No. B326990

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN

ELIJAH SIMONE,
Plaintiff/Respondent/Cross-Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,
Defendant/Appellant/Cross-Respondent.

Appeal from the Superior Court of the State of California
for the County of Los Angeles, Case No. 20-STCV-14579
The Honorable Mark V. Mooney, Judge Presiding

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA SUPPORTING APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

No entities or persons have either (1) an ownership interest of 10 percent or more in the party filing this certificate, or (2) a financial or other interest in the outcome of the proceeding that the Justices should consider in determining whether to disqualify themselves. (Cal. Rules of Court, rule 8.208(e)(1)–(2).)

Dated: November 8, 2024

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INTRODUCTION

Under California law, an insurer's failure to accept a reasonable settlement offer gives the insured a tort claim for breach of the implied covenant of good faith and fair dealing. (*Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425.) If the insured wins on their claim, they can recover extra-contractual damages beyond the limits of the insurance policy at issue. (*Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 43–44.) Those bad faith claims are designed to protect the insured from "exploitative behavior by insurers." (*Brighton v. Lutheran Church-Missouri Synod* (C.D. Cal. Feb. 1, 2013) 2013 WL 12136522, at *4.)

But with increasing regularity, private plaintiffs and their counsel try to manufacture bad-faith claims against insurers where none exists. They offer to settle coverage disputes within the insured's policy limits but only if the insurer complies with hyper-technical and often unrealistic conditions. (See, e.g., *White v. Cheek* (Ga. Ct. App. 2021) 859 S.E.2d 104, 111 (conc. specially opn. of McFaddin, J.) ["The offer before us specifies that it could be accepted only through compliance with its many requirements [that] are buried in a 22-page, single-spaced letter that includes 16 footnotes and is filled with warnings and threats on a wide variety of subjects."].) In reality, the purported "offer" is nothing more than a set-up designed to prevent the insurer from

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complying with its terms. When the settlement fails, the plaintiff pursues a judgment against the insured exceeding the policy limits. Once that judgment is in hand, the plaintiff settles with the insured, obtains an assignment of the insured's bad faith claim against the insurer, and pursues the insurer for the judgment's full amount.

Bad faith actions are meant to be used "as a shield for insureds—not as a sword for claimants." (*Peckham v. Continental Cas. Ins. Co.* (1st Cir. 1990) 895 F.2d 830, 835.) It would "turn[] the cause of action on its head" if a claimant could obtain a bad-faith judgment against an insurer notwithstanding the insurer's "reasonable settlement offers"—including "offer[s] to settle the claim for the policy limits." (*Wade v. EMASCO Ins. Co.* (10th Cir. 2007) 483 F.3d 657, 674.) But the trial court's ruling in this case incentivizes just this type of behavior.

In the proceedings below, the trial court concluded that Defendant-Appellant State Farm Mutual Automobile Insurance Company acted in bad faith in settlement negotiations with Plaintiff-Appellee Elijah Simone. (3AA869–878.) After being injured in an accident with State Farm's insured, Plaintiff-Appellee sent State Farm a letter requesting several types of information and stating that he would settle with State Farm only if it answered his questions. (1AA257, 272–73.) Plaintiff-Appellee also asked that State Farm make a policy limits

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settlement offer, "send [him] everything in writing," and do so within "15 days." (1AA273.)

Two days after Plaintiff-Appellee sent his letter, State Farm called him and left a voicemail offering to settle his claim for the insured's policy limits. (1AA503.) The same day, it also sent Plaintiff-Appellee a letter memorializing the policy limits offer and inviting a written response. (1AA281.) State Farm did not provide all the information that Plaintiff-Appellee requested in his letter, but that was because it was trying to establish contact with him (or his counsel) first so that it could better understand his questions and fully explain the answers. (2RT742:3–23, 750:8–23, 769:10–17; 3RT925:6–10, 954:16–955:21, 960:15–962:2, 970:19–25.)

State Farm followed up with Plaintiff-Appellee in writing and by phone, again offering to settle for the $25,000 policy limit. (1AA259, 284, 289–90.) But the next time it heard from Plaintiff-Appellee, it was through his counsel, who informed State Farm that Plaintiff-Appellee was filing a bad-faith action for the judgment he had won in his lawsuit against State Farm's insured. (1AA259–60, 294.) The amount of that judgment? More than $11 million. (3AA260.)

