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# ROYAL GLOBE REVISITED: STANDARDS FOR THE MATURITY OF A THIRD-PARTY ACTION

Guy O. Kornblum\* and Glen R. Olson\*\*

## I. INTRODUCTION

The decision of the California Supreme Court in *Royal Globe Insurance Co. v. Superior Court*<sup>1</sup> removed many of the barriers third-party claimants, and perhaps others,<sup>2</sup> usually encountered in bringing a direction against an insurer for wrongful handling of a claim under an insurance policy.<sup>3</sup> The basis for a third party's *Royal*

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1. 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979). See Kornblum, *Royal Globe Insurance Company v. Superior Court: Its Impact on Litigation Involving Insurers*, 15 FORUM 67 (1980), republished in 29 DEF. L.J. 355 (1980); Comment, *Bad Faith: Defining Applicable Standards In The Aftermath Of Royal Globe v. Superior Court*, 23 SANTA CLARA L. REV. 917 (1983).

2. For instance, in *Williams v. Transport Indem. Co.*, 157 Cal. App. 3d 953, 203 Cal. Rptr. 868 (1984), the wife of a deceased third-party claimant sued an insurer who failed to effect a settlement prior to her husband's death for, *inter alia*, negligent infliction of emotional distress. The reviewing court in *Williams* held that although the plaintiff was a foreseeable victim for purposes of establishing her own claim (*see Molien v. Kaiser Found. Hosp.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980)), her action was dependent upon the duties owed to her husband under the Insurance Code. 157 Cal. App. 3d at 964, 203 Cal. Rptr. at 875. However, the court concluded that the plaintiff's personal action for negligent infliction of emotional distress, as well as the action for violation of CAL. INS. CODE § 790.03(h), was barred for lack of a prior determination of the insured's liability. *Id.* The *Williams* case is discussed in further detail, *infra* notes 84-95 and accompanying text.

3. Insurance policies in California must contain a provision permitting the enforcement of a judgment in a separate action against an insurer of the policy "subject to its terms and limitations . . ." CAL. INS. CODE § 11580(b)(2). Notwithstanding the above provision, a third-party's rights were limited prior to the *Royal Globe* opinion. First, in the case of an excess verdict, a third-party claimant could enforce the insured's claim for breach of the covenant of good faith and fair dealing if there was an assignment of this claim from the insured to the third-party claimant enforcing it. *Murphy v. Allstate Ins. Co.*, 17 Cal. 3d 937, 553 P.2d 587, 132 Cal. Rptr. 424 (1976); *Purcell v. Colonial Ins. Co.*, 20 Cal. App. 3d 807, 97 Cal. Rptr. 874 (1971). However, even with an assignment, the third-party could only recover the amount of the excess judgment over and above the liability limits. The insured's personal claims for emotional distress and punitive damages pursuant to CAL. CIV. CODE § 3294 were not assignable. *Murphy*, 17 Cal. 3d at 942, 553 P.2d at 387, 132 Cal. Rptr. at 427.

*Globe* action is set forth in that opinion and in the provisions of California Insurance Code section 790.03(h)<sup>4</sup> to the extent that these provisions are applicable to a third party's claim against an insurer.<sup>5</sup>

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4. CAL. INS. CODE § 790.03(h) contains 15 subsections setting forth various unfair claims settlement practices. These are:

(h) Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair settlement practices:

- (1) Misrepresenting to claimants pertinent facts or insurance policy provisions relating to any coverages at issue.
- (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.
- (3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.
- (4) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements have been completed and submitted by the insured.
- (5) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.
- (6) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds, when such insureds have made claims for amounts reasonably similar to the amounts ultimately recovered.
- (7) Attempting to settle claims by an insured for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application.
- (8) Attempting to settle a claim on the basis of an application which was altered without notice to, or knowledge or consent of, the insured, his representative, agent, or broker.
- (9) Failing, after payment of a claim, to inform insureds or beneficiaries, upon request by them, of the coverage under which payment has been made.
- (10) Making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount in arbitration.
- (11) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.
- (12) Failing to settle claims promptly, where liability has become apparent, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.
- (13) Failing to provide promptly a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a claim or for the offer of a compromise settlement.
- (14) Directly advising a claimant not to obtain the services of an attorney.
- (15) Misleading a claimant as to the applicable statute of limitations.

CAL. INS. CODE § 790.03(h) (West Supp. 1985). The statute as adopted in California is a slight modification of the Model Unfair Claims Practices Act proposed by the Nat'l Assoc. of Ins. Comm'rs. The California version of those provisions of the Model Act set forth in CAL. INS. CODE § 790.03(h) adds subsections (14) and (15).

5. Some of the subsections of CAL. INS. CODE § 790.03(h) may not be applicable to actions by third-party claimants. In particular, subsections (h)(2) (regarding failure to acknowledge and act promptly on communications with respect to claims under an insurance

However, under *Royal Globe*, a third-party claimant may sue an insurer directly for violation of California Insurance Code section 790.03, subsections (h)(5) and (h)(14). These subsections provide that it is an unfair trade practice for one "in the business of insurance" to refrain from attempting to effectuate a prompt, fair and equitable settlement and to directly advise a claimant not to obtain the services of an attorney.<sup>6</sup> Yet, under the *Royal Globe* decision, an action may not be brought until the "conclusion" of the underlying action.<sup>7</sup> The *Royal Globe* court cited three policies underlying this holding: (1) to prevent the prejudicial use of evidence of insurance against the insured in the underlying action; (2) to prevent the hampering of the defense of the insured by discovery initiated against the insurer; and (3) to facilitate the determination of the damages suffered by the injured party as a result of the insurer's failure to settle.<sup>8</sup> As a result of the "conclusion" requirement, a question now facing our courts in *Royal Globe* actions by third parties is: precisely when is a third-party claim mature for purposes of bringing a "second suit" predicated on an insurer's violation of the Unfair Practices Act?

The *Royal Globe* requirement that a third-party action against an insurer for violation of the California Insurance Code be deferred until after the "conclusion" of the underlying action is strongly rooted in public policy. Permitting two actions to be asserted simultaneously, particularly in the context of a joint suit against insurer and insured, subverts the policy against disclosing evidence to a trier of fact of the existence and amount of insurance coverage.<sup>9</sup> The *Royal Globe* opinion was also based upon the more practical consideration that it is futile to permit the "second suit" to be brought until the damages in the underlying action are ascertained.<sup>10</sup>

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policy) and (h)(3) (regarding the failure to implement standards for the prompt investigation and processing of claims) may not be available in third-party actions. See *Beckham v. Safeco Ins. Co. of Am.*, 691 F.2d 898, 904 (9th Cir. 1982); *Avila v. Travelers Ins. Co.*, 651 F.2d 658, 661 (9th Cir. 1981).

6. See *supra* note 4.

7. *Royal Globe Ins. Co. v. Superior Ct.*, 23 Cal. 3d at 892, 592 P.2d at 336-37, 153 Cal. Rptr. at 850.

8. *Id.*

9. This policy is well-entrenched. See, e.g., CAL. EVID. CODE § 1155; *Roche v. Llewellyn Iron Works Co.*, 140 Cal. 563, 577, 74 P. 147, 153 (1903); *Crawford v. Alioto*, 105 Cal. App. 2d 45, 55, 233 P.2d 148, 155 (1951).

