Section 24, Comment (d): An Insurer's Duty to Act Reasonably Does Not Require the Acceptance of Any and All "Reasonable Settlement Demands"

Proposed Amendment to Restatement of the Law of Liability Insurance, Tentative Draft No. 1

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Amend § 24, comment (d) to delete the requirement imposed on insurers to accept a "reasonable" settlement offer on pain of voiding the policy limits, as reflected in the following text of draft comment (d):

> In determining whether a settlement decision was reasonable, the factfinder should view the settlement from the perspective of the parties at the time the settlement was made. A reasonable insurer is expected, at the time of settlement negotiations, to take account of the realistically possible outcomes of a trial, and, to the extent possible, to weigh those outcomes according to their likelihood…. The insurer will be liable for any excess judgment against the insured in the underlying litigation if the trier of fact finds that the insurer rejected a settlement demand, or failed to consent to a settlement that was reasonable….
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> The effect of this rule is that, once a claimant has made a settlement demand in the underlying litigation that is reasonable, an insurer that rejects that demand thereafter bears the risk of any excess judgment against the *insured defendant* at trial. One practical effect of this rule is to give claimants an incentive during the pretrial phase to make reasonable settlement demands within policy limits, since the insurer's rejection of such a demand creates the conditions for a subsequent breach-of-settlement-duty lawsuit in the event of a plaintiff's verdict that produces an excess judgment. Although courts have not on the whole emphasized this point, the fact that reasonableness is a range and not a point means that an insurer is liable even if the rejected settlement was at the high end of the reasonableness range.

This language has already been the subject of a prior motion that was resolved by removing and amending certain language that indicated that there might be a "range" of "reasonable settlement offers". That amendment, however, does not address the basic problems associated with imposing an obligation on insurers to accept any "reasonable settlement offer" on pain of voiding policy limits. A linguistic fix is not available for what ails this provision and the new mandate it entails.