The trial court concluded that Plaintiff-Appellee's letter constituted a reasonable settlement demand but that State Farm's conduct "operated as a rejection" of that demand—a

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rejection that was "unreasonable." (3AA874.) It made no difference that State Farm offered to settle Plaintiff-Appellee's claim for the policy limits just two days after receiving his letter. No, the trial court reasoned, because State Farm had failed to do "all within its power to effect a settlement," it was on the hook for a judgment more than 450 times its insured's policy limits. (3AA875–76.)

Even assuming Plaintiff-Appellee's letter was a reasonable settlement offer, State Farm's response to it was certainly not *un*reasonable. The trial court's conclusion to the contrary belies decades of jurisprudence and, if allowed to stand, would have serious consequences for insurers and consumers. Settlement offers that require compliance with non-material terms pose significant financial risks to insurers because they can lead—as here, through no fault of the insurer—to liability in amounts exponentially greater than the coverage limits for which the insured paid and the insurer accounted. (See *Shin Crest PTE, Ltd. v. AIU Ins. Co.* (M.D. Fla. 2009) 605 F.Supp.2d 1234, 1243 ["The goal of this [set-up] strategy is to convert a policy purchased by the insured which has low limits of insurance into unlimited insurance coverage."].) To deal with those added risks, insurers have two options: raise premiums or leave the market. Both options hurt consumers—particularly in states like

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California that face widespread problems with insurance affordability and availability.

The trial court's decision sets that chain in motion. If State Farm can be tagged for bad-faith liability in a case in which it made a policy-limits offer to the plaintiff, plaintiffs across California have a clear incentive to make set-up offers and require strict compliance with whatever terms they choose to include. This Court can and should prevent that result. It should do so by clarifying what has always been true: An insurer's offer to settle for the policy limits categorically demonstrates good faith. (*Graciano*, *supra*, 231 Cal.App.4th at p. 434.) That rule protects insurers from set-up offers while also preserving the rights of insureds and third-party plaintiffs to bring bad faith claims for *legitimate* malfeasance by insurers. It also ensures that the California insurance market does not tread a path that ultimately harms the state's consumers.

For those reasons, this Court should reverse the trial court's judgment.

ARGUMENT

I. BAD FAITH LAWSUITS PREMISED ON "SET-UP" SETTLEMENT OFFERS ARE PROLIFERATING.

In recent years, injured plaintiffs who have strong cases on liability and damages but face insureds with insufficient coverage have developed a new settlement strategy: set-up offers. In a

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sentence, set-up offers "attempt to force insurance companies into situations in which they must respond to unrealistic and artificially timed [settlement] demands, often without the necessary evidence to support such a demand, or by creating other artificial claims handling or settlement pitfalls." (Dobuler, *Florida's New Tort Reform Package: The Modernizing of Florida's Bad Faith Laws*, Mondaq (Apr. 5, 2023) <https://www.mondaq.com/unitedstates/insurance/1301494/floridas-new-tort-reform-package-the-modernizing-of-floridas-bad-faith-laws>.) Set-up offers have "little to do with the actual purpose of bad faith laws, i.e., protecting the insured, and everything to do with placing an unwary company into a situation in which bad faith allegations can be made against it . . . in an effort to unreasonably force that company to pay extracontractual damages." (*Ibid.*)

Set-up offers have made "[b]ad faith litigation against insurers . . . a burgeoning cottage industry throughout virtually all of the fifty states." (Richmond, *The Two-Way Street of Insurance Good Faith: Under Construction, But Not Yet Open* (1996) 28 Loy. U. Chi. L.J. 95, 97.) California courts have noticed this development, as have others. (See, e.g., *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, 900, fn. 2 (conc. in part & dis. in part opn. of Kaus, J.) ["It seems to me that attorneys who handle policy claims against insurance companies are no longer

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interested in collecting on those claims, but spend their wits and energies trying to maneuver the insurers into committing acts which the insureds can later trot out as evidence of bad faith."]; *Allstate Ins. Co. v. Regar* (Fla. Dist. Ct. App. 2006) 942 So.2d 969, 973 ["[T]he number of bad faith cases filed in the courts appears to be exponentially increasing, but the increase does not appear to be directly linked to the actions of the insurers."].)