10. See *supra* note 7. For example, assume the insured is found *not* liable to the third-party claimant. Does an insurer still have liability to a third-party claimant if it refuses a "nuisance" settlement and forces the third-party to try a weak case? Suppose a low limits policy demand is rejected by the insurer. After a much larger excess verdict is returned, the

Thus, two issues undecided by the *Royal Globe* opinion are: (1) what constitutes a "conclusion" of the underlying action; and (2) whether a determination of the liability of the insured in the underlying action is a necessary element of such a conclusion. Rather than simply raising questions of timing, these issues go directly to the substantive requirements for bringing a third-party action against an insurer.<sup>11</sup> Recently, the California courts of appeal have grappled with the "conclusion" concept in an attempt to clarify the situations in which *Royal Globe* actions can, and cannot, be brought. This article analyzes these opinions in the context of three situations: (1) *Royal Globe* actions brought prior to the entry of a final judgment in the underlying action;<sup>12</sup> (2) *Royal Globe* actions brought following settlements reached with or without underlying litigation;<sup>13</sup> and (3) *Royal Globe* actions brought without settlements or underlying litigation.<sup>14</sup>

As the above situations illustrate, the concept of a "conclusion" or "termination" for purposes of a third-party bad faith suit is one which is continually evolving in the California appellate courts<sup>15</sup> and requires clarification from the California Supreme Court. In particular, the controversial area of *Royal Globe* actions following settlements requires resolution.<sup>16</sup>

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insurer immediately pays the excess and satisfies the judgment against the insured. What damages can the third-party claimant then assert against the insurer for a violation of § 790.03(h)(5)'s requirement that the insurer attempt in good faith to effectuate a prompt, fair and equitable settlement after liability has become reasonably clear?

11. Although most typically raised in the context of an action by a third-party claimant for violation of CAL. INS. CODE § 790.03, the "conclusion" requirement extends also to an action by an *insured* against the insurer for failure to properly handle a liability suit. Such an action would generally proceed as one for breach of the covenant of good faith and fair dealing. See, e.g., *Critz v. Farmers Ins. Group*, 230 Cal. App. 788, 41 Cal. Rptr. 401 (1964). It is not clear whether the "conclusion" requirement applies to a first party case in which an insured asserts bad faith failure to pay benefits under an accident, health, or disability policy. However, some subsections of CAL. INS. CODE § 790.03(h) *do* apply to such actions. See *Colonial Life & Accident Ins. Co. v. Superior Ct.*, 31 Cal. 3d 785, 647 P.2d 86, 183 Cal. Rptr. 810 (1981).

12. See *infra* notes 17-57 and accompanying text.

13. See *infra* notes 58-82 and accompanying text.

14. See *infra* notes 83-95 and accompanying text.

15. In particular, as discussed in Section II, *infra*, a major issue is whether *Royal Globe* requires a determination of the liability of the insured in the underlying action, or whether *Royal Globe* only prevents a simultaneous action against insurer and insured.

16. Such an opinion may be forthcoming in *Coleman v. Gulf Ins. Group*, 153 Cal. App. 3d 706, 200 Cal. Rptr. 619 (1984), *hearing granted*, May 31, 1984. See *infra* notes 31-37 and accompanying text.

## II. INTERPRETATION OF THE "CONCLUSION" REQUIREMENT BY THE CALIFORNIA COURTS OF APPEAL

### A. *Royal Globe Actions in the Absence of a Final Judgment*

In situations in which the underlying litigation is in progress and a second suit<sup>17</sup> is simultaneously pursued against an insurer, an interesting question arises: when is the underlying suit against the insured sufficiently "mature" for *Royal Globe* purposes? California courts, addressing this scenario, have held in several cases that the underlying suit was not "concluded" for purposes of a second suit under *Royal Globe*.

#### 1. *Doser v. Middlesex Mutual Insurance Co.*

An opinion following the *Royal Globe* decision, *Doser v. Middlesex Mutual Insurance Company*,<sup>18</sup> indicates some of the policy considerations underlying *Royal Globe's* conclusion requirement. *Doser* involved a third party's action for violation of the implied covenant of good faith and fair dealing following a stipulated judgment in the underlying suit and an assignment of the insured's bad faith claim to the third party.<sup>19</sup> While not an action for breach of statutory duties, the *Doser* opinion contains enlightening commentary on the policies relating to the maturity of a "second suit."

The *Doser* case involved an airplane accident in which both the pilot (Kelly) and his passenger (Doser) were killed. Kelly was a member of a flying club whose participants were insured by the defendant Middlesex Mutual Insurance Company. Kelly's estate was virtually worthless at the time of the accident.

The *Doser* heirs subsequently filed a wrongful death action against Kelly's estate. A demand was then made upon Middlesex to defend the estate. An agent for Middlesex, Omni Aviation Managers, provided a defense for the flying club but did not provide a defense for the pilot's estate. Omni also denied the *Doser* heirs' \$100,000 demand for the policy limits.<sup>20</sup>

Prior to any significant involvement by Middlesex in the wrongful death action, the pilot's estate entered into a settlement for \$980,000, a condition of which was the assignment of all claims

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17. The "second suit" based upon *Royal Globe* may be filed separately, or joined with the underlying action as was done in *Royal Globe*. See, e.g., *Klaudt v. Flink*, 658 P.2d 1065 (Mont. 1983) (suit against insurer properly joined with suit against insured).

18. 101 Cal. App. 3d 883, 162 Cal. Rptr. 115 (1980).

19. *Id.* at 889, 162 Cal. Rptr. at 118.

20. *Id.*

against Middlesex to the Doser heirs. The Doser heirs then instituted a bad faith action against Middlesex, seeking \$980,000 in damages. The jury in the trial court action returned a special verdict finding that Middlesex had breached the duty of good faith and fair dealing by failing to defend the Kelly estate and by failing to accept the policy limits demand of the Doser heirs. The jury also found that the Kelly estate had breached the implied covenant in its dealings with Middlesex. Judgment was entered for Middlesex and the Doser heirs appealed.

On appeal, Middlesex argued that, because the wrongful death action against the Kelly estate had been dismissed,<sup>21</sup> no cause of action existed to assign to the third-party claimants. The court of appeal observed in its opinion that in the analogous situation of a *Royal Globe* action, no cause of action arises in favor of the third-party claimant until the liability of the insured is first determined.<sup>22</sup> Because the alleged breach of the duty to settle<sup>23</sup> only presented the *possibility* of a judgment in excess of the policy limits, the reviewing court held that the Doser heirs' assigned cause of action was invalid.<sup>24</sup> Of particular concern to the court was the fact that no judge or jury had ever determined the amount of the Doser heirs' damages and the settlement amount appeared to be excessive.<sup>25</sup>

## 2. *Nationwide Insurance Co. v. Superior Court*

Following *Doser*, the Fourth District Court of Appeal considered the concept of the conclusion of the underlying action in *Nationwide Insurance Co. v. Superior Court*.<sup>26</sup> In *Nationwide*, a case arising out of an automobile accident and liability policy, the third party claimant obtained a judgment against the insured, from which the insured appealed. While the appeal was pending, the claimant instituted an action against Nationwide alleging that it had acted wrongfully in failing to negotiate a settlement and thus had violated California Insurance Code section 790.03.

