, lapse or expiration of the policy, or exclusions from coverage"[41] – *i.e.*, "insurance policy provisions." However, the statute explicitly sets forth **two separate categories** of actionable misrepresentations, and State Farm's interpretation is **already addressed** by the Insurance Policy Provisions Clause. Thus, State

[38] *Theriot*, 694 So. 2d at 192, n .15.
[39] *See Kelly*, 582 F. App'x at 296 (certifying the following question: "(1) Can an insurer be found liable for a bad-faith failure-to-settle claim ***under Section 22:1973(A)*** when the insurer never received a firm settlement offer?") (emphasis added).
[40] *See also* 15 WILLIAM SHELBY MCKENZIE & H. ALSTON JOHNSON, III, LOUISIANA CIVIL LAW TREATISE, INSURANCE LAW & PRACTICE § 7:10 (4th ed. 2006), and cases cited therein.
[41] State Farm's Petition for Panel Rehearing before the U.S. Court of Appeals for the Fifth Circuit, p. 7.

Farm invites this Court to read the Pertinent Facts Clause as simply repeating the Insurance Policy Provisions Clause, and to give the Pertinent Facts Clause no independent meaning. While "statutes subjecting insurers to penalties are to be considered penal in nature and should be strictly construed,"[42] the rule of strict construction does not authorize a reading of Section 22:1973(B)(1) that would render the Pertinent Facts Clause mere surplusage.[43] Thus, State Farm's reading of Section 22:1973(B)(1) should be rejected out of hand.

Next, this Court must determine if the phrase "relating to any coverages at issue", which modifies the phrase "insurance policy provisions," also modifies the phrase "pertinent facts." It cannot for several reasons. First, "courts are bound, if possible, to give effect to all parts of a statute and to construe no sentence, clause, or word as meaningless and surplusage if a construction giving force to and preserving all words can legitimately be found."[44] Construing the statute so that it only applies to a misrepresentation of "pertinent facts . . . relating to any coverages at issue" makes the term "pertinent" devoid of any context or meaning.

Second, "[t]he rules of statutory construction are designed to ascertain and enforce the intent of the legislature."[45] The Louisiana Supreme Court has "long recognized the State, through the valid exercise of its police power, imposes statutory penalties 'to discourage certain types of conduct by an insurer.'"[46] Subsection (B) delineates certain "breach[es] of the insurer's duties imposed in Subsection A" for which insurers may be penalized.[47] Thus, Section 22:1973(B)(1) must be read and considered within the context of the insurer's duties set forth in Section 22:1973(A). Section 22:1973(A) imposes a duty upon insurers to deal fairly and in good faith with their insureds, to adjust claims fairly and promptly, and to make a reasonable effort to settle claims. Therefore, Section 22:1973(B)(1) must necessarily seek to discourage insurers from misrepresenting facts which may not relate to any coverages at issue but are nevertheless "pertinent" to the insurer's Section 22:1973(A) duties. These "pertinent facts" could include

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[42] *Theriot*, 694 So. 2d at 186.
[43] *Boudreaux v. Louisiana Dep't of Pub. Safety & Corr.*, 12-0239, p. 5 (La. 10/16/12); 101 So. 3d 22, 26 ("Every word, sentence, or provision in a law is presumed to be intended to serve some useful purpose, that some effect is given to each such provision, and that no unnecessary words or provisions were employed. Consequently, courts are bound, if possible, to give effect to all parts of a statute and to construe no sentence, clause, or word as meaningless and surplusage if a construction giving force to and preserving all words can legitimately be found.").
[44] *Id.*
[45] *In re Succession of Boyter*, 1999-0761 (La. 1/7/00), 756 So. 2d 1122, 1128.
[46] *Oubre v. Louisiana Citizens Fair Plan*, 2011-0097 (La. 12/16/11), 79 So. 3d 987, 1000.
[47] Section 22:1973(B) states, in pertinent part, that "[a]ny one of the following acts . . . constitutes a breach of the insurer's duties imposed in Subsection (A) . . . ."

facts concerning the nature and extent of the insurer's investigation, facts central to the insured's liability, facts regarding an insurer's payment of loss to its insured or claimants, and facts concerning the existence of insurance policies which are not yet "at issue" (perhaps because the insured does not know of their existence), but that may nevertheless provide coverage (*e.g.*, excess insurance policies). Separating "pertinent facts" from "coverages at issue" gives meaning to the disjunctive particle "or", preserves the insurers' underlying duties, and prevents insurers from misrepresenting, with impunity, facts which are necessary for insureds to make informed decisions regarding matters affecting their own interests.

In the instant case, State Farm never advised Thomas of the January 2006 letter, the total loss to Kelly's vehicle, the extent of Kelly's medical bills, State Farm's March 22 offer to Kelly, and Kelly's rejection of State Farm's offer. These facts were certainly pertinent to the Section 22:1973(A) duties State Farm owed to Thomas. Accordingly, State Farm **can** be penalized for failing to inform Thomas of facts suggesting a strong probability of personal liability.

CONCLUSION

Section 22:1973(A) makes clear that an insurer "has an *affirmative duty* . . . to *make a reasonable effort* to settle claims with the insured or the claimant, or both." Thus, an insurer may not simply wait for claimants to submit firm settlement offers before exploring settlement possibilities.

Section 22:1973(B)(1) cannot be interpreted as applying solely to misrepresentations of "coverage issues" – *i.e.*, facts about the policy itself, such as the amount of coverage, lapse or expiration of the policy, or exclusions from coverage. Not only would that interpretation render the phrase "pertinent facts" and the disjunctive particle "or" nugatory, but, it would also allow insurers to withhold information necessary for insureds to make informed decisions regarding their own interests, and it would discourage the frank exchange of information between an insurer – who "is held to a **high fiduciary duty** to discharge its policy obligations to its insured in good faith" –[48] and its insured – who relies on his insurer for an honest evaluation of the case against him.

Accordingly, both of the certified questions should be answered in the affirmative.

[48] *Pareti*, 536 So. 2d at 423 (emphasis added).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of United Policyholders's *Amicus Curiae* Brief in Support of Appellant, Danny Kelly, have been mailed by United States Mail, postage prepaid, to the following:

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Baton Rouge, Louisiana this 20th day of January, 2015.

/s/ Michael J. deBarros
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