The reason for the trend? "Bad faith claims are often more financially rewarding for a policyholder and his attorney than simply collecting on the underlying insurance claim." (Richmond, *supra*, at p. 97; see also *id.* at p. 141 ["[E]very bad faith . . . action is a potential bonanza for the insured."].) "As one firm put it: 'A bad faith case is a plaintiff's attorney's dream. Every insurance cliché, big business prejudice and "underdog" sentiment, can and should be used. Irrespective of the merits of the defense, insurers are target defendants.'" (O'Donnell, *Preparing For and Defending Against Bad Faith Claims* (2016) 45 The Brief 44, 46.)

Several states have recognized that their bad faith jurisprudence incentivizes set-up offers and have taken legislative action to eliminate those incentives. For example, in 2013 the General Assembly of Georgia passed legislation enumerating certain required terms of policy-limit settlement offers. (See 2013 Ga. Laws 860 (Act No. 271) [codified at Ga. Code Ann. § 9-11-67.1]; see also *Grange Mutual Casualty Co. v.*

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Woodard (11th Cir. 2016) 826 F.3d 1289, 1299–1300 [observing that § 9-11-67.1 was meant "to address the negative effects of" case law that "was arguably enabling plaintiffs to present settlement offers 'with impossible deadlines and expose [the] insurance company to potential "bad faith" claims when it is unable or unwilling to abide'"], citation omitted.) But in 2017, the Supreme Court of Georgia concluded that the terms of § 9-11-67.1 were non-exclusive. (See *Grange Mutual Casualty Co. v. Woodard* (Ga. 2017) 797 S.E.2d 814, 820.) That led to a new wave of set-up offers containing non-statutory and objectively immaterial terms. The General Assembly responded by amending § 9-11-67.1 in 2021 to clarify that "the terms outlined in subsection (a) . . . shall be the only terms which can be included in an offer to settle made under this Code section." (2021 Ga. Laws 431, 432 (Act No. 203, § 1) [codified at Ga. Code Ann. § 9-11-67.1(b)(1)].)

Missouri passed similar reforms. In 2017, the Missouri General Assembly amended Mo. Rev. Stat. § 537.065 to require that insurers be given notice and an opportunity to intervene when—after a denial of coverage—a claimant sues an insured and agrees with the insured (as allowed by state law) to only execute the ensuing judgment (if any) against the insurer. (See 2017 Mo. Laws 337, 339 (H.B.s 337 & 714) [codified at Mo. Rev. Stat. § 537.065].) The General Assembly also imposed requirements on time-limited settlement demands. (2017 Mo.

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Laws 337, 338–39 (H.B.s 337 & 714) [codified at Mo. Rev. Stat. § 537.058].)

Florida also addressed the issue. Last year, the Florida Legislature amended Fla. Stat. § 624.155 to impose a duty on claimants and their counsel to act in good faith when attempting to settle a claim, to provide immunity from bad faith actions to insurers who tender policy-limits offers within 90 days of receiving notice of a claim, and to codify Florida's common-law principle that an insurer's negligence or mistake does not constitute bad faith. (2023 Fla. Laws 286, 293 (ch. 2023-15 § 4) [codified at Fla. Stat. § 624.155(4)–(5)].)

California is joining efforts to protect insurers from unreasonable bad-faith claims. Like Georgia and Missouri, the California State Legislature recently enacted a statute setting out material terms of time-limited settlement demands that a claimant who is represented by counsel must include in their offer to an insurer if that offer is to be considered reasonable (such that an insurer's rejection of the offer could trigger liability for bad faith). (Code Civ. Proc., §§ 999–999.5.) All those legislative efforts share a common goal: Protecting insurers from gamesmanship by claimants and ensuring that bad faith litigation serves its intended purpose—allowing claimants to seek recovery for legitimate misconduct by insurers. They also enable

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insurers to keep coverage available and ensures that premiums remain reasonable for policyholders.

II. AN INSURER'S ATTEMPT TO SETTLE FOR THE POLICY LIMITS DEMONSTRATES GOOD FAITH AS A MATTER OF LAW.

This Court should enforce a brightline rule: An insurer's offer to settle for the policy limits demonstrates good faith—period. In a bad faith action, a claimant must prove that the insurer in fact acted in bad faith. In California, the "ultimate test" of whether an insurer acted in bad faith is "whether the insurer's conduct was unreasonable under all of the circumstances." (*Graciano*, *supra*, 231 Cal.App.4th at p. 427; see also *Chateau Chamberay Homeowners Ass'n v. Associated Intern. Ins. Co.* (2001) 90 Cal.App.4th 335, 346.) Here, the trial court found that State Farm acted unreasonably with respect to Plaintiff-Appellee's offer letter notwithstanding its efforts to settle with him for its insureds' policy limits. But that simply cannot be the case as a matter of law.