The trial court overruled Nationwide's demurrer to the third-

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21. *Id.* at 888, 162 Cal. Rptr. at 118. The wrongful death action was dismissed approximately four years after the execution of the assignment.

22. *Id.* at 891, 162 Cal. Rptr. at 120.

23. The estate also appeared to have a fully matured cause of action for breach of the duty to defend. Although the *Doser* opinion did not address this issue, there is authority to the effect that a bad faith refusal to defend can result in an award of extra-contractual damages. See, e.g., *Tibbs v. Great American Ins. Co.*, 755 F.2d 1370 (9th Cir. 1985).

24. 101 Cal. App. 3d at 894, 162 Cal. Rptr. at 121.

25. *Id.* at 892, 162 Cal. Rptr. at 120.

26. 128 Cal. App. 3d 697, 180 Cal. Rptr. 464 (1982).

party claimant's complaint. The court of appeal issued a writ directing the trial court to vacate its order. The *Nationwide* court held that the judgment was not final while the appeal was still pending; accordingly, the *Royal Globe* action was premature.<sup>27</sup> The court, citing *Doser*, also observed that *Royal Globe* held that the third-party claimant's damages may best be ascertained after the conclusion of the underlying action.<sup>28</sup> The court expressly rejected the argument that a judgment is final for *Royal Globe* purposes when it is final for the purpose of taking an appeal.<sup>29</sup>

Thus, *Nationwide*, while focusing on the issue of finality of a judgment, also referred to the *Royal Globe* policy relating to ascertaining the third-party claimant's damages after conclusion of the underlying suit. *Doser*, in contrast, focuses on the requirement of determining liability of the insured in the underlying case. These considerations may have the greatest impact in the context of "second suits" following settlements, because often such settlements lack indicia of liability on the part of the insured.<sup>30</sup>

### 3. *Coleman v. Gulf Insurance Group*

In contrast to the *Nationwide* opinion is the vacated opinion of the Second District Court of Appeal in *Coleman v. Gulf Insurance Group*.<sup>31</sup> In *Coleman*, the children of a deceased person brought suit

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27. *Id.* at 715-16, 180 Cal. Rptr. at 466.

28. *Id.* at 714, 180 Cal. Rptr. at 466. The *Nationwide* court noted that its holding was supported by the general rule of indemnity law that no right to indemnity accrues until recovery of a final judgment against the indemnitee. *Id.* at 714-15, 180 Cal. Rptr. at 466-67.

The *Nationwide* court also observed that "[i]n view of its reasoning, the court's language in *Royal Globe* until the liability of the insured is first determined and after the conclusion of the action by the third party claimant against the insured could only have reference to a final determination and conclusion, a final judgment." *Id.* at 714, 180 Cal. Rptr. at 466.

29. *Id.* at 715, 180 Cal. Rptr. at 467.

30. The *Doser/Nationwide* approach to the "maturity" question may tend to discourage *Royal Globe* actions following settlements, and thus shield insurers from unfair practices in such settlements. See *infra* notes 58-82 and accompanying text.

31. 153 Cal. App. 3d 706, 200 Cal. Rptr. 619, *hearing granted*, May 31, 1984. Although *Coleman* is presently before the California Supreme Court and the court of appeal opinion has no precedential effect, the opinion raises issues which the California Supreme Court may resolve in its forthcoming opinion. See, e.g., *Seaman's Direct Buying Service v. Standard Oil Co. of California*, 36 Cal. 3d 752, 769, 686 P.2d 1158, 1167, 206 Cal. Rptr. 354, 363 (1984). The *Seaman's* court avoided the question of whether a breach of *any* contract gives rise to an action for breach of the implied covenant. The court noted in this regard that: "For the purposes of this case it is unnecessary to decide the broad question which *Seaman's* poses. Indeed, it is not even necessary to predicate liability on a breach of the implied covenant. It is sufficient to recognize that a party to a contract may incur tort remedies when, in addition to breaching the contract, he seeks to shield himself from liability by denying, in bad faith and without probable cause, that the contract exists." *Id.* at 769, 686 P.2d at 1167, 206 Cal. Rptr. at 363.



for wrongful death against the City of Monrovia, which was insured by the defendant, Gulf Insurance Group. The heirs obtained a verdict against the city in the amount of \$350,000, and an appeal was taken on the city's behalf by Gulf. The appeal was subsequently dismissed after the parties settled the underlying action.

Following dismissal of the appeal, the Coleman heirs initiated a bad faith action, alleging that Gulf violated California Insurance Code section 790.03. Gulf demurred to the heirs' complaint, however, and the trial court dismissed all causes of action. The court ruled that because no final judgment existed, there was no predicate for a *Royal Globe* claim.<sup>32</sup>

The *Coleman* court reversed, holding that a settlement pending appeal was a sufficient "conclusion" of the underlying action for purposes of determining if a *Royal Globe* action had matured.<sup>33</sup> While recognizing that *Royal Globe* contemplates a conclusion of the underlying action, and that pending final resolution of an appeal there is no such a conclusion,<sup>34</sup> the *Coleman* court nonetheless determined that a sufficient termination of the underlying action existed on the facts of that case.<sup>35</sup> As a practical matter, the *Coleman* court was unable to distinguish between a settlement reached prior to or during trial and one reached while an appeal is pending.<sup>36</sup> In either

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32. *Coleman* also raises other issues. For example, the heirs of the third-party claimant sought to bring an action for violation of the implied covenant of good faith and fair dealing. This cause of action was dismissed by the trial court. The court of appeal affirmed, holding that absent an assignment from the insured, the third-party claimant (or his estate) had no basis for such an action. 153 Cal. App. 3d at 713, 200 Cal. Rptr. at 622. Second, the *Coleman* heirs argued that Gulf had maliciously prosecuted an appeal. The *Coleman* court upheld the dismissal of this cause of action, observing that the appeal did nothing more than perpetuate a "vigorous defense" and that an appeal "does not in truth seek affirmative relief." *Id.* An abuse of process cause of action was also rejected. *Id.* at 712-13, 200 Cal. Rptr. at 624-25.

33. *Id.* at 715-16, 200 Cal. Rptr. at 623. The court noted: "[T]he underlying litigation unequivocally remains open and pending when an appeal has been taken. As a consequence, the matter must still be amenable to a compromise good faith settlement contemplated by subdivision (h) (5) of section 790.03. Indeed, we perceive no practical difference . . . between a pretrial statutory offer to compromise (CAL. CIV. PROC. CODE § 998), a settlement offer made during trial and a settlement offer made during the pendency of an appeal . . . [T]he evil inherent in barring an Insurance Code section 790.03 action where the underlying action has been concluded by settlement and dismissal, that insurance companies . . . might entice a settlement by unfair practices, then seek to hide behind the cloak of that settlement . . . is the same where the dismissal is that of an appeal." *Id.* at 715.

34. *Id.* at 713, 200 Cal. Rptr. at 623.

35. *Id.* at 715, 200 Cal. Rptr. at 623.

36. *Id.* This result is no doubt correct because when a settlement is reached pending appeal, there appears to be a conclusion of the action sufficient for *Royal Globe* purposes. See also *Rodriguez v. Fireman's Fund Ins. Co.*, 142 Cal. App. 3d 46, 190 Cal. Rptr. 705 (1983), discussed *infra* at notes 59-76 and accompanying text.

case, according to the *Coleman* court, there exists a danger that an insurance company might obtain an unfair settlement, then seek to hide behind such a settlement.<sup>37</sup>

#### 4. *Carr v. Progressive Casualty Insurance Co.*

The recent opinion in *Carr v. Progressive Casualty Insurance Co.*<sup>38</sup> presents an interesting variation on the conclusion requirement. There, following an automobile accident, the third-party claimant brought suit against the insured and also made a demand for the insured's policy limits. However, no offer of settlement was made by the insurer. The third party committed suicide prior to the resolution of the underlying action. His personal representative then obtained an arbitration award and judgment was entered pursuant to it<sup>39</sup> in an amount less than the policy limits.

Following the judgment in the underlying action, the decedent's personal representative brought suit against Progressive, the decedent's insurer. Progressive argued successfully in the trial court that no cause of action for breach of statutory duties could be maintained because the personal injury action was not concluded prior to the decedent's demise. Accordingly, no cause of action "vested" which could later be prosecuted by the personal representative.<sup>40</sup>

The court of appeal held that while an actionable claim had not arisen during the claimant's lifetime, he did possess a cause of action which could be passed on to his personal representative.<sup>41</sup> Although the appellate court noted that the action against the insured had *not* been concluded (by either settlement or judgment) during the claimant's lifetime,<sup>42</sup> the court held that an action for breach of statutory duties could be maintained by the personal representative.<sup>43</sup>

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37. *Coleman*, 153 Cal. App. 3d at 715, 200 Cal. Rptr. at 623. Because of its emphasis on protecting the insured in the context of a settlement, *Coleman* adopts a different approach than the opinion in *Doser*, which appears to require something more than a settlement of the underlying action. The *Coleman* approach, however, tends to subject more settlements to scrutiny in "second suits," since all that is required is that the underlying suit be "concluded" by settlement and dismissal.

38. 152 Cal. App. 3d 881, 199 Cal. Rptr. 835 (1984).

39. This procedure is authorized by CAL. CIV. PROC. CODE § 41.23 (West Supp. 1985).

40. 152 Cal. App. 3d at 888, 199 Cal. Rptr. at 838.

41. *Id.* at 890-91, 199 Cal. Rptr. at 840-41.

42. *Id.* at 889 n.6, 199 Cal. Rptr. at 840 n.6.

43. *Id.* at 893, 199 Cal. Rptr. at 842. The appellate court stated: "[G]iven [the] legislative history and statutory scheme, we conclude that a complete cause of action need not exist at the time of the injured party's death in order for rights to survive which later may mature in an actionable claim." *Id.* at 891, 199 Cal. Rptr. at 841.

### 5. *Industrial Indemnity Co. v. Mazon*

The *Doser*, *Nationwide*, *Coleman* and *Carr* cases represent variations on *Royal Globe* actions brought in the absence of an underlying "final" judgment. The opinion of the court of appeal in *Industrial Indemnity Co. v. Mazon*<sup>44</sup> exemplifies the more typical situation in which the "conclusion" issue may arise: the third party seeks to initiate a *Royal Globe* action while the underlying suit is still pending.

In *Mazon*, the owner of a corporation was injured while riding as a passenger in a car driven by his employee. The owner brought suit against the corporation and the employee alleging the negligence of the driver. The insurer in the *Mazon* case, Industrial Indemnity, filed a separate declaratory relief action alleging a lack of coverage for the owner of the corporation because: (1) the corporate entity was a sham; and (2) the owner was acting within the course and scope of his employment at the time of the accident. *Mazon* (the owner) cross-complained in this separate action alleging unfair insurance claim practices on the part of Industrial Indemnity. Industrial Indemnity successfully demurred to the cross-complaint in the trial court.<sup>45</sup>

Although the court of appeal in *Mazon* recognized that not all of the policies underlying the conclusion requirement applied to the case before it,<sup>46</sup> it held that the cross-complaint for bad faith was indeed premature.<sup>47</sup> The court expressly held that the compulsory cross-complaint rule<sup>48</sup> did not bar *Mazon* from raising his cause of action at a later time because: (1) this cause of action was not mature; and (2) bad faith was not required to be asserted in an action for declaratory relief.<sup>49</sup>

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44. 158 Cal. App. 3d 862, 204 Cal. Rptr. 885 (1984).

45. *Id.* at 864, 204 Cal. Rptr. at 886.

46. Specifically, in light of the separate suit, there was no danger of evidence of insurance being submitted to the jury in the underlying action. *Id.* at 865, 204 Cal. Rptr. at 886.

47. *Id.* at 866, 204 Cal. Rptr. at 897. *Cf.* *Johnson v. Threats*, 140 Cal. App. 3d 287, 189 Cal. Rptr. 447 (1983) (an insurer may be joined in action against the insured when the plaintiff alleges fraud or conspiracy and when the issues are bifurcated to ensure that evidence of the existence of insurance does not come before the jury); *Klaudt v. Flink*, 658 P.2d 1065 (Mont. 1982) (action for breach of statutory duties may be filed and tried before, concurrent with, or after liability has been determined in the underlying action); *see generally* ASHLEY, *BAD FAITH ACTIONS, LIABILITY AND DAMAGES* § 9:09 (1984).

48. CAL. CIV. PROC. CODE § 426.30 (West Supp. 1985).

49. 158 Cal. App. 3d at 866, 204 Cal. Rptr. at 887.

### 6. *Smith v. Interinsurance Exchange*

Similarly, in the recent case of *Smith v. Interinsurance Exchange of the Automobile Club of Southern California*,<sup>50</sup> a court of appeals addressed the issue of simultaneous actions against insurer and insured. *Smith* involved an auto accident in which the plaintiff was injured and her father was killed. Following the accident, the plaintiff brought an action pursuant to California Probate Code section 721<sup>51</sup> to establish the liability of her father for the accident. She alleged two causes of action in her complaint: one against her father's estate under California Probate Code section 721, and the other against her father's insurer for violation of California Insurance Code section 790.03.

Interinsurance Exchange successfully demurred to the plaintiff's *Royal Globe* cause of action in the trial court, arguing that the insured's liability had yet to be established. On appeal, the plaintiff argued that the prohibition against suing the insured and the insurer in the same action does not apply in the context of actions brought under Probate Code section 721 because that section authorizes a direct action against an insurer. A court of appeals rejected this argument, however, holding that Probate Code section 721 only simplifies the procedure for suing a deceased tortfeasor, and does not authorize the naming of an insurance company as a defendant in the underlying action.<sup>52</sup>

The *Smith* court also considered the policies underlying the *Royal Globe* conclusion requirement. It held that the rationale of the *Royal Globe* opinion applies whether the defendant in the underlying action is an individual or the estate of the decedent.<sup>53</sup> The court further rejected the argument that, since coverage questions can be adjudicated in an action brought pursuant to section 721 of the California Probate Code, the "conclusion" requirement does not apply.<sup>54</sup>

50. 167 Cal. App. 3d 301, 213 Cal. Rptr. 138 (1985).