Graciano is clear that "[w]hen a liability insurer . . . *timely* tender[s] its 'full policy limits' in an attempt to effectuate a reasonable settlement of its insured's liability, the insurer has acted in good faith as a matter of law." (*Graciano*, *supra*, 231 Cal.App.4th at p. 434, quoting *State Farm Mut. Auto. Ins. Co. v. Crane* (1990) 217 Cal.App.3d 1127, 1136; see also *Farmers Alliance Mut. Ins. Co. v. Bethel* (8th Cir. 1987) 812 F.2d 412, 414

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[declining to find insurer liable for damages beyond policy limits because of its “many good faith offers to pay the full policy limits,” which “were refused through no fault of the insurer” and “precluded any obligation for” the excess damages at issue].) That decision does not stand in isolation—it sets out the rule that California courts have followed for years. (See, e.g., *Pinto v. Farmers Ins. Exch.* (2021) 61 Cal.App.5th 676, 694 [“Although Pinto complained at length about Farmers’s many bad acts, in the end it cured any deficiency by tendering the full $50,000 policy limits.”]; *Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1400 [finding insurer’s tender of policy limits would have precluded bad faith action if it had been timely].) That rule is grounded in well-reasoned policy: If the insurer has offered the maximum amount it agreed to pay a claimant on an insured’s behalf, then it has “done all within its power to effect a settlement,” so there is nothing for which the insurer could be liable. (*Graciano*, *supra*, 231 Cal.App.4th at p. 434, quoting *Lehto v. Allstate Ins. Co.* (1994) 31 Cal.App.4th 60, 73.)

The trial court below concluded that State Farm did not do everything within its power to effect a settlement *even though* it tendered a full policy-limits offer to Plaintiff-Appellee—in writing, as he requested, and by phone—within *two days* of receiving his demand letter. The trial court’s interpretation of *Graciano* imposes a burden on insurers that is impossible to

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carry—a burden to do *more* than tender a policy-limits offer. That "create[s] an artificial incentive for third-party claimants to reject otherwise reasonable settlement offers that are within the policy limits." (*Wade*, *supra*, 483 F.3d at p. 674.) The logic for claimants is not hard to follow. If they know an insurer can offer the insured's policy limits and still be found to have acted in bad faith, they know that they can reject that offer on account of the insurer's failure to strictly comply with immaterial terms embedded in a settlement demand—en route to a profitable bad faith claim.

Courts "must not lose sight of the fact that the doctrinal impetus for insurance bad faith claims derives from the idea that the insured must be treated fairly and his legitimate interests protected." (*Peckham*, *supra*, 895 F.2d at p. 835.) In other words, bad faith claims are meant to be used "as a shield for insureds—not as a sword for claimants." (*Ibid.*) It is for that reason that "[c]laimants have no right to insist upon any punctilio in the insurer's observance, or not, of its obligations toward its insured." *Ibid.*) That includes immaterial terms in a set-up offer.

If this Court were to affirm the decision below, it "would be turning the [bad faith] cause of action on its head by holding an insurance company liable where it . . . offered to settle the claim for the policy limits, but a claimant rejected the offer"—perhaps "in order to manufacture a lawsuit against the insurer for bad-

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faith refusal to settle." (*Wade*, *supra*, 483 F.3d at p. 674.) It would "permit bad faith in the insurance milieu to become a game of cat-and-mouse between claimants and insurer, letting claimants induce damages that they then seek to recover, whilst relegating the insured to the sidelines as if only a mildly curious spectator." (*Peckham*, *supra,* 895 F.2d at p. 835.) But *Graciano* mandates a different result. This Court should confirm what has always been true: An insurer's tender of a policy-limits offer demonstrates good faith as a matter of law.