51. CAL. PROB. CODE § 721 (West Supp. 1985) provides in pertinent part:  
[N]otwithstanding any other provision of law, the presentation or filing of a claim shall not be required and a civil action may be maintained by a claimant to establish, to the limits of the insurance protection only, a liability of the decedent for which the decedent was protected by liability insurance . . . .

*Id.*

52. *Id.* 167 Cal. App. 3d at 304, 213 Cal. Rptr. at 139.

53. *Id.* at 304-05, 213 Cal. Rptr. at 139.

54. *Id.* at 304, 213 Cal. Rptr. at 139. The plaintiff cited in this regard *Stewart v. Bohnert's Estate*, 101 Cal. App. 3d 978, 162 Cal. Rptr. 126 (1980). In the *Stewart* case, although the plaintiff brought suit against the decedent's estate only pursuant to CAL. PROB. CODE § 721, the court proceeded to adjudicate a coverage question in favor of the insurer. 101 Cal. App.

The dismissal of the plaintiff's *Royal Globe* cause of action was therefore affirmed.

The *Doser*, *Nationwide*, *Coleman*, *Carr*, *Mazon*, and *Smith* cases indicate that the California Courts of Appeal have given effect to each of the policy considerations underlying *Royal Globe's* conclusion requirement. Certainly these opinions evidence the strong policy against allowing actions to proceed simultaneously against insurer and insured.<sup>55</sup> The opinions also indicate, however, a tendency to require that the insured's liability be determined in the underlying action.<sup>56</sup> It is not clear, however, that *Royal Globe* contains such a requirement.<sup>57</sup> The presence or absence of such a requirement has enormous impact on *Royal Globe* actions following settlements, as discussed in the next section.

### B. *Royal Globe Actions Following Settlement Of The Underlying Claim*

Several questions arise in the context of *Royal Globe* actions following *settlement* of underlying claims. First, is the settlement itself a sufficient "conclusion" or is something further required, such as a dismissal with prejudice? Second, is a determination of liability on the part of the insured required before the "second suit" matures? Third, should claimants be required to reserve their *Royal Globe* actions in settling the underlying claim? Finally, is there any reason to distinguish, for *Royal Globe* purposes, between settlements reached during litigation from those settlements reached by the parties without litigation?

How the above questions are resolved depends on the manner in which certain judicial policies are applied. From one perspective, allowing *Royal Globe* actions to be filed after *any* settlement—with or without litigation, an admission of liability by the insured, or a

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3d at 992, 162 Cal. Rptr. at 133. The plaintiff in the *Smith* case argued unsuccessfully that this converted an action under CAL. PROB. CODE § 721 (West Supp. 1985) into a direct action against the insurer. 167 Cal. App. 3d at 304, 213 Cal. Rptr. at 139.

55. See *supra* notes 27-29, 46-49, 53-54 and accompanying text.

56. See *supra* notes 22, 28-30 and accompanying text.

57. The *Royal Globe* opinion mentioned the "determination of liability" issue only in the context of discussing the reasons why a simultaneous action should not proceed against insurer and insured. The court commented that "[u]nless the trial against the insurer is postponed until the liability of the insured is first determined, the defense of the insured may be seriously hampered by discovery initiated by the injured claimant against the insurer." 23 Cal. 3d at 892, 592 P.2d at 337, 153 Cal. Rptr. at 850. The *Royal Globe* court thus appears to have been more concerned with the danger of prejudice to the insured, than with an action proceeding against an insurer without a determination of the insured's liability beforehand.

reservation of the *Royal Globe* cause of action—further the policy of discouraging unfair settlements by insurers.<sup>58</sup> On the other hand, permitting such actions tends to discourage negotiation and settlement. In addition, it removes the finality to the settlement of claims, and increases the burden on the judicial process of an explosion of “second suits” to re-examine settlements. The following cases illustrate the tension between these competing social policies.

1. *Rodriguez v. Fireman's Fund Insurance Co.*

The “conclusion” requirement was first addressed in the context of settlement by the Second District Court of Appeal in *Rodriguez v. Fireman's Fund Insurance Co.*<sup>59</sup> In reversing a ruling by the trial court, the court held that for purposes of a third-party suit under *Royal Globe*, a settlement of an action was a “conclusion” of that action when certain other requirements were met.

In 1977, Gloria Rodriguez's car was rear-ended by a vehicle insured by Fireman's Fund. She sustained serious injuries, and sued the insured. Although Fireman's Fund failed to acknowledge the plaintiff's settlement demands, the insurer did serve a statutory offer<sup>60</sup> of \$200,000, which the plaintiff accepted.<sup>61</sup>

In accepting the statutory offer, the plaintiff advised Fireman's Fund that she was “reserving” her rights to proceed against it for “bad faith and tortious conduct” arising from the handling of her claim.<sup>62</sup> After the statutory offer was accepted, the action was voluntarily dismissed with prejudice. Although no judgment was entered after such dismissal, the plaintiff nevertheless filed a satisfaction of judgment.<sup>63</sup>

Ms. Rodriguez then filed a *Royal Globe* action, alleging that Fireman's Fund made no attempt to effectuate a prompt, fair, and equitable settlement of her claim<sup>64</sup> and that Fireman's Fund attempted to reduce her bargaining power and to coerce her into accepting the \$200,000 offer. She further alleged that the accident from which the underlying action arose was the result of the “sole negli-

58. At the same time, however, allowing *Royal Globe* actions following any settlement may tend to discourage insurers from entering into such settlements. If insurers do this however, they run afoul of liability under CAL. INS. CODE § 790.03(h)(5). See *supra* note 4.

59. 142 Cal. App. 3d 46, 190 Cal. Rptr. 705 (1983).

60. CAL. CIV. PROC. CODE § 998 (West 1980).

61. *Rodriguez v. Fireman's Fund Ins. Co.*, 142 Cal. App. 3d at 49, 190 Cal. Rptr. at 706.

62. *Id.*

63. *Id.*

64. CAL. INS. CODE § 790.03(h)(5).

gence" of the insured.<sup>65</sup> Fireman's Fund's demurrer to the complaint was sustained without leave to amend, and the *Royal Globe* action was subsequently dismissed. Ms. Rodriguez appealed.

On appeal, Fireman's Fund relied primarily on *Nationwide Insurance Co. v. Superior Court*<sup>66</sup> in which the court held that a third-party could not sue an insurer for "bad faith" until a judgment had been entered against the insured. While the *Rodriguez* court did not criticize the *Nationwide* reasoning that the preferable conclusion to the action is a final judgment, it did point out that *Royal Globe* speaks of a "conclusion" and not a "judgment."<sup>67</sup> Applying the broader concept of "conclusion" to Rodriguez's appeal, the court held that an underlying lawsuit is concluded by the acceptance of a statutory offer. "For all practical purposes, and as far as finality is concerned," the court stated, "we are unable to discern any difference between a final judgment resulting from a trial or a final judgment resulting from a settlement."<sup>68</sup>

Fireman's Fund also argued that to permit a third-party claimant to pursue an action against the insurer after settlement would discourage insurers from entering settlement negotiations because they would be aware that settlement might not conclude the matter. While the court acknowledged the validity of this public policy argument, it pointed out that to prohibit a third-party from pursuing a "bad faith" action after settlement would create the greater danger of abuse by insurers who might entice or coerce a settlement by unfair practices.<sup>69</sup>

As to the necessity for an admission or determination of liability on the part of the insured, the *Rodriguez* court held that there are two reasons to require such a finding: (1) to prevent the defense of the insured from being hampered by discovery initiated against the insurer;<sup>70</sup> and (2) to aid in ascertaining the damages suffered by the

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65. 142 Cal. App. 3d at 49, 190 Cal. Rptr. at 706. By demurring to the complaint, Fireman's Fund admitted the truth of this allegation for purposes of testing the question of law raised by the demurrer. *Id.* at 55, 190 Cal. Rptr. at 710. Thus, there was, essentially, an admission of the insured's liability.

66. 128 Cal. App. 3d 711, 180 Cal. Rptr. 464 (1982); see *supra* notes 26-30 and accompanying text.

67. *Rodriguez v. Fireman's Fund Ins. Co.*, 142 Cal. App. 3d at 53, 190 Cal. Rptr. at 709.

68. *Id.* at 54, 190 Cal. Rptr. at 709.

69. *Id.* at 56, 190 Cal. Rptr. at 711. See also *Coleman v. Gulf Ins. Group*, 153 Cal. App. 3d at 713, 200 Cal. Rptr. at 623.

70. 142 Cal. App. 3d at 55, 190 Cal. Rptr. at 710. The *Rodriguez* court's reasoning in this regard is unclear because this purpose is served by prohibiting a simultaneous action against insurer and insured. What the *Rodriguez* court apparently intended to hold was that

third-party claimant.<sup>71</sup> The court did not address the question of whether an admission of liability on the part of the insured is required as a predicate to analyzing whether the insurer had a duty to settle the claim.<sup>72</sup> Thus, it was sufficient that the liability of the insured be alleged in the complaint.<sup>73</sup>

*Rodriguez* presents another interesting twist. Now, even when an insurer settles a third-party liability claim, it is not protected from the "second suit" (*i.e.*, the extra-contract claim) from the third-party claimant, unless the second suit is settled along with the underlying case.<sup>74</sup> In addition, the insured also may have a claim for violation of the implied covenant of good faith and fair dealing which he may keep or assign to the third-party claimant in return for a covenant not to execute. If the assignment is made, however, the third-party claimant may only recover the amount of the excess verdict.<sup>75</sup> If the insured joins in the suit, then he may assert the extra-contract claim for compensatory damages, emotional distress, and punitive damages as well.<sup>76</sup>

## 2. *Trujillo v. Yosemite-Great Falls Insurance Co.*

In *Trujillo v. Yosemite-Great Falls Insurance Co.*,<sup>77</sup> another division of the Second District Court of Appeal followed the reason-

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the underlying action must be "concluded" (*i.e.*, terminated for all purposes) so that an action against the insurer would not adversely affect the action against the insured.

71. *Id.*

72. The *Nationwide* case, for instance, seems to require that liability of the insured be absolutely determined for the *Royal Globe* action to be mature. See *supra* notes 28-30 and accompanying text. The *Nationwide* approach appears to conflict with CAL. INS. CODE § 790.03 (h)(5), which prescribes that liability be "reasonably clear." As one court has noted, "[The insurer] argues that the phrase 'claims in which liability has become reasonably clear' was intended to refer only to those claims in which liability is effectively undisputed, such as rear-end collisions, situations involving strict liability and accidents where the insured admits having run a red light. In such claims, however, it seems to us that liability is clear, not just reasonably clear. Liability need not be effectively undisputed to be reasonably clear." *Beckham v. Safeco Ins. Co. of Am.*, 691 F.2d 898, 930 n.3 (9th Cir. 1982).

73. See *supra* note 65.

74. The difficulty with this approach from an insurer's perspective is that it is not a party to the underlying action and has no basis on which to insist that it be included in the signed release. There is the possibility that an insurer which insists on a release of the *Royal Globe* claim, thus jeopardizing a settlement on behalf of its insured, could be subject to liability under the implied covenant of good faith and fair dealing and/or CAL. INS. CODE § 790.03 (h)(5).

75. *Murphy v. Allstate Ins. Co.*, 17 Cal. 3d 937, 132 Cal. Rptr. 424 (1976); see *supra* note 3.

76. See, *e.g.*, *Cain v. State Farm Mut. Auto. Ins. Co.*, 47 Cal. App. 3d 783, 121 Cal. Rptr. 200 (1975).

77. 153 Cal. App. 3d 26, 200 Cal. Rptr. 26 (1984).



ing of *Rodriguez*. The plaintiff, Juan Hernandez Trujillo, alleged that the insurer was guilty of bad faith because it insisted on an unduly low settlement offer (\$9,000, which plaintiff accepted) designed to take advantage of the plaintiff's desperate financial situation. Plaintiff also contended that the insurer acted in bad faith for refusing to make an "advanced payment" of \$1,300.<sup>78</sup>

On appeal, plaintiff relied on the *Rodriguez* opinion's holding that a bad faith action may be instituted even though the underlying action was concluded by settlement rather than by trial and judgment, provided that there was a reservation of rights to pursue the extra-contract action.<sup>79</sup> The court held that the plaintiff should be permitted to amend his complaint to allege facts under *Rodriguez*.<sup>80</sup>

The *Trujillo* opinion thus followed *Rodriguez* in holding that a settlement could operate as a "conclusion" for purposes of a later *Royal Globe* action. However, in elaborating on the *Rodriguez* holding, the *Trujillo* court noted that the third-party complaint should allege such matters as: the extent of the plaintiff's damages; the policy limits of the insured; the disparity between the policy limits and the settlement amount; and the reservation of rights by the third-party claimant to pursue a subsequent bad faith action.<sup>81</sup>

Thus, on the basis of *Rodriguez* and *Trujillo*, it appears that a settlement of a lawsuit constitutes a sufficient "termination" or "conclusion" to support a subsequent *Royal Globe* action.<sup>82</sup> *Rodriguez* holds, however, that such a settlement should be accompanied by a

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78. In responding to the advance payment question, the *Trujillo* court stated:

The complaint before us seems to base its claim of bad faith on the refusal to make a \$1,300 advance. *We know of no duty on an insurer to underwrite an action against its insured and plaintiff could not recover on that theory.* However, plaintiff does adequately allege that the offer was intentionally too low and a purpose [sic] to take advantage of plaintiff's impecuniosity; that allegation, if true, would, given an amendment supplying the inadequacies pointed out in the text, support a complaint apart from the \$1,300 matter, which is surplusage.

*Id.* at 29 n.2, 200 Cal. Rptr. at 27 n.2 (emphasis added).

79. *Id.* at 28, 200 Cal. Rptr. at 26-27. Interestingly, the court used the term, "bad faith," to refer to a *Royal Globe* action, rather than a claim for violation of the covenant of good faith and fair dealing only. No claim for the breach of the covenant of good faith and fair dealing could be brought because the plaintiff was a third-party claimant and no assignment of this claim from the insured had been described in the complaint.

80. *Id.* at 29, 200 Cal. Rptr. at 27.