III. INSURERS AND INSUREDS ALIKE WILL BE HARMED IF THIS COURT AFFIRMS THE DECISION BELOW.

"[I]nsurers . . . know from experience that bad faith lawsuits frequently prove costly and disruptive." (O'Donnell, *supra*, at p. 49; see also Richmond, *supra*, at pp. 95–96 [commenting that "[i]nsurance companies are continuously pounded in bad faith cases" and noting bad faith judgments reaching up to $145 million].) For that reason, every settlement offer that an insurer receives presents the risk of a large bad faith judgment. In states where the law incentivizes set-up offers, those risks are amplified exponentially. To account for the added financial exposure, insurers are left with a choice: Pass those risks on to consumers by raising premiums or pull out of the state. An insurer's exit from a state forces other insurers to absorb the business—and the exposure—of the exiting insurer's

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customers, thereby prompting further increases in premiums. In the end, whether insurers facing set-up offers deal with them by raising premiums or by leaving the market, the result is the same: Consumers lose.

That would be a bad outcome in any state, but it would be particularly bad in California, which is struggling with insurance availability and affordability issues. Tens of millions of Californians rely on insurance to protect their vehicles, homes, and businesses (many of which are the Chamber's members). But insurers who operate in California must contend with huge amounts of exposure as it is, and many have already raised their premiums or have withdrawn from the market as a result. (See, e.g., Garcia, *California Auto Insurance Rates are Skyrocketing: Here's Why and How to Save* (Aug. 17, 2024) L.A. Times <https://www.latimes.com/california/story/2024-08-17/as-auto-insurance-rates-skyrocket-experts-say-maintain-a-relationship-with-your-agent>; Blood, *California Insurance Market Rattled by Withdrawal of Major Companies* (June 5, 2023) Associated Press <https://apnews.com/article/california-wildfire-insurance-e31bef0ed7eeddcde096a5b8f2c1768f>; *Major Car Insurance Companies Getting Out of California* (Jan. 20, 2023) CBS News <https://www.cbsnews.com/losangeles/news/auto-insurance-companies-pull-out-of-california/>; Sellers, *Tens of Thousands Hit as Yet Another Insurer Looks to Leave State* (Feb. 29, 2024)

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Insurance Business
<https://www.insurancebusinessmag.com/us/news/property/tens-of-thousands-hit-as-yet-another-insurer-looks-to-leave-state-479343.aspx>.)

Affirming the trial court's decision below will only make a bad situation worse. It will signal to California plaintiffs that they can stand in the way of reasonable attempts by insurers to settle for the policy limits in hopes of recouping bad faith judgments worth millions—conduct that will force insurers operating in the state to raise their premiums or get out while they still can. Bad faith actions are not meant to be used "as a sword." (*Peckham*, *supra*, 895 F.2d at p. 835.) If this Court holds otherwise, the one wielding that sword—California claimants—may end up doing more harm to themselves and their fellow insureds than to anyone else.

CONCLUSION

Although "there is a place for a remedy against insurers that in real situations act in actual bad faith," it is crucial that courts "also recognize that there are strategies which have developed in the pursuit of insurance claims which are employed to create bad faith claims against insurers when, after an objective, advised view of the insurer's claims handling, bad faith did not occur." (*Shin Crest PTE, Ltd.*, *supra*, 605 F.Supp.2d at p. 1243.)

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Here, the trial court incorrectly determined that State Farm acted in bad faith, notwithstanding its efforts to settle for the policy limits. That interpretation of bad faith stands only to exacerbate the swelling wave of set-up offers that insurers across California and the country now face. The bad faith lawsuits premised on those offers pose significant financial risks to insurers—risks which will ultimately be borne by California consumers.

This Court should not continue down the course set in motion by the trial court. Instead, it should enforce the brightline principle that an insurer's offer to settle for the policy limits is good faith as a matter of law—upholding the purpose of the covenant of good faith and fair dealing in the process.

Dated: November 8, 2024

Respectfully submitted,

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By: *_/s/ Alexander Akerman_*
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CERTIFICATION OF WORD COUNT

In accordance with California Rules of Court, rule 8.204(c)(1), the undersigned certifies that the foregoing brief contains 3,481 words, excluding the cover information, tables, signature blocks, certificate of interested entities or persons, and this certificate, according to the word count generated by the computer program used to produce this document.

Dated: November 8, 2024

ALSTON & BIRD LLP

By: */s/ Alexander Akerman*
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PROOF OF SERVICE

I, Alexander Akerman, declare as follows:

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and am not a party to this action. My business address is 350 South Grand Avenue, 51st Floor, Los Angeles, CA 90071. On November 8, 2024, I served the following document:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 8, 2024.

/s/ Alexander Akerman
Alexander Akerman

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