81. *Trujillo* thus serves to illustrate the pleading requirements for a third-party *Royal Globe* action where the underlying suit was concluded by settlement. *Id.* at 28, 200 Cal. Rptr. at 27; cf. *Jackson v. State Farm Mut. Auto. Ins. Co.*, 148 Cal. App.3d 1179, 196 Cal. Rptr. 474 (1983) (complaint contained the necessary allegations).

82. As noted above, the "conclusion" requirement should also be satisfied by settlement in a suit by an insured for failure of an insurer to properly process a third-party claim. See *supra* note 10.

dismissal with prejudice, so that the underlying litigation is terminated in all respects.

What remains unsettled, however, is whether a settlement must be accompanied by facts demonstrating the *liability* of the insured in the underlying action. This is an issue of substantial importance because settlements are often accompanied by written releases which include statements that no admission of liability is intended by entering into such settlements. Thus, the question raised is: does every settlement potentially subject an insurer to a later *Royal Globe* suit? Further, how are settlements to be treated for *Royal Globe* purposes when there has been *no* underlying litigation? Section C, below, examines these issues.

### C. *Royal Globe Actions In The Absence Of A Final Judgment Or Settlement*

#### 1. *Williams v. Transport Indemnity Co.*

The Second District Court of Appeal in *Williams v. Transport Indemnity Co.*<sup>83</sup> held the absence of a sufficient "conclusion" of the underlying action barred the third-party claimant's subsequent suit for breach of statutory duties by the insurer. Significantly, the *Williams* court emphasized the need for some determination of the liability of the insured in the underlying action.

The *Williams* case involved an accident in which a truck owned by the insured of defendant Transport Indemnity Company struck a vehicle driven by the plaintiff's husband. A claim was made against Transport Indemnity and Mr. Williams' property damages were paid, without a corresponding offer to pay the personal injury claim. At the time Mr. Williams made his claim, he suffered from cancer and a heart condition which were presumably unrelated to the accident.

The first and only offer to settle the third-party claimant's personal injuries was in the amount of \$2,000, and was made by the insurer three days before the claimant entered the hospital. The offer was allegedly made on a "take-it-or-leave-it" basis and was rejected by Mr. Williams. Five days later he died.

Mr. Williams had not initiated any legal action to establish the liability of the defendant's insured; nor was legal action initiated by his estate after his death. Instead, Mrs. Williams pursued a "bad faith" action, as an individual, and as a personal representative of the

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83. 157 Cal. App. 3d 953, 203 Cal. Rptr. 868 (1984).

estate. The complaint filed by Mrs. Williams alleged that the liability of the insured was reasonably clear,<sup>84</sup> and that the insurer failed to attempt to effectuate a prompt, fair and equitable settlement, and instead took advantage of Mr. Williams' desperate situation.

The *Williams* complaint contained causes of action for violation of California Insurance Code section 790.03 and for negligent infliction of emotional distress. The plaintiff pursued the causes of action predicated on breach of section 790.03 in both her individual capacity and her capacity as the personal representative of the estate of her deceased husband. After the trial court granted summary judgment in favor of Transport Indemnity, the plaintiff appealed.

As in *Rodriguez*, much of the *Williams* opinion centered on how *Royal Globe Insurance Co. v. Superior Court*<sup>85</sup> was to be interpreted. Specifically, the court considered what constitutes a "conclusion" of the underlying action for the purpose of triggering the point at which a third-party can pursue the second suit based on violation of California Insurance Code section 790.03. Mrs. Williams argued that *Royal Globe* held only that the insurer and the insured may not be sued in the same suit, and that the case did not hold that the insured's liability must be established in the underlying suit prior to an Insurance Code section 790.03(h)(5) action against the insurer. The *Williams* court, however, declined to accept this reasoning, noting that the plaintiff's argument had been "persuasively rejected" in *Nationwide Insurance Company v. Superior Court*.<sup>86</sup>

The *Williams* court recognized that one of the bases of the *Royal Globe* opinion was that, if a simultaneous action were allowed against insurer and insured, the defense of the insured might be hampered by a premature action against the insurer.<sup>87</sup> However, the *Williams* court also noted that this was not the only rationale of the *Royal Globe* opinion.<sup>88</sup> *Royal Globe* also recognized, according to the *Williams* court, that the third-party claimant's damages could best be ascertained after termination of the underlying action.<sup>89</sup>

The *Williams* court also placed great emphasis on the insured's

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84. A similar allegation was made in the *Rodriguez* case. See *supra* note 65 and accompanying text.

85. See *supra* note 1.

86. See *supra* notes 26-30 and accompanying text.

87. 157 Cal. App. 3d at 958, 203 Cal. Rptr. at 870.

88. *Id.* at 958, 203 Cal. Rptr. at 871.

89. *Id.*

express admission of liability in *Rodriguez*.<sup>90</sup> The *Williams* court noted that the requirement of an express admission of liability follows from the fact that an insurer's obligation to settle a third-party claim only arises when the insured has a contractual right to indemnification from the insurer.<sup>91</sup>

Interestingly, the *Williams* court was presented with facts which might have led it to an opposite holding on the "conclusion" issue. The statute of limitations with regard to the third-party claimant's personal injury action had run, so there was no threat of an action against the insurer interfering with the defense of an action against the insured. The court nonetheless held that the lapse of the limitation period was an insufficient final termination for *Royal Globe* purposes, because the issue of when the liability of the insured became reasonably clear was still unresolved for section 790.03(h)(5) purposes.<sup>92</sup>

It was also suggested in *Williams* that payment of the property damage claim by the insurer was tantamount to an admission of liability on the personal injury claim. The court noted, however, that a settlement does not act as an admission of liability with regard to any other claim arising from the incident.<sup>93</sup>

The *Williams* court limited the holding of *Rodriguez* to situations in which two factors are present:

(1) the complaint alleges the insurer's express admission of the insured's liability; and

(2) any settlement entered into in the underlying action was a compromise between the insurer and the injured party.<sup>94</sup>

*Williams* held that the requisite degree of certainty with regard to the amount of damages sustained by third-party claimants in the context of a settlement is present only when the foregoing two requirements are met. The *Williams* court was therefore very much concerned that the liability of the insured in the underlying action be

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90. *Id.* at 959, 203 Cal. Rptr. at 871-72. See *supra* note 65.

91. 157 Cal. App. 3d at 960, 203 Cal. Rptr. at 871-72.

92. In the *Williams* case, the underlying claim was indisputably "final" in the sense that no action could be brought against the insured as of the time of the *Royal Globe* suit was filed. Nevertheless, the *Williams* court held the *Royal Globe* action was barred, noting that the rationale of the conclusion requirement is to provide "some means of assessing the extent of the insured's liability and, hence, the damaging effect of the insurer's violation of its statutory duty." *Id.* at 961, 203 Cal. Rptr. at 872. Under *Williams*, the determination of liability requirement provides a means for evaluating the conduct of the insurer, as well as a device to prevent a simultaneous suit against insurer and insured. *Id.* at 960-61, 203 Cal. Rptr. at 872.

93. *Id.* at 960, 203 Cal. Rptr. at 872.

94. *Id.* at 961, 203 Cal. Rptr. at 873.

considered to determine whether that action was "concluded" for *Royal Globe* purposes. In fact, *Williams* indicates that, absent a settlement with an admission of liability or a judgment in favor of a third-party, very few underlying actions may be considered "concluded" so as to allow a subsequent suit predicated on breach of statutory duties.<sup>95</sup>

### III. DISCUSSION

Case law following *Royal Globe* indicates an evolution of the concept of "conclusion" of the underlying action for purposes of subsequent action by a third-party claimant. The concept of "conclusion" has expanded to encompass settlement of the underlying action when certain requirements, such as an express admission of liability or a dismissal with prejudice, are met.

The status of the law on the issue of conclusion of the underlying action can be summarized by noting the situations in which a *Royal Globe* action can be brought:

- (1) after judgment;<sup>96</sup> or,
- (2) after settlement and a dismissal with prejudice of the underlying action prior to trial of that action, under circumstances in which the third-party claimant has reserved his or her rights to pursue the *Royal Globe* claim.<sup>97</sup>

In contrast, *Royal Globe* actions have been denied in the following situations:

- (1) when there is no action filed by the plaintiff in the underlying action, or any settlement agreement which could be interpreted as a "termination" of that action;<sup>98</sup>
- (2) when there is a judgment which is the subject of a pending appeal;<sup>99</sup>

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95. The *Williams* approach was followed in the recent case of *Muraoka v. Budget Rent-A-Car, Inc.*, 160 Cal. App. 3d 107, 206 Cal. Rptr. 476 (1984). In *Muraoka*, a cause of action was dismissed for violation of CAL. INS. CODE § 790.03 because no conclusion of the underlying action was alleged, and there was no settlement or judgment upon which to predicate a later statutory action. *Muraoka* also held that the lack of an appropriate "conclusion" bars claims under CAL. INS. CODE § 790.03(h)(5). 160 Cal. App. 3d at 120, 206 Cal. Rptr. at 482.

96. *Royal Globe Ins. Co. v. Superior Ct.*, 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979).

97. *Rodriguez v. Fireman's Fund Ins. Co.*, 142 Cal. App. 3d 46, 190 Cal. Rptr. 705 (1983).

98. *Williams v. Transport Indem. Co.*, 157 Cal. App. 3d 953, 203 Cal. Rptr. 868 (1984).

99. *Nationwide Ins. Co. v. Superior Ct.*, 128 Cal. App. 3d 711, 180 Cal. Rptr. 464 (1982).

(3) when there is a cross-complaint brought in a separate action for breach of statutory duties while the underlying case is pending;<sup>100</sup> and,

(4) when an action is brought against a decedent's estate pursuant to California Probate Code section 721, and a cause of action for violation of Insurance Code section 790.03 is joined against an insurer.<sup>101</sup>

While there is now some certainty as to when a *Royal Globe* action may be pursued following settlement of the underlying action, further issues remain unresolved. These issues are:

(1) whether a *Royal Globe* action can be maintained if there is an appeal which becomes final;

(2) whether a *Royal Globe* action can be maintained if there is an *accepted* offer pursuant to California Code of Civil Procedure section 998;<sup>102</sup>

(3) whether a *Royal Globe* action can be maintained after a dismissal *without* prejudice; and

(4) whether a *Royal Globe* action can be maintained when the underlying action was not pursued to judgment or dismissal with prejudice because of intervening circumstances (death, neglect, etc.).

Clearly, significant issues remain with respect to *Royal Globe* actions following settlement. Specifically, the question which requires resolution is what constitutes sufficient indicia of liability to allow such actions to proceed. To allow a *Royal Globe* action after *any* settlement offers insurers a significant disincentive to settlement. To allow the circumstances of every settlement to be re-examined raises dangers of opening a "Pandora's Box" of "second suits." Such a course would place immense practical burdens upon the judicial system and upon the insurance industry.<sup>103</sup>

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100. *Industrial Indem. Co. v. Mazon*, 158 Cal. App. 3d 862, 204 Cal. Rptr. 885 (1984).

101. *Smith v. Interinsurance Exch.*, 167 Cal. App. 3d 301, 213 Cal. Rptr. 138 (1985).

102. Presumably, an action would be maintainable in this instance because the underlying action would be concluded or a judgment would be entered against the insured.

103. These types of "practical" burdens have been held persuasive by California courts. *Borer v. American Airlines*, 19 Cal. 3d 441, 447, 53 P.2d 858, 862, 138 Cal. Rptr. 302, 306 (1977), addressed a child's loss of parental consortium claim. Justice Tobriner observed that:

We cannot ignore the social burden of providing damages for loss of parental consortium merely because the money to pay such awards comes initially from the "negligent" defendant or his insurer. Realistically the burden of payment of awards for loss of consortium must be borne by the public generally in increased insurance premiums or, otherwise, in the enhanced danger that accrues from the greater number of people who may choose to go without insurance. We must also take into account the cost of administration of a system to determine and pay consortium awards; since virtually every serious injury to a parent would

In contrast, to discourage *Royal Globe* actions following settlement might encourage insurers to force unfair settlements as a means of avoiding liability for extra-contractual damages. In particular, strictly interpreting the determination of liability requirement, as did the *Williams* court, may shield from scrutiny some settlements which are indeed unfair.

The California Supreme Court has the opportunity to provide some guidance on the issue of maturity of a *Royal Globe* action in the *Coleman* case.<sup>104</sup> The court can strictly apply the "determination of liability" requirement as did the court of appeal in *Williams v. Transport Indemnity Co.*,<sup>105</sup> or it can limit the *Royal Globe* holding to a simple prohibition against simultaneous suits against insurer and insured.<sup>106</sup> If the latter course is chosen, many settlements entered into by insurers on behalf of their insureds will become subject to re-examination in subsequent *Royal Globe* actions. In this situation, the settlement of the underlying suit can become a mechanical requirement for bringing the second suit rendering virtually every suit ripe for re-evaluation. The thought that every third-party personal injury claim might require two actions before it is concluded is overwhelming in light of statistics which demonstrate that the number of personal injury lawsuits is increasing at a rapid pace.

#### IV. CONCLUSION

The California Supreme Court should carefully balance the policy considerations implicit in both a strict and a liberal interpretation of the "conclusion" requirement. While there are advantages to the re-examination of settlements via *Royal Globe* actions (i.e., discouraging unfair settlement practices), there are also significant and costly disadvantages (i.e., numerous *Royal Globe* actions following settlements of "nuisance" suits). It is therefore critical that some compromise be struck by which meritorious *Royal Globe* actions are not discouraged, yet every settlement does not become the subject of an involved and expensive "second suit." These authors submit that these competing policies are best accommodated by requiring some indicia of liability on the part of the insured in the underlying action before the second suit can be brought after settlement. This can be

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engender a claim for loss of consortium . . . .

*Id.*

104. See *supra* notes 31-37 and accompanying text.

105. See *supra* notes 83-95 and accompanying text.

106. There is support for this interpretation of the *Royal Globe* opinion. See *supra* note 57.

accomplished if the courts require: 1) an implied admission of liability (e.g., an accepted Civil Procedure Code section 998 offer), or an express admission of liability, and 2) a dismissal with prejudice of the underlying action. Otherwise, the courts may become inundated with "second suits" following the underlying action.



